Communities, Evictions & Criminal Convictions

Public Housing and Disparate Impact: A Model Policy

Formerly Incarcerated & Convicted People's Movement
2013

Acknowledgments

I first encountered this public housing issue over a decade ago while living in Rhode Island, and finally began legal research while in New York City last summer. It is national in scope, and much of the relevant law is federal. However, I felt it would be easier to comprehend if focused on a particular city. I moved to New Orleans in 2011 and do not pretend to fully understand the entire socio-political landscape. To the degree that this report is incomplete, such as detailed data on evictions, I apologize. What follows is meant to be a starting point on a complex issue, rather than an ending point. I expect others to capitalize on this consolidation of material and move forward in their own regions or specialties.

This report would not be possible without the families of convicted people standing up and resisting discrimination. In particular, members of Stand with Dignity have been instrumental in advocating for changes outlined in the report. I thank their organizers, Toya X and Collette Tippy, for connecting with me. Very little of my work in New Orleans would be relevant if not for my fellow members of Voice of the Ex-Offender (VOTE) and Norris Henderson.

Furthermore, I would like to thank the work of Marie-Claire Tran (formerly of Shriver Center), Michelle Navidad Rodriguez and Maurice Emsellem (National Employment Law Project) for their work on civil rights law and criminal convictions. Also, Stacy Seicshnaydre (Tulane University Law School), Mark Ladov (Brennan Center for Justice), and Tiffany Antioch-Emory (formerly of Rhode Island Legal Services) for their insights and suggestions. A special thanks goes out to FICPM member Daryl Atkinson, Esq. (Southern Coalition for Social Justice). He is a strong example of how to be an effective advocate when also directly impacted by the issue at hand.

Bruce Reilly

Bruce Reilly
Formerly Incarcerated & Convicted People's Movement
Voice of the Ex-Offender
Tulane University Law School, J.D. Candidate '14

A Note From The FICPM:

This report represents more than just a legal analysis about the struggles in low-income communities. For many of us, this is about our homes. This is about where we try to cook our meals, relax, and raise our families. The stakes are high, inciting passion. Yet we do not let this passion blind us; instead, we use it to motivate ourselves. We encourage everyone, regardless of background or circumstance, to join us in taking action upon a most critical issue.

We are fortunate to have strong individuals and organizations working towards change in New Orleans. The city is "ground zero" for incarceration, and a true tragedy considering the rich history and difficult geographic location at the mouth of the Mississippi. What we have created is a national model, drawing from the expertise on the ground and in the legal community, to help our people step up and out of the carnage created by two generations of the "War on Drugs."

The FICPM looks forward to building partnerships with people working on this and other issues across the nation.

Sincerely,

Dorsey Nunn
Dorsey Nunn
Formerly Incarcerated & Convicted People's Movement

Table of Contents

Executive Summary

This report is broken into five primary pieces, along with an Introduction and conclusion.

Section I: Introduction provides a starting point on the topic of public housing and criminal conviction policies, rooting this issue in one particular city. New Orleans tangles with the most intense incarceration in America, and thus the world. Seemingly innocent programs related to criminal convictions, can take on a primary role in a city such as New Orleans, where one in seven Black men is either in prison, on parole or probation.

To fully grasp the community impact of affordable housing barriers in this sphere, one must account for arrest, incarceration, and poverty rates. Particular to civil rights law, one should factor in the proportionality between recognized ethnic and language groups. It is no mystery that in New Orleans, policies that affect people impacted by the criminal justice system (both individuals and families) are disproportionately affecting people of Color- especially African-Americans. The contrasting affect is most glaring when comparing the drug enforcement policies of densely populated, overwhelmingly White, college students. The excuse of "experimentation" has been reserved for a certain segment of young drug users.

Public housing exclusion standards apply to entire families, thus the impact is far broader than the tens of thousands who are formerly convicted, whether incarcerated or not. Statistics typically fail to account for those who are no longer serving a punishment, yet they too have a criminal history that impacts their ability to obtain housing or employment. Hurricane Katrina exasperated the dilemma of a public housing shortage, and rebuilding efforts have intentionally been below previous capacity. There are now over 27,000 households on the waiting list for affordable housing, putting pressure on other services to deal with homelessness.

In **Section II**, this report provides a brief overview on housing and policing policies within the context of The War on Drugs. The primary method of encouraging "drug free"

behavior has been punishment, while the primary mode of enforcement has been to focus on densely populated low-income communities of Color. The exclusions and evictions from public housing has been accelerated along with the escalation of the War on Drugs. Accordingly, it may make sense for a recession of the punitive policies to span all fronts as widespread de-escalation is afoot in response to the growing sentiment that the War on Drugs has been a failure.

The goal of Forced Sobriety has justified highly-policed communities and a massive construction boom (and employment growth) associated with prison expansion. The Department of Justice estimates that nearly 7% of all people born after 2001 will serve time in state or federal prison; this is on top of the 65 million people who currently have been convicted of a crime. If current rates continue, about 1 in 17 White men, 1 in 6 Hispanic men, and 1 in 3 African American men are expected to serve prison time in their lifetime. It is difficult to imagine anyone in the public sphere being satisfied with these statistics.

The history of public housing, and HUD, includes an acknowledged discrimination over time. The 1.1 million remaining public housing units, and 2.2 million households assisted by vouchers, must be implemented in a manner consistent with HUD's mission to support community development. HUD has long been a partner with local policing efforts. This partnership deserves scrutiny in the same manner as the police, as overly aggressive tactics have become (in some opinions) more destructive than the harms they purport to reduce.

Section III looks at how government actors are evolving on criminal justice, and new policies are competing with the "Tough on Crime" reactionary rhetoric. The National Reentry Council is an interagency approach to confront the effects of mass incarceration. The most active agency among them, the Equal Employment Opportunity Commission, has been dealing with employment issues for decades, and the agency's 2012 policy change regarding the use of criminal records in hiring is a major breakthrough.

The EEOC provided one of the most significant advances in recent Civil Rights law, and they make specific findings regarding national data. Specifically, the EEOC finds that the criminal justice system disproportionately impacts Black and Latino people in America.

This is significant when assessing a neutral policy under Title VII of the Civil Rights Act of 1965, and any blanket policy using criminal history alone to exclude people will run afoul of Title VII. The EEOC provides a framework to guide policies in both the public and private sector. Courts have held that the various Civil Rights statutes are intended to work as a unified framework, thus developments in employment law can be persuasive regarding similar issues in housing law.

Section IV lays out the complex web of laws that serve as Congressional guidance to local public housing authorities (PHA), regarding the exclusions and evictions from subsidized programs. Ultimately, HUD allows broad discretion to the local PHA. By comparing policies to the HUD requirements, and comparing them to each other, it is clear that overly restrictive, and extremely vague, policies are guiding decisions that have a far-reaching affect on community housing. When HUD Secretary Shaun Donovan put out a clear statement, that only two types of crimes are barred from HUD, few local agencies took any action.

Only people convicted of sex offenses, *and on a Registry for life*, along with those who manufactured methamphetamines on federal property, are barred from public housing. Congress makes particular exclusions optional beyond that, generally related to drug use. If someone was previously evicted for a drug related crime, they are faced with a three-year ban unless the offending family member is in prison, dead, or completed a drug rehabilitation program. However, community members around the country have been dealing with policies that don't provide for those nuances.

A model admission and eviction policy is included. This policy is currently being used as a starting point for changes in New Orleans, and has gotten past a public hearing stage. It addresses the need for the PHA to be part of a system where mentally ill and addicted people are directed towards help rather than prisons and homelessness. The phrase "Reasonable Time" is reasonably defined, eliminating the extreme lengths of time people are facing around the country before eligibility for affordable housing. The Housing Authority of New Orleans is currently working to develop and finalize a policy in accordance with these principals.

Section V is a detailed assessment of housing discrimination under federal law. It also includes a proposed change (as of this writing) of HUD's policy, by finally providing a federal code regarding disparate impact in housing. Disparate impact is when a neutral policy becomes discriminatory- such as using drug convictions to exclude people from public housing. Whereas studies indicate drug use is similar across all identified races, the chosen policing patterns result in an overwhelming percentage of drug convictions concentrated in Black and Latino communities. All additional penalties attached, based on those convictions, will disproportionately impact Black and Latino people. Thus, "Disparate Impact."

Courts have long transferred disparate impact theory between employment and housing, but at times differed on the proper standards and process. It is important for advocates to gain a full understanding of disparate impact theory. This is likely to serve as a legal framework for pushing back against a myriad of criminal justice policies that have resulted in the systemic loss of economic and political power among Black and Latino communities.

The EEOC has found four key factors so that employers may design an acceptable "targeted screen," rather than a blanket policy subject to civil rights lawsuits. These factors are (1) Nature of the crime; (2) Time elapsed; (3) Nature of the job; and (4) Individual assessment. Housing providers, particularly where there is a documented shortage of affordable housing (i.e. New Orleans), should develop a similar screen suitable to residential life.

Section VI focuses on the key elements to make a legal case for dispirate impact in the courts. Those who are not interested in litigating a claim will nonetheless want to appropriate some of the standards and justifications that the courts have developed as consistent with the constitution. One complication in presenting "impact" data is that many people with criminal records (and their families) do not apply for public housing. Most people have "heard" you can't get in with a felony, to some degree of accuracy or another. Even if they were fully knowledgeable about the waiting periods, it is impossible to know how many are foreclosed because they would need to *not* know the policy, apply anyway, and be denied. Thus, data of this sort may require a study of the potential (rather than

actual) applicants who are deemed ineligible solely due to criminal convictions. If Black residents have a rate below 80% of the White residents' rate, it is likely to be deemed sufficiently "disparate."

Under disparate impact litigation, housing providers would need to present the court with their substantial, legitimate, nondiscriminatory interests being served by the exclusion policies. Furthermore, they will be tasked to show that the exclusions actually serve the goal: Resident safety. This cannot merely be speculation. Finally, reformers can still prove victorious by showing that the interests (i.e. resident safety) can be achieved in a less discriminatory manner. PHA's who understand this civil rights litigation framework are more likely to recognize that a court may ultimately order them to a negotiating position exactly like the one being offered at the outset. Delaying the adoption of a new policy by requiring the court order is the *least* cost-efficient way forward.

This report recognizes that there is a movement to repeal Civil Rights protections for people of Color in America. Although Justice Antonin Scalia famously referred to the protection of voting rights as "just another racial entitlement," the sentiments of state and federal policymakers suggest that Civil Rights are not going to be eroded. Racial disproportion is one manner of addressing the problems of discrimination, and is the primary path outlined in this report. As criminal records impact a larger swath of America, however, new legal arguments will emerge regarding the rationale to continue, or repeal, this framework that supports two separate citizenships.

The Appendix provides the complete proposed policy for the Housing Authority of New Orleans, and a nationwide sample snapshot of six other cities.

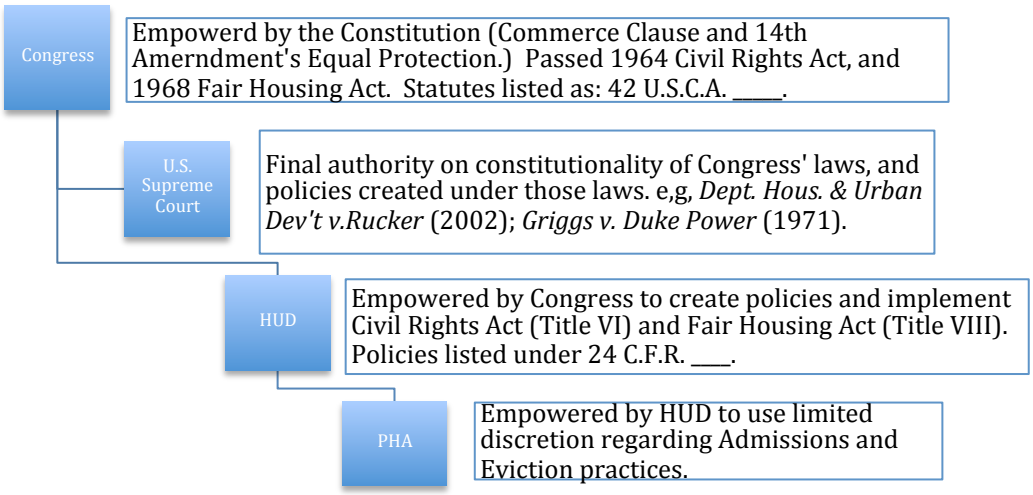
I. Introduction

The focus of this report is to isolate and clarify one element of housing discrimination: excluding people with criminal records, and their whole families, from public housing. This issue persists within the challenging contexts of race and poverty, and is perpetrated by agencies with stated goals to eradicate discrimination. In New Orleans,

affordable housing is a controversial subject, particularly after the post-Katrina demolition of housing units and a rebuilding process tangling with corruption.[1] The displaced and traumatized children of Katrina are now the teenagers and young adults struggling in schools, seeking employment, and filling prison cells. As many families' support structures are disbanded across the country, a social crisis is at hand.

This report is designed to make a specific analysis of the current legal standards guiding tenant selection and eviction. Primarily, the focus is on the federal requirements of HUD, and the local discretion to impose their own discrimination regimes. It will also contrast public housing practices with other stated policies that encourage reentry and rehabilitation for people impacted by the criminal justice system. Furthermore, a model policy is recommended to encourage family unification and overall community health, particularly where the target areas in America's "War on Drugs" have been economically disadvantaged neighborhoods. This policy emerged from the below research, and is now being advocated in New Orleans.

For advocates and policymakers not entirely familiar with the overall federal housing structure, consider this chart showing the power flow from Congress to Dept. of Housing and Urban Development (HUD), to the public housing authorities (PHA):



[1] See generally:"Then And Now- A Progress Report on the Operational Assessment of the Housing Authority of New Orleans," presented by Federal Receiver David Gilmore to HUD Sec'y Shaun Donovan (04/12).
[2] Source: Louisiana DOC. Most experts agree that if someone is out for five years, they have an equal, or

New Orleans, Louisiana

Prison systems built on convict-leasing schemes in the 1800's have evolved into a vast industry. In the past two decades, Louisiana's prison population doubled, costing taxpayers billions, having no impact on crime, and New Orleans' homicide rate has been among the nation's highest.

- 1 in 86 Louisiana adults is doing time, nearly double the national average.
- Louisiana releases 15,000 prisoners per year, who have about a 50% chance of staying out for five years.[2]
- Among black men from New Orleans:
  - *One in 14 is behind bars;*
  - *One in seven is either in prison, on parole or on probation.*[3]

Relatively high crime rates fail to explain the state's No. 1 ranking, year after year, in the percentage of incarcerated residents. Severe sentencing, including life sentences for a third conviction, has created a massive warehousing of 48,000 people. The lobbying muscle of the sheriffs, buttressed by a tough-on-crime electorate, keeps these harsh sentencing schemes firmly in place.[4]

The Crescent City is the most incarcerated city in the most incarcerated state in the most incarcerated nation in the world.[5] The population of 360,000 is roughly two-thirds

---

[2] Source: Louisiana DOC. Most experts agree that if someone is out for five years, they have an equal, or lesser, chance of going to prison than the normal population.

[3] At any given time, about 6600 people living in New Orleans are on probation or parole.

[4] Cindy Chang, "Louisiana Is The World's Prison Capital," *The Times Picayune*, (May 11, 2012) available at: http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html.

[5] U.S. leads in rate of incarceration 742 per 100,000, followed by Rwanda (595) and Russia (568). The U.S. leads in total numbers of imprisoned people (2.29m), followed by China (1.65m) and Russia (.81m). China approaches American total numbers when including "Detention Centers." *See*: International Center for Prison Studies, "World Prison Population List, 9th Ed."(2012): Available at: http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf.
LA has 865 sentenced prisoners per 100,000, including 1,662 males, followed by MS (690) and AL (650). *See*: Bureau of Justice Statistics, Prisoners in 2011 (12/2012), Appendix Table 3, at 23. Available at: http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf.
13.7% of all LA prisoners are from Orleans Parish (New Orleans). *See*: LA Dept. Public Safety and Corrections Fact Sheet (6/30/12), available at http://doc.la.gov/wp-content/uploads/stats/2a.pdf. The 1 in 14 Black men in New Orleans serving state prison time represents an incarceration rate of 7,142 per 100,000, roughly ten times the national rate. *See also*: Chang, (Supra).

African-American, whereas the state of Louisiana is two-thirds White.[6] Racial tensions date back to slavery and Reconstruction, along with a notorious history of violence and repression of voting rights.[7] Southern Louisiana has served as an important location in several landmark decisions of the Supreme Court.[8] There are likely more than 20,000 people living in New Orleans who have been incarcerated,[9] and far more with a criminal record.[10] The growing tally of people who have finished sentences, yet still facing consequences, are never accounted for among those presently serving out their punishments.

Impact on Families

Nearly 2 million children in America have a parent currently incarcerated.[11] Studies reflect that generally half of prisoners have two children, so roughly 5000 children in New Orleans have a parent in prison. Policies that negatively impact *families* of convicted people will add further layers of systemic poverty upon the community. The metropolitan area already has the 8th highest rate of food hardship for families with children.[12] Over 13,000 children (21%) in Orleans Parish are at risk of hunger; 90% are income-eligible for

---

[6] U.S. Census Bureau, Quick Facts, New Orleans (2011). This is a 29% overall decline since 2000.
[7] Judge Henry Minor Wisdom summarizes the racial political history, and then states the events are "all related members of a series, all reactions to the same dynamics that produced the interpretation test and speak eloquently of its purpose. In sum, the interpretation test is another grandfather clause. Its purpose is rooted in the same history. It has the same objective the delegates to the Constitutional Convention of 1898 envisaged for the grandfather clause. It is capable of producing the same effective disfranchisement of Negroes today that the grandfather clause produced sixty-five years ago." *United States v. State of La*., 225 F. Supp. 353, 380-81 (E.D. La. 1963) aff'd sub nom. *Louisiana v. United States*, 380 U.S. 145 (1965).
[8] *Snyder v Louisiana*, 552 U.S. 472 (2008) (prosecutor's peremptory challenge was pretext for racial discrimination); *Louisiana v U.S.,* 380 U.S. 145 (1965) (Cannot exclude Blacks from voting; under 10% of Blacks were registered to vote due to various tactics since the end of Reconstruction); *United States v. Hays*, 515 U.S. 737 (1995) (revisiting a racial gerrymandering issue in place since before the VRA)., *et. al*.
[9] Over the past 20 years, the LADOC has released approximately 300,000 people, with a 50% likelihood of staying out of prison at least 5 years. New Orleans has been the source of about 15% of all prisoners, and even more return there with the prospects of employment, housing, and services only available in cities. Mortality and emigration would reduce the figure, while former prisoners of the 1970's and 1980's, along with immigration, would increase the figure.
[10] Louisiana has 41,916 probationers and 27,640 parolees. Many on probation were never sentenced to incarceration. Nationally, two-thirds of people complete probation without incarceration. In 2011, 15,694 people exited probation. *See*: BJS Statistics, "Probation and Parole in the United States, 2011," (11/2012).
[11] BJS, "Parents in Prison and Their Minor Children," (Rev. 3/30/10). In 2007, an estimated 809,000 parents in prison had 1.7m children under age 18. In 1991, the number of children was under 1m.
[12] Food Research and Action Center, "Food Hardship in America 2010," (08/11). 38% of the 2nd LA Congressional District struggles with food hardship.

federal nutrition programs (185% of poverty level).[13]

Despite clear indications of needing public programs to stem the tide and create stability, the Housing Authority of New Orleans (HANO) did not always reflect a city in need of affordable housing. Prior to Katrina, only 9000 people were receiving housing vouchers.[14] According to HANO staff, the pre-Katrina waiting lists were comprised of approximately 14,000 individuals, with approximately 9,000 unduplicated names (there were separate waiting lists for public housing and housing vouchers, and people were encouraged to sign up for both). The waiting list had since been purged and closed.[15]

In 2005, Hurricane Katrina created the greatest housing disaster in American history, including the loss of 2000 affordable public housing units.[16] There were 773 scattered public housing units, but much of it was damaged by the storm and demolished (rather than repaired) by HANO. By 2009, only 144 of the sites had been reoccupied.[17] Today, the Housing Authority of New Orleans (HANO) only has 2,389 households in public housing, although 17,081 households receive housing vouchers.[18] This is 14% of the 134,342 households in the city.[19] It is difficult to say precisely how many eligible people in the city are unable to access assistance, but the median household income is $37,000, and 26% are below the poverty level. Furthermore, future HANO plans are concentrated as much on market-rate housing as affordable housing.[20]

There are now 3,939 households on the public housing waiting list, 99% are African-American. Another 22,118 are on the Section 8 voucher waiting list, 94% are African-American. The Section 8 list has been closed since 2009.[21] When a family gets

---

[13] *See*: Feeding America, Map the Meal Project, online at http://feedingamerica.org/hunger-in-america/hunger-studies/map-the-meal-gap.aspx. 200% of the 2012 poverty line for a mother and two children is $38, 180, or roughly $20/hour.

[14] "HUD Katrina Accomplishments – One Year Later." Available on HUD's website: http://www.hud.gov/news/katrina05response.cfm.

[15] HANO, "Then And Now- A Progress Report on the Operational Assessment of the Housing Authority of New Orleans," presented by Federal Receiver David Gilmore to HUD Sec'y Shaun Donovan (April, 2012), at 47.

[16] *Id.*, at 38.

[17] *Id.*, at 44.

[18] *Id*., at 23. The public housing has drastically shrunk, while the vouchers have nearly doubled. The latter, however, should be seen in the context of program administration rather than reflecting need.

[19] Census, *id*.

[20] "Then and Now," *id.* The goal of 7,652 units is similar to the pre-Katrina number, except (a) 1001 of the pre-Katrina number were already scheduled for demolition, and (b) the final percentage of affordable units is still unknown.

[21] HANO FY2013 Full Draft Annual Plan, at 7-8.

within ten places of assistance, a criminal history eligibility assessment will be done.[22] It is not uncommon for someone to be on the waiting list for years, only to be told that they are not eligible when they finally get within the finish line.

A Grandmother's Plight

> When Terry Sylvester came to her door in the Iberville housing development she confronted a young woman who had an ongoing dispute with her daughter. When Ms. Sylvester attempted to retrieve and protect her grandchildren, they were all maced by the young woman. Ms. Sylvester struck the young woman before going to the hospital for treatment. At the hospital she was given a $500 citation that was later dismissed at court.[23]
>
> HANO immediately moved to evict Ms. Sylvester and her children. The trial court ruled that, although Ms. Sylvester immediately notified the site manager, she did not say she was "arrested." The court would not review the videotape, was unconcerned about self-defense, nor the technical definition of "arrest." It only considered strict interpretation of the lease, that a tenant should immediately notify the site manager after being arrested. The court gave her a few weeks to move.[24]
>
> On appeal, the court found differently, particularly finding "nothing in state or federal jurisprudence" that supports finding that a police record creates a presumption of criminal activity for purposes of evictions.[25] This is a crucial ruling, considering the number of evictions based on no more than an arrest, with often no more than a police report in evidence. Public housing tenants have a constitutionally protect interest in maintaining their occupancy, and are entitled to due process in any eviction.[26]

---

[22] *Id.*, at 11.
[23] *Housing Authority of New Orleans v. Terry Sylvester*, Case No. 2012-20048, First City Court, Orleans Parish (6/14/12), J. M. Morial.
[24] *Id.*
[25] *Housing Authority of New Orleans v. Terry Sylvester*, 2012-CA-1102, La. Ct. App. 4th, (2/27/13).
[26] *Thorpe v Housing Authority of the City of Durham*, 393 U.S. 268 (1969).

Policing Choices Lead to Arrest Disparities

To illustrate the contrast in how police tactics can alter lifetime punishments, consider the criminal behavior of the city's most White and affluent neighborhood: Uptown, also home of Tulane and Loyola universities. One poll among students shows that 80% of students believe illegal drug use is noticeable, with nearly half claiming it is "pretty" or "very" noticeable. Also, whereas "most" or "many" students take part in the drinking scene, over 90% find underage students have abundant to unlimited access to alcohol.[27]

Loyola and Tulane's police have made zero arrests over the past three years for liquor law violations, while an average of 386 have been referred to discipline hearings. The campus police have averaged 35 drug arrests per year, and referred an average of 37 to discipline hearings.[28] This is among an influx of over 18,000 students, who have 1/10th of 1% chance of being arrested for drugs (some of whom, presumably, will have charges dismissed, or be found not guilty).

While the spirit of resident protection is in the air for the young adults in Uptown, the rest of New Orleans has a different relationship to their police. Roughly 5000 Black men (or 1 in 14) from New Orleans are serving state prison time, along with about 400 local White men (or 1 in 141).[29] Clearly, the overt and concentrated illegal drug use is not being pursued in an overwhelmingly White area, while a similar age group is being targeted elsewhere. Accordingly, Governor Jindal and the legislature recently empowered the 26-member HANO "peace officers" to become police officers, and their statistics are not likely to mirror those of the campus police forces.

---

[27] College Prowler, http://collegeprowler.com/tulane-university/drug-safety/student-polls/, Tulane received a C- grade for Drug Safety. There are over 5,000 undergraduate students, 56% of whom are under 21, 9% are African-American and nearly 80% are White.

[28] Campus crime statistics available at: http://finance.loyno.edu/police/campus-crime-report, and http://tulane.edu/publicsafety/training/upload/annual-security-report.pdf

[29] Chang, *id.*

II. Background | Housing and Crime Policies

It is essential to understand that criminal justice policy, including punishments and exclusions, has been integrated across all aspects of our lives. Housing providers are typically not criminal justice experts, and vice versa. Decades later, it is essential to question whether the mission of sustainable communities is compatible with lifetime punishments that effect a large segment of that community.

Affordable Housing and Highly-Policed Communities

The U.S. Department of Housing and Urban Development (HUD) was formed to "utilize housing as a platform for improving quality of life" and build "inclusive and sustainable communities free from discrimination."[30] For the past several decades this mission has been questioned, as discrimination against families with criminally convicted members is pervasive among low-income communities of Color.

The exponential expansion of convicting Americans has created a growing underclass that needs to be factored into pre-existing laws and policies. In 1991, only 1.8% of the American adult population had served time in prison. By 2001, this number had risen to 2.7%. The numbers continue to rise and, according to the Department of Justice, nearly 7% of all persons born after 2001 will serve time in state or federal prison during their lifetimes.[31] One study suggests 65 million people in America have a criminal record,

---

[30] http://portal.hud.gov/hudportal/HUD?src=/about/mission

[31] EEOC Report, at 3; citing *See* THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 3 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf [hereinafter PREVALENCE OF IMPRISONMENT] ("Between 1974 and 2001 the number of former prisoners living in the United States more than doubled, from 1,603,000 to 4,299,000."); SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES 1 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (reporting that between 1990 and 2006, there has been a 37% increase in the number of felony offenders sentenced in state courts); *see also* PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 4 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26- 09.pdf [hereinafter ONE IN 31] ("During the past quarter-century, the number of prison and jail inmates has grown by 274 percent . . . .[bringing] the total population in custody to 2.3 million. During the same period, the number under community supervision grew by a staggering 3,535,660 to a total of 5.1 million."); PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 3 (2008), http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1- 1_FORWEB.pdf ("[M]ore than one in every 100 adults is now confined in an American jail or prison."); Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25, 26 (2012) (finding that approximately 1 out of 3 of all American

any one of which has the potential of impacting an entire household for life.[32]

Arrest and incarceration rates are particularly high for African American and Hispanic men.[33] African American and Hispanic people[34] are arrested at a rate that is 2 to 3 times their proportion of the general population.[35] Assuming that current incarceration rates remain unchanged, about 1 in 17 White men are expected to serve time in prison

---

youth will experience at least 1 arrest for a nontraffic offense by the age of 23).

[32] Michelle Natvidad Rodriguez & Maurice Emsellem, The National Employment Law Project, 65 Million "Need Not Apply": The Case For Reforming Criminal Background Checks in Employment, 27 n.2 (Mar. 2011), http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1. Note, this is not the number of people who have served time in prison, it is the number convicted of a criminal offense.

[33] *d.* at 5, Table 5; *cf.* PEW CTR. ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 6 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Collateral_Costs.pdf?n=8653 ("Simply stated, incarceration in America is concentrated among African American men. While 1 in every 87 white males ages 18 to 64 is incarcerated and the number for similarly-aged Hispanic males is 1 in 36, for black men it is 1 in 12."). Incarceration rates are even starker for 20-to-34-year-old men without a high school diploma or GED: 1 in 8 White males in this demographic group is incarcerated, compared to 1 in 14 Hispanic males, and 1 in 3 Black males. PEW CTR. ON THE STATES, *supra*, at 8, Figure 2.

[34] This report acknowledges and respects that people have a right to refer to themselves, however they prefer, regardless of how HUD, the Census Bureau, or Department of Corrections may categorize people. Where cited, the terms are those used in the original report. The terms "African American" or "Black" are meant to be interchangeable, as is "Hispanic" or "Latino," and "White" or "Caucasian." Collectively, Black and Latino are also referred to as "People of Color."

[35] UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. the-u.s.-2010/tables/table-43/10tbl43a.xls.
U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (reporting that in 2010, "14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races"). Accurate data on the number of Hispanics arrested and convicted in the United States is limited. *See* NANCY E. WALKER ET AL., NAT'L COUNCIL OF LA RAZA, LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL JUSTICE SYSTEM 17–18 (2004), http://www.policyarchive.org/handle/10207/bitstreams/20279.pdf (explaining why "[i]t is very difficult to find any information – let alone accurate information – on the number of Latinos arrested in the United States"). The Department of Justice's Bureau of Justice Statistics' (BJS) *Sourcebook of Criminal Justice Statistics* and the FBI's Crime Information Services Division do not provide data for arrests by ethnicity. *Id.* at 17. However, the U.S. Drug Enforcement Administration (DEA) disaggregates data by Hispanic and non-Hispanic ethnicity. *Id.* at 18. According to DOJ/BJS, from October 1, 2008 to September 30, 2009, 45.5% of drug arrests made by the DEA were of Hispanics or Latinos. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 – STATISTICAL TABLES, at 6, Table 1.4 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09.pdf. Accordingly, Hispanics were arrested for drug offenses by the DEA at a rate of three times their numbers in the general population. *See* U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 3 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (reporting that in 2010, "there were 50.5 million Hispanics in the United States, composing 16 percent of the total population"). However, national statistics indicate that Hispanics have similar or lower drug usage rates compared to Whites. *See, e.g.,* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21, Figure 2.10 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting, for example, that the usage rate for Hispanics in 2009 was 7.9% compared to 8.8% for Whites).

during their lifetime;[36] by contrast, this rate climbs to 1 in 6 for Hispanic men; and to 1 in 3 for African American men.[37] Admissions and eviction policies, regarding public housing and criminal histories, generally discriminate against and exclude not only the arrested individual, but their entire family.

Housing & Urban Development

Public housing was not originally built to house the 'poorest of the poor,' but was intended for select segments of the working class. Specifically, it was designed to serve the needs of the 'submerged middle class,' who were temporarily outside of the labor market during the Depression. After World War II, many working class people were able to buy their own homes using low-interest mortgages through the VA and FHA. These benefits were targeted to White families and helped move them to suburbs, but kept Black families concentrated in cities and inner suburbs (especially in the northeastern and mid-western states). The distribution of federal benefits made it possible for mostly White working-class people to move out of public housing, and contributed to a downward income shift in the public housing population after the 1940's. The discriminatory nature of these practices has been well documented by social scientists, and HUD itself.[38]

Today, the HUD Office of Public and Indian Housing comprises 57% of the overall HUD fiscal budget.[39] The Housing Choice Voucher Program (HCVP) provides housing subsidies to approximately 2.2 million low-income, elderly, and disabled families.[40] The Public Housing Program provides a subsidy to over 1.1 million units to assist vulnerable low-income families, of which nearly half are either elderly, disabled, or both.[41] Native

---

[36] PREVALENCE OF IMPRISONMENT, *supra* note 4, at 1.
[37] *Id.* at 8.
[38] "Brief History of Public Housing," at 1-2.
http://reengageinc.org/research/brief_history_public_housing.pdf
[39] HUD Fiscal Report, at 10. It is the second largest in size, behind the mortgage insurance program Ginnie Mae. Fannie Mae and Freddie Mac are in receivership following the still-unfolding scandals of the subprime mortgage lending crisis.
[40] *Id.* A family who is issued a housing voucher is responsible for finding a suitable housing unit of the family's choice, the owner of which agrees to rent under the program and follow certain conditions of HUD. Thus the owners can be held accountable to standards and goals of HUD, or they can opt to rent their properties on the open housing market.
[41] *Id.* Public Housing Agencies (PHAs) receive two separate funding streams, the Capital Fund and the Operating Fund, which were established in 1998 by the Quality Housing and Work Responsibility Act (QWHRA). The Capital Fund was established to support the development, financing, and modernization of

American Programs (ONAP) provide a coordinated and comprehensive response to Indian Country's housing and community development needs through work with tribal, state, and local governments, federal agencies, community organizations, and the private sector.[42]

HUD and the War on Drugs

There is no dispute that substance abuse and addiction threatens to destroy families from the inside. It drains the finances from breadwinners, turns people to unreliable employees, consuming their time, energy and spirit. The parent, spouse, or child of an addicted person also expends a great deal of energy trying to manage the situation and seek help. Finally, the criminal justice system interventions do all of those things and more, considering the lifetime consequences of a conviction. It is a fallacy, however, that all drug use qualifies as abuse or addiction. Many highly functional people recreationally use drugs, with no serious ramifications.

HUD has attempted to combat substance abuse using the most obvious tactic available: screening families for any criminal activity as renters, evicting them, and barring them for years. Since the 1980's, public housing has been a primary site for police buying drugs and arresting people.[43] Because of its design, public housing is the most efficient and accessible location for law enforcement to target people, and some housing authorities even have their own police forces. Unfortunately, other models of intervention, such as declaring addiction a public health issue in the vein of polio or HIV, have not been nearly as well funded. The law enforcement strategy, including prisons, represents a trillion dollars invested over the past forty years with a purported goal of improving the lives of these community residents.

---

public housing developments, while the Operating Fund provides for the operation and management of public housing.

[42] *Id.* More than 550 American Indian tribal governments and Alaska Native Villages receive an annual Indian Housing Block Grant to provide safe, decent, and affordable housing to low-income residents of Indian areas. The loan guarantee programs for American Indians, Alaska Natives, native Hawaiians, and tribal governments ensure market-rate financing for housing is available in traditional native areas. The study of Native American policies in the arena of criminal convictions may serve as an interesting comparison to non-Native American programs. There may or may not be an alternative approach, considering the tragic history of government actions towards aboriginal peoples, and more recent attempts at reparations.

[43] *See:* "HUD Programs to Combat Drug Abuse in Public Housing: Hearings Before the Subcomm. On Employment and Housing of the House Comm. On Government Operations," 100th Cong., 2d Sess. 22 (1988).

Since the 1990's, Congress has clearly stated their desire to fund public housing that is devoid of drug users and alcohol abusers. This has resulted in a series of code amendments and a wealth of civil cases, particularly in regards to evictions. In 2002, HUD issued a Notice outlining five mandatory categories of exclusion, and four discretionary categories.[44] The Notice stated public housing authorities (PHAs) must change their selection and eviction policies to reflect the new rules under the Quality Housing and Work Responsibility Act.[45] These original categories have since been amended and encoded in Title 24, Section 5 (or "Part Five").[46] It requires all PHAs, who maintain considerable discretion, to develop standards in accordance with their guidelines.[47]

III. Recent Trends in Rehabilitation and Reentry

Federal and state government officials have had to confront the results of over-criminalizing drugs during the past two generations. "Tough on Crime" and "Zero Tolerance" slogans resulted in the creation of more laws, increased maximum penalties, mandatory minimum sentences, a prison construction boom, police in schools, massive payroll expansion in law enforcement, and a drastic increase of incarcerated men, women, and children. State budgets have been gutted, as prison costs have equaled (and surpassed) education expenditures.[48]

While some officials have called for more of the same, various individuals and authoritative bodies have taken a different course. Marijuana is increasingly accepted as

---

[44] John Weicher, Asst. Sec'y for Housing, Screening and Eviction for Drug Abuse and Other Criminal Activity - Final Rule, NOTICE H 2002- 22 (HUD). 10/29/02. The Notice was sent to: All Regional Directors, All Multifamily Hub Directors, All Multifamily Program Center Directors, All Project Managers, All Owners and Management Agents of Multifamily Properties, All Section 8 Contract Administrators, All State Housing Finance Agencies, Regional Counsel, Chief Counsel, and Chief Attorneys.

[45] *Id*., at 4.

[46] 24 C.F.R. § 5.850, et. seq.

[47] These are known as an Admission and Continued Occupancy Policy (ACOP). The code frequently states, "you must establish standards" regarding each section.

[48] Louisiana spends about $663m per year on 40,000 prisoners. Chang, *id., see*: http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html. *See also*: Les Leopold, "Crazy Country: 6 Reasons America Spends More On Prisons Than Higher Education," AlterNet (8/27/2012) http://www.alternet.org/education/crazy-country-6-reasons-america-spends-more-prisons-higher-education?page=0%2C0

medicine and/or non-criminal behavior. Prisoners are often assessed regarding mental health and/or substance abuse treatment, even where that treatment may not exist. Agencies are attempting to coordinate services, including housing and employment, in recognition that a massive barrier has been built in the way of second chances. In lieu of establishing oneself with employment and housing, someone caught in the criminal justice system (and their children) are likely to become wards of the state for life- at roughly $50,000 per year, plus services for their dependents.

Change |The 2012 EEOC Policy

The U.S. Equal Employment Opportunity Commission (EEOC) issued new guidance in 2012, regarding criminal convictions and employment.[49] After an extensive investigation and hearing process, they ruled that blanket bans against hiring all who have been convicted of crimes will likely violate Title VII in the Civil Rights Act of 1964.[50] This is because evidence is clear that Black and Latino Americans are disparately impacted by the criminal justice system.[51] This rationale is not unique to employment, as barriers erected around criminal histories are prevalent in our society.

Housing and policing patterns, especially regarding urban Black and Latino Americans, coincide with documented degrees of racial discrimination throughout every level of the criminal justice system (arrest, conviction, sentencing, parole, and post-incarceration discrimination).[52] This ultimately leads criminal convictions to be a non-neutral, non-"merit based" tool to judge people's fitness for equal treatment under the law.

EEOC is on the National Reentry Council with several other federal agencies, including HUD.[53] HUD is responsible for ensuring that housing discrimination does not exist in public programs, under Title VI of the Civil Rights Act of 1964, and among private

[49] "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (April 25, 2012). http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
[50] *Id*. At I. Summary: A violation may occur when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability). An employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity (disparate impact liability).
[51] *Id*., at Part II, Introduction.
[52] *See:* The Sentencing Project, "Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers" (2d Ed. 2008).
http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.
[53] Available online at: http://www.nationalreentryresourcecenter.org/reentry-council.

housing under Title VIII of the Fair Housing Act of 1968. Whereas the EEOC guidelines recommend that only convictions with a relationship to the job being sought should be considered legal barriers to employment, HUD should consider a similar mandate be issued to the local public housing authorities: Only criminal convictions with a relationship to jeopardizing the safety of the property, or of the particular residents, can be used as barriers to subsidized housing.

HUD Secretary Shaun Donovan has made recent moves indicating the agency is moving in this direction.[54] However, a concerted effort by legislators and advocates will be required to overturn the overt discriminatory policies that lead to, for example, entire families being barred from housing due to a misdemeanor, or evicted due to a child's indiscretions. The law is presently inconsistent, and the retreat from flawed Zero Tolerance standards has been haphazard and gone unnoticed.

IV. Housing Policy | Barring and Evicting Families

Who Is Barred from Public Housing?[55]

Mandatory Exclusions

The *only mandatory waiting period* applies to those who have been previously evicted for drug-related criminal activity. This three-year bar does not apply to those applying for the first time, or those evicted for other reasons.[56] Furthermore, the bar may be overcome if the household member completes a drug rehabilitation program, dies, or is in prison.[57]

---

[54] *See* below.
[55] *See:* Table A (below), illustrating the key provisions of barring admission, local policy, and a model policy.
[56] *Id*. § 5.854(a).
[57] *Id*.

HUD's Three Mandatory Bans

Discretionary Exclusions

Under federal law, a PHA *may* prohibit (although not required to prohibit) admission if the PHA determines a household member is:

Currently engaging in,[58] or

Has **engaged** during a **reasonable time** prior to the decision:

(1) Drug-related criminal activity;

(2) Violent criminal activity;

(3) Other criminal activity that would affect residents; or

(4) Other criminal activity that would affect PHA staff.[59]

The local PHA may define "reasonable time," "engaged," and "current," regarding prior criminal activity.[60] However, most leave these terms vaguely open to a panel, or single reviewing officer, to determine.

If the PHA denies admission for any of the above reasons, a household may be reconsidered by submitting certification that the behavior is not current, or the reasonable time period has elapsed. The supporting information may come from sources such as a probation officer, landlord, neighbors, social service agency workers, and verified criminal records.

[58] A household member is currently engaged in the criminal activity if the person has engaged in the behavior recently enough to justify a reasonable belief that the behavior is current. 24 C.F.R. § 5.855(c)(2).
[59] 24 C.F.R. § 5.855(a).
[60] *Id.* § 5.855(b).

HUD's policies in Section Five include the prohibition of those subject to lifetime sex offender registration.[61] The code also mandates local PHAs establish standards that prohibit households with a member whose alcohol abuse might *reasonably affect* other residents.[62] This section omits any reference to methamphetamine manufacturing.[63]

Section Five is not a substitute for a local policy. There are many legal nuances that can be misconstrued, and a lack of guidance regarding what constitutes threats to "health, safety, or peaceful enjoyment of the premises." For example, would legal, physician-approved marijuana usage pose a threat? If not, would the *illegal* use of marijuana, in the privacy of one's own home, pose a threat? Would this be different in the states that recognize medical marijuana and those that do not?[64] Or, furthermore, in states that have decriminalized marijuana?[65]

U.S. Supreme Court Review

The Supreme Court has previously held that Congress has the power to exclude whom they wish, based on a rational relationship between the anti-drug goal and the exclusion policy. In 2002, the Court in *Dep't of Hous. & Urban Dev. v. Rucker* held that the Anti–Drug Abuse Act required lease terms that gave local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engaged in drug-related activity, regardless of whether a tenant knew, or should have known, of the drug-related activity.[66] This policy, however, was not viewed in the context of Disparate Impact, and the case stems from 1997-1998 activity.[67] The *Rucker* ruling, evicting an elderly woman for a grandchild's possession of illegal drugs, is one of the most highly criticized cases in the area of public housing and tenancy.

---

[61] *Id.* § 5.856.
[62] *Id.* § 5.857. *Emphasis added.*
[63] Methamphetamine-based exclusions are listed in 24 § 960.204, which is largely redundant to this section.
[64] As of January, 2013, eighteen states and D.C. have enacted laws to legalize medical marijuana: AK, AZ, CA, CT, DC, DE, HI, MA, ME, MI, MT, NV, NJ, NM, OR, RI, VT, WA. Ten states have pending legislation: AL, IL, IA, KA, KY, MD, MS, NH, NY, OK. SD has a bill that would treat it favorably, although not legalizing. http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481
[65] As of January, 2013, seventeen states have some form of marijuana decriminalization laws, either statewide or in a major city, where small amounts are treated similarly to traffic tickets: AK, CA, CO, CT, IL, ME, MA, MN, MI, NE, NV, NY, NC, OH, OR, RI, WA. Colorado and Washington have essentially legalized marijuana similar to alcohol, although this does not protect residents from federal prosecutions.
[66] 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002)
[67] *See Below*, regarding disparate impact.

Although the Court has historically provided great leeway in the government's efforts to eradicate drugs, including a finding that the smell of marijuana justified breaking down a door,[68] any future rulings in this area will be forced to acknowledge Congressional and Agency efforts to temper the War on Drugs' devastation on communities. Many legal challenges regarding public housing and criminal convictions can be distinguished from *Rucker*, especially where various drug policies have been changing over the past two decades.

New Orleans, 2013 | A New HANO Policy

In late 2012, community members in New Orleans submitted a proposal to Housing Authority of New Orleans (HANO) to amend their policy regarding criminal convictions, admissions and evictions.[69] This proposal reflects the Model Policy enclosed here (see Appendix A). HANO is under federal receivership, and is currently being operated directly by HUD. Although not specifically stating the proposal applies to all manner of HANO assisted housing, the relevant Housing Choice Voucher and Project Based Voucher program policies mirror the public housing Admissions and Continued Occupancy Policy (ACOP).[70] One structural difference in the programs is the ability for individual landlords to evict under HCV.[71]

On January 5th, 2013, HANO issued a draft "Criminal Background Policy Statement," and notice for a public hearing. A preamble to the statement references a Washington Post

---

[68] *Kentucky v King,* 563 U.S. ___ (2011).

[69] Stand With Dignity is a grassroots group organizing around local housing issues, and are a part of the New Orleans Workers' Center for Racial Jusitice (NOWCRJ). Along with Voice of the Ex-Offender (VOTE), they have organized other members of the community.

[70] *See:* HANO Housing Choice Voucher Administrative Plan (HCVP), at 29-34. (10/01/11). This Plan denies admission where there is a pending criminal charge (p. 30). Once enrolled in HCV, HANO will not provide a criminal history to prospective landlords attempting to screen a prospective HCV tenant (p. 31, citing 24 C.F.R. § 982.307); *cf:* HANO will provide criminal history to landlords upon written request (HANO FY 2013 Full Draft Annual Plan, at 16). Will not deny a household member who shows proof of drug rehabilitation completion (p. 32). Terminations for any violent or drug-related activated, by anyone (including guests and "persons under tenant's control") *on or near the premises* (p. 128, 161, 165, emphasis added).
Project Based Voucher (PBV) Plan is within the HCVP, at 202. It states they will have the same eligibility, and most will apply for both programs simultaneously.

[71] HCVP, at 166: "The owner may terminate tenancy and evict by judicial action a family for criminal activity by a covered person if the owner determines they have engaged in the criminal activity, regardless of arrest or conviction and without satisfying the standard of proof used for a criminal conviction, except in certain incidents where the criminal activity directly relates to domestic violence, dating violence, or stalking and the tenant or an immediate member of the tenant's family is the victim or threatened victim of the domestic violence, dating violence, or stalking."

article that outlines the ignored plight of Black males in America.[72] HANO recognizes the lifelong label of "felon" is "an almost automatic bar to gainful work" and a "likely bar to admission to most affordable housing."[73]

> "HANO recognizes that, whether explicit or implicit, its practices have served to perpetuate the problem. As the city's major provider of affordable housing and of safe and healthy communities, HANO accepts that it has a responsibility to give men and women with criminal histories the opportunity to rejoin their families and communities and to rejoin them as productive members."[74]

This represents a major shift in policy, recognizing the problem and the agency's role in perpetuating discrimination and unstable communities. HANO has been known to seek eviction of entire families even where no arrest occurred, and where the alleged activity is not even attributed to a household member.[75]

HANO's Proposed Policy Statements | 2013

Although lacking in specifics, the first statement highlights that all people, regardless of criminal history, will have access to HANO housing and employment. Those denied are people who pose a "clear and present danger," or have acts of child abuse, sexual predation, or domestic violence.[76]

Such a vague policy, in practice, might serve to broaden the pool of admissions denials and convictions, depending on:

(1) How "clear and present danger" is defined;

(2) How broadly they determine the scope of sex crimes;[77]

---

[72] Gerson, Michael (uncited), "mid-December 2012," Washington Post.
[73] DRAFT HANO Criminal Background Policy Statement, 1/05/13, at 1.
[74] *Id.*
[75] *Hous. Auth. of New Orleans v. Graham*, 2005-0665 (La. App. 4 Cir. 3/2/06), 925 So. 2d 674 (A teenage daughter allegedly dated a boy for several weeks before becoming a wanted fugitive. He had entered the unit several hours before the police came. The police were let in, and directed to the fugitive upstairs. Despite no charges by the NOPD, the eviction case was allowed to go forward.)
[76] HANO's policy statement includes reference to employment which mirror housing eligibility. This poses another problem, although it will not be addressed here.
[77] Currently, all people on the Sex Registry (regardless of level) are barred- including their families. This is similar to Chicago. *See, e.g.*, CHICAGO HOUSING AUTHORITY, FY2010 ADMISSIONS AND CONTINUED OCCUPANCY POLICY, 14 (approved Sept. 21, 2010) (denying admission to applicants who have —ever been convicted of a crime that requires them to be registered under a state sex offender registration program including the ten-year Illinois State Sex Offender Registration Act).

(3) What is meant by "history of domestic violence;"

(4) The composition of the review panel, and

(5) What guidance is used to analyze the factors.

Public pressure and comments led to a Second Policy Statement much more conducive to community concerns.[78] HANO has hired Vera Institute of Justice to facilitate stakeholder concerns and propose the final policy language.

Table A- Comparing HUD, HANO, and Model Policies

Model Preamble:
The PHA recognizes that among leading causes of criminal activity in America are mental illness, addiction, unemployment, and homelessness. Healthy communities exist where these social issues are being treated in a comprehensive manner, therefore the PHA will make reasonable efforts to contribute to a positive community response to these ailments.

*The following review periods of exclusion apply to any member of the household.

	HUD Policy (Minimum Standards)	**HANO Policy**	**PHA Model Policy[i]**
Lifetime Ban	Convicted of manufacturing methamphetamine on PHA premises[ii]	HUD	HUD Policy
	Family with household member subject to **lifetime** sex offender registry[iii]	***All*** registered sex offenders and their families.[iv]	Exclude a lifetime registered person only, particularly not where it would serve to exclude victims of sex offenses.

[78] "No applicant for HANO-assisted housing will be automatically barred from receiving housing because of his or her criminal background, except as mandated by federal law.

HANO will conduct a criminal record check for all applicants before admission into HANO- assisted housing. For applicants not barred by federal law, the applicant's criminal conviction(s) will be assessed to determine the risk the applicant poses to the safety and well being of the community using an objective set of valid criteria. Applicants whose conviction(s) do not suggest a significant level of risk will be deemed admissible to housing if otherwise eligible. Applicants whose conviction(s) suggest a significant level of risk will be reviewed by a panel of senior HANO officials to assess, based on the totality of the circumstances including any information the applicant wishes to provide, whether the applicant should be admitted to housing or denied. If the panel recommends denial of an applicant, the HANO chief executive officer will review the recommendation and make the final decision on admission. HANO will make public the risk assessment criteria it uses and details of the review process.

To implement this policy, HANO will revise its housing and employment procedures, including procedures that will apply to those who do business with HANO."

3 year Ban	**Prior eviction for drug-related criminal activity**; Bans entire household unless guilty person has completed rehab, or is no longer in household[v]	5 years; waivable if offending member is dead or in prison.[vi]	3 years unless waived under HUD standards; In all cases under review, PHA will make a decision after reviewing evidence, including rehabilitation, 42 U.S.C.A. § 13662.
	Criminal activity directed at PHA agents[vii]	7 years	3 years, in cases of conviction.
	Fraud, bribery, or other corrupt act connected with fed. Housing program	7 years	3 years, in cases of conviction.
Possible Ban	**Past Criminal Activity:** Drug-Related or Violent Criminal activity[viii] within a reasonable time[ix]	7 years	Immediately eligible, dependent upon relationship between activity and housing, time elapsed, mitigation, etc.
	Current Illegal Drug or Alcohol Abuse: Reasonable cause to believe a household member is using in a way that threatens the health, safety, or right to peaceful enjoyment by other residents.[x]	7 years (includes guests) whether or not arrested and/or convicted[xi]	A review of current activity shall not extend beyond the previous six months.
	Current Drug-Related or Criminal Activity: Reasonable cause to believe the activity threatens the health, safety, or right to peaceful enjoyment of the premises by other residents.[xii]	Yes. Need not be arrested.	Arrests, alone, shall not be determinations of guilt, or that the conduct actually occurred.
Possible Eviction[xiii]	**Tenants:** 1. Pattern of Illegal Drug and Alcohol abuse that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents; 2. Fleeing prosecution or confinement; 3. Violation of probation or parole.	Any act. Need not be arrested or convicted.[xiv] Anyone believed to be actual and imminent threat to resident or employee.[xv]	PHA will establish by clear and convincing evidence that a lease violation has occurred. PHA shall not base a decision solely upon allegations contained in an arrest, and shall specifically look to whether the action(s) are part of a pattern, and threaten the health, safety, and right to peaceful enjoyment of the premises by other residents. See: 24 C.F.R. § 5.861.
	Tenants and Guests:[xvi] 1. Criminal Activity that threatens the health, safety, or right to peaceful enjoyment…; 2. Drug-related criminal activity on premises.[xvii]	See above.	A visitor to a tenant, family member or otherwise, shall not be presumed to be under the tenant's control; nor shall a person on the premises, although related to a tenant, be presumed to be a guest or under the tenant's control without further evidence of being in the tenant's unit. PHA shall make reasonable accommodation for formerly evicted tenants to visit their immediate family members on the premises. Trespass by someone lawfully prohibited from PHA premises shall not be grounds for a tenant's eviction

			unless it is clear and convincing that the tenant aided and abetted the trespass.
	Persons Under Control of Tenant:[xviii] Drug- Related criminal activity on premises	HUD Policy. If contraband or controlled substance is seized during search or arrest, HANO will be notified by District Attorney that it will commence eviction.[xix]	PHA may work in conjunction with Courts, Agencies, and Non-Government Organizations focused on assisting the development and/or rehabilitation of the PHA resident. PHA should, when possible, encourage and assist residents who may need substance abuse, mental health, or vocational counseling as it may be connected to criminal behavior and/or arrest.
			Where the action(s) are disputed, PHA shall not render a presumption of guilt, nor insert its decision over that of a judge or jury. PHA shall await the findings of the courts, and, where an immediate danger is feared, may provide factual information that is relevant to a bail hearing.
			Where PHA have properly evicted a tenant, they shall not evict an entire household unless the remaining household members are also found to: a) Exhibit a pattern of disqualifying behavior, or b) Have knowledge of the disqualifying behavior, and failed to seek help or intervene.

Evidence	Conviction records certified by a state or federal agency will be given a presumption of correctness, subject to rebuttal by the person challenging their accuracy. Conviction records will not be considered binding until the named person has been presented with the record and given an opportunity to challenge, as it is not uncommon to produce an incorrect record. 24 C.F.R. § 5.903(f).	Preponderance of the Evidence (more probable than not the act occurred).[xx] Credible evidence includes HANO Hotline, arrest warrants, documentation of drug raids. Evidence of neighbors is possibly credible when combined with other factual evidence. No adverse action based on criminal record is taken before presenting it to the applicant/tenant. Consideration given to Time, Nature, and Extent of Conduct.[xxi]	Where convictions during the past three years are considered, PHA (in accordance with 24 C.F.R. § 5.852) shall: a) Make a determination of how the act committed is reasonably related to the community at large; b) Consider all mitigating evidence, including (but not limited to): 1. The determination by the court; 2. Completion of, or ongoing satisfaction of, the sentence; and 3. Completion of relevant rehabilitative programming, whether inside or outside of prison; c) Recognize that where the Court orders an offender to remain in the community, the Court has not ordered that offender, or their family, to homelessness. d) The seriousness of the offending action; e) The effect on the community by denial or eviction; f) The extent of participation by the leaseholder in the offending action; g) The effect of denial of admission or termination of tenancy on household members not involved in the offending action; h) The extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action.
			Expunged convictions shall not be considered.
			Arrests not followed by convictions during the previous six months shall only be considered when assessing: a) Current illegal drug or alcohol abuse, or b) Current criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents.
			HANO and its Agents recognizes that people are innocent until proven guilty, and **allegations by law enforcement or private citizens fail to satisfy clear and convincing standard** that behavior is both actual and current. Arrests without convictions, resulting in deferment to a substance abuse program, may prompt HANO or its Agents to ensure the person is adhering to the program.

*Endnotes on page 62.

Demilitarizing the Zones?

A federal judge in New York City recently ruled that the NYCHA police cannot stop and frisk everyone simply for being on Housing Authority property. In New Orleans, complaints have been arising for similar treatment. HANO posts signs that say "No Trespassing unless you're with a HANO resident," and instruct their police to ensure nobody sets foot on their property.[79] Such an approach would, if evenly applied, lead to the police stopping Census workers, community organizers, politicians, religious proselytizers, and girl scouts with cookies. It does not allow for someone to visit their own mother, unless the mother (who may be homebound) meets the child at the property edge.

"Operation Clean Halls" is a common name for the NYPD's "Trespass Affidavit Program," and resulted in a number of arrests, at times of residents who lacked identification or relatives of residents. A recent hearing determined that the vague policy intending to limit trespass resulted in police believing they had a right (and duty) to detain anyone on the property. It was struck down at the federal district court level, in the context of broader challenges to the police overwhelmingly detaining Black and Latino men.[80]

National Efforts to Amend Exclusion Policies

As the table below illustrates, PHAs have a variety of standards, many of which result in families being broken up and/or excluded from affordable housing. Sometimes exclusions are for life, and never in consultation with a judge regarding an appropriate sentence for a criminal conviction. Typically the policies are unclear, are not accessible to the public, and are buried within several hundred pages of text regarding admissions and continued occupancy. Those posted on the Internet can require a thorough search of the site to find a link.

---

[79] State v. Marzett, 2009-1080 (La. App. 4 Cir. 6/9/10), 40 So. 3d 1204, 1206. In this case, the Defendant was convicted of drug possession. Evidence suggests that people who are stopped and released by the police do not file formal complaints.

[80] *Davis v. The City of New York,* 10 Civ. 0699. Gardiner and Gold, "Judge Halts a Stop and Frisk Tactic," The Wall Street Journal (1/08/13). http://online.wsj.com/article/SB10001424127887323482504578229981202346100.html Judge Shira Scheindlin issued an 83-page pre-trial ruling in October, 2012.

Table B. Select Cities' Exclusion Policy

	Felony	Misdemeanor or violation	Bar w/o Conviction	Prior Eviction	Clear Policy	Internet Posted
NYC[xxii]	5- 6 yrs after prison, parole, and probation[xxiii]	2 to 4 yrs after prison, parole, & probation[xxiv]	Yes* (Does not screen for arrests)	3 yrs+	Yes	Yes
Providence	10 yrs, Probation ½ complete[xxv]	Prob. ½ complete; 2 yrs sober[xxvi]	Yes	Life	No	No
Durham[xxvii]	1-10 yrs from release or placed on probation[xxviii]	1-3 yrs; also arrests over past 5 yrs	Yes	5 years		Yes
Oakland	5yrs (Discretionary)[xxix]			5 yrs (no waiver)	No	Yes
San Antonio[xxx]	Unspecified	3 years	Yes	5 years	No	Yes
Minneapolis[xxxi]	1-10 yrs after sentence complete (includes probation)[xxxii]	1-2 yrs after sentence complete	Yes	5 years	Yes	Yes
Seattle[xxxiii] **(WA recently decrim marijuana)**[xxxiv]	2-20 yrs since realease. HCVP: 1 yr since release	2 yrs since crime/release	Yes	3 years	Yes	Yes
Denver[xxxv] **(CO recently decrim marijuana)**[xxxvi]	Indefinite[xxxvii]	Indefinite	Yes	3 years	No	Yes (not easily located)
Los Angeles[xxxviii]	3 years	Unclear	Yes* (Does not screen for arrests)	3 years	No	Yes
New Orleans[xxxix]	7 years	Unclear	Yes	5 years	No	Yes

*Endnotes, on page 63.

Courts and agencies have been asymmetrically moving in the same direction undertaken by New Orleans. In Chicago, for instance, the state appeals court held that arrests, alone, are incapable of constituting a "history of criminal activity" and was not evidence that someone is a potential threat to the health, safety, and welfare of the public housing community.[81] Despite all of a man's arrests ending in dismissals, he was still barred from housing before the appeals court held otherwise.

Reports on homelessness are also taking into account criminal records, such as a 2003 survey finding 1 in 8 homeless adults in Minnesota had been released from prison within the past two years.[82] A report on Illinois' public housing identified four key areas for reform:

(1) The number of years to look back for past criminal activity;

(2) The use of arrests without convictions as proof of criminal activity;

(3) Use of vague categories neither applicants nor administrators can fully understand and apply fairly; and

(4) Absence of mitigating circumstances as a means to overcome barriers.[83]

The recent developments from HUD indicate a possibility that sustained efforts (including litigation, organizing, journalism, and studies) may propel a new set of national standards. HUD first publicly dispelled the myths regarding barriers to public housing,[84] then reiterated this in a letter to all PHA executive directors- along with the stated commitment to helping ex-offenders gain access to housing.[85]

---

[81] *Landers v. Chicago Housing Authority*, 936 N.E.2d 735, at 742 (Ill. App. Ct. 2010).

[82] Wilder Research, Ex-Offenders Among the Homeless: Highlights From The 2003 Minnesota Survey of Homelessness 1 (June 2006).

[83] Marie Claire Tran-Leung, Sargent Shriver National Center on Poverty Law, When Discretion Means Denial: The Use of Criminal Records to Deny Low-Income People Access to Federally Subsidized Housing in Illinois, 3, 10-27 (August 2011). The author would like to acknowledge Ms. Tran-Leung for her work as being an essential foundation to this report.

[84] Federal Interagency Reentry Council, Reentry Mythbuster on Public Housing (2011), http://www.nationalreentryresourcecenter.org/documents/0000/1089/Reentry_Council_Mythbuster_Housing.pdf.

[85] Letter from Shaun Donovan, Secretary, United States Department of Housing and Urban Development, to Public Housing Authority Executive Directors (Jun. 17, 2011), available at http://www.nationalreentryresourcecenter.org/documents/0000/1126/HUD_letter_6.23.11.pdf [hereinafter Donovan Letter].

It is more accurate to perceive the deescalating arc of HUD as a natural recognition of the failed War on Drugs, rather than the direction of any political party. The agency has at times been trying to dismantle the PHAs' discretionary exclusion regimes through HUD guidance, including admonitions that screening applicants is very difficult where criminal histories are mixed or marginal.[86] HUD guidance calls for trained staff to sometimes gather additional information and intervention by outside agencies,[87] yet, HUD has watched PHAs use their discretion to develop blanket bans, several decades in the making.[88]

HUD recognizes the look-back periods PHAs use are at times draconian, failing to take into account the principle of *completing* one's punishment. They have recommended that the term "recently" be defined as the past month or six months,[89] and discourage excluding former drug users and alcohol abusers, particularly where rental histories show a propensity for compliance.[90] They have also advised PHAs to make case-by-case reviews, focusing on concrete evidence of seriousness, recentness of criminal activity, and evidence of rehabilitation, as best predictors of tenant suitability.[91]

V. Legal Analysis of Housing Discrimination

Title VII of the Civil Rights Act of 1964, barring discrimination, applies to all programs receiving federal funds. This includes PHAs, private affordable housing developments not directly administered by the PHA, and the housing vouchers. Discrimination based on race, among other protected classes, is prohibited. The judicial interpretations of discrimination have often been interchangeable with other parts of the Civil Rights Act, and of the Fair Housing Act of 1968. Title VIII of the FHA deals directly

---

[86] HUD, PUBLIC HOUSING OCCUPANCY GUIDEBOOK 73 (June 2003), available at http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf.
[87] *Id.*
[88] John W. Barbrey, Measuring the Effectiveness of Crime Control Policies in Knoxville's Public Housing: Using Mapping Software to Filter Part I Crime Data, 20 JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE 6, 15 (2004) (describing how the public housing authority in Knoxville, Tennessee would deny admission to applicants even if they had never been convicted of a crime out of a desire to err on the side of caution).
[89] PUBLIC HOUSING OCCUPANCY GUIDEBOOK, *supra* note 9, at 53.
[90] *See, e.g.,* PUBLIC HOUSING OCCUPANCY GUIDEBOOK, supra note 9, at 92.
[91] HUD, HUD NOTICE PIH 96-16, "ONE STRIKE AND YOU'RE OUT: SCREENING & EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES" (HAS) 6 (1996), www.hud.gov/offices/adm/hudclips/notices/pih/files/96-16PIHN.doc.

with housing discrimination. Courts draw their rationale from parallel provisions, including employment law. Thus, advocates must take a comprehensive approach, while courts make individual rulings "with an eye toward the development of a coherent methodology."[92]

Fair Housing Act of 1968

The Fair Housing Act bars (among other things) the refusal to negotiate for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of race or color. Terms, conditions or privileges in a rental cannot be discriminatory, nor can anyone print any notice, statement, or advertisement, with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on race or color.[93]

Intentional discrimination against people with criminal convictions (and their families) appears to be legal, however, it is illegal to intentionally discriminate based on race. The Supreme Court's *Rucker* decision[94] relied upon Congress' rational intent to keep drugs out of public housing, however this is unlikely to serve as a basis to bar any and all people with criminal records. Landlords and PHAs should not rely on perceived liability of future bad acts either; Louisiana courts, for example, have ruled that there is no special "duty to protect" a tenant.[95]

---

[92] A thoughtful analysis of the difficulties in FHA cases is contained in Judge Moran's opinion in *Hack v. President and Fellows of Yale College*, 237 F.3d 81, 87, 91-101 (2d. Cir. 2000) (Moran, J., dissenting in part), which noted that "although there is now consensus that Title VII standards govern claims under [the FHA], it has not always been easy to translate principles designed to regulate employment relations into the realm of public and private housing. For instance, "job performance" may be more closely related to employment qualifications than "tenant performance" is to rental criteria. . . . There are analogous, but not identical concerns at issue; just as there are analogous, but not identical provisions in the antidiscrimination statutes. The toughest challenge is "to translate a body of precedent that simultaneously is undergoing rapid evolution." . . . Because the nature of cases under the Fair Housing Act varies dramatically – from landlord/tenant disputes to Section 8 housing participation, from lending practices to urban zoning conflicts – this translation is best accomplished piece by piece, but with an eye toward the development of a coherent methodology. *Id*. at 96.

[93] 42 U.S.C.A. § 3604(a)(b)(c).

[94] *See* Above.

[95] *Foxworth v. Hous. Auth. of Jefferson Parish*, 590 So. 2d 1347 (La. Ct. App. 1991) *writ not considered*, 592 So. 2d 1328 (La. 1992) (Tenant's complaints to parish housing authority about threats made by another resident of apartment complex owned and operated by housing authority did not create "special relationship" between housing authority and tenant, such that housing authority would have duty to protect tenant from

Disparate Impact Theory

Well-established myths regarding people with criminal records pervade American culture, particularly that they (a) are barred from public housing; (b) federal policy mandates this bar; and (c) such housing discrimination is legal. People with criminal convictions are not a protected class however, they (as a group), can show illegal discrimination under the "Disparate Impact" theory of the Fair Housing Act of 1968.[96] Although, the Supreme Court has not expressly approved a Disparate Impact theory for housing discrimination claims, 11 out of 12 federal circuits have- and 12th (D.C. Circuit) has assumed as much, due to the federal consensus.[97] Many of the early cases that established this consensus followed the lead of the Supreme Court's first FHA decision, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972), in relying on precedents under Title VII of the 1964 Civil Rights Act to interpret the FHA, and the Court's unanimous decision a year earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971), which held that Title VII proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited… Congress directed the thrust of the Act at consequences of employment practices, not simply the motivation.[98]

Change | HUD 2013 Disparate Impact Policy Amendments

In 2013, HUD finally embraced and codified disparate impact under Part 100, "Discriminatory Conduct Under the Fair Housing Act."[99] Regarding the scope of

---

other resident, who fatally stabbed tenant); *Succession of Vanderhoff v. Alphonso*, 2007-1183 (La. App. 4 Cir. 4/9/08).

[96] 42 U.S.C. §3601, et. seq.

[97] *Langlois v. Abington Housing Authority*, 207 F.3d 43, 49 (1st Cir. 2000); *Pfaff v. HUD*, 88 F.3d 739, 745–46 (9th Cir. 1996); *Mountain Side Mobile Estates Partnership v. HUD*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934–35 (2d Cir. 1988); *Hanson v. Veterans Administration*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986 (4th Cir. 1984); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

[98] Robert Schwemm, Sarah Pratt, National Fair Housing Alliance, "Disparate Impact Under the Fair Housing Act: A Proposed Approach," (12/1/2009).

[99] "DISPARATE IMPACT – H.U.D. FINAL RULE (Transmitted by HUD to Federal Register Feb. 8, 2013). The actual regulations are preceded by 79 pages of Preamble.

discrimination, HUD adds that unlawful practices may be "established by a practice's discriminatory effect, even if not motivated by discriminatory intent."[100] They also have now added the enactment of land-use rules, ordinances, policies, or procedures that restrict, deny, or otherwise make unavailable housing opportunities to protected classes.[101]

HUD's new Subpart G applies directly to prohibition of Discriminatory Effect, and is copied in full here, considering the recent change:

Subpart G—Discriminatory Effect

§ 100.500 Discriminatory effect prohibited.

Liability may be established under the Fair Housing Act based on a practice's discriminatory effect, as defined in § 100.500(a), even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in § 100.500(b). The burdens of proof for establishing a violation under this subpart are set forth in § 100.500(c).

. (a) **Discriminatory effect**. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.

. (b) **Legally sufficient justification.**

. (1) A legally sufficient justification exists where the challenged practice:

(i) Is necessary to achieve one or more substantial, legitimate, nondis- criminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and

(ii) Thoseinterestscouldnotbeservedbyanotherpracticethathasaless discriminatory effect.

(2) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative. The burdens of proof for establishing each of the two elements of a legally sufficient justification are set forth in § 100.500(c)(2)-(c)(3).

(c) **Burdens of proof in discriminatory effects cases.**

[100] 24 C.F.R. Subpart A 100.5(b).
[101] 24 C.F.R. Subpart B 100.7(d)(5).

(1) The charging party, with respect to a claim brought under 42 U.S.C. 3612, or the plaintiff, with respect to a claim brought under 42 U.S.C. 3613 or 3614, has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.

(2) Once the charging party or plaintiff satisfies the burden of proof set forth in paragraph (c)(1) of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.

(3) If the respondent or defendant satisfies the burden of proof set forth in paragraph (c)(2) of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

(d) **Relationship to discriminatory intent.** A demonstration that a practice is supported by a legally sufficient justification, as defined in § 100.500(b), may not be used as a defense against a claim of intentional discrimination.

Use of Disparate Impact Theory

Prior to enacting their own regulations, HUD themselves has used Disparate Impact as a method of proving discrimination under Title VI. This poses a problem for HUD, who funds the local PHAs: If discriminating against families with criminal records creates a Disparate Impact, **HUD is subsidizing the very practice they are charged with fighting against.** Disparate impact regarding housing and criminal convictions may be only recently added to HUD's radar, but a confluence of HUD and EEOC policies indicate that strong cases exist. Furthermore, the Court has held that HUD's regulations interpreting the FHA are entitled to substantial deference in determining the meaning of the FHA. [102]

In cases where Disparate Impact has been found, most involved a waiting list for affordable housing or a demonstrated shortage of affordable housing.[103] Although courts will implement varying tests in each circuit, the 5th Circuit has held that the relevant question in a discriminatory effects claim against a private defendant is whether a policy, procedure, or practice specifically identified by the plaintiff has a significantly greater

[102] *See Meyer v. Holley*, 537 U.S. 280, 287-88 (2003); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (determining that HUD's internal interpretation of the FHA is "entitled to great weight").
[103] Artisan/Am. Corp. v. City of Alvin, Tex., 588 F.3d 291, 298 (5th Cir. 2009); *See Hallmark Developers, Inc. v. Fulton County, Ga.,* 466 F.3d 1276, 1287 (11th Cir.2006) (citing cases); *see also Huntington Branch NAACP v. Town of Huntington,* 844 F.2d 926, 938 (2d Cir.1988), *aff'd* 488 U.S. 15, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988).

discriminatory impact on members of a protected class.[104] Recent history in New Orleans has been unique, as Hurricane Katrina displaced several hundred thousand people, and thousands of affordable housing units were destroyed. The waiting lists for a housing voucher are so long in Orleans and Jefferson parishes, they no longer take applications.[105]

Affordable Housing Shortage in New Orleans

In 2013, the waiting list for public housing in New Orleans is 3,939 families, and for housing vouchers (HCV Program) it is 22,118. The expected annual turnover is 120 and 1,700, respectively; meaning a wait of over a decade.[106] In neighboring Chalmette, over 1000 people recently lined up at the PHA to be placed on the HCV waiting list.[107] Tensions were so high, six people were arrested for disorderly conduct.[108] Any successful case under Disparate Impact will need to show statistical evidence that the discrimination against families with criminal convictions disproportionately impact Black and Latino people in New Orleans.

A recent federal court case puts the availability issue to rest. The court found a plausible case of housing discrimination against the city of New Orleans for blocking the zoning and funding of a proposed housing development using post-Katrina funding.[109] Through the Piggyback Program, eligible projects require the approval of the Bond Commission. In August 2009, the Bond Commission adopted a moratorium on approving bond financing under the Piggyback Program for low-income housing projects, stating that it needed to study the housing market in New Orleans. A final study was released in March

---

[104] *Simms v. First Gibralter Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996).

[105] Jefferson Parish is across the river from New Orleans. The Parish was made famous during Katrina for law enforcement lining the bridge and blocking refugees from seeking assistance. John Burnett, "Evacuees Were Turned Away at Gretna, La.," NPR, (09/20/05)
http://www.npr.org/templates/story/story.php?storyId=4855611

[106] HANO FY2013 Full Draft Plan, at 23.

[107] WGNO 10pm News, January 9, 2013.

[108] *Id.*

[109] *United States v. City of New Orleans*, CIV.A. 12-2011, 2012 WL 6085081 (E.D. La. Dec. 6, 2012).
Under the first and second *Arlington Heights* factors, the United States alleges that the Board denied the developers' variance applications on three different occasions, in large part because of the community opposition expressed at the hearings. The City contends that the public's statements are irrelevant; however, several courts have held that a city may be liable for responding to public opposition.

2011, which concluded that the New Orleans' housing market would support additional low-income affordable housing; however, the moratorium has yet to be lifted.[110]

Criminal Convictions and Disparate Impact in Employment

In 2012, the EEOC revised their official standards regarding criminal convictions and employment practices.[111] They provided strict, yet flexible, contours for employers to remain in compliance with Title VII. Namely:

Differences between arrests and convictions

- Exclusions based on an arrest, in itself, is not job related nor consistent with business necessity;
    - Decisions based on conduct underlying arrests may be legitimate if such conduct makes them unfit for the particular position.
- Conviction records are usually sufficient evidence that a person engaged in particular conduct, however there may be reasons for an employer not to rely upon a conviction record, alone, in making a decision.

Differences between disparate treatment and disparate impact

- **Treatment:** If, for example, White applicants with criminal records received more favorable treatment than African-American applicants with criminal records;[112]

---

[110] *Id.*

[111] Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (April 25, 2012). http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

[112] *See generally*: Devah Pager, "The Mark of a Criminal Record," 108 AM. J. SOC. 937 (2003). www.princeton.edu/~pager/pager_ajs.pdf. Pager matched pairs of young Black and White men as "testers" for her study. The "testers" in Pager's study were college students who applied for 350 low-skilled jobs advertised in Milwaukee-area classified advertisements, to test the degree to which a criminal record affects subsequent employment opportunities. The same study showed that White job applicants with a criminal record were called back for interviews more often than equally-qualified Black applicants who *did not have* a criminal record. *Id.* at 958. *See also* Devah Pager et al., *Sequencing Disadvantage: The Effects of Race and Criminal Background for Low Wage Job Seekers*, 623 ANNALS AM. ACAD. POL. & SOC. SCI., 199 (2009), www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf (finding that among Black and White testers with similar backgrounds and criminal records, "the negative effect of a criminal conviction is substantially larger for blacks than whites. . . . the magnitude of the criminal record penalty suffered by black applicants (60 percent) is roughly double the size of the penalty for whites with a record (30 percent)"); *see id.* at 200–201 (finding that personal contact plays an important role in mediating the effects of a criminal stigma in the hiring process, and that Black applicants are less often invited to interview, thereby having fewer opportunities to counteract the stigma by establishing rapport with the hiring official); Devah Pager, *Statement of Devah Pager, Professor of Sociology at Princeton University*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm (last visited April 23, 2012) (discussing the results of the *Sequencing Disadvantage* study); DEVAH PAGER & BRUCE WESTERN, NYC COMMISSION ON HUMAN RIGHTS, RACE AT WORK, REALITIES OF RACE AND CRIMINAL RECORD IN THE NYC JOB MARKET 6,

- Evidence of disparate treatment include, but are not limited to: biased statements, inconsistencies, similarly situated comparators, match-pair testing, and statistical evidence.[113]

- **Impact:** A neutral policy (e.g. exclusions based on criminal conduct) may disproportionately impact some protected classes of individuals, and may violate the law if not job related and consistent with business necessity (disparate impact liability);
    - The EEOC acknowledges that national data proves exclusions based on criminal records will have a disparate impact based on race and national origin.

Employers are likely to meet "job related" and "business necessity" standards where they have developed a target screen considering at least:

1. Nature of the crime;
2. Time elapsed;
3. Nature of the job;[114]
4. Individualized assessment.[115]

Although compliance with federal laws and/or regulations conflicting with Title VII is a defense to a discrimination charge, local laws and policies are preempted by Title VII if they require or permit any unlawful employment practice under Title VII.[116] This enforcement structure, where naturally extended to public housing practices, allows PHAs a defense where adhering to HUD requirements, yet a liability where local discretionary policies either "require" or "permit" unlawful discrimination by use of a criminal record.

After the Supreme Court acknowledged in 1971 that Title VII permits disparate impact claims, and consensus evolved in the Courts of Appeals that disparate impact is also

---

Figure 2 (2006), http://www.nyc.gov/html/cchr/pdf/race_report_web.pdf (finding that White testers *with* a felony conviction were called back 13% of the time, Hispanic testers *without* a criminal record were called back 14% of the time, and Black testers *without* a criminal record were called back 10% of the time).

[113] EEOC Guidelines, at 8.

[114] *Id*., at 5, *citing* Green v. Missouri Pacific, 549 F.2d 1158 (8th Cir. 1977).

[115] *Id.* Although not required, those screens lacking an individualized assessment are more likely to violate Title VII.

[116] *Id., citing* 42 U.S.C. § 2000e-7.

cognizable under the Fair Housing Act, Congress passed the Fair Housing Amendments Act of 1988., and the Civil Rights Act of 1991.[117] The updated laws presume Congress adopts prior judicial interpretation when it is reenacted without change.[118] The more contemporary judicial rulings require, a respondent facing an established disparate impact claim to demonstrate that the practice is job related for the position in question and consistent with job necessity.[119]

VI. Making the Disparate Impact Case

1. Identify the Policy or Practice

The policy at issue here are crime-related provisions of the Housing Authority of New Orleans (HANO) Admissions and Continued Occupancy Policy (ACOP). Every local housing agency is required to develop an ACOP, subject to the baseline standards of HUD guidelines. HUD currently gives the PHAs discretion to exclude beyond what is required by Congress. In this way, exclusion policies serve as a mandatory minimum sentence, where punishments may be harsher, yet never more lenient. Furthermore, private developers who administer the typical HOPE VI mixed-income properties, such as River Gardens in New Orleans, would be subject to the same disparate impact standards.[120]

The complaining party must also establish causation in an impact-based case. The plaintiff must begin by identifying the specific practice that is challenged. Especially in

---

[117] *Griggs v. Duke Power*, 401 U.S. 424, 431-32 (1971).
[118] *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)
[119] 42 U.S.C. § 2000e-2(k)(1)(A)(i). The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105; *see also: Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010) (reaffirming disparate impact analysis); *Ricci v. DeStefano*, 557 U.S. 557 (2009).
[120] *See, e.g.*, *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d. Cir. 1998) (transposing a formula derived from FHA cases against governmental defendants to one involving a private defendant by merely omitting the word "governmental" (i.e., concluding that a private defendant must "prove that its actions furthered, in theory and in practice a legitimate bona fide . . . interest" [quoting *Rizzo*, 564 F.2d at 148-49])); *National Fair Housing Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 59-60 (D. D.C. 2002) (rejecting the *Brown* approach in favor of applying an impact standard for FHA claims against both public and private defendants); *cf. Graoch Associates # 33 v. Louisville/Jefferson County*, 508 F.3d 366, 382-90 (6th Cir. 2007) (Nelson, J., concurring, suggesting that, while FHA impact cases may be brought against both public and private defendants, some parts of the analysis should differ depending on which type of defendant is involved); *Betsey*, 736 F. 2d at 988 n.5 ("Obviously, a business necessity test is inapplicable in situations where the defendant is a public body.")

cases where a provider of housing opportunities combines subjective criteria with the use of more rigid standardized rules or standards, the plaintiff is responsible for isolating and identifying the specific housing practices that are allegedly responsible for any observed statistical disparities. A typical case can not be made by offering only one set of cumulative comparative statistics as evidence of the disparate impact of each and all of the defendant's housing practices. As is true under Title VII, FHA disparate-impact cases focus on the impact of *particular* practices on opportunities for protected-class members. However, if the complaining party can demonstrate that the elements of a defendant's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one practice.[121]

2. Determining Disparate Impact

A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, et.al.[122] The proper comparison is between the racial composition of the at-issue housing opportunities and the racial composition of the qualified population in the relevant housing market. This comparison generally forms the proper basis for the initial inquiry in an impact case. Alternatively, in cases where such housing market statistics will be difficult or impossible to ascertain, certain other statistics – such as measures indicating the racial composition of "otherwise-qualified applicants" for the at-issue housing opportunities – are equally probative for this purpose. In fact, where figures for the general population might accurately reflect the pool of qualified housing applicants, a prima facie case may be established based on such statistics as well.[123]

Nationally, African Americans and Hispanics are arrested in numbers

---

[121] Schwemm and Pratt, *supra*, at 19-20.

[122] 24 C.F.R. 100 Subpart G §100.500(a) (as amended, 2/8/2013). *See: United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1184-85, 1188 (8th Cir. 1974) (holding, in exclusionary land-use case brought by the Justice Department, that the defendant-municipality violated the FHA's § 3604(a) and § 3617 and commenting that in order "[t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . Effect, and not motivation, is the touchstone . . . .").

[123] Schwemm and Pratt, at 19.

disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans,[124] even though African Americans only comprised approximately 14% of the general population.[125] Moreover, African Americans and Hispanics were more likely than Whites to be targeted and arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.[126]

African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men is expected to go to prison at some point during his lifetime, assuming that current incarceration rates remain unchanged.[127] This rate climbs to 1 in 6 for Hispanic men.[128] For African American men, the rate of expected incarceration rises to 1 in 3.[129] Based on a state- by-state examination of incarceration rates in 2005, African Americans were incarcerated at a rate 5.6 times higher than Whites,[130] and seven states had a Black-to-White ratio of

---

[124] UNIF. CRIME REPORTING PROGRAM, FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. the-u.s.-2010/tables/table-43/10tbl43a.xls.

[125] U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 3 (2011) , http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (reporting that in 2010, "14 percent of all people in the United States identified as Black, either alone, or in combination with one or more races").

[126] *See, e.g.*, HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 1 (2009), http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf (noting that the "[t]he higher rates of black drug arrests do not reflect higher rates of black drug offending . . . . blacks and whites engage in drug offenses - possession and sales - at roughly comparable rates"); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 21 (2011), http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.pdf (reporting that in 2010, the rates of illicit drug use in the United States among persons aged 12 or older were 10.7% for African Americans, 9.1% for Whites, and 8.1% for Hispanics); HARRY LEVINE & DEBORAH SMALL, N.Y. CIVIL LIBERTIES UNION, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997–2007, at 13–16 (2008), www.nyclu.org/files/MARIJUANA-ARREST- CRUSADE_Final.pdf (citing U.S. Government surveys showing that Whites use marijuana at higher rates than African Americans and Hispanics; however, the marijuana arrest rate of Hispanics is nearly three times the arrest rate of Whites, and the marijuana arrest rate of African Americans is five times the arrest rate of Whites).

[127] PREVALENCE OF IMPRISONMENT, *supra* note 4, at 1, 8. Due to the nature of available data, the Commission is using incarceration data as a proxy for conviction data.

[128] *Id.*

[129] *Id.*

[130] MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 10 (2007), www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Crd_stateratesofincbyraceandethnicity.pdf.

incarceration that was 10 to1.[131] In 2010, Black men had an imprisonment rate that was nearly seven times higher than White men and almost three times higher than Hispanic men.[132]

Some supporters of current policy quietly claim that People of Color simply commit that many more crimes than White people. This view, rooted in racism, has no statistical foundation. Although education and economic factors do correlate to criminal activity, there are more poor and under-educated White Americans than all People of Color combined in America.

National data, such as that cited above, supports the EEOC finding that criminal record exclusions have a disparate impact based on race and national origin. The EEOC has established a benchmark of "four fifths" as to how substantial the disparate impact is. A selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact.[133]

The national data (according to the EEOC, a federal agency) provides a basis for the EEOC to further investigate such Title VII disparate impact charges. During an EEOC investigation, the employer also has an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s). For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate

---

[131] *Id.*

[132] PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 27, Table 14 (2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (reporting that as of December 31, 2010, Black men were imprisoned at a rate of 3,074 per 100,000 Black male residents, Hispanic men were imprisoned at a rate of 1,258 per 100,000 Hispanic male residents, and White men were imprisoned at a rate of 459 per 100,000 White male residents); *cf.* ONE IN 31, *supra* note 4, at 5 ("Black adults are four times as likely as whites and nearly 2.5 times as likely as Hispanics to be under correctional control. One in 11 black adults -- 9.2 percent -- was under correctional control [probation, parole, prison, or jail] at year end 2007.").

[133] *See* 29 C.F.R. § 1607.4(D), which some FHA decisions have considered. *See, e.g.*, *Langlois v. Abington Housing Authority*, 207 F.3d 43, 50 (1st Cir. 2000). Many courts have held that, in order to violate the FHA, a defendant's practice must produce a "substantial" disparate impact. *See, e.g.*, *Schwartz v. City of Treasure Island*, 544 F.3d 1201, 1217 (11th Cir. 2008); *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118-19 (9th Cir. 2008) (same, citing *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997)); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007). In determining whether the proven impact is substantial enough, no single test controls. *Cf. Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 995-96 n. 3 (1988) (Title VII case).

impact.

An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact. In *Connecticut v. Teal*, the Supreme Court held that a "bottom line" racial balance in the workforce does not preclude employees from establishing a prima facie case of disparate impact; nor does it provide employers with a defense.[134] The issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals of employment opportunities.[135] Such an issue would be central to assessing HANO's policy, where the population served is overwhelmingly African-American families.

Finally, in determining disparate impact, the EEOC will assess the probative value of an employer's applicant data. As the Supreme Court stated in *Dothard v. Rawlinson*, an employer's "application process might itself not adequately reflect the actual potential applicant pool since otherwise qualified people might be discouraged from applying" because of an alleged discriminatory policy or practice.[136] Therefore, the Commission will closely consider whether an employer has a reputation in the community for excluding individuals with criminal records. Relevant evidence may come from ex-offender employment programs, individual testimony, employer statements, evidence of employer recruitment practices, or publicly posted notices, among other sources.[137] The Commission will determine the persuasiveness of such evidence on a case-by-case basis. Considering the pervasiveness of well-established myths of permanent housing bans, this is likely to have significant impact regarding HANO.

3. Burden-Shifting Under Disparate Impact Litigation

Presuming the data is evident regarding criminal convictions becoming a proxy for race, and that the number of families barred from public housing disproportionately impacts People of Color, the PHA would need to then show that the exclusions have a

---

[134] 457 U.S. 440, 442 (1982).
[135] *Id*., at 453-54.
[136] 433 U.S. 321, 330 (1977).
[137] *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) (stating that "[a] consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection").

legally sufficient justification.[138] A justification exists where (1) it is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the PHA, and (2) those interests could not be served by another practice that has a less discriminatory effect.[139] Finally, such justification must be supported by evidence and may not be hypothetical or speculative.[140]

The Supreme Court found Congress' desire to have a drug-free public housing system to be, on its face, a "legally sufficient justification." [141] However, a PHA or private housing corporation administering a subsidized property would need to show that those interests can not be achieved in a less discriminatory manner, and that, for example, a blanket ban on people with felony convictions is not speculative regarding their prospective drug use.

The new HUD regulations should clarify courts' past conflicts on the proper burden of proof. Once the charging party establishes a prima facie case of (actual or predictable) discriminatory effect, the defendant/respondent has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.[142] Even if this burden is satisfied, the charging party may still prevail upon proving that such legitimate interests could be served by another practice with a less discriminatory effect.[143] Although it seems reasonable to ask a PHA to show

---

[138] 24 C.F.R. 100 Subpart G §100.500(b) (as amended, 2/8/2013). *See, e.g.*, *Huntington Branch*, 844 F.2d at 936 (requiring the defendant to prove that its actions furthered "a legitimate bona fide governmental interest");; *Black Jack*, 508 F.2d at 1188 n. 4 (requiring the defendant "to demonstrate that its conduct was necessary to promote a compelling governmental interest"). Placing the burden upon the Defendant is consistent with Congress' response to the Supreme Court holding that the burden of persuasion lies with the plaintiff. *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 659 (1989). In 1991, Congress overturned this part of *Wards Cove* in the Civil Rights Act of 1991. This law amended Title VII to explicitly recognize an impact standard and, for such cases, to place the full burden of proof (both production and persuasion) on the defendant to rebut a showing of disparate impact by demonstrating "that the challenged practice is job related for the position in question and consistent with business necessity." *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[139] 24 C.F.R. 100 Subpart G §100.500(b)(1)(i)(ii) (as amended, 2/8/2013).

[140] 24 C.F.R. 100 Subpart G §100.500(b)(2) (as amended, 2/8/2013).

[141] *Dep't of Hous. & Urban Dev. v. Rucker*, *supra*.

[142] 24 C.F.R. 100 Subpart G §100.500(c)(2) (as amended, 2/8/2013). *See, e.g.*, *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 808-11 & n.12 (5th Cir. 1974) (holding, in case brought under both the FHA and 14th Amendment, that the defendants bear a heavy burden of justification once the plaintiffs prove the existence of a racially discriminatory effect)

[143] 24 C.F.R. 100 Subpart G §100.500(c)(3) (as amended, 2/8/2013). There is general agreement about this element in a FHA impact case. *See, e.g.*, *Huntington Branch*, 844 F.2d at 936 ("the defendant must prove . . . that no alternative would serve that interest with less discriminatory effect");; *Rizzo*, 564 F.2d at 149 ("the

what other practices are available to achieve their goals, or to show why they chose the particular policy of exclusions, the haphazard development of the status quo suggests that they would not have a cohesive answer.

VII. Conclusion

Public Housing Authorities can attempt to exclude their way into providing sufficient affordable housing for all those who are eligible. If 50% of New Orleans' families have a criminal conviction in 20 years, it is certainly one dystopian method of meeting the people's needs. Such a tactic, however, would certainly lose the consent of the People, and invite civil unrest. As Dr. Martin L. King said, we need to undergo a "true revolution of values" in order to develop true justice and democracy in America.

Low-income communities of Color are devastated for being the primary targets in the War on Drugs. A range of motivations created the current state of affairs bifurcating communities. Whether cynical, racist, greedy, hopeful, fearful, or defiant: many forces are at work. Furthermore, few policy makers and administrators are proceeding from a position of comprehensive knowledge. Those who wish to develop honest community-building policies will need to familiarize themselves in the areas of housing law, civil rights, criminal sentencing, drug policy, and grassroots community organizations. Isolated experts cannot be expected to adopt effective housing plans, and should be encouraged to collaborate with experts in these other fields.

The media and politicians sometimes advance the notion that affordable housing is a gift taken by society's leaches. Such viewpoints overlook the historical sacrifices made by African-Americans, oppressed immigrant groups, and Native Americans. They also negate the choice to assist children, the elderly and disabled. When assessing such levels of discourse, one cannot overlook the role of racism in America.

If and when the people living in a community take control of solving local problems, we can expect solutions that acknowledge that the so-called enemy (people convicted of felonies, for example) is ourselves. We can then recognize that policies on housing, drugs,

---

defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact").

education, and employment exist in a social ecosystem that must be addressed as a whole. The goal of this report is to shed light on a widely unknown pillar of this ecosystem within low-income communities of Color. People living in these environments should be sought out to share their wisdom, and local children should be developed in a way to overcome these challenges- rather than simply be the next generation feeding prisoners into that industry.

Proposed HANO Admissions and Continued Occupancy Policy (ACOP)

Amended Regarding Criminal Convictions

Preamble

HANO recognizes that among the leading causes of criminal activity in America are mental illness, addiction, unemployment, and homelessness. Healthy New Orleans communities exist where these social issues are being treated in a comprehensive manner, therefore HANO will make every reasonable effort to contribute to a positive community response to these ailments.

DENIAL FOR DRUG-RELATED & CRIMINAL ACTIVITY

[Replacing original language, p.20, et. seq.]

Purpose

All federally assisted housing is intended to provide a safe place to live and raise families in a drug-free community. HANO recognizes that the rise in arrest and incarceartion rates have increased dramatically over the past 20 years, and blanket policies barring families with a member who has been arrested and/or convicted would likely contribute to systemic homelessness. Arrest and incarceration rates have particularly impacted African American and Hispanic men. African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population. Assuming the current incarceration rates continue, Whites have a 1 in 17 chance of serving time in prison in their lifetimes. The rate climbs to 1 in 7 for Hispanics, and 1 in 3 for African Americans.

It is the intention of HANO and its agents to implement a policy designed to:

1. Help create and maintain a safe and drug-free community;
2. Keep our residents free from threats to their safety;
3. Support parental efforts to instill values of personal responsibility and hard work;
4. Help maintain an environment where children can live safely, learn and grow up to be productive citizens;
5. Assist families in their vocational/educational goals in the pursuit of self-sufficiency;
6. Encourage and assist residents seeking rehabilitative treatment;
7. Further community goals regarding prison diversion and reentry; and
8. Deny admission, or evict, persons only where there is a reasonable connection to a specific community goal.

Administration

All screening procedures shall be administered fairly and in such a way as not to discriminate based on race, color, nationality, religion, sex, familial status, sexual orientation, disability or against other legally protected groups, and not to violate privacy.

HANO or its Agents may request an adult criminal background check from a law enforcement agency after receiving a signed consent form from the household member over 18 years old. The request must include this policy's standards for prohibiting

admission and/or eviction. Fees may not be passed along to the applicant or tenant. *See*: 24 C.F.R. § 5.903.

To the maximum extent possible, HANO and its Agents will involve other community and governmental entities in the promotion and enforcement of this policy.

This policy will be posted on HANO's or its Agents' bulletin board and copies made readily available to applicants and residents upon request.

Permanent Denial of Admission

Pursuant to federal law, HANO or its Agents must permanently deny admission to:

1) Persons convicted of manufacturing or producing methamphetamine on the premises of an assisted housing project. 42 U.S.C. § 1437n(f)(1).
2) Any family in which a household member is subject to a lifetime sex offender registration requirement. HANO or its agents shall perform necessary criminal history background checks in Louisiana and any state in which the applicant is known to have resided. 42 U.S.C.A. § 13663; 24 C.F.R. § 5.856.

Potential Denial of Admission

Prior Lease Termination

HANO or its Agents will deny an otherwise-eligible family who was evicted from federally-assisted housing within the past 3 years for drug-related criminal activity, *unless* HANO is able to verify that the household member who engaged in the criminal activity has completed a supervised drug rehabilitation program, or the person who committed the crime is no longer living in the household. 42 U.S.C.A. § 13661; 24 C.F.R. 5.854(a).

Prior Abuse of Federal Housing Program

HANO or its Agents may deny someone who has engaged in criminal activity that particularly threatens HANO or its Agents' personnel at any time within the past 3 years. See: 24 C.F.R. § 5.855(a)4.

HANO or its Agents may deny someone who has committed fraud, bribery, or any other corrupt or criminal act in connection with any federal housing program in the last 3 years.

Recent Drug-Related or Violent Criminal Convictions

HANO or its Agents may conduct a criminal background check on household members over the age of 18. The period of review shall be limited to the previous three years. The scope of review will be limited to drug-related or violent criminal activity. HANO has the discretion to admit or deny applicants, after considering all of the circumstances, pursuant to 42 U.S.C.A. § 13661; 24 C.F.R. §§ 5.852(a) and 960.204.

HUD permits, but does not require, local PHAs to deny admission to those who have committed disqualifying behavior within a "reasonable time," under 24 C.F.R. 5.855(b). Household members convicted of drug-related or violent felonies, during the previous three years, may be denied admission after HANO or its Agents has reviewed all evidence in accordance with this policy. HANO and its Agents also have the authority to admit them,

pursuant to 24 C.F.R. § 5.852(d).

"Violent criminal activity" means any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage. 24 C.F.R. § 5.100.

Current Drug or Alcohol Abuse, or Criminal Activity

HANO or its Agents may deny admission where they determine there is a reasonable cause to believe that a member of the applicant household is currently:

a) Illegally using a controlled substance, or alcohol, in a way that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (See: 24 C.F.R. §§5.854(b) and 5.857);
b) Engages in drug-related or criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (See: 24 C.F.R. 5.855(a)).

In cases where HANO or its Agents has received credible evidence of any of the previously named categories, they will make a decision after reviewing evidence, including rehabilitation, in accordance with this policy. 42 U.S.C.A. § 13662.

A review of current activity shall not extend beyond the previous six months.

Reviewing Evidence

Conviction records certified by a state or federal agency will be given a presumption of correctness, subject to rebuttal by the person challenging their accuracy. Conviction records will not be considered binding until the named person has been presented with the record and given an opportunity to challenge, as it is not uncommon to produce an incorrect record. 24 C.F.R. § 5.903(f).

Expunged or Overturned convictions shall not be considered.

Where convictions during the past three years are considered, HANO and its Agents (in accordance with 24 C.F.R. § 5.852) shall:

i) Make a determination of how the act committed is reasonably related to the community at large;
j) Consider all mitigating evidence, including (but not limited to):
    1. The determination by the court;
    2. Completion of, or ongoing satisfaction of, the sentence; and
    3. Completion of relevant rehabilitative programming, whether inside or outside of prison;
k) Recognize that where the Court orders an offender to remain in the community, the Court has not ordered that offender, or their family, to homelessness.
l) The seriousness of the offending action;
m) The effect on the community by denial or eviction;
n) The extent of participation by the leaseholder in the offending action;

o) The effect of denial of admission or termination of tenancy on household members not involved in the offending action;
p) The extent to which the leaseholder has shown personal responsibility and taken all reasonable steps to prevent or mitigate the offending action

Arrests not followed by convictions during the previous six months shall only be considered when assessing:

c) Current illegal drug or alcohol abuse, or
d) Current criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents.

HANO and its Agents recognizes that people are innocent until proven guilty, and allegations by law enforcement or private citizens fail to satisfy clear and convincing standard that behavior is both actual and current. Arrests without convictions, resulting in deferment to a substance abuse program, may prompt HANO or its Agents to ensure the person is adhering to the program.

Any policy driven primarily by arrest records will risk producing discriminatory impact among otherwise-qualified households. *See*: *EEOC Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, 915.002 (4/25/2012).

HANO and its Agents recognize that mental illness is a federally protected disability, one that also leads to a disproportionate number of arrests. HANO and its Agents shall make every effort to incorporate the professional assessments of the mental health community regarding individual applicants. These assessments will relate to how an applicant stands to threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.

Defining "Current"

HANO and its Agents may consider all credible evidence, limited to the previous six months, for a pattern of disqualifying behavior that would indicate that this behavior would continue. Where the evidence is clear and convincing, leading a reasonable person to believe that the behavior would continue, the evidence shall be presented to the applicant for an opportunity to rebut and/or provide mitigating evidence in response. See: 24 C.F.R. 5.853(d)..

Completion of, or successful current participation in, a supervised drug or alcohol counseling program shall be considered mitigating evidence. See: 24 C.F.R. 5.852(c).

HANO and its Agents, in furtherance of creating safe and healthy communities for families, will strive to work with other agencies and organizations that promote and provide substance abuse rehabilitative services.

Action Upon Disqualification

In the event that a family member is barred, HANO and its Agents shall give the household

an opportunity to remove the member from the application. The household will reasonably satisfy HANO and its Agents that the person will not be living in the unit. See: 24 C.F.R. § 5.852(b).

HANO and its Agents shall also provide the disqualified applicant with a pathway to admission, unless permanently barred under the methamphetamine or lifetime sex offender registration requirement. See: 24 C.F.R. § 5.855(c).

Recordkeeping

HANO shall track and periodically review the admissions data. Practices shall be honed in order to further the creation of stable communities for families, and nondiscrimination based on race, color, nationality, religion, sex, familial status, sexual orientation, disability or against other legally protected groups.

Additions to Lease

Following receipt of a family's request for approval, Management will conduct a pre-admission screening, including Criminal History (subject to the within guidelines regarding Admissions and criminal histories) of the proposed new member. Only new members approved by HANO or its Agents will be added to the household.

Factors determining household additions:

…

8. HANO and its Agents will seek to promote, wherever possible and consistent with federal law, reunification of families that have been separated by the criminal justice system.

Absence Due to Incarceration

If any resident is incarcerated for more than 30 consecutive days, he/she will be considered permanently absent, except in cases where the person remains innocent. If the resident is the sole household member, their assistance will be terminated in accordance with HANO's "Absence of Entire Family" policy. If the resident is part of a household, they alone will be terminated from the lease after 30 consecutive days incarceration, except in cases where they remain innocent.

HANO or its Agents will determine all reapplications by those terminated under this provision in accordance with the policy regarding Admissions and/or Additions to Lease.

Lease Terminations

….

The following criminal and substance abuse activity will subject the household to possible termination, pursuant to 24 C.F.R. §§ 5.858, 5.859, 5.860:

a) Tenants shall not engage in a pattern of drug or alcohol abuse that threatens the health, safety, or right of peaceful enjoyment of the premises by other residents;

b) Tenants and their guests shall not engage in any criminal activity that threatens the

health, safety, or right of peaceful enjoyment of the premises by other residents; nor any drug-related criminal activity on or near the premises;

c) Tenants shall ensure that persons under their control do not engage in any drug-related criminal activity on the premises;

d) A tenant is fleeing to avoid prosecution, custody, or confinement after conviction; or in violating terms of their probation or parole.

Leases shall indicate that the above activities may subject them to eviction. 24 C.F.R. § 966.4(I)(5).

The term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use or possession with intent to manufacturel, sell, distribute, or use a controlled substance (as defined by Section 102 of the Controlled Substances Act, 21 U.S.C. 802).

The term "guest" means a person temporarily staying in the unit with the consent of a tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. 24 C.F.R. § 5.100. Tenants shall be allowed reasonable accommodation of their guests. 24 C.F.R. § 966.4(d)(1).

"Person under the tenant's control" means that the person, although not staying as a guest (as defined in this section) in the unit, is, or was at the time of the activity in question, on the premises (as premises is defined in this section) because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control. 24 C.F.R. § 5.100.

A visitor to a tenant, family member or otherwise, shall not be presumed to be under the tenant's control; nor shall a person on the premises, although related to a tenant, be presumed to be a guest or under the tenant's control without further evidence of being in the tenant's unit. HANO and its Agents shall make reasonable accommodation for formerly evicted tenants to visit their immediate family members on the premises. Trespass by someone lawfully prohibited from HANO premises shall not be grounds for a tenant's eviction unless it is clear and convincing that the tenant aided and abetted the trespass.

"Premises" means the building or complex or development in which the public or assisted housing dwelling unit is located, including common areas and grounds. 24 C.F.R. § 5.100.

If contraband or controlled substance is seized on the above premises, incidental to a lawful search or arrest, and the District Attorney's Office notifies HANO or its Agents, an unlawful detainer action may be commenced.

HANO and its Agents will establish by clear and convincing evidence that a lease violation has occurred, in accordance with this policy's chapter on Denial of Admission for Drug-

Related or Other Criminal Activity. HANO and its agents shall not base a decision solely upon allegations contained in an arrest, and shall specifically look to whether the action(s) are part of a pattern, and threaten the health, safety, and right to peaceful enjoyment of the premises by other residents. See: 24 C.F.R. § 5.861.

HANO and its Agents may work in conjunction with Courts, Agencies, and Non-Government Organizations focused on assisting the development and/or rehabilitation of the HANO resident. HANO and its Agents should, when possible, encourage and assist residents who may need substance abuse, mental health, or vocational counseling as it may be connected to criminal behavior and/or arrest.

Where the action(s) in question are disputed by the resident, HANO and its Agents shall not render a presumption of guilt, nor insert its decision over that of a judge or jury. Hano and its Agents shall await the findings of the courts, and, where an immediate danger is feared, may provide factual information that is relevant to a bail hearing.

Where HANO and its Agents have properly evicted a tenant, they shall not evict an entire household unless the remaining household members are also found to:

c) Exhibit a pattern of disqualifying behavior, or
d) Have knowledge of the disqualifying behavior, and failed to seek help or intervene.

Recordkeeping

. . .

HANO shall periodically review the termination data in order to further the creation of stable communities for families, and nondiscrimination based on race, color, nationality, religion, sex, familial status, sexual orientation, disability or against other legally protected groups.

Nationwide Sample

New York City

America's largest city should be expected to have the greatest number of everything, including residents eligible for federally subsidized housing.[144] A total of 629,345 New Yorkers are served by NYCHA's Public Housing and Section 8 Programs. If NYCHA was a city, it would rank 21st in population size in the United States, with New York City ranked first. At the intersection of housing and criminal convictions, the city has been under sharp criticism over its racially disproportionate arrest numbers. Marijuana, for example, has been decriminalized in the city and yet the police still arrested 50,000 people last year, 87% were Black or Latino.[145]

Rule:
The 53-page NYCHA Tenant Selection and Assignment Plan (TSAP) does not reference criminal convictions until page 45, in the Appendix.[146] Families with a family member (over age 16) in the following categories will be ineligible for the stated period of time:

1) Lifetime sex offender registration- until the person "is no longer subject to" the registration;
2) Class A, B, or C felonies[147]- until 6 years after completion of prison, parole, and probation, with no further convictions or pending charges;
3) Class D or E felonies[148]- until 5 years after completion of prison, parole, and probation, with no further convictions or pending charges;
4) Class A misdemeanors[149]- until 4 years after completion of prison, parole, and probation, with no further convictions or pending charges;
5) Class B or unclassified misdemeanors[150]- until 3 years after completion of prison, parole, and probation, with no further convictions or pending charges;
6) Violations or DWI infractions[151]- until 2 years after completion of prison, parole, and probation, with no further convictions or pending charges;

---

[144] On February 1, 2012 there were:163,965 families on the waiting list for Conventional Public Housing (including 6,987 who are in the certification process). 123,499 families on the waiting list for Section 8 Housing (including 716 in the certification process). The Section 8 waiting list re-opened on February 12, 2007 and subsequently closed on May 14, 2007. 21,936 applicants are on both waiting lists.
[145] http://www.nytimes.com/2012/04/29/opinion/sunday/the-cost-of-zero-tolerance.html
[146] Updated January, 2011. Available on the NYCHA website, last accessed July 19, 2012. http://www.nyc.gov/html/nycha/downloads/pdf/TSAPlan.pdf
[147] Class A and B are the most serious felonies. Class B Non-Violent generally receive 1-3 years in prison. Class C are crimes that carry sentences of up to 15 years, including assault, larceny, and drug distribution. A Non-Violent Class C felony generally receives no jail, and probation between 1-15 years.
[148] Class D felonies generally lack malice and carry up to 7 years in prison, including theft and fraud. Class E is the lowest felony charge, including contempt, mischief, and possession of stolen goods, and typically carry up to 4 years in prison. People convicted in these classes typically receive probation.
[149] Carry up to 1 year in jail. Often a fine is paid. Common Class A is possession of a controlled substance in 7th degree (residue), leaving the scene of an accident, 3rd degree assault (minimal injury).
[150] Carry up to 3 months in jail. Usually a fine is paid. Common charges are 5th degree marijuana (sale/possession), 3rd degree trespass, prostitution, 3rd degree menacing, possession of graffiti instruments.

7) Further non-conviction barriers include fire-related (4 years), behaving violently within past 3 years (3 years), disturbing neighbors within past 3 years (2 years), unsanitary housekeeping (2 years); illegally used a controlled substance, including marijuana,[152] within last three years (3 years), persons permanently excluded from NYCHA (5 years).[153]

Example:

After the death of a tenant in 2009, her two children (one with a daughter) attempted to take over the lease of the public apartment they had lived in.[154] After conducting a criminal background check, the property manager and borough manager concurred the household was not eligible. One son had pled guilty to sale of a controlled substance in the third degree (Class B felony) in 2006, and served a three year sentence, with two years of parole, and six months license suspension.[155]

In 2009, he pled guilty to criminal possession of a controlled substance in the seventh degree (class A misdemeanor), and was sentence to one-year conditional discharge, community service, and six month loss of license.[156] He has since worked for the same company for three years. Neither crime was alleged to have happened on NYCHA property.

The other son, who also grew up in the apartment and wished to take over the lease, pled guilty in 2007 of criminal possession of a controlled substance in the seventh degree and received a six month suspension of his license. He explained that he and his daughter will be homeless if NYCHA rules against them.

The brothers represented themselves in court against NYCHA General Counsel. The court upheld the NYCHA board's ruling that the first brother is not eligible for housing until 2017. The second brother was not able to demonstrate rehabilitation, and the future homelessness of his daughter was not something they could consider. Thus the application was denied.

---

[151] Violations are not considered crimes and do not give someone a criminal record. They include disorderly conduct, 2nd degree harassment, trespass, public intoxication, loitering, and possession of marijuana.

[152] TSAP, Appendix, p.5. Drug use (without a conviction) ineligibility can be overcome by providing written verification from a state-licensed drug treatment agency that the person has been drug-free for 12 consecutive months and a current clean toxicology report.

[153] Id. Ineligibility periods do not commence with the prohibited activity, they commence from the date NYCHA finds them ineligible. For example, one who has waited three years since the activity to apply, may need to await another three years from the date of application denial.

[154] Matter of Baum v New York City Hous. Auth., Unfiled Judgment Index Number 100097/2011, Seq. # 001, Art. 78, Cal #154, Barabara Jaffe, J.S.C. (Apr. 16, 2012).
https://docs.google.com/viewer?a=v&q=cache:mH3S5R6nizwJ:statecasefiles.justia.com/documents/new-york/other-courts/2012-ny-slip-op-31014-u.pdf%3Fts%3D1335194389+&hl=en&gl=us&pid=bl&srcid=ADGEESj48Q3Arz7eurdIBUBOK_qZ5N24AhpqwDYSZvsUJs0TEQPoQ5mdZkpLVlJkqYHX-KiUAbdRZcM8JpU9dI_0rpR_OHVLwfyIcrPcmPdaZV_v8UpzBVPSqJP_vk5owy4uKkOHXww0&sig=AHIEtbSi8MkoeWLeZmgAUcyD1euCRxCWeA

[155] N.Y. Penal Law § 220.39 (McKinney). The elements consist of knowingly selling "a narcotic drug." There is no weight requirement, and the statute has been interpreted to mean the seller need not actually possess, nor be the actual seller in a transaction.

[156] N.Y. Penal Law § 220.03 (McKinney). A person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance.

Providence, RI

The City of Providence Consolidated Plan (2011-2013) recognizes that the problems of people "re-entering the community" from prison were mentioned at almost every focus group regarding the plan.[157] There is no system of halfway houses in Rhode Island and some of the 17,000 annual exits from the Adult Correctional Institutions will walk to the homeless shelter.[158] Regulations barring these people from housing (both public and private) "exacerbate the problem."[159] The Plan recognizes that single adults with children are limited in program access.[160] Furthermore, estimates of drug use and abuse are all significantly tied to housing access, in a city reporting 14% unemployment in 2009.[161] A specific objective for persons living with HIV/AIDS (PLWA) is to eliminate background criteria for housing.[162]

The Providence Housing Authority (PHA) has a website tab for "How to Apply."[163] The third step of the process explains that PHA investigates past behavior, including court and police records. There is no link on the website to any standards of procedures.[164] The local PHA attorney explained that she does not have an ACOP, and she uses Section Five to make her decisions.[165] There is, however, an ACOP.

The PHA states that a family does not meet the criteria for admission if anyone:

- Has ever been evicted from public housing;
- Commits drug related criminal activity, violent criminal activity, or is subject to the lifetime sex offender registration. [166]

PHA will do a background check and consider all criminal activity, including felonies, misdemeanors, and pending charges, regardless of when they occurred.[167] The policy lacks specific guidance, stating that nearly any criminal activity may result in a family's rejection, including possession of illegal drugs, larceny, receipt of stolen goods, spouse abuse, "violence," and "drugs."[168] The PHA does note that the Fair Housing Act bars

---

[157] Plan, at 56. Accessible on the web: http://www.providenceri.biz/efile/2213

[158] The Plan references "over 1500" released from prison. However, the DOC data is much higher. 17000 are released from the consolidated jail and prison.

[159] Id.

[160] Id. At 69.

[161] Id. At 57. The Plan estimates 17,635 individuals with substance abuse problems, 22,560 marijuana users, 8,460 nonmedical pain reliever users, and 5,460 cocaine users in Providence. Based on U.S. Dept. of Health and Human Services survey: 2007 National Household Survey on Drug Use and Health.

[162] Id. At 131.

[163] http://www.pha-providence.com/index.php?cID=how-to-apply

[164] Last accessed July 19, 2012.

[165] Michelle Bergin, esq., phone call with Bruce Reilly, July 25, 2012. An initial call to the PHA failed, as a worker directed Reilly to the local HUD office, "where they have all of that." The HUD attorney was also not familiar with ACOP, expalined that the federal code regulates the policy, and suggested Reilly purchase a copy of the Federal Code at a local post office. A call back to the PHA, specifically asking for the "legal department," prompted the conversation with Bergin.

[166] PHA, Dept. of Rental Housing Adminstrative Plan, Sec. 2 Eligibility for Admission, at 17.

[167] Providence Housing Authority, Dept. of Housing Mgmt. Plan, Sec. 6.7.1, page 6-18.

[168] Id., Sec. 7.6, at page 7-4.

discrimination against former users of drugs, thus the question depends upon whether they are currently in recovery.

Mitigating Circumstances

Furthermore, the PHA will not overlook "years of criminal activity," although someone is now rehabilitated.[169] PHA will allow a probationer who is at least halfway through their probation period, with a letter from their probation officer verifying compliance with the terms of probation. For those with substance abuse problems, they must show completion of a drug rehabilitation program, and evidence of at least two years of sobriety.[170] Those with violent crimes or sex offenses (other than the permanently barred lifetime registrant) must also be over halfway through their probation, have a letter from the probation officer, and have completed a program directed at the nature of the offense.[171] The guidance on non-violent crimes are the same halfway period for probation, along with evidence of counseling and restitution. There is no guidance in the policy as to what constitutes a violent or non-violent crime, however, the process of reviewing mitigating circumstances are similar.

The Providence Housing Authority final determination policy regarding criminal activity states that they will consider any criminal activity during the past 10 years. They also state that nobody 18 years or older should be admitted if they have been convicted of a felony, have charges pending, or are currently involved in criminal activity.[172]

Durham, NC

Durham's standing policy is the 2010 version posted on their website. Proposed changes include increasing the waiting period for those evicted due to drug-related activity, from three years to five.[173] They held a public hearing in September, 2012, regarding proposed changes for the next Five Year Plan.

According to the policy, DHA is still operating under the mistaken belief that they will receive points, and additional funding, for showing HUD that they screen out people with criminal histories.

"Under the Public Housing Assessment System (PHAS), PHA's that have adopted policies, implemented procedures and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories receive points."[174]

DHA requires all of its residents to authorize an annual criminal background check on them.[175]

---

[169] Id., Ch. 7.6.2, at p. 7-5.
[170] Id. Ch. 7.6.3.
[171] Id. It is unclear how a combination sentence of prison and probation factors into this equation. For example, on the same charge: someone could receive ten years in prison followed by ten years probation. Someone else may have been sentenced to fifteen years in prison, without probation. Someone else may have been sentenced to twenty years probation, without prison.
[172] Id. Ch. 8.2.2.
[173] DHA Plan Update, Amendments Only to the HCV Plan (9), at 3 (Oct. 22, 2010). Available on the web at: http://www.durhamhousingauthority.org/assets/20105YP-approved.pdf
[174] ACOP (2010), at 46. Page 3-14, *citing:* 24 CFR 960.203 (b) and (c).
[175] ACOP (2010), at 174, Page 9-4.

Following HUD guidance, DHA will admit an otherwise-eligible family who was evicted from federally-assisted housing within the past 3 years for drug-related criminal activity, *if* DHA is able to verify that the household member who engaged in the criminal activity has completed a supervised drug rehabilitation program approved by DHA, or the person who committed the crime is no longer living in the household.

Mandatory Exclusion

DHA will deny admission if:

- They determine that any household member has used illegal drugs during the previous six months.[176]
- DHA has reasonable cause to believe that any household member's current use or pattern of use of illegal drugs, or current abuse or pattern of abuse of alcohol, may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[177]
- If any household member has ever been convicted of drug-related criminal activity for the production or manufacture of methamphetamine in any location;[178]
- If any household member is currently registered as a sex offender under a state registration requirement, regardless of whether it is a lifetime registration requirement.[179]

The standard of any determination is based on a preponderance of the evidence.[180]

Discretionary Exclusion

If any household member is currently engaged in, or has engaged in any of the following criminal activities, **within the past five years**, the family will be denied admission:

- *Drug-related criminal activity*,[181]
- *Violent criminal activity*,[182]

---

[176] ACOP, at 45, Page 3-15. "*Drug* means a controlled substance as defined in section 102 of the Controlled Substances Act [21 U.S.C. 802]. *Currently engaged in the illegal use of a drug* means a person has engaged in the behavior recently enough to justify a reasonable belief that there is continuing illegal drug use by a household member [24 CFR 960.205(b)(1)]."

[177] Id. In determining reasonable cause, DHA will consider all credible evidence, including but not limited to, any record of convictions, arrests, or evictions of household members related to the use of illegal drugs or the abuse of alcohol.

[178] HUD mandates denial only for those who have manufactured on federally-assisted housing premises.

[179] HUD mandates denial only for those subject to lifetime registration requirements.

[180] DHA considers the following factors when making its decision:
(1) The seriousness of the case, especially with respect to how it would affect other residents; (2) The effects that denial of admission may have on other members of the family not involved in the action; (3) The extent of participation or culpability of individual family members, including whether the culpable member is a minor or disabled; (4) The length of time since the violation occurred, the family's recent history and the likelihood of favorable conduct in the future; (5) Evidence of the applicant family's participation in or willingness to participate in social service or other appropriate counseling; (6) In the case of drug or alcohol abuse, whether the culpable household member is participating in or has successfully completed a supervised drug or alcohol rehabilitation program or has otherwise been rehabilitated successfully

[181] defined by HUD as the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug [24 CFR 5.100].

- Criminal activity that may threaten the health, safety, or welfare of other tenants.[183]
- Criminal activity that may threaten the health or safety of DHA staff, contractors, subcontractors, or agents.
- Criminal sexual conduct, including but not limited to sexual assault, incest, open and gross lewdness, criminal sexual offenses involving children, or child abuse.

Evidence of such criminal activity includes, but is not limited to any record of convictions, arrests, or evictions for suspected drug-related or violent criminal activity of household members within the past 5 years.[184]

Oakland, CA

Oakland's Admissions and Continued Occupancy Policy is easily accessible on their public website.[185] Oakland Housing Authority (OHA) opens their denial of admissions with a factual error, believing that HUD requires them to exclude those evicted for drug-related activity for five years.[186] They also leave out the provision where a competed drug rehabilitation program can overcome that ban.[187]

Mandatory Exclusion

"HUD requires OHA to deny assistance in the following cases":

- Any household member has been evicted from federally-assisted housing in the last 5 years for drug-related criminal activity.
- OHA determines that any household member is currently engaged in the illegal use of drugs.[188]
- OHA has reasonable cause to believe that any household member's current drug or alcohol use, may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.[189]
- Any household member has ever been convicted of manufacturing methamphetamine on the premises of federally assisted housing;

---

[182] defined by HUD as any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage [24 CFR 5.100].
[183] [24 CFR 960.203(c)(3)].
[184] In making its decision to deny assistance, DHA will consider the factors discussed in Section 3-III.E. Upon consideration of such factors, DHA may, on a case-by-case basis, decide not to deny assistance.
[185] http://www.oakha.org/MTW/ACOP.pdf
[186] Oakland Housing Authority, ACOP, Page 3-19, 04/14/2006. The HUD policy is three years. OHA cites 24 CFR 960.204 for their section 3-III.B. Required Denial of Admission.
[187] 24 CFR 960.204(a)(1)(i). The PHA may also allow a household if the offender is dead, in prison, or otherwise out of the household. Id. (a)(1)(ii).
[188] Drug means a controlled substance as defined in section 102 of the Controlled Substances Act [21 U.S.C. 802]. Currently engaged in the illegal use of a drug means a person has engaged in the behavior recently enough to justify a reasonable belief that there is continuing illegal drug use by a household member [citing: 24 CFR 960.205(b)(1)].
[189] In determining reasonable cause, OHA will consider all credible evidence, including but not limited to, any record of convictions, arrests, or evictions of household members related to the use, sales, possession or abuse of illegal drugs or the abuse of alcohol.

- Any household member is subject to a lifetime sex offender registration.

Like Durham, NC, Oakland is still operating under the policy that there are PHAS points to be earned for screening and exclusion.[190]

Discretionary Exclusion

A family will be denied admission if any household member has engaged in, **any of the following within the past five years**:

- Drug-related criminal activity, [191]
- Violent criminal activity, [192]
- Criminal activity that may threaten the health, safety, or welfare of other tenants,[193]
- Criminal activity that may threaten the health or safety of OHA staff, contractors, subcontractors, or agents.
- Criminal sexual conduct.[194]

Evidence of such criminal activity includes, but is not limited to any record of convictions, arrests, or evictions for suspected drug-related or violent criminal activity of household members within the past 5 years.[195]

San Antonio, TX

The San Antonio Housing Authority (SAHA) recently updated their ACOP policy, and it is available on their public website.[196] All applicants over 18 will undergo a background check, and SAHA will test all applicants against the following additional criteria:[197]

- History of any drug-related or violent criminal activity, or other criminal acts, which would adversely affect the health, safety, well-being or right of peaceful enjoyment of the premises by other residents or SAHA employees;
- History of abusing alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by others;

---

[190] ACOP, Page 3-20. "Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures, and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories receive points."

[191] "Defined by HUD as the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug" [citing: 24 CFR 5.100].

[192] "Defined by HUD as any criminal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage." Citing: 24 CFR 5.100.

[193] Citing: 24 CFR 960.203(c)(3).

[194] Including but not limited to sexual assault, incest, open and gross lewdness, or child abuse.

[195] In making its decision to deny assistance, OHA will consider the factors discussed in Section 3-III.E. Upon consideration of such factors, OHA may, on a case-by-case basis, decide not to deny assistance.

[196] http://www.saha.org/aboutsaha/pdfs/Final%202012%20ACOP%20as%20of%20June%2012%202012.pdf

[197] ACOP, at 96-97.

- Alcohol abuse shall only be evaluated as an aggravating factor in the context of a criminal conviction, as determined in Exhibit 1E hereof, or in the context of a prior housing eviction.

Discretionary Exclusion

- Evidence of current drug-related criminal activity;
- Reasonable belief that illegal drug use may adversely affect other residents;
- Evidence of current violent criminal activity; or
- Other criminal activity which may threaten the other residents; or personnel for the Authority.
- Evidence of eviction within the last five (5) years from any federal assisted housing program for drug and/or criminal related activity.
    - Can be waived if the evicted household member who engaged in drug-related criminal activity demonstrates successful completion of a rehabilitation program approved by the Authority; or
    - The circumstances leading to the eviction no longer exist (e.g., the individual involved in drugs is no longer a household member because of incarceration.)

Where applicable, the Authority may waive its policy of prohibiting admission if the household member demonstrates to the Authority's satisfaction that he/she is no longer engaging in illegal use of a controlled substance or abuse of alcohol and:

- Has successfully completed a supervised rehabilitation program;
- Has otherwise been rehabilitated successfully; or
- Is currently participating in a supervised rehabilitation program
- The circumstances which led to eviction no longer exist (e.g. the person involved in the criminal activity no longer lives in the household).

In evaluating evidence of negative past behavior, the Authority will give fair consideration to the seriousness of the activity with respect to how it would affect other residents, and/or the likelihood of favorable conduct in the future which could be supported by evidence of rehabilitation.

SAHA may conditionally admit a household, with a requirement that the household member who engaged in or is culpable for the drug use or alcohol abuse may not reside in the unit.

Minneapolis, MN

This policy is among the more straightforward and user-friendly policies surveyed, and it is available on their public website.[198] The policy includes a detailed Appendix that correlates waiting periods to specific criminal activity.[199] There are mandatory waiting

[198] http://www.mphaonline.org/pr-policies-and-publications/public-housing-statement-of-policies/
[199] http://www.mphaonline.org/wp-content/uploads/2011/11/SOP-2011-12-Appendix-H.pdf. See Appendix in this report.

periods for a list of crimes, which provide guidance for crimes not listed. The MPHA will not consider any crime that has occurred outside of the waiting period. The waiting period begins after all prison and/or probation is served.

MPHA differentiates the various levels of sex offenses (including the lifetime ban on those registered for life) and drug offenses (including the lifetime ban for those manufacturing methamphetamines).

The MPHA waiting periods are lengthy, although clear. Minnesota sentences people to some of the longer probation periods in the nation; terms spent living in the community. Probation for the prisoner is a mandatory last third of the sentence. Thus, if a household member is sentenced to one year probation for public urination or disorderly conduct, the family will be eligible to apply for public housing one year after that period runs out. Similarly, If someone serves seven years in prison for "intent to sell" drugs, then spends three years living outside on probation: their family will be eligible for public housing after another five years; fifteen years after the crime.

Endnotes- Table A and B

TABLE A

[i] Proposed policy of the Formerly Incarcerated & Convicted People's Movement, and currently under consideration at HANO with the local efforts of Stand With Dignity (organization within the New Orleans Workers' Center for Racial Justice), Voice of the Ex-Offender (VOTE), and others. A public hearing was held at HANO, January 22, 2012.

[ii] 42 U.S.C. § 1437n(f)(1). Commonly known as "Meth Labs," these operations have been known to explode due to the dangerous chemical compounds involved.

[iii] 42 U.S.C.A. § 13663; 24 C.F.R. § 5.856.

[iv] The effect of this ban implies that someone guilty of a sex offense who was either not placed on the Registry, or has been removed, would then be eligible 7 years after the activity. The proposed change would turn all sex offenses into the equivalent of manufacturing methamphetamine on federally-subsidized housing property. Even mothers with an act of prostitution 20 years ago would be banned.

[v] 42 U.S.C.A. § 13661; 24 C.F.R. § 5.854(a).

[vi] See the exclusion standards: HANO ACOP, at 22-24.

[vii] 24 C.F.R. § 5.855(a)4.

[viii] "Violent Criminal Activity" means any criminal activity that has one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, *serious* bodily injury or property damage. 24 C.F.R. § 5.100. (emphasis added).

[ix] 42 U.S.C.A. § 13661; 24 C.F.R. §§ 5.852(a) and 960.204 (limiting scope to drug-related and violent criminal activity). 24 C.F.R. 5.855(b) (permitting, but not requiring, denials based on disqualifying information within "reasonable time."). 24 C.F.R. § 5.852(d) (granting authority for PHA to admit, even when activity is within a reasonable time.)

"Drug-related criminal activity" means the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute, or use a controlled substance (as defined by Section 102 of the Controlled Substance Act, 21 U.S.C. 802).

[x] 24 C.F.R. §§ 5.854(b) and 5.857.

[xi] Includes narcotic paraphernalia. This will be waived for remaining household members if the offender is incarcerated for a term over 7 years.

[xii] 24 C.F.R. § 5.855. This is most likely to apply where there is an arrest but no conviction. The EEOC has recently set guidelines warding employers away from their use of arrests (*see:* EEOC Guidelines, at 12, and citations).

"The fact of an arrest does not establish that criminal conduct has occurred. At least 13 states have

statutes explicitly prohibiting arrest record inquiries and/or dissemination; Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.

An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact- based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity. Another reason for employers not to rely on arrest records is that they may not report the final disposition of the arrest (e.g., not prosecuted, convicted, or acquitted). As documented in Section III.A., *supra*, the DOJ/BJS reported that many arrest records in the FBI's III database and state criminal record repositories are not associated with final dispositions. Arrest records also may include inaccuracies or may continue to be reported even if expunged or sealed."

[xiii] 24 C.F.R. §§ 5.858-860. Leases shall indicate that the listed activities may subject them to eviction. 24 C.F.R. § 966.4(l)(5).

[xiv] HANO ACOP, at 138.

[xv] Id. At 144.

[xvi] "Guest" means a person temporarily staying in the unit with the consent of the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. 24 C.F.R. § 5.100. Tenants shall be allowed reasonable accommodation of their guests. 24 C.F.R. § 966.4(d)(1).

[xvii] "Premises" means the building or complex or development in which the public or assisted housing dwelling unit is located, including common areas and grounds. 24 C.F.R. § 5.100.

[xviii] "Person under the tenant's control" means that the person, although not staying as a guest (as defined in this section) in the unit, is, or was at the time of the activity in question, on the premises (as premises is defined in this section) because of an invitation from the tenant or other member of the household who has express or implied authority to so consent on behalf of the tenant. Absent evidence to the contrary, a person temporarily and infrequently on the premises solely for legitimate commercial purposes is not under the tenant's control. 24 C.F.R. § 5.100.

[xix] HANO ACOP, at 136. It appears unusual that HANO's policy includes regulations for the District Attorney. Regardless of HANO's power to compel a separate state agency, this clearly represents longstanding practice of initiating eviction before any evaluation of the evidence by the court.

[xx] HANO ACOP, at 23-24.

[xxi] HANO ACOP , at 27.

TABLE B

[xxii] Updated January, 2011. Available on the NYCHA website, last accessed July 19, 2012. http://www.nyc.gov/html/nycha/downloads/pdf/TSAPlan.pdf

[xxiii] Class A and B are the most serious felonies. Class B Non-Violent generally receive 1-3 years in prison. Class C are crimes that carry sentences of up to 15 years, including assault, larceny, and drug distribution. A Non-Violent Class C felony generally receives no jail, and probation between 1-15 years. Class D felonies generally lack malice and carry up to 7 years in prison, including theft and fraud. Class E is the lowest felony charge, including contempt, mischief, and possession of stolen goods, and typically carry up to 4 years in prison. People convicted in these classes typically receive probation.

[xxiv] Class A Misdemeanors carry up to 1 year in jail. Often a fine is paid. Common Class A is possession of a controlled substance in 7th degree (residue), leaving the scene of an accident, 3rd degree assault (minimal injury).

Class B Misdemeanors carry up to 3 months in jail. Usually a fine is paid. Common charges are 5th degree marijuana (sale/possession), 3rd degree trespass, prostitution, 3rd degree menacing, possession of graffiti instruments.

Violations are not considered crimes and do not give someone a criminal record. They include disorderly conduct, 2nd degree harassment, trespass, public intoxication, loitering, and possession of marijuana.

Further barriers (TSAP, Appendix, p.5) include drug use (without a conviction) ineligibility can be overcome by providing written verification from a state-licensed drug treatment agency that the person has been drug-free for 12 consecutive months and a current clean toxicology report.

Ineligibility periods do not commence with the prohibited activity (Id.), they commence from the date NYCHA finds them ineligible. For example, one who has waited three years since the activity to apply, may need to await another three years from the date of application denial.

[xxv] Providence Housing Authority, Dept. of Housing Mgmt. Plan Ch. 8.2.2.

[xxvi] Id., Sec. 6.7.1, page 6-18.

[xxvii] DHA Administrative Plan for HCVP (10/2011), at 51. DHA has accepted public comments for a revision to their overall Plan. Available online at: http://www.durhamhousingauthority.org/assets/Admin%20Plan%202011%20Final.pdf

[xxviii] DHA ACOP (08/25/2010), Exhibit 3-2, page 3-25. Misdemeanor Assault, Fraud, Property Damage, Trespassing (1 yr); Misdemeanor larceny, drug possession, felony assault, Breaking and Entering, burglary (3 yrs); drug use, drug possession w/intent to sell, felony fraud, felony larceny, poss. Weapon on school grounds, arrest or conviction where posed threat to DHA staff/resident (5 yrs); drugs trafficking (10 yrs).

[xxix] Oakland Housing Authority, ACOP, Page 3-19, 04/14/2006.

[xxx] SAHA 2012 ACOP, pp 96-100, http://www.saha.org/aboutsaha/pdfs/Final%202012%20ACOP%20as%20of%20June%2012%202012.pdf SAHA's policy is one of the more clear policies. Although the look-back period has no est parameter, the review calls for a clear analysis of rehabilitation and reasonably expected future conduct. Similarly, SAHA will not put the crimes/addictions of one upon the entire family, both in admissions and evictions.

[xxxi] MPHA Applicant Screening Guidelines, Appx H, available online: http://www.mphaonline.org/wp-content/uploads/2012/12/2012-13-SOP-Appendix-H.pdf

[xxxii] MN is one of the national leaders in usage of probation, including extremely long terms.

[xxxiii] Applicants are automatically denied for certain crimes, including: Misdemeanors, drug crimes, burglary, prostitution within (2 years); unlisted felony convictions (3 years); domestic abuse, robbery, felony drug crimes, felony assault (5 years); kidnapping (7 years);sexual assault, arson, armed robbery, 4 or more assaults within 10 years (10 years); homicide (20 years). Available on the web: http://www.seattlehousing.org/housing/public/eligibility/

This does not include time spent incarcerated; it is unclear how this relates to probation or parole. SHA will deny anyone who has been incarcerated in the past 6 months for any reason; and treats Not Guilty verdicts by reason of insanity, or diminished capacity, the same as a guilty verdict. SHA Manual, Code L10.4-1, Section F, p.9-10 (Rev. 07/01/10).

See also: Seattle Housing Authority, Housing Choice Vouchers Administrative Plan (11/2003), Updated December 2012, 2-7. http://www.seattlehousing.org/residents/pdf/HCVP_AP_Chapter_2.pdf

SHA has a detailed point system for suitability in public housing. Among ways to earn points is successful residency in transitional housing; *see*: SHA Manual, Code L10.4-1, p.6 (Rev. 07/01/10). http://www.seattlehousing.org/residents/pdf/10-4-1_Suitability_Factors.pdf SHA also allows for "Sponsor Agreements" for those lacking the suitability history to qualify. Id., at 7-8.

[xxxiv] SHA allows for medical marijuana use, as an accommodation for residents' disability. All other marijuana use, on or off premises, is cause for eviction. SHA Manual, L11.1-3 http://www.seattlehousing.org/residents/pdf/11-1-3_Eligibility_For_Continued_Occupancy.pdf

Washington state passed a law that renders marijuana similar to alcohol for personal use. Parts of the federal government have refused to recognize any changes in marijuana laws, however U.S. Department of Housing and Urban Development (HUD) defines medical marijuana which, when prescribed by a physician to treat a serious illness such AIDS, cancer, or glaucoma, is legal under State law. (Id.)

[xxxv] Denver Housing Authority Admissions and Occupancy Terms and Policies (2) revised 8-17-11, Generally, including Section 8, at 23-27. Available at: http://www.denverhousing.org/aboutus/agencyplan/Documents/Admissions%20and%20Occupancy%20Terms%20and%20Policy%20revised%208-17-11.pdf DHA permits mitigating circumstances, but does not ensure it will override the uncertain bar.

[xxxvi] Any reference to medical marijuana, or other marijuana usage, could not be found in the policy.

[xxxvii] Particularly looking at criminal activity against a person (7 yrs), property crime conviction (5 yrs), any violent or drug related criminal activity. Id., at 29.

[xxxviii] HACLA ACOP (04/03/12), at 16-17. http://www3.lacdc.org/CDCWebsite/uploadedFiles/HM/ACOP.pdf HACLA considers it a lease violation, subject to 3 days notice of eviction, to have a controlled substance in their system, on or off the premises. Id. At 121. Use of a controlled substance or alcohol is considered a

"pattern" by 3 or more incidents in 12-month period. Id., at 122. No loitering is allowed in any common area of the premises, defined as "when a person delays, lingers, idles, or remains in an area and *does not have a lawful purpose* for being there." Id. At 151. Similar language was held unconstitutional in Chicago and New York City. *See:* Chicago v Morales, 527 U.S. 41 (1999).

[xxxix] HANO ACOP, Id.