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## The Never-Ending Grasp of the Prison Walls: Banning the Box on Housing Applications

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## COMMENT

### THE NEVER-ENDING GRASP OF THE PRISON WALLS: BANNING THE BOX ON HOUSING APPLICATIONS

ASHLEY DE LA GARZA\*

*We want all Americans to have a fair chance to live up to their full potential to engage with their families and communities, and to reach for a bright future that is not defined by their past mistakes.<sup>1</sup>*

—Federal Interagency Reentry Counsel

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\* St. Mary's University School of Law J.D., May 2020; Texas A&M University, B.S., Sociology, December 2016. First, I would like to thank my mother, who raised me and my sister as a single parent. Thank you for believing in me and pushing me to go after my dreams. Secondly, I would like to thank my grandparents, who moved from Mexico to give us a chance at a better life. Though my grandmother is no longer with us, I continue to strive to make them proud and to remind them that their sacrifices were not for nothing. To my sister and nephew, you motivate me to change the injustice in the world—to ensure that my nephew can grow up without fear of discrimination. To the rest of my family, all the work I do is for us. Know that through the long hours and times I am away, I am always thinking of you. To all the teachers and friends who believed in me, thank you. Through times of doubt, your words encouraged me to keep fighting. Finally, to those currently and previously incarcerated, this is for you. Together, I will continue to work so that all individuals have a second chance at life. It takes a community to make a difference and together I know we can achieve that.

1. FED. INTERAGENCY REENTRY COUNCIL, A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE 6 (Aug. 2016), <https://www.fatherhood.gov/sites/default/files/Resource%20Files/e000003603.pdf> [<https://perma.cc/37UK-8V6W>].

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## INTRODUCTION

House: where we sleep; where we eat; where we bathe; where we keep our valuables; where we feel safe; where we grow as individuals.<sup>2</sup> Imagine if one mistake took away the opportunity of ever owning a home—leaving you at risk of never finding employment, losing your family, and possibly becoming homeless.<sup>3</sup> For many, this is the harsh reality of the never-ending cycle caused by their encounters with the criminal justice system.<sup>4</sup>

Michael Monsivais was released into a halfway house from federal custody; he was one of over 50,000 federal “inmates”<sup>5</sup> who are released annually to a halfway house.<sup>6</sup> Michael’s latest encounter with law enforcement resulted from a friend organizing a drug sale between Michael and an undercover Federal Bureau of Investigation (FBI) agent.<sup>7</sup> Unbeknownst to Michael, the sale was part of his friend’s efforts to secure a lower sentence for a prior offense.<sup>8</sup> For Michael, the sale resulted in a 130-month sentence in federal prison.<sup>9</sup> Michael lost everything he owned when he went to prison, and therefore, would leave prison “with only the clothes on [his] back and not much else.”<sup>10</sup>

Michael Monsivais’ experience reflects the same concerns many others face when they enter prison and are left wondering what awaits

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2. See *House*, Merriam-Webster Dictionary (Apr. 2019) (defining “house” as a building for human habitation).

3. See FED. INTERAGENCY REENTRY COUNCIL, *supra* note 1 at 8 (finding 15.3% of all people in jail in the United States experience homelessness the year prior to incarceration).

4. See *id.* at 3 (stating two out of three people are subsequently arrested after being released from prison, while some return to prison within three years of being released).

5. See Letter from Eddie Ellis, Founder, Ctr. for Nuleadership on Urban Solutions, to Our Friends, <https://cmjcenter.org/wp-content/uploads/2017/07/CNUS-AppropriateLanguage.pdf> [<https://perma.cc/SCD2-3U2J>] (stating the words “convict,” “inmate,” “felon,” etc. are derogatory terms commonly accepted by the media, public policy agents, law enforcement, and the prison system and reflecting, “calling me inmate, convict, prisoner, felon, or offender indicates a lack of understanding of who I am, but more importantly *what I can be*. I can be and am much more than an “ex-con,” or an “ex-offender,” or an ex-felon.”).

6. Water Pavlo, *America’s Real Criminal Justice Crisis: Coming Home*, FORBES (Aug. 17, 2018), <https://www.forbes.com/sites/walterpavlo/2018/08/17/americas-real-criminal-justice-crisis-coming-home/#102c280d2018> [<https://perma.cc/J6ZM-8MPK>].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

them upon release.<sup>11</sup> In May of 2018, Michael was released from prison to serve his remaining six month sentence in a halfway house—an option not offered to many.<sup>12</sup> This option would help him get back on his feet, but he was still concerned with where he would call home after completing his remaining sentence.<sup>13</sup>

Incarcerated individuals, in theory, have already served their sentences when they leave prison.<sup>14</sup> Unfortunately, the formerly incarcerated become victims to a variety of collateral consequences preventing them from being contributing members of society.<sup>15</sup> The community should assist those leaving prison to reintegrate, rather than continue to perpetuate the prison walls.<sup>16</sup> By denying housing to individuals, we are

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11. See Mitch Mitchell, *Ex-offenders Says Housing, Jobs are Tough to Find*, MCCLATCHY DC BUREAU (May 29, 2012), <https://www.mcclatchydc.com/news/nation-world/national/economy/article24730114.html> [<https://perma.cc/M7GN-GXYG>] (explaining how Tim Baker lost his job and became homeless due to his felony conviction from two driving while intoxicated charges); see also Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<https://perma.cc/WGS8-RUNZ>] (stressing that Susan Burton was legally discriminated in employment and housing because of her criminal record).

12. See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 89 (2005) (explaining the ways halfway houses are considered successful programs that reduce recidivism, but due to their public opposition, they play a limited role for returning prisoners); see also Pavlo, *supra* note 6 (proving halfway houses are a benefit for individuals like Michael because it allows them to slowly re-integrate into society after being in prison).

13. See Pavlo, *supra* note 6 (showing how Michael was uncertain of where he would live, but he knew he would need to establish a “new life”).

14. See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 152 (2006) (sharing thoughts from an ex-felon, Karen, when she stated, “[p]eople that are convicted of drug crimes can’t even get housing anymore. . . . Yes, I did my prison time. How long are you going to punish me as a result of it?”); see also Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 19 (Marc Mauer & Meda Chesney-Lind eds., 2002) (asserting a prison sentence is no longer an adequate form of punishment because an offender’s debt to society for their mistake is never paid).

15. See TRAVIS, *supra* note 12 at 63 (addressing the penalties that a conviction carries—including ineligibility of public assistance, public housing, voting rights, employment education loans, etc.).

16. See *From Prisons to Communities: Confronting Re-Entry Challenges and Social Inequality*, AM. PSYCHOL. ASS’N (Mar. 2018), <https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities> [<https://perma.cc/TG7W-CQ2M>] (describing the importance of reintegration for individuals released from prison to overcome the challenges they face when re-entering the community).

punishing them beyond the scope of the law.<sup>17</sup> If we truly care about public safety, then as a society we must continue fighting for the rights of the previously incarcerated, especially when it comes to a basic need such as housing.<sup>18</sup>

“Ban the Box” is one step towards making reentry and rehabilitation easier for the previously incarcerated.<sup>19</sup> It will allow the formerly incarcerated to reclaim their identity and be more than just a “convict.”<sup>20</sup> This Comment explores how “Ban the Box” can be implemented in housing applications to help the previously incarcerated receive a fair opportunity at housing.<sup>21</sup>

In a criminal prosecution, the United States Constitution grants the accused the right to a speedy and public trial.<sup>22</sup> An impartial jury judges the accused and the accused has the opportunity to obtain witnesses in their favor.<sup>23</sup> The application of this right should extend to housing. When an individual applies for housing, they should feel confident that they will be judged by an impartial person.<sup>24</sup> They should feel confident

17. Cf. Shristi Devu, *Trapped in the Shackles of America's Criminal Justice System*, 20 SCHOLAR 217, 229 (2018) (arguing that denying jobs to individuals because of their convictions is punishing them beyond the intended scope of the law).

18. See NINO RODRIGUEZ & BRENNER BROWN, STATE SENTENCING & CORRECTIONS PROGRAM, VERA INST. OF JUST., PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 5 (Dec. 2003), [https://www.prisonpolicy.org/scans/vera/209\\_407.pdf](https://www.prisonpolicy.org/scans/vera/209_407.pdf) [<https://perma.cc/8229-SKF9>] (explaining how Massachusetts, Hawaii, and Illinois do not release incarcerated individuals that may become homeless, but examine each of them individually to address their needs as their release date nears).

19. See Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NAT'L EMP'T L. PROJECT 1 (July 2019), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-July-2019.pdf> [<https://perma.cc/2SKA-9TSM>] (showing how “Ban the Box” can benefit the individual reintegrating into society by obtaining a job).

20. See Faye S. Taxman, *The Offender and Reentry: Supporting Active Participation in Reintegration*, 68 FED. PROB. 31, 35 (2004) (“[I]t is important for reentry to occur in a manner that empowers the offender to be a productive citizen contributing to the economy.”).

21. See *About: The Ban the Box Campaign*, ALL OF US OR NONE, <http://bantheboxcampaign.org/about/#.W4DcNy2ZPow> [<https://perma.cc/466X-VKAZ>] (discussing how the “Ban the Box” campaign is aimed to encourage employers to hire based on skills rather than criminal history).

22. U.S. CONST. amend VI.

23. *Id.*

24. Cf. FED. INTERAGENCY REENTRY COUNCIL, *supra* note 1 at 49 (announcing that the Reentry Council will work with housing providers to increase understanding and provide appropriate training for the implementation of fair housing policies, while ensuring their residents with a safe living environment).

knowing that even though they have a criminal record, they will be able to provide mitigating evidence as to why they deserve to have housing.<sup>25</sup>

The conversation begins by exploring the history of mass incarceration and how it still has an impact on individuals.<sup>26</sup> Section II focuses on the exclusion of those with criminal records from housing.<sup>27</sup> Section III will delve into how the “Ban the Box” movement is implemented, the effects it has on employment, and how it can be mirrored in housing applications.<sup>28</sup> Section IV will emphasize why “Ban the Box” must be implemented in housing applications.<sup>29</sup> Section V will explore what factors will ensure the success of “Ban the Box.”<sup>30</sup> Lastly, Section VI will give a brief overview on how “Ban the Box” will affect sex offenders.<sup>31</sup> Though sex offenders will not be the main focus of this Comment, they are an important group that must be considered and discussed.<sup>32</sup> “Ban the Box” is not meant to cure all forms of discrimination, but it will be an avenue to inform housing authorities and landlords how to effectively implement fair housing policies.<sup>33</sup>

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25. *See id.* (expressing the Council’s objective for housing providers to consider mitigating factors such as the nature of the crime and the length of time since the crime occurred).

26. *See generally id.* (outlining a plan to attack the issues of rehabilitation and reintegration into society).

27. *See id.* (emphasizing the critical consequences a lack of stable housing can bring and stating that ten percent of newly released prisoners face homelessness).

28. *See ALL OF US OR NONE*, *supra* note 21 (indicating “Ban the Box” policies can be extended to housing, and recognizing that such kind of an ordinance has been adopted in Newark, New Jersey).

29. *See* Jesse Kropf, *Keeping Them Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Caste*, 4 *GEO. J. L. & MOD. CRITICAL RACE PERSP.* 75, 77–79 (2012) (criticizing public housing authorities for barring applicants with criminal records while considering the negative effects this has on minority communities and children especially).

30. *See* MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT’L CTR. ON POVERTY L., *WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING* 15, 21 (2015) <http://www.povertylaw.org/files/docs/WDMDFinal.pdf> [<https://perma.cc/3WWB-LN44>] (noting two factors to help ensure success is eliminating unreasonable lookback periods and making sure that mere arrests are not equated with convictions).

31. *See* MANZA & UGGEN, *supra* note 14 at 155 (providing the consequences sex offenders experience when attempting to reintegrate into society).

32. *See id.* (reporting the hyper stigmatized status sex offenders have, and the unique struggles they face).

33. *Cf. Policy Debates: How Can we Improve Ban the Box Policies?*, URBAN INST., (Feb. 21, 2017), <https://www.urban.org/debates/how-can-we-improve-ban-box-policies> [<https://perma.cc/8AYS-TYGZ>] (discussing differing views on the efficacy of “Ban the Box” policies while agreeing that these policies are not a cure all solution to hiring discrimination).

## I. BACKGROUND: MASS INCARCERATION

Mass incarceration is “the trend toward historically high incarceration rates in the United States.”<sup>34</sup> High incarceration rates are traced back to the War on Drugs<sup>35</sup> and tough on crime policies.<sup>36</sup> From 1980 to 2003, the number of individuals incarcerated for drug offenses alone increased by 1100%, from 41,100 in 1980 to 493,800 in 2003.<sup>37</sup> Consequently, minority groups were the most affected by these policy initiatives.<sup>38</sup> The American Civil Liberties Union reported that even though Blacks and Whites use marijuana at the same rates, Blacks are 3.73 times more likely to be arrested for possession.<sup>39</sup> These tough on crime policies are now an ordinary aspect of life for minorities.<sup>40</sup>

As of December 31, 2016, the United States estimated 1,506,800 incarcerated individuals in both federal and state

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34. See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426–27 (2012) (characterizing mass incarceration by (1) unusually historically high imprisonment rates, and (2) heavy concentration on certain demographic groups, as described by David Garland, who coined the term “mass incarceration”).

35. See generally JAMES KILGORE, UNDERSTANDING MASS INCARCERATION: A PEOPLE’S GUIDE TO THE KEY CIVIL RIGHTS STRUGGLE OF OUR TIME 31, 59 (2015) (stating the prison population nearly doubled during the Reagan administration because the War on Drugs was renewed through a warlike approach, which was previously implemented by former President Nixon and former FBI Director J. Edgar Hoover).

36. See Traum, *supra* note 34 at 429–30 (developing a historical analysis on how incarceration rates have reached an explosive growth); see also Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 12 (2011) (noting incarceration rates of imprisonment have increased—not because of an increase in acts of crime, but because of other reasons).

37. Ryan S. King & Marc Mauer, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2, 10 (2007); see Traum, *supra* note 34 at 429 (stating that during 1980 to 2007, there was a twenty-fold increase in the number of federal offenders); see also Alexander, *supra* note 36 (emphasizing drug convictions accounted for about two-thirds of the increase of convictions in the federal system).

38. See Alexander, *supra* note 36 at 13 (affirming people of all races sell drugs all throughout American communities, but people of color have been the most affected).

39. See ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 9, 17 (June 2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-rel1.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-rel1.pdf) [https://perma.cc/H6QA-FLTT] (reporting in 2010, the Black arrest rate for marijuana was 716 per 100,000, while the White arrest rate was 192 per 100,000—when it is used at comparable rates by Blacks and Whites).

40. See Traum, *supra* note 34 at 432 (stressing the risk of being imprisoned has become an ordinary aspect of life for Black and Latino men).



prisons.<sup>41</sup> The result of mass incarceration developed a growing segment of the community with prior convictions.<sup>42</sup> Each year, roughly 600,000 individuals leave prison to reenter the community.<sup>43</sup> They leave the prison walls excited for freedom, but they leave with a mark.<sup>44</sup> They are unable to secure lawful employment, apply for housing, and become vulnerable to recidivism.<sup>45</sup> The previously incarcerated consist of a variety of individuals with a diverse conviction history.<sup>46</sup> They include felons, murderers, sex offenders, drug offenders, thieves, etc.<sup>47</sup> Regardless of the specific conviction, every individual with such a history is prevented from fully reintegrating into society.<sup>48</sup>

Among many of the challenges the previously incarcerated face, housing is the most important because it is essential for the individual's successful reentry back into society.<sup>49</sup> Without a stable place to call

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41. E. ANN CARSON, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., PRISONERS IN 2016, (Aug. 7, 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/GMJ9-C6WW>].

42. See FED. INTERAGENCY REENTRY COUNCIL, *supra* note 1 at 3 (discussing the cycle of incarceration and failed reentry while noting that one in three American adults have a criminal record).

43. *Id.*

44. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 5 at 937, 955 (2003) [hereinafter *Mark of a Criminal Record*] (describing the term "marked," coined by Devah Pager in her sociological research study, as a person whose criminal record has had an effect on employment opportunities); see generally DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) [hereinafter *Finding Work*] (detailing Devah Pager's research study on the effects of a criminal record on employment).

45. See MANZA & UGGEN, *supra* note 14 at 126 (stressing how individuals continue to face forms of punishment upon release "including occupational restrictions, loss of parental rights, and disenfranchisement"); see also Matthew D. Goldstein, Comment, *HUD's 2016 Legal Guidance: An Administrative Dilemma*, 69 ADMIN. L. REV. 951, 957 (2017) (arguing the formerly incarcerated are often unsuccessful in reintegrating because they are repeatedly subject to collateral consequences); FED. INTERAGENCY REENTRY COUNCIL, *supra* note 1 at 3 ("Having a criminal record can make it more difficult for a person to access employment, education, and housing."); Kropf, *supra* note 29 at 77 ("Minorities are often denied private housing, employment, or public benefits because of their criminal record, thus further compounding their struggle.").

46. See TRAVIS, *supra* note 12 at 95 (listing the numerous types of crimes committed over a three-year period by released prisoners).

47. See generally Travis, *supra* note 14 (opining that not all crimes committed by a released offender are the same and the difference is on the individual criminal).

48. See *id.* at 15, 26 (addressing the unclear purpose of invisible punishments that place barriers on reintegration and are retributive).

49. See Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> [<http://perma.cc/5U3Z-35BT>] (illustrating how the previously incarcerated are unable

home, the individual is at risk of facing homelessness and recidivism.<sup>50</sup> Police officers aggressively enforce city ordinances that specifically affect the homeless population, thus creating a “revolving door” of incarceration.<sup>51</sup> Unfortunately, current housing policies prevent the previously incarcerated from receiving housing due to their prior criminal records.<sup>52</sup>

The previously incarcerated constitute a vulnerable population due to lack of support and constant pushback from the community.<sup>53</sup> Congress recently worked to combat the effects of the large prison population by enacting the First Step Act.<sup>54</sup> As the name suggests, this is the first step in reforming the prison system for both the current and previously incarcerated.<sup>55</sup> The passage of the First Step Act shows a willingness by Congress and the President to embrace prison reform.<sup>56</sup>

Throughout the United States, there is another movement to provide previously incarcerated individuals with an opportunity at fair employment through “Ban the Box.”<sup>57</sup> “Ban the Box” refers to the

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overcome many challenges they face until they find a place to live); *see also* Kropf, *supra* note 29 at 78 (“[F]inding housing is uniquely important in building a new life without recidivism.”).

50. *See* Couloute, *supra* note 49 (noting those who were previously incarcerated and homeless are more likely to be arrested because homelessness is criminalized by offenses such as sleeping in public places, panhandling, and public urination).

51. *See id.* (illustrating the previously incarcerated as placed in a “revolving door” when convicted for offenses related to their homelessness).

52. *See, e.g.*, Tenant Screening, 24 C.F.R. § 982.307(3)(iv) (2016) (“An owner may consider a family’s background with respect to such factors as: . . . (iv) Drug-related criminal activity or other criminal activity that is a threat to health, safety or property of others.”).

53. *See* Kropf, *supra* note 29 at 77 (“[T]hose returning from prison often have few skills and little social support.”); *see also* Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 553 (2005) (arguing that the public will not protest the exclusion from public housing because the public views people with criminal records with “suspicion, fear, hate, and anger”).

54. *See* First Step Act, H.R. 5682, 115th Cong. (2nd Sess. 2018) (focusing on combatting recidivism and ultimately helping reduce the large prison population).

55. *See* German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform> [<https://perma.cc/XX3E-JJS6>] (quoting President Trump at the 2019 State of the Union address describing the First Step Act as giving “nonviolent offenders the chance to reenter society as productive, law-abiding citizens”).

56. *See id.* (reporting the Act passed with overwhelming support from Republicans and Democrats).

57. *See* Michelle N. Rodriguez, “Ban the Box” is a Fair Chance for Workers with Records, NAT’L EMP’T L. PROJECT (Aug. 2017), <https://www.nelp.org/publication/ban-box-fair-chance->

initiative of removing the checkbox on employment applications that ask about conviction history.<sup>58</sup> This initiative delays when an employer can examine an applicant's conviction history, providing an opportunity to focus on what an applicant can contribute to their business.<sup>59</sup> If the same "Ban the Box" initiative were applied to housing applications, landlords would be more inclined to focus on more positive attributes of a tenant's application—rather than automatically excluding the tenant.<sup>60</sup>

## II. WHY ARE THE PREVIOUSLY INCARCERATED EXCLUDED?

Stable housing is important to increase an individual's standard of living in the United States.<sup>61</sup> The Housing Act of 1937 asserts the United States' goal to provide decent and affordable housing for all citizens by enlisting the help of federal, state, and local governments to ensure that all citizens can access affordable housing.<sup>62</sup> Additionally, both public and private entities assist in implementing housing programs throughout the nation.<sup>63</sup> When the government is unable to provide housing, it looks for private landlords who are willing to work with constant government oversight and funding to provide more housing.<sup>64</sup> Almost two million

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workers-records/ [https://perma.cc/8MB5-6X4T] (considering "Ban the Box" as "a simple policy change that eases hiring barriers and creates a fair chance to compete for jobs.").

58. *Id.*

59. See Jessica Chinnadurai, Note, *Banning the Box in Missouri: A Statewide Step in the Right Direction*, 82 MO. L. REV. 863, 869 (2017) (emphasizing that the "Ban the Box" initiative forces "employers to evaluate the skills of the applicant before having an opportunity to make a stereotypical judgement about [previous] offenders"); Rebecca J. Wolfe, Comment, *Safest Port in the Storm: The Case for a Ban the Box Law in South Carolina*, 9 CHARLESTON L. REV. 503, 522 (2015) (indicating the two policy goals of the "Ban the Box" movement to be: 1) restricting how soon the employer views criminal history and 2) deterring the negative effects of an individual's criminal history).

60. See TRAN-LEUNG, *supra* note 30 at 10 (urging Public Housing Authorities to consider applications based on the likelihood of favorable conduct instead of focusing on past criminal behavior).

61. Carey, *supra* note 53 at 548.

62. United States Housing Act of 1937, 42 U.S.C. § 1437(a)(4) (2016).

63. See *id.* (asserting that there must be a national effort that involves both governmental and private action to provide affordable housing for all citizens); see also Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 117 (2015) (distinguishing Section 8 housing from general public housing since it is owned and operated by private landlords—yet both private and public entities are involved in housing programs).

64. See Lee, *supra* note 63 at 151 ("Private-sector landlords must be willing to endure bureaucratic hassles, additional inspections, and in many cases, below-market rents set by the government.").

individuals currently rely on public housing,—sixty-one percent of those individuals are minorities.<sup>65</sup>

#### A. *The Shift in Housing Laws*

Current housing laws throughout the nation impose discriminatory consequences towards those with criminal records.<sup>66</sup> At the federal level, there are two permanent bans on access to a federally funded housing program: (1) those convicted of manufacturing methamphetamine on a federally funded property<sup>67</sup> and (2) those required to register as sex offenders for life.<sup>68</sup> Sex offenders are left with limited housing because they are banned from the public sector and shunned from the private sector.<sup>69</sup> However, our focus throughout this piece will be on those convicted of drug offenses and other felonies.

Due to the effects of mass incarceration, the largest section of individuals released are those with drug-related convictions.<sup>70</sup> Since most drug-related convictions are not included in the permanent bans, these proposed policies are most beneficial to this targeted population.<sup>71</sup>

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65. *Assisted Housing: National and Local*, U.S. DEP'T OF HOUS. & URBAN DEV., <https://www.huduser.gov/portal/datasets/assthsg.html> [<https://perma.cc/VCQ7-J5E2>].

66. See U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 2 (Apr. 4, 2016) [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/G7JP-3SXC>] (acknowledging there are barriers to housing for those with criminal records); see also Hensleigh Crowell, *A Home of One's Own: The Fight Against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who Are Still Left Behind*, 95 TEX. L. REV. 1103, 1106 (2017) (“[D]iscrimination occurs in both public and private housing . . . regardless of whether the criminal record is evidence of a long past life or a reminder of the effects of drug addiction and poverty.”).

67. See 42 U.S.C. § 1437n(f)(1) (2012) (“[P]ermanently prohibit occupancy in any public housing dwelling unit . . . [A]ny person who has been convicted of manufacturing or otherwise producing methamphetamine on the premises in violation of any Federal or State law.”).

68. See *id.* § 13663(a) (“Notwithstanding any other provision of law, an owner of federally assisted housing shall prohibit admission to such housing for any house-hold that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program.”).

69. See Travis, *supra* note 14 at 24–26 (noting that sex offenders face unique challenges in public and private housing compared to those charged with different offenses).

70. See FED. INTERAGENCY REENTRY COUNCIL, *supra* note 1 at 8–9 (highlighting drug crimes as the leading crime with increased enforcement during the “tough on crime” era).

71. TRAN-LEUNG, *supra* note 30 at 7.

In 1988, Congress enacted the Anti-Drug Abuse Act, which strictly enforced leases and called for the eviction of tenants engaged in criminal activity.<sup>72</sup> This act granted public housing authorities (PHAs) the power to bar and evict any tenant or household member who engaged in criminal activity.<sup>73</sup> In 1996, President Bill Clinton spoke of a proposed “one-strike” rule at his State of the Union address.<sup>74</sup> Consequently, Congress passed the 1996 Housing Opportunity Extension Act, which excluded applicants based on their criminal records.<sup>75</sup> This policy led to a forty percent increase in evictions.<sup>76</sup> Landlords were encouraged to implement their own screening criteria and their funding was dependent on their effectiveness of screening applicants.<sup>77</sup> Further, landlords began to heavily rely on criminal background checks—arguing the results provided safe housing for their tenants.<sup>78</sup>

Housing and Urban Development (HUD) has called for PHAs and project owners to take an individualized approach when reviewing applications, but this goal has fallen short.<sup>79</sup> When examining applications, PHAs should examine each individual on a case-by-case basis taking into account the seriousness and recentness of the criminal

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72. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); *see* Carey, *supra* note 53 at 560.

73. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (“[A]ny member of the tenant’s household, or a guest or any other person under the tenant’s control shall not engage in criminal activity[.]”); *see also* Carey, *supra* note 53 at 560 (discussing that the act calls for strict lease enforcement and eviction for tenants who engage in criminal activity); Kropf, *supra* 29 at 78 (describing areas in which PHAs have disqualified applicants).

74. *See* President William J. Clinton, *State of the Union Address at the U.S. Capitol*, AM. PRESIDENCY PROJECT (Jan. 23, 1996), <https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-10> [<https://perma.cc/RU2N-K2CL>] (“If you break the law, you no longer have a home in public housing, one strike and you’re out.”).

75. Housing Opportunity Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).

76. *See* TRAVIS, *supra* note 12 at 232 (reporting 3,794 tenants were evicted six months after the “one strike” policy went into effect—a forty percent increase from before the implementation of the policy).

77. Carey, *supra* note 53 at 561.

78. *Cf. id.* at 560 (highlighting that every person has a right to housing that is decent and safe; and to ensure safe housing, housing authorities run a criminal background check on their applicants).

79. TRAN-LEUNG, *supra* note 30 at 9–10; *see* Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 47 (Marc Mauer & Meda Chesney-Lind eds., 2002) (stating that “any applicant whose background check indicates a history of criminal activity, no matter what kind or how remote the conviction” was being denied housing).

activity.<sup>80</sup> The previously incarcerated have a greater chance at receiving housing with an individualized approach of analyzing mitigating factors—such as the recentness of the criminal activity and the likelihood of favorable conduct.<sup>81</sup>

The Shriver Center conducted a national study where the Center examined admission policies of various public housing, Housing Choice Voucher, and project-based Section 8 programs across the country.<sup>82</sup> The study found that even though PHAs and project managers are provided with discretion, they are hesitant to provide housing to those with a criminal record.<sup>83</sup> Instead of implementing individualized screening, managers and housing authorities (HAs) drew strict lines on certain convictions, automatically preventing individuals from access to housing.<sup>84</sup>

For example, a property manager in Illinois had a zero-tolerance policy on drug convictions, regardless of how old the conviction was.<sup>85</sup> Similarly, an executive director of a New Hampshire Housing Authority said, “[a]nyone who has a criminal record with any sort of violence or drug-related crimes is pretty much excluded from getting housing.”<sup>86</sup> It is difficult for managers and HAs to accept such a risk when they lack an automatic benefit of renting to this population.<sup>87</sup> Without PHAs and project managers engaging in an individualized approach, federal law is not implemented to its full capability.<sup>88</sup>

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80. TRAN-LEUNG, *supra* note 30 at 9–10.

81. *Id.* at 30.

82. *Id.* at 4.

83. *See e.g., id.* at 10 (noting that a manager in Illinois recognized that he was given flexibility in interpreting the HUD guidelines; however, he elected not to modify too much from what HUD gave him).

84. *See id.* at 1, 10 (describing the unequivocal rejection many people with criminal records face); *see also* Rubinstein & Mukamal, *supra* note 79 (acknowledging housing authorities exclude applicants with any kind of criminal background).

85. TRAN-LEUNG, *supra* note 30 at 10.

86. *Id.*

87. *Cf.* Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 *Fed. Probation* 20, 21 (2007) [https://www.uscourts.gov/sites/default/files/71\\_1\\_4\\_0.pdf](https://www.uscourts.gov/sites/default/files/71_1_4_0.pdf) [<https://perma.cc/BP6C-H4C5>] (recognizing landlords constantly fear being held liable for the acts of third parties, therefore finding little incentive to rent to individuals with criminal records).

88. TRAN-LEUNG, *supra* note 30 at 9–10.

Public safety was at the forefront of many of these policies.<sup>89</sup> Landlords believed individuals with a criminal record are more likely to commit crimes on the property as opposed to individuals without a criminal record.<sup>90</sup> Landlords justify their discriminatory exclusions by saying they are protecting their tenants—but in reality, they are only trying to protect themselves.<sup>91</sup> There is a concern amongst landlords that if the previously incarcerated live on their property, landlords will be held liable for potential crimes against other tenants.<sup>92</sup> Landlords also fear that by accepting the previously incarcerated, they will lose business because people will not want to live next to a convicted criminal.<sup>93</sup> These fears acknowledge that there is much more than low availability of affordable housing that causes homelessness among the previously incarcerated.<sup>94</sup>

*B. A Glimpse of Hope: Fair Housing, Housing and Urban Development, and Disparate Impact Theory*

The Fair Housing Act (FHA) makes it unlawful to discriminate against any person on account of “race, color, religion, sex, familial status, or national origin.”<sup>95</sup> Unfortunately, this Act fails to prevent discrimination

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89. See Goldstein, *supra* note 45 at 952 (“[A]rguing that [criminal background checks] are necessary to protect the health and safety of the other renters and owners.”); see also Marie Claire Tran-Leung, *Beyond Fear and Myth: Using the Disparate Impact Theory Under the Fair Housing Act to Challenge Housing Barriers Against People with Criminal Records*, 45 CLEARINGHOUSE REV. 4 (2011) (“Housing providers often justify these policies with yet another myth—that screening tenants with criminal records improves residential safety.”).

90. *Evans v. UDR, Inc.*, 644 F.Supp.2d 675, 683 (E.D.N.C. 2009).

91. See Clark, *supra* note 87 (claiming landlords have a constant fear of being held liable for the acts of third parties); see also TRAVIS, *supra* note 12 at 234–35 (asserting that landlords often use the “one strike” policy as a “tool in their crime control toolkit,” but benefits have yet to be proven).

92. See Clark, *supra* note 87 (“[L]andlords greatly fear being sued by tenants or neighbors if criminal acts were to occur in the rental property . . .”).

93. See *id.* (asserting that landlords are concerned about their reputations in the community by being known as willing to rent to released offenders, consequently hindering the type of tenants they attract and who they retain).

94. See *id.* (discussing different reasons why landlords reject previously incarcerated individuals); see also Rubinstein & Mukamal, *supra* note 79 at 48 (arguing that exclusion from public housing puts a strain on homeless shelters, and people with criminal records resort to community shelters).

95. Fair Housing Act, 42 U.S.C. § 3604(b) (2012).

against individuals with a criminal record.<sup>96</sup> With no direct protection under the FHA, the previously incarcerated are reliant on the disparate impact theory in seeking relief.<sup>97</sup>

As we further understand the effects of mass incarceration, we begin to realize that people of color are targets of aggressive policing policies.<sup>98</sup> Black males are 11.8 times more likely to be imprisoned than White men of the same age.<sup>99</sup> If more people of color are imprisoned, then more people of color are leaving prison with the stigmatization of a criminal record.<sup>100</sup> A person of color's criminal record is in effect tied to their race—which is now a new form of discrimination.<sup>101</sup>

Under this new form of discrimination, the previously incarcerated struggled to find a way to challenge these discriminatory housing policies.<sup>102</sup> Since they were not a protected class under the FHA, they lacked a way to challenge their unfair treatment.<sup>103</sup> However, an opportunity finally arose after the case of *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* was decided, where the Supreme Court held that disparate impact claims are available under the FHA.<sup>104</sup>

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96. See Tran-Leung, *supra* note 89 (indicating there is no explicit provision within the FHA that protects those with criminal records).

97. See *id.* (explaining how the disparate impact theory will assist those with criminal records to challenge the FHA).

98. See Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 855 (2009) (“Blacks and Hispanics also have higher incarceration rates than whites.”).

99. E. ANN CARSON, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., PRISONERS IN 2016 (Jan. 2018), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=6187> [<https://perma.cc/G2CP-Z7ZN>]; see *id.* at 860 (“Blacks and Hispanics together account for about two-thirds of the state prison populations.”).

100. See Alexander, *supra* note 36 at 10 (“Those bearing criminal records and cycling in and out of prisons today are part of a growing undercaste—not class, caste—a group of people, defined largely by race, who are relegated to a permanent second-class status by law.”).

101. See *id.* (labeling mass incarceration as the New Jim Crow, where administrators and policies are finding new ways not to hold people of color as the same class as Whites merely by giving them a criminal record).

102. Cf. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 66 (stating that “having a criminal record is not a protected characteristic under the FHA”).

103. See *id.* (explaining the lack of protected status prevents the previously incarcerated from having standing to challenge the discrimination against them).

104. See 135 S. Ct. 2507, 2525 (2015) (reasoning the holding is supported by the Court’s previous interpretations of Title VII and the Age Discrimination in Employment Act of 1967).



Under a disparate impact liability claim, a plaintiff challenges practices that have a disproportionately adverse effect on minorities that cannot be justified by a legitimate rationale.<sup>105</sup> This case was instrumental in showing that there can be a new protected class of individuals in discrimination cases.<sup>106</sup> Although the case involved the discriminatory effect of the Department's tax credit allocation,<sup>107</sup> the United States Department of Housing and Urban Development (HUD) issued a guidance on the use of criminal records in housing applications.<sup>108</sup>

The HUD Guidance was an important shift in providing a legal remedy when housing providers violate the FHA by excluding individuals with criminal records.<sup>109</sup> As previously noted, African Americans and Hispanics are incarcerated at higher rates than the general population.<sup>110</sup> Therefore, conviction-based barriers disproportionately affect minority individuals seeking housing.<sup>111</sup> The HUD Guidance asserts that a housing provider violates the FHA when their policy or practice has an unjustified discriminatory effect, regardless of whether the provider had no intent to discriminate.<sup>112</sup>

Under this legal remedy, the court follows a three-step analysis to determine if housing providers are using criminal records in a discriminatory manner.<sup>113</sup> Step one places the burden on the plaintiff to prove the criminal history policy has a discriminatory effect.<sup>114</sup> This burden requires the plaintiff to provide evidence of local or national

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105. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2513 (2015).

106. *See id.* at 2525 (explaining how disparate treatment claims can be brought up by those discriminated for their previous incarcerations).

107. *Id.* at 2514.

108. *See* U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 66 at 1 ("HUD's Office of General Counsel issues this guidance concerning how the Fair Housing Act applies to the use of criminal history by providers or operators of housing and real-estate related transactions.").

109. *See id.* at 2 (describing the new shift for previously incarcerated individuals, and how they can now bring disparate treatment claims).

110. *Id.*; *see* Alexander, *supra* note 36 at 13 (discussing how drug wars are waged almost exclusively against poor communities of color).

111. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 66.

112. *Id.*

113. *Id.*

114. *See id.* at 3; *see also* 24 C.F.R. § 100.500 (2019) (codifying the three-step analysis and demonstrating the burden shifting in discriminatory effect claims).

statistics illustrating racial and ethnic disparities.<sup>115</sup> Step two shifts the burden to the housing provider to rebut and demonstrate that their challenged practice or policy has a justified purpose.<sup>116</sup> Many housing providers use the justification that most of their decisions are based on their duty to protect the residents and property.<sup>117</sup>

However, the HUD Guidance held: (1) a housing provider who denies an application based solely on arrests does not prove that they are assisting in protecting their residents and property;<sup>118</sup> (2) blanket provisions on individuals with any conviction record do not satisfy the housing provider's burden;<sup>119</sup> and (3) a housing provider fails to meet their burden if the policy or practice fails to take into account the nature and severity of the conviction.<sup>120</sup> Lastly, under step three, if the housing provider successfully proves that their practices and policies are necessary, the burden shifts back to the plaintiff to show there was another alternative with a less discriminatory effect.<sup>121</sup>

### C. HUD Guidance is Not Enough

Even though the HUD Guidance outlines a way for courts to analyze whether current policies and practices have a discriminatory effect, it still does not provide an adequate remedy to the previously incarcerated.<sup>122</sup> When issuing this legal guidance, HUD failed to do so under the requisite notice-and-comment rulemaking authority, therefore challenging its validity under the Administrative Procedure Act

115. See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 66 at 3 (discussing how statistics can help provide grounds for HUD to investigate).

116. *Id.* at 4.

117. See *e.g.*, Clark, *supra* note 87 (asserting landlords greatly fear being sued by tenants or neighbors if criminal acts were to occur in their rental property).

118. U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 66 at 5.

119. *Id.* at 6.

120. *Id.* at 7; *cf.* Green v. Mo. P. R. Co., 523 F.2d 1290, 1298 (8th Cir. 1975) (holding that barring employment opportunities based on criminal convictions is a violation of Title VII).

121. 24 C.F.R. § 100.500(c)(3) (2019); accord U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 66 at 7 (referencing the burden shifting standard in 24 C.F.R. §100.500).

122. See Goldstein, *supra* note 45 at 968–69 (arguing the HUD Guidance has left uncertainty because agencies struggle to determine if it should be considered a legislative or non-legislative rule and HUD'S failure to issue the legal guidance without notice and comment rulemaking puts its validity under attack and severely hinders its ability to assist the formerly incarcerated).

(APA).<sup>123</sup> The APA requires all federal agencies to provide the public with notice and allow individuals the opportunity to voice their concerns before administrative agencies create new regulations.<sup>124</sup> Failure to issue guidance in accordance with notice-and-comment rulemaking leaves the HUD Guidance open to challenge under the APA.<sup>125</sup>

Not only can the HUD Guidance be held unenforceable, it also runs on the hope that individuals will bring their claims to court and actually seek enforcement.<sup>126</sup> Often, it is difficult and expensive for individuals to file their claims, leaving the HUD Guidance ineffective.<sup>127</sup> In order to file a discrimination claim with the Office of Fair Housing and Equal Opportunity (FHEO), an individual must file the complaint within one year from the alleged discrimination.<sup>128</sup> If a complaint is filed with the FHEO, the individual may not receive a remedy, and if they do receive a remedy, it will take time to see any true results.<sup>129</sup> Under state and local fair housing laws, both HUD and the Fair Housing Assistance Program (FHAP) must complete their investigation within 100 days from the filing of a claim.<sup>130</sup> While the FHEO investigates to see if discrimination has

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123. *See id.* at 965 (arguing that without a uniform test to distinguish between legislative and non-legislative rules, there is no sure way to anticipate how a reviewing court would rule on HUD's legal guidance).

124. *See* Federal Administrative Procedure Act, 5 U.S.C § 553 (2020) ("General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.").

125. *See* Goldstein, *supra* note 45 at 976 (stressing HUD must pursue promulgation of either a legislative rule implementing the disparate impact standard as it did in its legal guidance, or attempt to promulgate a new, innovative rule that encompasses the ideas of the "Ban the Box" movement).

126. *Cf.* Alexander, *supra* note 11 (alleging the current criminal justice system is rigged to where individuals seldom use their constitutional right to a trial).

127. *Contra* *Learn About the FHEO Complaint and Investigation Process*, U.S. DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/complaint-process](https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process) [<https://perma.cc/Y5J9-ABKT>] (indicating that HUD attorneys will be assigned to represent a plaintiff before an administrative law judge hearing at no cost).

128. *Id.*

129. *See generally id.* (outlining the process of complaints and investigations, which notes that if an agreement fails to arise, the FHEO may bring a legal action to enforce compensation).

130. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUSING & EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS FY 2016 at 22 (Jan. 19, 2017), <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF> [<https://perma.cc/QU57-6T89>] [hereinafter *FHEO 2016 Report*].

occurred, HUD helps the parties come to an agreement.<sup>131</sup> This is a voluntary agreement that the parties are not required to accept.<sup>132</sup>

During the period of October 1, 2016, through September 30, 2017, the FHEO completed 7,985 investigations.<sup>133</sup> State and local agencies within FHAP assist HUD in investigating these complaints.<sup>134</sup> Of these complaints, \$8,907,003 of monetary relief was awarded in housing discrimination cases.<sup>135</sup> There were 2,132 complaints raised on the issue of “race” discrimination.<sup>136</sup> Notably, this was the second highest complaint raised to the FHEO, behind disability discrimination.<sup>137</sup>

HUD awards national and local fair housing organization grants to address violations of the FHA.<sup>138</sup> These grants provide a broader scope for locating areas in which violations occur.<sup>139</sup> During the 2016 fiscal year, HUD awarded grants to only four states that reported they would be updating their educational materials to include information on HUD’s criminal background guidance.<sup>140</sup> The FHEO 2017 Annual Report did not share summaries as to which states were awarded funding for Fair Housing Initiative Programs.<sup>141</sup> Without this information, we are unable

131. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 127.

132. *Id.*

133. U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUSING & EQUAL OPPORTUNITY ANNUAL REPORT TO CONGRESS FY 2017 at 4, [https://www.hud.gov/sites/dfiles/FHEO/images/FHEO\\_Annual\\_Report\\_2017-508c.pdf](https://www.hud.gov/sites/dfiles/FHEO/images/FHEO_Annual_Report_2017-508c.pdf) [<https://perma.cc/2SCH-PKAM>] [hereinafter *FHEO 2017 Report*] (reporting on the FHEO completed investigation statistics).

134. *Id.*

135. *Id.* (reporting the amount awarded to those who successfully argued housing discrimination cases).

136. *See id.* at 15 (reporting statistical data on table 2.1).

137. *Id.*

138. *See FHEO 2016 Report, supra* note 130 at 28 (reporting HUD awarded \$38 million to 155 national and local fair housing organizations to confront violations of the nation’s landmark Fair Housing Act).

139. *See id.* (informing that the Fair Housing Initiative Program provides funding to help establish new fair housing enforcement organizations and to build the capacity of existing organizations, particularly in areas of the country which are currently underserved by fair housing enforcement organizations, including rural areas or areas with a large number of recent immigrants).

140. *See e.g., id.* at 28–93 (listing FHAs that were awarded grants that would be used to address the new HUD criminal background guidance in New Orleans, LA; Boston MA; Portland, OR; and Washington, PA).

141. *See FHEO 2017 Report, supra* note 133 at 23–39 (showing each state’s grants and how much money the state is receiving but not where exactly that money will be going).

to see if states are trying to educate PHA or landlords on the new HUD Guidance.<sup>142</sup>

#### D. Public Housing in Texas

As of January 25, 2018, 7,638 people are homeless in Texas.<sup>143</sup> This was a seven-point increase from the previous year.<sup>144</sup> As the income gap between renters and owners continues to widen, the number of high-poverty neighborhoods continues to increase.<sup>145</sup> The housing prices are outpacing salaries, and consequently, people in Texas are struggling to keep up with the housing market.<sup>146</sup>

In the 2017 fiscal year, there were 869 total complaints filed to the FHEO in Texas.<sup>147</sup> This was a 303 complaint decrease from the 2016 fiscal year.<sup>148</sup> This decrease in discrimination complaints from 2016 to 2017 is surprising because the HUD Guidance recently affirmed that criminal records have a discriminatory effect on individuals.<sup>149</sup> The decrease is further surprising after the Texas Housing Authority conducted an anonymous survey with one public housing authority reporting that it “NEVER house[s] anyone who has an assault/bodily injury charge.”<sup>150</sup> This hostility towards the previously incarcerated needs to end.<sup>151</sup> Incarceration is much more than an individual

142. See *FHEO 2016 Report*, *supra* note 130 at 23–39 (failing to give more information than the organization and the amount each are receiving).

143. *2018 Point-in-Time*, TEX. BALANCE OF STATE, <https://infogram.com/final-pit-report-1hzj4ow8yxqp2pw> [<https://perma.cc/782B-YGMM>].

144. *Id.*

145. See Brandon Formby, et al., *Despite “Texas Miracle,” Affordable Housing Difficult for Many Urban Dwellers*, TEX. TRIBUNE (June 16, 2017), <https://www.texastribune.org/2017/06/16/search-affordable-home-urban-texas-getting-more-difficult/> [<https://perma.cc/ZLJ2-P2S7>] (explaining an increased income gap between renters and owners is commensurate to the number of high-poverty neighborhoods).

146. *Id.*

147. *FHEO 2017 Report*, *supra* note 133 at 44.

148. Compare *id.* (depicting 869 complaints brought in Texas in 2017), with *FHEO 2016 Report*, *supra* note 130 at 98 (providing a total of 1,172 complaints brought in Texas in 2016).

149. See generally *FHEO 2016 Report*, *supra* note 130 at 5 (explaining FHA’s treatment in connection with the utilization of criminal history information).

150. See TRAN-LEUNG, *supra* note 30 at 12 (emphasizing the refusal of housing for anyone with an assault or bodily injury charge).

151. See *FHEO 2016 Report*, *supra* note 130 at 5 (providing information that demonstrates the negative treatment towards individuals with a criminal history).

issue.<sup>152</sup> Incarceration has become a political structure used to discriminate and socially exclude minority individuals from fundamental needs.<sup>153</sup>

In an attempt to access barriers occurring within Austin/Travis County, the Austin/Travis County Reentry Roundtable published “Locked Out: Criminal History Barriers to Affordable Rental Housing in Austin & Travis County, Texas” (Locked Out).<sup>154</sup> This research followed the 2015 report, “When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing,” published by the Sargent Shriver National Center on Poverty Law.<sup>155</sup> Locked Out collected data from 80 of 113 identified multi-family affordable housing properties and it found the five barriers in current housing provider screening to be: (1) unavailability of written tenant selection criteria; (2) unreasonable lookback periods; (3) failure to consider mitigating circumstances; (4) equating arrests with convictions; and (5) overbroad categories of criminal activity.<sup>156</sup>

The Texas Property Code requires a landlord to “make available to the applicant printed notice of the landlord’s tenant selection criteria and the grounds for which the rental application may be denied.”<sup>157</sup> Of the eighty properties contacted, thirty-two provided incomplete or vague criminal screening criteria, and only one property posted tenant selection criteria on its website.<sup>158</sup> Vague criminal screening criteria fail to

152. See TRAVIS, *supra* note 12 at xvii (illustrating the impact incarceration has on society as a whole).

153. Cf. Lucy Gubernick, *Erasing the Mark of Cain: An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 FORDHAM URB. L.J. 1153, 1161 (2017) (illustrating criminal records in the labor market as a mechanism for discrimination and social exclusion created by the state).

154. AUSTIN/TRAVIS COUNTY REENTRY ROUNDTABLE, LOCKED OUT: CRIMINAL HISTORY BARRIERS TO AFFORDABLE RENTAL HOUSING IN AUSTIN & TRAVIS COUNTY, TEXAS 3 (Oct. 2016), [http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final\\_.pdf](http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf) [<https://perma.cc/ZDU4-2FNR>] [hereinafter *Barriers to Affordable Rental Housing*].

155. See generally TRAN-LEUNG, *supra* note 30 at 10 (serving as a foundation for the research in “Locked Out”).

156. See *Barriers to Affordable Rental Housing*, *supra* note 154 at 9, 15 (analyzing the five barriers individuals with a criminal record face in seeking housing with the current policies in Austin and Travis County).

157. Tex. Prop. Code Ann. § 92.3515 (2019).

158. *Barriers to Affordable Rental Housing*, *supra* note 154 at 9.

provide applicants with adequate notice of what is required of them.<sup>159</sup> One of the properties makes the Tenant Selection Plan available upon request—available for review at the office during normal office hours.<sup>160</sup> This limitation prolongs the application process and limits access to screening criteria to those with transportation.<sup>161</sup>

The second barrier involves unreasonable lookback periods.<sup>162</sup> Overall, the lookback periods for each offense varied greatly among the eighty properties.<sup>163</sup> “A ‘lookback period’ refers to the length of time that an offense remains relevant to the decision to accept or deny a request for housing.”<sup>164</sup> Locked Out compared the lookback periods of the eighty properties with the Housing Authority of the City of Austin (HACA) screening criteria used in its Housing Choice Voucher (HCV) program.<sup>165</sup> Five properties imposed a lifetime ban on drug-related activities, while twenty-one imposed a ten-year ban.<sup>166</sup> Most properties applied a ten-year lookback period or a lifetime ban on charges classified as violent criminal activity, while HACA only applied a four-year lookback period.<sup>167</sup> These discrepancies illustrate the subjective discretion housing providers retain to implement their own lookback periods.<sup>168</sup>

Currently, housing providers use third-party vendors to handle their screening.<sup>169</sup> This process denies applicants the opportunity to provide mitigating evidence of their current circumstances and efforts of rehabilitation.<sup>170</sup> These third-party vendors are found to make many

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159. *See id.* at 23 (“Without clear guidance, applicants with criminal records may elect to forgo federally subsidized housing altogether rather than endure an apparently fruitless process.”).

160. *See id.* at 9 (offering the very limited tenant screening criteria available in the discussion of only one property).

161. *See e.g., id.* at 10 (recognizing examples of impediments which inhibit access to screening criteria and prolongs the application process).

162. *See generally id.* (identifying the second key barrier affecting persons with criminal history).

163. *See id.* (“Overall, the lookback periods for each offense varied greatly, indicating how subjective assigning lookback period appears to be.”).

164. *Id.*

165. *Id.*

166. *Id.*

167. *See id.* at 11 (demonstrating the discrepancies between most parties and HACA).

168. *See id.* at 10 (drawing attention to the subjective discretion among housing providers).

169. *Id.* at 12.

170. *Id.*

mistakes in screening applicants, but only fifteen of the properties allow applicants to appeal their case.<sup>171</sup> Housing providers that allow an applicant to appeal their denial make it difficult to even reach the third-party providers.<sup>172</sup> Applicants are only given the contact information once their application is denied.<sup>173</sup> This post-denial access allows properties to collect application fees, taking advantage of low-income applicants with limited housing options.<sup>174</sup> Failure to allow mitigating evidence further stigmatizes applicants solely on their criminal record.<sup>175</sup>

The data provided by Locked Out led the Austin/Travis County Reentry Roundtable to issue the “Texas Criminal Background Screening Guide for Rental Housing Providers” (Screening Guide).<sup>176</sup> The Screening Guide provides landlords and property managers with guidance on how to best comply with the FHA and HUD Guidance.<sup>177</sup> The Screening Guide also helped define key terms identified as criminal activity.<sup>178</sup> This Guide stressed that an arrest is not a valid predictor of potential risk to resident safety and therefore should not be used in screening applicants.<sup>179</sup>

On a national level, housing providers were seeking guidance on what constituted “reasonable time” when examining criminal activity.<sup>180</sup>

171. *Id.*

172. *See id.* (“These practices offer applicants little means to correct these mistakes, with companies simply providing a toll free number to contact instead of being able to interact directly with a housing provider.”).

173. *Id.*

174. *Id.* at 12–13.

175. *Id.* at 11–12.

176. *See generally* AUSTIN/TRAVIS COUNTY REENTRY ROUNDTABLE, TEXAS CRIMINAL BACKGROUND SCREENING GUIDE FOR RENTAL HOUSING PROVIDERS (Apr. 2018), [https://www.reentryroundtable.net/wp-content/uploads/2018/04/Austin-Criminal-Background-Screening-Guidebook.final\\_.pdf](https://www.reentryroundtable.net/wp-content/uploads/2018/04/Austin-Criminal-Background-Screening-Guidebook.final_.pdf) [<https://perma.cc/LG4E-4A42>] [hereinafter *Screening Guide*] (expanding on “Locked Out” and fair housing and criminal record screening of publicly funded affordable housing in Austin).

177. *See generally id.* (seeking to find fair ways to implement criminal background checks on applicants while protecting landlords and the public).

178. *See id.* at 3–4 (highlighting arrests and deferred adjudication are not formal convictions).

179. *See id.* at 3 (following the Supreme Court’s recognition that, “the mere fact that man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”).

180. TRAN-LEUNG, *supra* note 30 at 9–15.



Seeking to provide more clarity, the Screening Guide prepared a table of suggested lookback periods based on specific types of crimes and convictions.<sup>181</sup> Generally, five to seven years is the recommended lookback period.<sup>182</sup> If an individual has not received any new offenses for at least seven years, then they are not likely to re-offend.<sup>183</sup> The suggested lookback periods provided in the Screening Guide were all under five years—with a maximum lookback period of four years.<sup>184</sup> The Screening Guide additionally states the triggering date as the date of conviction.<sup>185</sup> These clarifications and added guidance provide applicants easier access to housing because if the date of the individual's conviction falls outside of the lookback period, then the individual automatically passes the criminal background screening.<sup>186</sup>

The Screening Guide is an excellent example of how a city can research their current housing practices and provide housing providers with adequate guidelines.<sup>187</sup> The HUD Guidance provided a basic framework, but individually states need to provide housing providers with further guidance.<sup>188</sup> Though states can provide guidelines and education for their housing providers, the published guidebooks are not binding—they are merely suggestions.<sup>189</sup>

### III. “BAN THE BOX” ON EMPLOYMENT APPLICATIONS

As the HUD Guidance continues to be labeled as optional, the previously incarcerated continue to lack an adequate remedy to secure stable housing.<sup>190</sup> One solution is to implement “Ban the Box” to current

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181. *Screening Guide*, *supra* note 176 at 5, 11.

182. *Barriers to Affordable Rental Housing*, *supra* note 154 at 10.

183. *Id.*

184. *See Screening Guide*, *supra* note 176 at 5 (listing the max lookback period as four years for the following crimes: use of a firearm against a person offenses, armed robbery offenses, intentional homicide offenses, manslaughter offenses, kidnapping and abduction offenses, forcible sex offenses, and arson related offenses).

185. *Id.* at 6.

186. *Id.*

187. *See generally id.* (containing information on housing practices within the city).

188. *Cf. id.* (providing clarity to Texas housing providers on how to implement and abide to the Federal Housing Act and HUD Guidance).

189. *See id.* (introducing the Criminal Background Screening Guide as a form of instruction).

190. *See Goldstein*, *supra* note 45 at 968–969 (elaborating on the unfortunate effects of optional legal guidances).

housing applications.<sup>191</sup> When labor laws began shifting in employment discrimination, “Ban the Box” became a new remedy for individuals seeking employment.<sup>192</sup> “Ban the Box” will provide more structure to PHAs and landlords and make it easier to recognize discriminatory effects.<sup>193</sup> We must first understand what the “Ban the Box” movement is and how it can be implemented into housing.<sup>194</sup>

“All of Us or None” is a grassroots civil and human rights organization fighting for the rights of the currently and previously incarcerated.<sup>195</sup> In 2004, the All of Us or None Organization formed the “Ban the Box” movement to combat employment discrimination the previously incarcerated were facing once released.<sup>196</sup> Focusing on government and public hiring agencies, the campaign challenged employers to look at more than just convictions and see the many ways the applicant can contribute to the business.<sup>197</sup> “Ban the Box” is currently implemented at the state and local level through different ordinances and statutes.<sup>198</sup> This provides cities flexibility in implementing the program in a way that best fits each of their needs.<sup>199</sup>

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191. Gubernick, *supra* note 153.

192. *See id.* at 1175 (signifying that though history once “made it unnecessary to enact laws targeting discrimination based on race and criminal records, the contemporary legal climate requires an alternative avenue to combat such discrimination.”).

193. *Id.* at 1183.

194. *See* Fair Housing Act, 42 U.S.C. § 3604(b) (2012) (making occupancy policies that use criminal records as a pretext for intentional discrimination a violation of the FHA under a disparate treatment theory of liability).

195. *See All of Us or None*, LEGAL SERV. FOR PRISONERS WITH CHILD., <https://www.prisonerswithchildren.org/our-projects/allorus-or-none/> [https://perma.cc/HQ9M-ZQLZ] (advocating for the voices of those who have been incarcerated and affected by mass incarceration).

196. *See* ALL OF US OR NONE, *supra* note 21 (addressing the goal the “Ban the Box” campaign seeks to accomplish).

197. *See id.* (advocating for employers to look at the present qualifications of an applicant instead of focusing on their past convictions).

198. *See* Chinnadurai, *supra* note 59 at 870 (providing an outlook on how the “Ban the Box” provisions are being implemented throughout the country); *see also* Wolfe, *supra* note 59 (proving the “Ban the Box” movement has impacted the way employers conduct their application process against individuals with criminal histories); ALL OF US OR NONE, *supra* note 21 (explaining how the impact of the organization has grown throughout the state).

199. *See* Wolfe, *supra* note 59 at 525–26 (explaining how “Ban the Box” varies between the “type of employer covered, the type of position that is covered, the stage in the hiring process at which criminal background information can be obtained, and how much guidance is provided to employers”).

Though the “Ban the Box” regulation comes in many forms, they all prohibit “the employer from inquiring into the initial application until either after the interview or after a conditional job offer is made.”<sup>200</sup> One misconception is that the “Ban the Box” movement prohibits employers from running background checks on interested applicants altogether.<sup>201</sup> However, this policy merely delays when the employer can run a background check on the application, it does not completely ban criminal background checks.<sup>202</sup> Criminal background checks can be important in providing some sense of security in the individuals that are being hired—but it should not be the only factor that is taken into account.<sup>203</sup>

Critics of the “Ban the Box” movement argue that this new policy increases the costs of doing business.<sup>204</sup> They argue the costs of business will increase as litigation rises due to the possibility of crimes and theft at work.<sup>205</sup> These misguided critics believe that they are doing the applicants a favor by saving them time and money by doing the background check early in the process.<sup>206</sup> These critics also argue that by implementing the background check at the beginning of the application process, the applicant need not go through the whole application merely to be rejected in the end.<sup>207</sup> What these critics fail to

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200. See Adriel Garcia, *The Kobayashi Maru of Ex-Offender Employment: Re-Writing the Rules and Thinking Outside Current “Ban the Box” Legislation*, 85 TEMP. L. REV. 921 (2013) (explaining the limits employers face when they inquire into an applicant’s criminal background).

201. See Wolfe, *supra* note 59 at 527 (stating how employers are still able to conduct background checks).

202. See *id.* (indicating how the laws implemented postpone background checks until the “employer has had an opportunity to gauge an individual’s skills and qualifications apart from any potential bias or stereotypes”).

203. See Avery, *supra* note 19 (providing a broader insight on how each state in the United States has its own “Ban the Box” policies in regard to criminal background checks).

204. See Christina Stacy & Mychal Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, URBAN INST. 8 (Feb. 2017), [https://www.urban.org/sites/default/files/publication/88366/ban\\_the\\_box\\_and\\_racial\\_discrimination.pdf](https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination.pdf) [<https://perma.cc/9358-7E5D>] (explaining how some employers do not believe in the “Ban the Box” movement because it is fiscally ineffective).

205. See *id.* (addressing the possibility of an increase in litigation because of hiring through the “Ban the Box” policy).

206. See *id.* (demonstrating the misconception that conducting background checks in the preliminary process is beneficial to the applicant).

207. See *id.* (explaining how critics think a preliminary background check would be more time efficient for the applicant).

recognize, however, is the potential positive impacts “Ban the Box” can have on the previously incarcerated.<sup>208</sup>

There is currently mixed evidence as to whether “Ban the Box” has had positive effects on the employment of those with a criminal record.<sup>209</sup> On the one hand, some studies suggest that it increases callback rates for people with a criminal record.<sup>210</sup> On the other hand, some studies are concerned that it has led to more blatant racial discrimination.<sup>211</sup> By postponing criminal background checks, employers have the opportunity to deny employment based on race.<sup>212</sup> Sociological studies have proven that with or without a conviction record, people of color are still less likely to be hired compared to convicted Whites.<sup>213</sup> In the United States, there are still forms of underlying racist policies.<sup>214</sup> “Ban the Box” cannot cure all forms of racism, but it will begin the conversation on needed change.<sup>215</sup> Since these policies are still fairly new, studies are still needed to fully understand the overall impact the “Ban the Box” movement has in obtaining employment for the criminally convicted.<sup>216</sup>

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208. See Daryl V. Atkinson & Kathleen Lockwood, *The Benefits of Ban the Box*, S. COAL. FOR SOC. JUST. <https://docs.house.gov/meetings/GO/GO00/20190326/109189/HMKP-116-GO00-20190326-SD013.pdf> [<https://perma.cc/PL9Y-S6MN>] (providing evidence on how employees with criminal backgrounds are an asset to the employer because they tend to be more productive).

209. See Stacy & Cohen, *supra* note 204 at 9 (showing mixed emotions towards the “Ban the Box” movement).

210. See, e.g., *id.* at 10 (providing statistical evidence which shows how the “Ban the Box” policies positively impacts callbacks for individuals who have a criminal background).

211. See Chinnadurai, *supra* note 59 at 876 (providing information of employers who inadvertently discriminate on the basis of race in the application process).

212. See *id.* (emphasizing how the “Ban the Box” policy can have discriminatory impacts on an applicant based on their race).

213. See *Mark of a Criminal Record*, *supra* note 44 at 958 (explaining statistical evidence which shows that discrimination occurs whether or not a person has a criminal background).

214. Cf. Kropf, *supra* note 29 at 79 (“[A] Black person returning from prison today ‘can be denied right to vote, automatically excluded from juries, and legally discriminated against in employment, housing, access to education, and public benefits, much as their grandparents and great-grandparents were during the Jim Crow Era’”).

215. See *Mark of a Criminal Record*, *supra* note 44 at 960 (arguing a strong position on the debate “over the extent to which contact with the criminal justice system—in itself—leads to harmful consequences for employment”).

216. See Stacy & Cohen, *supra* note 204 at 11 (suggesting there is a lack of evidence revealing the effects the “Ban the Box” policies have on actual job offers to people with criminal records).

Due to differing policies between states and cities, it can be difficult to discern which policy is the most effective.<sup>217</sup> The National Employment Law Project has set out a guideline titled, “Best Practices and Model Policies” for when a state or city is looking to create their own Fair Chance Policy.<sup>218</sup> Some key elements that make a “Ban the Box” policy effective are: (1) banning the box on job applications to prevent inquiries into a conviction history; (2) limiting the access to background checks of arrests that do not result in convictions, or where they were sealed, dismissed or expunged, and misdemeanors where there was no jail sentence; (3) only considering convictions that have a direct relation to the duties and responsibilities of the job; (4) allowing the applicant to submit evidence of mitigation and rehabilitation if a background check is required; and (5) holding the position open until the review has been completed.<sup>219</sup> These key elements need to be implemented as the same policies for housing applications.<sup>220</sup>

#### IV. “BAN THE BOX” IS ESSENTIAL IN HOUSING APPLICATIONS

##### A. *Housing is Vital to the Reintegration of the Previously Incarcerated*

As we deal with the negative effects of mass incarceration, we must focus on reintegrating and lowering the recidivism of the previously incarcerated.<sup>221</sup> Approximately two-thirds of those released from prison will be rearrested within three years.<sup>222</sup> In 2017, the total number of

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217. See Chinnadurai, *supra* note 59 at 870 (illustrating the different “Ban the Box” legislations that vary across the United States).

218. See Michelle N. Rodriguez, *Best Practices and Model Policies: Creating a Fair Chance Policy*, NAT’L EMP’T L. PROJECT (Apr. 2015), <https://www.nelp.org/publication/best-practices-model-fair-chance-policies/> [<https://perma.cc/P5LL-9UN2>] (establishing the guidelines, including sample language and principles to follow when crafting a fair chance policy).

219. See *id.* at 1, 5 (listing principals for crafting a successful “Ban the Box” policy).

220. See *id.* at 7 (noting people with records experience extreme discrimination on housing applications as well as employment applications).

221. See Chinnadurai, *supra* note 59 at 872 (justifying “Ban the Box” because full time employment is a successful predictor that a person will not reoffend).

222. See *id.*; see also TEX. DEP’T OF CRIM. JUST., FY 2016 STATISTICAL REPORT 35, [https://www.tdcj.state.tx.us/documents/Statistical\\_Report\\_FY2016.pdf](https://www.tdcj.state.tx.us/documents/Statistical_Report_FY2016.pdf) [<https://perma.cc/BY2F-6SST>] (reporting 69,664 as the total number of Texas Department of Criminal Justice releases and departures in the 2016 Fiscal Year); Carson, *supra* note 99 (reporting 52,035 as the total number of individuals released from Federal correctional authorities in 2016).

people experiencing homelessness was roughly 553,742.<sup>223</sup> Amongst the homeless, the formerly incarcerated are almost ten times more likely to be homeless than those without a record.<sup>224</sup> As an increasing amount of people are released from prison, society is incapable of providing resources for the previously incarcerated.<sup>225</sup> Ensuring that the previously incarcerated have access to housing when released is dependent upon affordable housing options and the willingness of landlords to accept those with a criminal record.<sup>226</sup>

Immediate housing is vital for ensuring that the previously incarcerated fully reintegrate back into society.<sup>227</sup> Research has proved that there is a relationship between housing instability and criminal recidivism.<sup>228</sup> The first two years after being released are critical in predicting recidivism.<sup>229</sup> Released prisoners on probation were almost twice as

223. HUD 2017 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, U.S. DEP'T OF HOUS. & URBAN DEV. (Nov. 7, 2017), [https://files.hudexchange.info/reports/published/CoC\\_PopSub\\_NatlTerrDC\\_2017.pdf](https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2017.pdf) [<https://perma.cc/J8YV-J6V6>].

224. See Couloute, *supra* note 49 at 1 (showing data from 2008—the most recent year for which this data is available).

225. See Kropf, *supra* note 29 at 83 (“[P]eople with criminal records are systematically barred from many of the resources essential to successful reintegration.”); see also Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL’Y 139, 140 (2004) (“Escalating imprisonment rates have led to increasing numbers of released prisoners and fewer available resources for facilitating their reintegration.”).

226. See Clark, *supra* note 87 (examining the landlord’s perspective when housing the previously incarcerated and finding though the cost of housing is a significant barrier, the previously incarcerated have to combat the lack of willingness landlords have in renting to them).

227. See Katharine H. Bradley et al., *No Place Like Home: Housing and the Ex-prisoner*, CMTY. RES. FOR JUST. 7 (Nov. 2001), [https://pdfs.semanticscholar.org/a734/bbdae284b80eb9598e64ad83a431580e749c.pdf?\\_ga=2.42753254.21915258.1589321887-192633002.1589321887](https://pdfs.semanticscholar.org/a734/bbdae284b80eb9598e64ad83a431580e749c.pdf?_ga=2.42753254.21915258.1589321887-192633002.1589321887) [<https://perma.cc/24X6-JMCN>] (“Housing is the lynchpin that holds the reintegration process together.”); see also Couloute, *supra* note 49 (emphasizing the foundational aspect of having a home for reintegration and noting this need must be addressed before finding a job, addressing health problems, or gaining new skills).

228. See Kristen M. Zgoba, Jill Levenson & Tracy McKee, *Examining the Impact of Sex Offender Residence Restrictions on Housing Availability*, 20 CRIM. JUST. POL’Y REV. 91, 93–94 (2009) (“An unstable living arrangement was the strongest predictor of parole absconding of a sample of more than 4,000 parolees in California.”).

229. See Couloute, *supra* note 49 (“[P]eople who spent two years or less in the community were more than twice as likely to be homeless as those who had been out of prison for four years or longer.”).

likely to have disciplinary hearings due to their lack of housing.<sup>230</sup> If left homeless, those previously incarcerated run the risk of becoming one of the forty percent rearrested and incarcerated within the first year of release.<sup>231</sup> Most of the focus on lowering recidivism is increasing employment,<sup>232</sup> but housing is the second most important factor affecting recidivism.<sup>233</sup>

Housing will differ based on the needs among the formerly incarcerated.<sup>234</sup> Among the formerly incarcerated, there are three groups of individuals: (1) low need; (2) moderate need; and (3) high need.<sup>235</sup> The two groups that would benefit the most from the “Ban the Box” movement would be those in the low and moderate need groups.<sup>236</sup> Low need individuals are relatively self-sufficient.<sup>237</sup> They are able-bodied and employable but face a short-term affordability gap.<sup>238</sup> Moderate

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230. See Zgoba, Levenson & McKee, *supra* note 228 at 94 (referring to probationers whose housing arrangements were instable because they had moved more than one time during their probation period).

231. See MARIEL ALPER & MATTHEW R. DUROSE, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) at 1 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/Z9KY-6KLN>] (“About 4 in 9 (44%) prisoners released in 2005 were arrested at least once during their first year after release.”); see also Couloute, *supra* note 49 (stating up to 15% of previously incarcerated people are homeless in the year before they go back to prison).

232. See Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 10 (2014) (emphasizing employment discrimination as the “most serious and pervasive collateral consequence faced by former prisoners” and further stating unemployment is the highest risk for recidivism); see also Western & Wildeman, *supra* note 98 at 852 (indicating employment opportunities as a factor which will reverse the effects of mass incarceration).

233. Bell, *supra* note 232 at 11.

234. See Jocelyn Fontaine, *Examining Housing as a Pathway to Successful Reentry: A Demonstration Design Process*, URBAN INST. 3–5 (Nov. 2013), <https://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF> [<https://perma.cc/9GPG-HV97>] (asserting that individuals released from prison need different post-release housing support).

235. See *id.* at 5 (exhibiting the three levels of needs we tend to see among the formerly incarcerated).

236. See *id.* at 3–5 (demonstrating that high need individuals tend to have significant disabilities and/or behavioral health issues, who will need longer-term services).

237. See *id.* at 5 (stating that low need individuals are self-sufficient).

238. See *id.* (analyzing how people in the low need category may also desire to leave their former neighborhood).

need individuals have limited employment histories and prospects.<sup>239</sup> They may suffer from some substance abuse, but with a good network, they may be able to get back on track.<sup>240</sup>

With small ordinances and laws being strictly enforced, the previously incarcerated have a target on their backs for reincarceration.<sup>241</sup> Housing ensures that at the very least, there is a place to go to at night, to sleep, to take care of hygienic needs in privacy, and to be an example for their children.<sup>242</sup> Housing is also not an individualized issue, it affects families as well.<sup>243</sup> Paternal incarceration is linked to increased housing instability, food insecurity, behavioral problems, and poor physical and mental health outcomes for children.<sup>244</sup> Their criminal record can further inhibit their family by getting them evicted from public housing.<sup>245</sup> If the individual's family is living in Section 8 housing, the formerly incarcerated may be forbidden from living with their family.<sup>246</sup> This can apply to those living in private apartments.<sup>247</sup> Individuals with a criminal record have just as much responsibility to provide for their families as any other parent.<sup>248</sup>

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239. *See id.* (explaining the needs of moderate individuals).

240. *See id.* at 6 (using substance abuse as an example of when risk level for recidivism and need factors do not necessarily align in an individual).

241. *See* Couloute, *supra* note 49 (emphasizing police officers are aggressively enforcing “offenses” such as sleeping in public spaces, panhandling, and public urination).

242. *See* CHRIS GARDNER, *THE PURSUIT OF HAPPYNESS* 6 (2006) (sharing the personal account of Chris Gardner, an individual struggling to find employment and take care of his son, all while homeless. Often times, Chris would find himself in the public bathroom of an Oakland BART station. The small restroom “represented both [his] worst nightmare of being confined, locked up, and excluded, while at the same time, a true godsend of protection where [he] could lock the door and keep the wolves out.” The public restroom was where he could get himself and his son washed up the best they could).

243. FED. INTERAGENCY REENTRY COUNCIL, *supra* note 1 at 4.

244. *Id.*

245. Erica Surprenant, *A New Start: A Re-entry Guide for Texas, Key Information for Successful Reintegration*, TEX. CRIM. JUST. COAL. 9 (2010), [http://www.tdcj.state.tx.us/documents/rid/RID\\_Article\\_A\\_New\\_Start.pdf](http://www.tdcj.state.tx.us/documents/rid/RID_Article_A_New_Start.pdf) [<https://perma.cc/J4Q7-KWLL>].

246. *See* Dep’t of Hous. v. Rucker, 535 U.S. 125, 128, 130 (2002) (holding 42 U.S.C § 1437(d)(1)(6) gives public agencies authority to terminate tenancies if any member of the household engaged in criminal activity, whether or not the tenant knew or should have known about the activity); *see also id.* (explaining the struggles of reintegrating into society, especially in relation to the previously incarcerated being reunited with his or her family).

247. Surprenant, *supra* note 245.

248. *Id.*



When leaving prison, the previously incarcerated are usually released back into poor, ethnic neighborhoods.<sup>249</sup> This can be an issue when they are trying to stay away from crime.<sup>250</sup> Often, individuals are released and then return to their “neighborhood, attempt to change, find few alternatives,” only to return to their old ways.<sup>251</sup> The youth in the community then become surrounded by individuals who are constantly involved with the prison system.<sup>252</sup> In the end, the youth become the new generation of incarcerated.<sup>253</sup> Many factors come into play for successful reentry, and housing is just one of them.<sup>254</sup>

Currently, the United States is facing a housing crisis where both the poor and the working class are unable to afford housing.<sup>255</sup> If the working class are unable to find housing, the previously incarcerated are at a much greater risk of finding housing.<sup>256</sup> When leaving prison, the previously incarcerated seek public housing because it is one option within their means.<sup>257</sup> If those without a criminal record are struggling to find housing, then the previously incarcerated are at the bottom of the

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249. Cf. Fontaine, *supra* note 234 at 2 (elaborating on how reliance on family and friends is not ideal for those returning from prison because their families may be facing their own criminal histories and service needs).

250. See generally Surprenant, *supra* note 245 at 6–10 (explaining the different obstacles that the incarcerated face once leaving prison and attempting to reintegrate back into society).

251. See VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 36 (2011) (following four young men in an ethnographic study to understand the effects of criminalization on young men in Oakland and providing the account of an author who immersed himself into the community with the young men and got first-hand experience on how deeply incarceration has affected these youth); see also TRAVIS, *supra* note 12 at 221 (sharing a testimony from an “exit orientation” interview with an ex-prisoner who acknowledged, “I know if I go live with [family] now, before I can be a productive member of the household, paying my share of the rent, I will feel dependent on them. And I will fail. I know I can only cope if I am a full member of the family.”).

252. RIOS, *supra* note 251.

253. *Id.* at 36–37.

254. Bell, *supra* note 232.

255. See Carey, *supra* note 53 at 549 (stating that the United States is currently facing a housing crisis because their supply of affordable housing is incapable of meeting the demand and because “[a] growing number of Americans, including many who work full-time, are unable to rent—much less own—their own homes.”); see also TRAVIS, *supra* note 12 at 228 (addressing the decline in public housing that has increased the waiting list to nearly a million families).

256. Couloute, *supra* note 49.

257. See TRAVIS, *supra* note 12 at 223 (acknowledging that one of the barriers former prisoners face when seeking access to private housing is money).

list to be considered.<sup>258</sup>

## V. MAKING “BAN THE BOX” SUCCESSFUL

### A. *Four Areas That Must Change with the Implementation of “Ban the Box”*

“Ban the Box” in employment has experienced some momentum at both the state and local level.<sup>259</sup> In the beginning stages, “Ban the Box” for housing can be implemented at the local level.<sup>260</sup> Often, state and local governments are hesitant to implement something new if they have not seen the benefits yet.<sup>261</sup> If implemented at the local level, a law must pass to ensure that housing providers have an outline to comply with.<sup>262</sup> By implementing “Ban the Box” at a smaller scale, the policy can have a test run to ensure that all the quirks are identified and dealt with.<sup>263</sup>

Several issues arose as landlords struggled to screen applicants.<sup>264</sup> HUD does not appreciate bright-line rules and automatic denials and yet, they continue to exist.<sup>265</sup> Marie Claire Tran-Leung published a report with the Sargent Shriver National Center on Poverty Law assessing over 300 written admissions policies on a national level and identified certain areas where PHAs and project owners erred.<sup>266</sup> The report analyzed the admissions policies of various public housing, housing choice vouchers, and project-based Section 8 programs across the country.<sup>267</sup> The following four areas are where written admissions policies tend to be

258. See Carey, *supra* note 53 at 554 (“To some extent, HUD is merely indicating that it makes sense to exclude those who will be problem tenants.”).

259. See ALL OF US OR NONE, *supra* note 21 (reporting there are currently 45 cities and counties that have removed the question regarding criminal history from their employment applications; seven states have changed their hiring practices in public employment).

260. *Id.*

261. *Cf.* Clark, *supra* note 87 (stressing landlords’ hesitance in implementing a program with increased liability and no clear benefit).

262. See ALL OF US OR NONE, *supra* note 21 (demonstrating that change at the local and state level has been successful to the “Ban the Box” campaign).

263. *Cf.* TRAVIS, *supra* note 12 at 247 (encouraging prisons and parole agencies to embrace the goal of ensuring “that no prisoner is released homeless,” and stating that once they attempt to meet this goal, there will be community support that they never existed).

264. TRAN-LEUNG, *supra* note 30.

265. *Id.* at 3.

266. *Id.* at 4.

267. *Id.*

overly restrictive on applicants with a criminal record: (1) the use of long lookback periods for determining whether past criminal activity is relevant to the admissions decision; (2) the use of arrests without subsequent convictions as proof of past criminal activity; (3) the use of overbroad categories of criminal activity that sweep in activity tenuously related to the housing provider's public safety interest; and (4) the underuse of mitigating evidence as a means for overcoming criminal records-based denials.<sup>268</sup> When constructing future "Ban the Box" laws in housing, these four areas must be addressed.<sup>269</sup>

Congress has directed PHAs and project owners to only consider criminal activity that has occurred within a "reasonable time" before applicants submitted their applications.<sup>270</sup> After a "reasonable time" has passed, applicants can then submit evidence proving that they are no longer involved in criminal activity.<sup>271</sup> Unfortunately, PHAs and project owners extended their lookback periods and have made them limitless.<sup>272</sup> HUD has asserted the need to limit lookback periods because the relevance of a criminal record diminishes over time.<sup>273</sup> By having limitless lookback periods, a person could have committed a crime over twenty years ago and yet still be denied housing.<sup>274</sup> In establishing the "Ban the Box" initiative, it is important to set a

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268. *Id.*; see TRAVIS, *supra* note 12 at 231 (acknowledging the power PHAs have in evicting individuals; a conviction is not required, the criminal activity does not need to be recent, the entire family can be evicted).

269. TRAN-LEUNG, *supra* note 30 at 4.

270. See 42 U.S.C. § 13661(c) (2012) (instructing PHAs—when reviewing whether an applicant is or was engaged in criminal activity—that a reasonable time precedes the date when an applicant would be selected for admission).

271. See *id.* § 13661(c)(2) (requiring applicants to submit evidence to the public housing agency or owner that they no longer engage in criminal activity).

272. See TRAN-LEUNG, *supra* note 30 at 11 (explaining that many PHAs and project owners have failed to include lookback periods).

273. *Id.*; see, e.g., Memorandum from Thomas J. Coleman, Regional Counsel, HUD Region VII at 5 (Feb 4, 2010), <https://www.hud.gov/sites/documents/CRIMINALBGSCREENING.PDF> [<https://perma.cc/Q9WQ-AN9D>] (advising, when it comes to pre-admission criminal activity denials, that, for example, if an applicant was convicted in arm robbery in 1998, but has "not engaged in criminal activity since that time and has otherwise been a good resident," the landlord can reasonably decide to give admission).

274. See e.g., TRAVIS, *supra* note 12 at 235 (illustrating that a crime committed over forty years ago should not be the sole reason someone is denied housing); see TRAN-LEUNG, *supra* note 30 at 12, 26 (demonstrating that some PHAs will look as far back as twenty years when looking at an applicant's criminal history).

reasonable lookback time period.<sup>275</sup> If left vague, PHAs and project owners will continue to abuse their discretion when screening.<sup>276</sup> A reasonable time period would be between one and three years.<sup>277</sup> This shorter time frame makes housing more attainable—rather than setting up released individuals to be homeless.<sup>278</sup>

The second issue involves denying housing to individuals who were never convicted of an offense but were merely arrested.<sup>279</sup> An arrest does nothing more than show “that someone probably suspected the person apprehended of an offense.”<sup>280</sup> By focusing on an arrest record, minorities are disparately impacted because they have higher arrest rates than the general population.<sup>281</sup> New “Ban the Box” laws must prohibit PHAs and project owners from using an arrest record as a factor when

275. See 24 C.F.R. § 5.855(b) (2019) (“You may establish a period before the admission decision during which an applicant must not have engaged in the activities specified in paragraph (a) of this section (reasonable time).”); see also U.S. DEP’T OF HOUS. & URBAN DEV., HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 257 (Nov. 2013), [https://www.hud.gov/program\\_offices/administration/hudclips/handbooks/hsg/4350.3](https://www.hud.gov/program_offices/administration/hudclips/handbooks/hsg/4350.3) [<https://perma.cc/SB6W-3MQR>] (“For those behaviors that would result in denial for a “reasonable time,” the owner must define a reasonable period in the tenant selection plan.”).

276. TRAN-LEUNG, *supra* note 30 at 12.

277. See 42 U.S.C. § 13661(a) (2012) (illustrating Congress’ reasoning that three years is a reasonable time period for drug-related criminal convictions). *But see* 66 Fed. Reg. 28,776, at 28,779 (May 24, 2001) (to be codified at 24 C.F.R. pt. 5) (“HUD considers that five years may be a reasonable period for serious offenses.”).

278. See TRAN-LEUNG, *supra* note 30 at 13 (“[S]ome PHAs and project owners are eschewing overly long lookback periods, which leads to a more realistic opportunity for applicants to overcome their past criminal histories in their search for affordable housing.”).

279. See OFFICE OF PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 3 (Nov. 2, 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/W65X-RLJB>] (emphasizing that arrests do not show if a person is guilty of a crime, but rather show if a person is culpable for a crime, and such arrests may be dismissed or lead to no convictions); see also TRAVIS, *supra* note 12 at 231 (noting that individuals are denied housing and are evicted even if there was no conviction).

280. *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 241 (1957).

281. See SENT’G PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 6 (2d ed., 2008), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf> [<https://perma.cc/LZL4-LEZC>] (informing minorities with arrest records are more likely to get rearrested and receive a higher sentencing).

denying housing.<sup>282</sup>

Not only have arrest records been overused, but PHAs and project owners have created overbroad categories of criminal activities that deny admission.<sup>283</sup> Vague screening bans deter applicants from seeking public housing altogether.<sup>284</sup> HUD currently grants PHAs and project owners the ability to create screening policies for drug-related criminal activity, violent criminal activity, and criminal activity that poses a threat to the health, safety, and welfare of other residents.<sup>285</sup> In order to ensure that not everyone with a criminal record is being screened out, “Ban the Box” laws must ensure that these categories are narrowly tailored and defined.<sup>286</sup>

Lastly, PHAs and project owners have failed to take into account mitigating circumstances.<sup>287</sup> Providing mitigation evidence allows applicants to prove that they are more than what their criminal record defines them to be.<sup>288</sup> In refusing to accept mitigating evidence, PHAs and project owners are contributing to the increase in homelessness.<sup>289</sup> For example,

a mother applied for a Housing Choice Voucher to reunite with her son and avoid becoming homeless. The housing authority rejected her application

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282. See OFFICE OF PUB. & INDIAN HOUS., *supra* note 279 at 2 (reminding PHAs and owners of their obligation to follow federal laws and regulations when admitting occupants).

283. TRAVIS, *supra* note 12 at 231.

284. TRAN-LEUNG, *supra* note 30 at 23–24.

285. 24 C.F.R. § 960.203(c) (2019).

286. TRAN-LEUNG, *supra* note 30 at 28.

287. See 24 C.F.R. § 960.203(d) (2019) (permitting PHAs to consider evidence of rehabilitation for individuals previously involved in illegal drug use or have a pattern of illegal drug use); see also *id.* at 29 (allowing an applicant to present evidence that he is rehabilitated and reformed aligns with HUD’s view of giving second chances to people with criminal records).

288. See 24 C.F.R. § 960.203(d)(1) (2019) (“[C]onsideration may be given to factors which might indicate a reasonable probability of favorable future conduct.”); see also TRAN-LEUNG, *supra* note 30 at 29 (discussing how applicants should be given an opportunity to show they are not a risk to the program in order to make second chances more available).

289. See OFFICE OF PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., GUIDANCE ON HOUSING INDIVIDUALS AND FAMILIES EXPERIENCING HOMELESSNESS THROUGH THE PUBLIC HOUSING AND HOUSING CHOICE VOUCHER PROGRAMS 8 (June 10, 2013), <https://files.hudexchange.info/resources/documents/Notice-pih-2013-15-ha-guidance-on-housing-individuals-and-families-experiencing-homelessness-through-ph-and-HCV-programs.pdf> [<https://perma.cc/49PG-69TG>] (identifying that a PHA may have strict policies relating to criminal backgrounds and previous rental housing history—which may result in screening out the most vulnerable people).

because of a prior conviction for possession of drug paraphernalia. Determined to preserve her family, she returned with a host of evidence demonstrating her fitness for federally subsidized housing, including completion of substance abuse treatment, therapeutic treatment, and parenting classes; ongoing negative drug tests; and testimony from three different professionals citing her commitment to recovery. Despite the strength of this mitigating evidence, the housing authority nevertheless stuck to its decision to deny assistance.<sup>290</sup>

Such mitigating evidence, if accepted, will allow the previously incarcerated to demonstrate that they are more than what their criminal record depicts them to be.<sup>291</sup>

HUD has expressed the importance of second chances, and if its ideas actually follow through, then mitigating evidence must be accepted.<sup>292</sup> Individuals will not be motivated to change and leave behind their bad habits if evidence of their good habits will not be taken into account where it really matters.<sup>293</sup> HUD has given PHAs and project owners the authority to reconsider denials if the applicant has provided “sufficient evidence” that they are no longer engaged in criminal activity:<sup>294</sup>

The PHA would have “sufficient evidence” if the household member submitted a certification that she or he is not currently engaged in and has

290. TRAN-LEUNG, *supra* note 30 at 29; see Letter from Shaun Donovan, Sec’y, U.S. Dep’t of Hous. and Urban Dev. & Sandra B. Henriquez, Assistant Sec’y for Pub. and Indian Hous., to Pub. Hous. Auth. Exec. Dirs. (June 17, 2011), <https://www.hud.gov/sites/documents/SOHUDREENTRYLTR.PDF> [<https://perma.cc/4YRS-CGKL>] [hereinafter *Letter to PHA Exec. Dirs.*] (“As President Obama recently made clear, this is an Administration that believes in the importance of second chances – that people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents, to set the past aside and embrace the future.”).

291. 24 C.F.R. § 960.203(d)(1) (2019); see also TRAN-LEUNG, *supra* note 30 at 29 (allowing evidence of mitigating circumstances to be admitted gives an applicant the ability to demonstrate that they are not at risk of committing further crimes).

292. See OFFICE OF PUB. & INDIAN HOUS., *supra* note 279 at 2 (“HUD remains committed to the goal of providing second chances to formerly incarcerated individuals where appropriated.”); see also *Letter to PHA Exec. Dirs.*, *supra* note 290 (discussing the goal of the Obama Administration to give criminals a second chance who have paid their debt to society).

293. See e.g., Emmanuella Grinberg, *No Longer a Registered Sex Offender, but the Stigma Remains*, CNN (Feb. 2010), <http://www.cnn.com/2010/CRIME/02/11/oklahoma.teen.sex.offender/index.html> [<https://perma.cc/M2AE-UW3X>] (depicting a story of a young man who’s “sexual offender” status followed him all throughout his years despite expungement and bettering his lifestyle).

294. 24 C.F.R. § 982.553(a)(2)(ii)(C) (2019).

not engaged in such criminal activity during the specified period and provided supporting information from such sources as a probation officer, a landlord, neighbors, social service agency workers, and criminal records, which the PHA verified.<sup>295</sup>

These four areas inhibit the previously incarcerated from receiving a fair chance at housing.<sup>296</sup> HUD has provided little direction in current screening practices and in return, PHAs and project owners are struggling to implement fair housing practices.<sup>297</sup> By implementing a new “Ban the Box” policy addressing these four areas, we can better ensure that PHAs and project owners are adequately informed when screening applicants who have criminal records.<sup>298</sup>

### B. *Landlords Must be Willing*

Half the battle in providing housing for the previously incarcerated is the availability of public housing.<sup>299</sup> The other half is encouraging landlords to rent to the previously incarcerated.<sup>300</sup> Landlords hold a unique role.<sup>301</sup> Even if there is a policy change, they must be willing to rent their property to this unique population.<sup>302</sup> Notably, landlords have shown interest in looking at factors other than criminal history on its own.<sup>303</sup> For some landlords, eviction history, employment, and income

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295. *Id.* § 982.553(a)(2)(ii)(C)(1).

296. TRAN-LEUNG, *supra* note 30 at 4.

297. *See* Letter from Dominique Blom, Gen. Deputy Assistant Sec’y for Pub. And Indian Hous., to Exec. Dir. (Nov. 13, 2018), <https://content.govdelivery.com/accounts/USHUDPIH/bulletins/21b4342> [<https://perma.cc/PJG6-5USK>] (“Some PHAs are understandably struggling to preserve the quality of these important affordable housing resources which serve one million families nationwide.”).

298. TRAN-LEUNG, *supra* note 30.

299. *See* Clark, *supra* note 87 (describing the lack of housing availability overall); *see also* TRAVIS, *supra* note 12 at 228–29 (identifying long waiting periods have made public housing merely impossible for the previously incarcerated).

300. *See* Clark, *supra* note 87 (showing the percentage of landlords who are willing to rent to people who have prior convictions).

301. *See id.* at 20 (introducing landlords’ perspectives towards renting to released criminal offenders).

302. *See id.* at 20–21 (surveying landlords to identify their attitudes towards released offenders).

303. *See id.* at 22 (finding criminal history may not be the most important issue that landlords focus on in the city of Akron through a thirty-one question survey to landlords in the city).

were of greater importance than a criminal record.<sup>304</sup> Landlords even show a willingness to consider explanations regarding an applicant's criminal history.<sup>305</sup>

The severity of the crime is also a factor landlords consider during the application process.<sup>306</sup> For example, landlords are sixty-three percent more willing to rent to applicants with a misdemeanor than those with a felony.<sup>307</sup> Rehabilitation is also an important factor when examining housing applications.<sup>308</sup> Rehabilitation can be influential by showing that the individual is making decisions to change their habits.<sup>309</sup> Evidence includes going to Alcoholics Anonymous meetings, drug counseling, anger management, or attending rehab.<sup>310</sup> Each of these factors help the landlord decide if they can trust their tenant.<sup>311</sup>

Landlords face tough battles as they balance the cost of liability with the possible loss of income if the vacancy is not filled.<sup>312</sup> The weight of these factors shift—depending on the housing market—leaving much uncertainty for the previously incarcerated.<sup>313</sup> The current housing system places the ball in the landlord's hands.<sup>314</sup> The landlord's business and success dictate their willingness to accept an applicant with

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304. *Id.* at 5, 15–16.

305. *See id.* at 16 (charting statistics of landlords willing to allow explanations on applicants' deficiencies).

306. *See id.* at 19–20 (showing the percentage amounts of which convictions landlords accept and which they prohibit).

307. *See id.* at 23–24 (comparing acceptance of applicants with misdemeanors, and those with felonies in Table 7).

308. *Id.* (indicating that nearly thirty percent of landlords surveyed would reconsider renting to someone convicted of a felony if they had been rehabilitated).

309. *Cf.* TRAN-LEUNG, *supra* note 30 at 29 (portraying the negative consequences that occur when Housing Authorities do not consider evidence of drug abuse treatment, therapeutic treatment, and parenting classes as evidence of commitment of recovery).

310. *Id.* at 33.

311. *See* Clark, *supra* note 87 at 18–19 (showing that landlords use rehabilitation as a factor in deciding whether or not to rent to someone with a prior conviction).

312. *See id.* at 7 (describing the tough choices landlords have to make when deciding to rent to someone with a prior conviction).

313. *See id.* at 25 (asserting when supply is low and demand is high, landlords set the standards high to eliminate unwanted applicants, but these standards are lower when the demand is low).

314. *See id.* (describing the many factors that the landlord can take into account when deciding whether or not to rent to a particular tenant).



a criminal record.<sup>315</sup> “Ban the Box” will help shift how much power the landlords have and will help provide consistency in how applications are reviewed.<sup>316</sup>

### C. *Federal v. State Implementation*

Whether to apply “Ban the Box” on a federal or state level is a major decision that must be considered when looking at how it will be implemented.<sup>317</sup> When “Ban the Box” was first implemented in the employment sector, it was implemented at the state level.<sup>318</sup> However, it eventually became difficult for employers who had offices in different states to implement quality hiring processes.<sup>319</sup> The same issue could apply if “Ban the Box” were implemented at the local level and the previously incarcerated tried finding a new life in a different state.<sup>320</sup> A federal law would better provide a uniform, national framework for PHAs and project managers to comply with and give applicants better opportunities in finding housing.<sup>321</sup>

Texas ranks in the top ten of states with high incarceration rates.<sup>322</sup> Texas incarcerates 891 individuals per 100,000 people.<sup>323</sup> The Texas

315. *See id.* at 27–28 (describing how under certain market conditions, such as when there are high vacancy rates, landlords are placed in a position to be more accepting of renters with prior convictions).

316. *See ALL OF US OR NONE*, *supra* note 21 (discussing how “Ban the Box” protections are extending to housing).

317. *See generally* Christina O’Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801 (2015) (advocating for a federal prohibition on disclosure of prior convictions in employment and how it would be implemented through the Equal Employment Opportunity Commission).

318. *See ALL OF US OR NONE*, *supra* note 21 (describing the first successful “Ban the Box” campaign which banned requiring applicants for public sector employment from disclosing prior convictions in Minnesota in 2009).

319. *See* O’Connell, *supra* note 317 at 2803 (acknowledging there is a lack of uniformity across the states due to an inconsistent process).

320. *See generally id.* at 2818–19 (explaining the differences in state “Ban the Box” legislation and how that affects individuals).

321. *Cf. id.* at 2803 (“This law would provide a national framework for employer compliance and best balance employers’ concerns over controlling their hiring process with an applicant’s desires of gaining employment.”).

322. *See* Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/FQ97-G9EF>] (analyzing incarceration rates between various states in the United States and countries across the world).

323. *Id.*

Department of Criminal Justice reported a total of 69,664 releases and departures in the 2016 Fiscal Year.<sup>324</sup> Texas has the potential to become a model for other states in how to treat released offenders.<sup>325</sup> Since 2007, Texas is a leading force in prison reform as it struggled with the increasing prison population.<sup>326</sup> Recently, the House of Representatives pushed for the passage of the First Step Act.<sup>327</sup> Many Texans were at the forefront pushing for support at the federal level for the passage of this bill.<sup>328</sup> Texas can pave the way and push for housing opportunities at both the state and federal level for the previously incarcerated.<sup>329</sup> If “Ban the Box” were implemented in Texas, other states and the federal government would be influenced to follow.<sup>330</sup>

At the beginning stages, “Ban the Box” can be implemented at the state level as a trial run.<sup>331</sup> Agencies can see the benefits at the state level and learn from the downfalls for better federal implementation.<sup>332</sup> It can be beneficial to start smaller in states like Texas where there are large populations of previously incarcerated individuals and where there is constant reform effort.<sup>333</sup> It is important to implement the policy and

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324. TEX. DEP’T OF CRIM. JUST., *supra* note 222 at 34.

325. *See generally* Hannah Wiley, *Trump Administration Looks to Texas as it Pushes a Criminal Justice Reform Bill*, TEX. TRIB. (Dec. 3, 2018), <https://www.texastribune.org/2018/12/03/first-step-act-prison-reform-texas-criminal-justice/> [<https://perma.cc/TKV3-BMZV>] (emphasizing how Texas has made great strides in prison reform to date and could lead by example for other states).

326. *See id.* (recognizing how Texas has tackled prison reform through programs and educational courses).

327. *See id.* (reporting the House is supportive of the First Step Act, which is a bill put forth with the intent to reduce America’s prison population by fifty percent).

328. *Id.*

329. *See id.* (inferring that because Texas has been at the forefront of reform so far, it could also lead the way for housing reform for the previously incarcerated).

330. *See* Jerry Madden, *Prison, Probation, and Parole Reforms—The Texas Model*, THE HILL (Dec. 2018), <https://thehill.com/opinion/criminal-justice/420204-prison-probation-and-parole-reforms-the-texas-model> [<https://perma.cc/E94A-MCVD>] (commenting on the impact Texas has had on thirty other states in reducing the prison population).

331. *See* O’Connell, *supra* note 317 at 2832 (explaining the benefit of states experimenting with their own laws to allow the federal government to find which would work best).

332. *See id.* (describing how the federal government can develop an effective law if it looks towards the ways the states have implemented “Ban the Box” laws).

333. *Cf.* Wagner & Sawyer, *supra* note 322 (echoing the fact that Texas has a significantly large previously incarcerated population).

start the conversation, regardless of where it begins.<sup>334</sup> Any program has to start from somewhere.

## VI. THE IMPACT ON SEX OFFENDERS

Community members will also begin to fear what “Ban the Box” will mean for sex offenders.<sup>335</sup> “Ban the Box” will likely not have much of an effect on current housing policies involving sex offenders.<sup>336</sup> Often, people buy a house and are living there for a while before they even realize that there is a registered sex offender living in their neighborhood.<sup>337</sup>

Sex offender regulations are often difficult to discuss.<sup>338</sup> They involve sensitive events and those labeled as sex offenders struggle to reintegrate into the community.<sup>339</sup> Community members ostracize sex offenders and at times publicly humiliate them to other community members.<sup>340</sup> Current sex offender laws have strict requirements that must be followed in order for those on the sex registry to be monitored.<sup>341</sup> Sex offender registries are implemented to protect children from known sex

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334. See TRAVIS, *supra* note 12 at 88 (“The critical first step in a reform agenda is to make invisible punishments visible. We should begin by challenging our language to recognize that these are indeed punishments—they are legislatively authorized sanctions imposed on individuals convicted of criminal offenses.”).

335. See *Collateral Consequences: Hearing Before the Over-Criminalization Task Force of 2014 Before the H. Comm. on the Judiciary*, 113th Cong. 1, 2 (June 26, 2014), <https://www.govinfo.gov/content/pkg/CHRG-113hhrg88438/html/CHRG-113hhrg88438.htm> [<https://perma.cc/H47A-3GPE>] (opening statement of F. James Sensenbrenner, Jr., Representative in Congress from the State of Wisconsin) (commenting on the possible fears and consequences of “Ban the Box” laws in a hearing before the House of Representatives).

336. See 34 U.S.C.A. § 20913 (2017) (mandating that sex offenders must register according to federal law).

337. See Jessica Ann Orben, *Connecticut Department of Public Safety v. Doe: Sex Offenders’ Due Process Under Megan’s Law and the Effectiveness of Sex Offender Registration*, 36 U. TOL. L. REV. 789, 790 (2005) (illustrating a scenario of when a family purchases a home and comes to realize that their neighbor is actually a sex offender).

338. See *id.* at 807–09 (showing the inconsistencies and downfalls of the registry due to allowing the public free access to these databases).

339. Cf. Grinberg, *supra* note 293 (sharing the story of Ricky Blackman, a twenty-year-old who is now able to have his name removed from the sex offender registry; however, he tenses up when he sees children, has become an introvert, and is distrustful of others).

340. See *id.* (depicting how a neighbor publicly humiliated a sex offender by videotaping him when he went outside).

341. See *e.g.*, 28 C.F.R. § 811 (2019) (setting out the regulations and requirements of sex offender registration).

criminals.<sup>342</sup> Most states allow access to the sex offender registry so that people can become familiar with possible offenders in their neighborhood.<sup>343</sup>

“Ban the Box” will have little effect on current sex offender laws because it will not override current sex offender policies.<sup>344</sup> Currently, sex offenders are required to register the moment they are found guilty of a registration offense.<sup>345</sup> Failure to register can lead to criminal prosecution.<sup>346</sup> Current laws outline where an offender must live while designating areas they must avoid.<sup>347</sup> Under “Ban the Box,” none of these policies will change.<sup>348</sup>

On the other hand, sex offenders are arguably similar to other previously incarcerated individuals seeking to get their life on track.<sup>349</sup> They face many more collateral consequences by their new label, and housing is just one of them.<sup>350</sup> Current guidelines can be so restrictive that they are unable to find a place to live when they are released.<sup>351</sup> Many sex offenders often face increased transience and homelessness and are unable to live with supportive or dependent family members.<sup>352</sup> The restrictions also prevent them from living near employment opportunities, public transportation, and other social services.<sup>353</sup>

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342. See Zgoba, Levenson & McKee, *supra* note 228 at 92 (describing the background of sex offender registries and their intended purpose).

343. See, e.g., *Texas Public Sex Offender Registry*, TEX. DEP’T OF PUB. SAFETY (Oct. 2, 2019), <https://records.txdps.state.tx.us/SexOffenderRegistry> [https://perma.cc/A5MY-PWDK] (showing the public database where community members may search for local sex offenders); *see id.* at 91 (explaining how sex offender registries are utilized to protect vulnerable communities through enhanced notification).

344. See O’Connell, *supra* note 317 at 2812 (permitting employers to have discriminatory hiring policies which fail to recognize each applicant as a unique individual).

345. Commencement of the Obligation to Register, 28 C.F.R. § 811.5 (2003).

346. *Id.* § 811.12.

347. See e.g., Tex. Local Gov’t Code § 341.906 (2016).

348. See Garcia, *supra* note 200 at 944 (articulating the importance of excluding schools, daycares, and other organizations with regular access to children from the “Ban the Box” statute).

349. See *id.* at 931 (summarizing the stigmatization and discrimination that ex-offenders face upon reintegration into the community).

350. See MANZA & UGGEN, *supra* note 14 at 155 (addressing the hyper-stigmatization sex offenders face due to registration and notification laws).

351. Zgoba, Levenson & McKee, *supra* note 228 at 92.

352. *Id.*

353. *Id.*

Reentry barriers have severe limitations for offenders required to register compared to offenders who are not required to register.<sup>354</sup> Many jurisdictions fail to distinguish between sex offender conduct that may be more or less serious to public safety.<sup>355</sup> When sex offenders are released onto the sex offender registry, all they have is a label.<sup>356</sup> A “sex offender” can include individuals convicted for “sexting, indecent urinating in public, possessing child pornography, or ongoing sexual abuse of a child.”<sup>357</sup> This label prevents offenders from finding employment, housing, and attending college.<sup>358</sup> In Austin, Texas, the Austin/Travis County Reentry Roundtable has recommended an automatic individualized approach when screening applicants on the sex offender registry.<sup>359</sup> An individualized approach will allow housing providers to take an individual’s circumstances into full consideration.<sup>360</sup> The individualized approach can only be implemented at the private level because there is still a blanket ban on sex offenders obtaining public housing.<sup>361</sup>

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354. See *Screening Guide*, *supra* note 176 at 9 (clarifying that regardless of the nature of the offense, the reentry barriers for sex offenders are far more severe than those with just a criminal record).

355. See *id.* (recognizing the Texas sex offender registry fails to distinguish between the severity of the conduct in terms of public safety); see also David Feige, *Shawna: A Life on the Sex Offender Registry*, MARSHALL PROJECT (Sept. 17, 2017), <https://www.themarshallproject.org/2017/09/17/shawna-a-life-on-the-sex-offender-registry> [https://perma.cc/6V9W-UT24] (describing the long-term effects of a sex offender registry failing to consider the unique circumstances of an individual’s offense).

356. See Feige, *supra* note 355 (illustrating the way sex offenders are left subjected to the stigma of their label notwithstanding their specific crime).

357. See *Screening Guide*, *supra* note 176 at 9 (highlighting the similar restrictions imposed on sex offenders across the board).

358. Cf. Feige, *supra* note 355 (emphasizing the difficulties an individual faces when placed on the sex offender registry).

359. See *Screening Guide*, *supra* note 176 at 9 (summarizing why this Guide recommends an automatic individualized review).

360. See *id.* at 6 (explaining how the implementation of an individualized approach will help distinguish between applicants that do and do not demonstrate real risks to residents and properties).

361. See 24 C.F.R. § 960.204(a)(4) (2019) (declaring the denial of admission of persons subject to sex offender registration requirement).

## CONCLUSION

“Ban the Box” is a nationwide movement allowing the previously incarcerated to reclaim basic human needs.<sup>362</sup> By focusing on employment and housing, they can have a better opportunity at successful reentry.<sup>363</sup> Mass incarceration has created an overwhelming issue where millions of individuals have been incarcerated, mostly for drug offenses.<sup>364</sup> But the issue goes beyond incarceration rates.<sup>365</sup> As more individuals leave prison, they enter a world where returning to prison is always within reach.<sup>366</sup> They leave prison with no resources, no support, and the mark of a criminal record.<sup>367</sup>

The United States must continue to implement policies and programs to give these individuals an opportunity to reintegrate and become full members of society.<sup>368</sup> Without successful reentry programs, families and children become victims of the system as well.<sup>369</sup> Without “Ban the Box,” we are setting the previously incarcerated up for failure—leaving them with no support in finding a job or in receiving housing.<sup>370</sup> All they have left is what they have known, returning to the life of crime.<sup>371</sup>

Often, as individuals, we are so easy to judge.<sup>372</sup> We immediately blame the individual for choosing to disobey the law, but fail to recognize

362. See Garcia, *supra* note 200 at 929 (recognizing the goal to prevent criminal recidivism and increase employment opportunities for ex-offenders through “Ban the Box” legislation).

363. See Bell, *supra* note 232 at 3–16 (distinguishing employment and housing as the two most important factors affecting recidivism).

364. See King & Mauer, *supra* note 37 at 3 (“During the 1990s, 79% of the total growth in drug arrests were for marijuana offenses.”).

365. See MANZA & UGGEN, *supra* note 14 at 126 (discussing issues offenders worry about beyond incarceration itself).

366. See *id.* at 152 (elaborating how the anxiety of housing, re-establishing credit, and volunteering remind offenders of the punishment outside incarceration).

367. See *id.* (perpetuating the label attached to every aspect of an offender’s life).

368. See Carey, *supra* note 53 at 594 (suggesting that the United States should address the shortage of affordable housing and ensure that unreasonable criminal exclusions prevent people with prior convictions the same benefits as other members of society).

369. See Traum, *supra* note 34 at 433 (highlighting that incarcerated parents can lower educational achievements of their children which can lead their own risk of incarceration).

370. See Crowell, *supra* note 66 at 1113 (demonstrating the unfortunate consequences that a previously incarcerated individual faces in finding a home once released).

371. See *id.* (illustrating the idea that homelessness greatly increases the rate of recidivism).

372. See TRAVIS, *supra* note 12 at 77 (“[O]ur nation should reverse the current cultural sensibility about those who have violated our laws and adopt a goal of reintegration, not exclusion.”).

all the factors that the individual faces.<sup>373</sup> People of color often face racial profiling, low opportunities, and zero support.<sup>374</sup> Incarceration affects children, families, and the community.<sup>375</sup> Without proper reentry programs, children become susceptible to incarceration and lower standards of living.<sup>376</sup> The current system has created a never-ending cycle of incarceration.<sup>377</sup> If more reentry programs are implemented, we can lower poverty rates, crime rates, and incarceration rates.<sup>378</sup> “Ban the Box” is one step forward in addressing the cycle of incarceration.<sup>379</sup>

“Ban the Box” in housing will allow the previously incarcerated to have some place of stability.<sup>380</sup> It will be their place to escape all issues around them and focus on turning around their lives.<sup>381</sup> For individuals

373. See Chinnadurai, *supra* note 59 at 869–70 (explaining how there are collateral consequences by stereotypical judgments about a felony conviction and how these convictions play a role in housing and reintegration into communities after release); see also Kropf, *supra* note 29 at 76–77 (indicating that a major hurdle criminals must overcome when re-integrating into society is finding housing).

374. See James Forman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150, 152 (Marc Mauer & Meda Chesney-Lind eds., 2002) (“[T]he everyday black kid in the neighborhood struggling just to survive, being targeted by the police is not only more routine, it is more disempowering. There doesn’t appear any way to fight back.”); cf. Gubernick, *supra* note 153 at 1156 (claiming the disproportionate convictions of people of color has driven minorities to abandon prospects of a legal job altogether).

375. See Traum, *supra* note 34 at 433–34 (summarizing the impacts prison has on families once parents are released); see also TRAVIS, *supra* note 12 at 147 (highlighting children with parents involved in the criminal justice system are “likely to grow up in families that have been weakened, increasing the challenges they face in staying out of the criminal justice system and leading productive lives.”).

376. Carey, *supra* note 53 at 552.

377. See Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 117, 127 (Marc Mauer & Meda Chesney-Lind eds., 2002) (asserting that children “made fatherless by incarceration, are not only more likely to be abused, live in poverty, and burden their extended family, but are also more likely to be involved in the criminal justice system themselves.”).

378. See Crowell, *supra* note 66 at 1141–42 (acknowledging more housing programs for individuals with prior convictions can help the population increase their potential of gaining employment and housing; also, such programs will assist people with criminal convictions to have the opportunity to move on with their lives instead of being reincarcerated).

379. Gubernick, *supra* note 153 at 1182–83.

380. See Crowell, *supra* note 66 at 1139 (stating supportive housing for marginalized populations, like people recently released from prison, may help provide “stability, autonomy, and dignity”).

381. See generally *id.* at 1117 (illustrating one example of all the worries and anxieties that someone going through this process struggles with).

with families, this new regulation will allow them to stay together, rather than force them to leave and find a new place to stay.<sup>382</sup> Housing is vital to integration, and with the proposed guidelines—provided by “Ban the Box”—landlords will have more direction in implementing the 2016 HUD Guidance.<sup>383</sup> The HUD Guidance is one step in the right direction, but “Ban the Box” will bridge the gap in ensuring that those with criminal records have a fair opportunity at housing.<sup>384</sup>

If “Ban the Box” is to succeed, PHAs, landlords, project owners, and parole officers must come together as one.<sup>385</sup> They each have first-hand knowledge of what is useful and helpful for the previously incarcerated to succeed.<sup>386</sup> Together they can cut off the strong grasp that prison has on individuals and allow them to truly move forward and leave the prison walls behind.<sup>387</sup>

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382. See Carey, *supra* note 53 at 558 (acknowledging people are forced to move day by day from motels, shelters, or even couches of relatives because they do not have stability from proper housing).

383. See TRAN-LEUNG, *supra* note 30 at 5 (asserting the need of further guidance from HUD, which has been requested by both housing providers and perspective tenants); see also Crowell, *supra* note 66 at 1107 (highlighting the need for HUD to provide adequate “guidance on how long is a ‘reasonable time’ between a criminal conviction and submitting a housing application.”).

384. See TRAN-LEUNG, *supra* note 30 (stating that although HUD can provide guidance on what are reasonable lookback periods, PHAs and project owners may continue to err on the side of caution when screening applicants; this is where “Ban the Box” can help provide a uniform opportunity to those with criminal convictions).

385. See generally Crowell, *supra* note 66 at 1115–21 (illustrating all the parts, agencies, and standards that must come together to help improve the likelihood that someone released from prison does not return).

386. See generally *id.* at 1143 (emphasizing that we must all step up and help each of these individuals into a better path and life).

387. See *id.* at 1142–43 (“But we cannot successfully reduce the number of incarcerated people without adequately supporting those who are being released.”).