



EVALUATE THE APPLICANT, NOT THE RECORD

-Background-

In an effort to protect building assets and provide a safe environment for tenants, housing providers often utilize tenant screening protocols that include criminal background checks. In fact, conducting criminal background screening has been touted as a landlord “best practice,” as technology has made it possible for quick and inexpensive access to criminal records. However, with recent advancements in fair housing law, movements for criminal justice reform, and emerging social science research, it has become apparent that overly stringent criminal screening policies not only serve as a bad business model,¹ but one with potential legal pitfalls. This paper explores these issues and provides recommendations for tenant screening.

Although it may seem counterintuitive, there is no research that establishes a connection between criminal background and successful tenancy.² Criminal history is a poor predictor of future behavior and does not determine who will and who won't be good tenants.³ There are a host of reasons why this is the case. A few central themes are outlined below.

1 out of 3 Americans has a criminal record – it's as common as having a college degree

The chances of having a criminal record are extraordinarily high in the U.S., with 1 in 3 adults having some type of arrest or criminal record—which is about the same rate as bachelor degree attainment.⁴ As of July 2015, more than 70 million people in the U.S. had a “rap sheet”—a criminal record indexed by the FBI.⁵ The Department of Justice estimates that as many as 100 million individuals have a criminal background of some sort.⁶ The Cook County Department of Corrections alone admits about 100,000 primarily pre-trial detainees annually.⁷

Not only are criminal records extremely common but also there are serious issues with record accuracy⁸. Blanket exclusions on a third of potential housing applicants is simply a bad business practice as it needlessly inhibits otherwise qualified applicants from even submitting rental applications. These limitations could increase unit vacancy time and/or prevent otherwise well-suited tenants from leasing.

¹Alan Greenspan, while chairman of the Federal Reserve, said “Discrimination is against the interests of business—yet business people too often practice it. To the extent that market participants discriminate, they erect barriers to the free flow of capital and labor to their most profitable employment, and the distribution of output is distorted.... By removing the non-economic distortions that arise as a result of discrimination, we can generate higher returns....” Alan Greenspan, “*Economic Challenges in the New Century*”, before the Annual Conference of the National Reinvestment Coalition, March 22, 2000; <http://www.federalreserve.gov/boarddocs/speeches/2000/20000322.htm>.

² Ehman & Reosti. “Tenant Screening in an Era of Mass Incarceration.” NYU Journal of Legislation & Policy. March 2015.

³ Ehman & Reosti. “Tenant Screening in an Era of Mass Incarceration.” NYU Journal of Legislation & Policy. March 2015.

⁴ The Sentencing Project. “Americans with Criminal Records.”

⁵ Mathew Friedman, “Just Facts: As Many Americans Have Criminal Records As College Diplomas.” Brennan Center For Justice. November 2015.

⁶ https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf

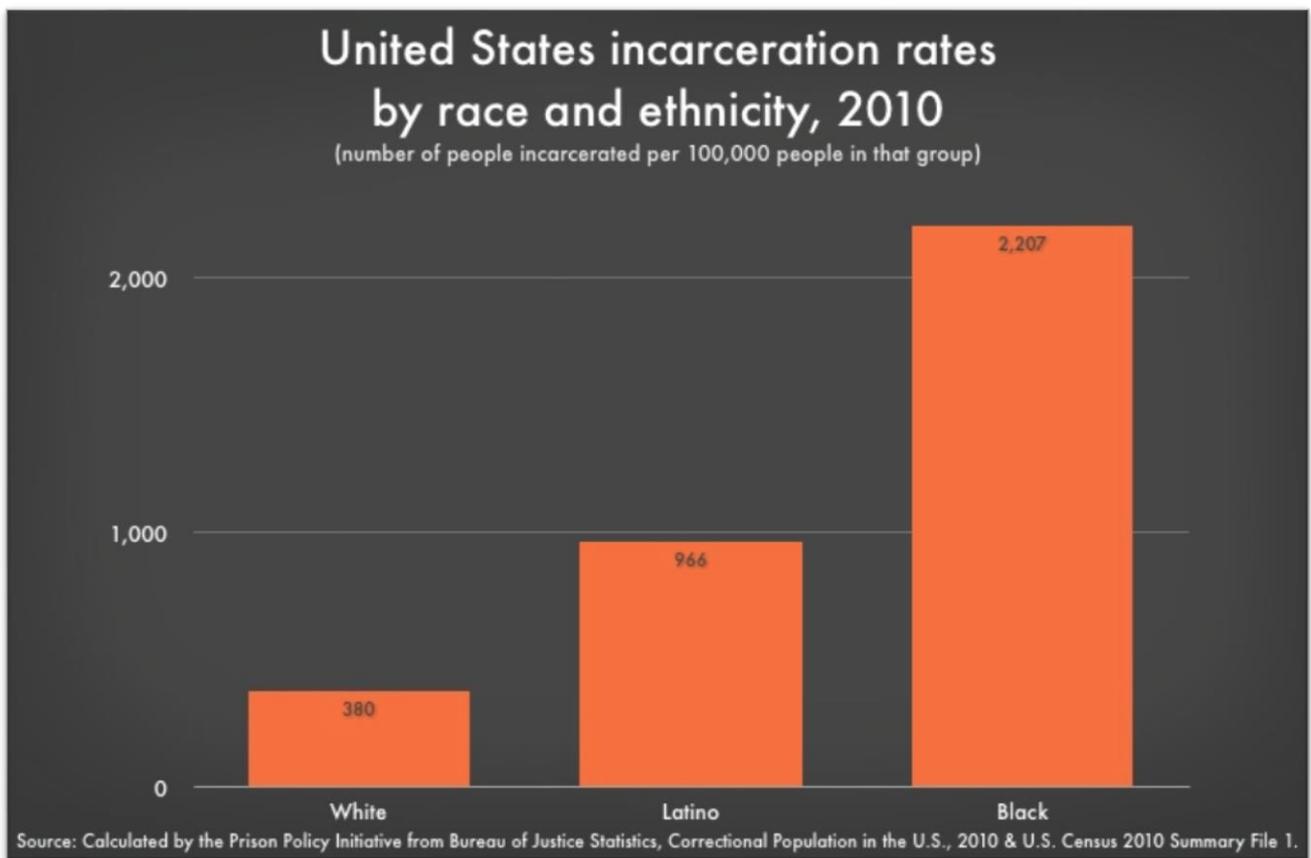
⁷ Cook County Department of Corrections: http://www.cookcountysheriff.org/doc/doc_main.html

⁸ <http://bangordailynews.com/2011/12/16/news/nation/when-your-criminal-past-isnt-yours-background-check-errors-have-devastating-consequences/?ref=relatedBox>

-People of color are disproportionately caught up in the criminal justice system-

Significant racial disparities exist in every stage of the criminal justice system from arrest, to conviction to incarceration, but are not reflective of higher rates of criminal behavior. Nearly half of black males have been arrested by age 23, despite similar propensities for criminal behavior among all racial groups African Americans are 3.7 times more likely to be arrested for marijuana possession despite equal rates of marijuana use among individuals of all races.⁹ In 2014, non-whites accounted for 62% of arrests in Cook County while making up only 33% of Cook County's population.¹⁰

The United States has the highest prison population rate in the world, but the rate varies based on race. As the chart below indicates, the incarceration rate for African Americans is about 6 times higher than it is for whites.



⁹ Dylan Matthews, "The black/white marijuana arrest gap, in nine charts", *Washington Post Wonk Blog*, June 4, 2013.

¹⁰ Illinois Criminal Justice Information Authority.

<http://www.icjia.state.il.us/sac/tools/DataProfiles/CriminalJusticeDataProfiles.cfm?ProfileNumber=10&ProfileNumber=50&ProfileNumber=30&ProfileNumber=40&ICJIANumber=1088&getProfile=1>

This paper does not explore the reasons behind this disparity, but rather the legal and ethical pitfalls of using criminal indicators when such a vast disparity exists.

Adhering to blanket screening policies that exclude individuals with criminal records will inevitably result in the exclusion of many people of color. Whether intentionally or not, this has legal ramifications that housing providers must be aware of. As the U.S. Departments of Housing and Urban Development and the Equal Employment Opportunity Commission have found, because of the disparate impact of the justice system on people of color, employment and housing decisions made solely on the basis of criminal records run the risk of racially-based discrimination.¹¹

Arrests are not convictions.

An arrest is not a finding that a person has committed a crime. The U.S. justice system includes a court process to determine guilt. Indeed, many people arrested are never charged or found guilty of wrongdoing.¹² Arrests that do not result in conviction should therefore not affect access to housing, as our prevailing American principle of “innocent until proven guilty” should dictate that these individuals be treated similarly to applicants without arrest histories. Despite these concerns, many housing providers either explicitly deny tenancy due to arrest records alone or utilize background check companies that pull from county court records or FBI rap sheets which are so difficult to decipher that it is often unclear whether or not an arrest has resulted in a conviction.¹³ Due to these concerns, Illinois law prohibits using arrests records in employment decisions.

¹¹ https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf

¹² “Eight out of 10 misdemeanor cases have been dismissed between 2006 and 2012, shows a Chicago Reporter analysis of records for 1.4 million cases maintained by the Clerk of the Circuit Court of Cook County and the Administrative Office of the Illinois Courts.” <http://chicagoreporter.com/charges-dismissed/>

¹³ <https://talkpoverty.org/2014/12/09/held-back-by-a-criminal-record/>

All convictions are not equal.

Even when a housing applicant has been convicted of a crime, treating all conviction records equally is also problematic. Based on 2014 filings in Cook County, 79% of criminal charges were for misdemeanors – the very lowest, most minor kind of charges.¹⁴ Indeed, the most common conviction in Cook County, at almost one fourth of all convictions, is that of low-level, misdemeanor drug possession.¹⁵ Moreover, data from the Circuit Court of Cook County shows that the majority of felony convictions are for the lowest level of felony, “Class 4” felony.¹⁶ Many housing providers utilizing blanket criminal record bans treat those with an arrest or low-level conviction identically to those who have been convicted of more serious crimes. The consequences of treating all records the same is that the vast majority of individuals with records face *lifetime* housing consequences for simple arrests and infractions that are unrelated to how one will perform as a tenant.

Time matters

Research indicates that reoffending is unlikely if a few years have passed since the person committed a crime. Therefore, not only is it important to consider records on an individual basis, but it is also important to consider the timing of when convictions occurred when reviewing records.

Many offenses are the result of a momentary lack of judgment, not an indication of a pattern of criminal conduct or propensities for future criminal behavior. As a society, we recognize that people deserve second chances. Screening policies with unreasonably long look-back periods harm those who pose almost no future risk and who would otherwise have successful tenancy application.

¹⁴ Illinois Criminal Justice Information Authority. <http://www.icjia.state.il.us/sac/tools/DataProfiles/CriminalJusticeDataProfiles.cfm?ProfileNumber=10&ProfileNumber=50&ProfileNumber=30&ProfileNumber=40&ICJIANumber=1088&getProfile=1>

¹⁵ Convicted in Cook. Accessed at: <http://convictions.smartchicagoapps.org/#intro>

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-Landlord Risk & Liability-

Keeping in mind the factors outlined above, landlords face serious risks by denying tenant applicants on the basis of blanket criminal record bans. In April of 2016, the U.S. Department of Housing and Urban Development (HUD) issued Guidance to landlords that explained that they might be liable if they routinely exclude people with records, based on the longstanding legal standard of *discriminatory impact*. “A housing provider violates the Fair Housing Act (FHA) when the provider’s policy or practice has an unjustified discriminatory effect, even when the provider had no intent to discriminate.”¹⁷ For example, a landlord who denies applicants with criminal records may not wish to discriminate against any protected group. But due to racial and other disparities within the criminal justice system, the landlord consequently screens out a higher number of African Americans, Latinos, and people with disabilities, and therefore the policy has a disparate impact.¹⁸ This means that cases of discrimination can be filed without hard proof that the landlord intentionally discriminated, as long as one can demonstrate that a landlord’s policy or actions had a disparate impact.

In addition to discriminatory impact, housing providers can be found liable for *direct discrimination* if they use criminal background screening differently for groups protected by the Fair Housing Act, for example by rejecting a Latino applicant based on criminal background but accepting a white applicant with a similar background. A landlord may also not impose different conditions or terms to those with criminal backgrounds, such as asking for higher rents or security deposits. These screening methods may also have a discriminatory intent, as fair housing testing projects in other jurisdictions¹⁹ have found that criminal background checks are often used, at times purposefully, to screen out people of color. This results in a troubling, two-fold barrier in which people of color and other protected groups are not only more likely to face interactions with the criminal justice system, but are also more likely to have a criminal record used against them when searching for housing.^{20,21}

While the Guidance does not have the force of law, both HUD administrative judges and federal judges can use it as a benchmark in making decisions on individual cases, and since the Guidance was released, major associations of landlords urge their members to take it seriously and to create appropriate policies to comply with its recommendations.²² Furthermore, the underlying legal framework of disparate impact predates the HUD Guidance and is enforceable under the law.²³

Under the Guidance and disparate impact theory,²⁴ if housing providers cannot prove that criminal history screening is “necessary to achieve a substantial, legitimate non-discriminatory interest,” they are opening themselves up to potentially costly lawsuits. By following the recommendations set out below, landlords can not only avoid legal issues, but can also help reduce recidivism and homelessness in their communities.

Alternatively, landlords would not risk additional liability for utilizing research-based criminal record screenings as outlined here, or even for choosing not to conduct criminal record screening at all. Under current negligence standards, an actor is only responsible for harm s/he could reasonably have foreseen and prevented. Based upon social science research, a criminal record cannot reliably indicate the risk of future problematic tenant behavior. Therefore, the presence of a criminal record does not equal foreseeability of harm and should not by itself lead to liability.²⁵ To date, no courts have imposed a duty on landlords to conduct background checks.

¹⁷ https://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf

¹⁸ In a more blatant example, St. Bernard Parish, a community near New Orleans, passed a “blood relative” ordinance after Hurricane Katrina displaced residents, which said that residents could only rent to blood relatives. Since 93% of the Parish residents were white, the ordinance effectively locked black people out. While it was not possible to prove discriminatory intent, it was struck down as having a discriminatory impact. See 641 F. Supp. 2nd 563, 565-66 & 565 n.1 (E.D. La. 2009)

¹⁹ Testers are people who check for compliance with the Fair Housing Act (FHA) (42 U.S. Code § § 3601-3619 and 3631), and state and local housing discrimination laws, by pretending to be prospective tenants. HUD, fair housing agencies, and housing advocacy organizations use testers, often by pairing together two individuals who have a similar financial profile but differ when it comes to a protected class that may be at issue.

²⁰ Greater New Orleans Fair Housing Action Center. “Locked Out.” 2016

²¹ Equal Rights Center. “Unlocking Discrimination.” 2016

²² http://aagdallas.com/assets/files/Criminal_Conviction_Screening_Policies_White_Paper_2016_05-FINAL.pdf

²³ <https://www.justice.gov/crt/case/fortune-society-inc-v-sandcastle-towers-housing-development-fund-corp-et-al-edny>

²⁴ The Supreme Court officially recognized disparate impact theory as a basis for a lawsuit under the Fair Housing Act in *Texas Department of Housing and Community Affairs, et al., v Inclusive Communities Project, Inc., et al.*

²⁵ Ehman & Reosti. “Tenant Screening in an Era of Mass Incarceration.” NYU Journal of Legislation & Policy. March 2015.

-Recommendations to Housing Providers -

The best practice for housing providers is to do an individualized assessment of any applicant with a criminal record, based on the factors listed in our recommendations. To avoid legal pitfalls and unnecessary exclusion of tenant applicants, housing providers (including public housing authorities) should consider the recommendations below.

In making a housing determination:

Housing providers/landlords **SHOULD NOT**:

- Consider juvenile records.
- Consider records that have been sealed, expunged, or pardoned.
- Consider arrest records.
- Utilize blanket criminal record bans that eliminate applicants with any kind of criminal history regardless of crime type and how long ago the crime occurred.
- Offer different terms or conditions (such as higher rents or security deposit) based on criminal background screening.

Housing providers/ landlords **SHOULD**:²⁶

- Review other aspects of an application, and determine whether or not an applicant is otherwise qualified *before* reviewing criminal records. This is similar to “ban the box” initiatives in the employment context.²⁷
- Consider individual factors and circumstances, such as how long it has been since the conviction occurred and the severity of the crime, when reviewing criminal histories.
- Utilize a reasonable “look back” period. For example, if a person has avoided subsequent criminal convictions for a period of three or more years there is decreasing possibility that (s)he will re-offend beyond the rate of those who have never been convicted.
- Allow the applicant to provide “mitigating” evidence such as:
 - Satisfactory compliance with conditions of parole or probation
 - Letters of recommendation from employers, community organizations, counselors or case managers, teachers, community leaders or parole and probation officers who have observed the person since his or her conviction.
 - Educational attainment, including vocational or professional training since conviction
 - Active participation in a rehabilitation program.
 - Ongoing attendance at drug or alcohol recovery meetings, including recommendations from a person’s sponsor.

Regardless of the specifics of criminal screening policies it is also vitally important that housing providers communicate transparently with applicants about what their screening criteria are. Moreover, the screening criteria must be applied equally to all housing applicants so as not to serve as a proxy for race, national origin, religion, disability, family status, gender, or sexual orientation discrimination. Equal housing opportunity is a vital component of healthy, prosperous households, communities, and society as a whole. Critically reviewing tenant-screening policies to ensure compliance with the law not only identifies potential legal liabilities for landlords, but also will remove barriers to fair housing.

²⁶ If you need information about how to be compliant with the Fair Housing Act, contact Neda Nozari, an attorney who directs Open Communities’ housing programs: 847-501-5760, ext. 408.

²⁷ The campaign challenges the stereotypes of people with conviction histories by asking employers to choose their best candidates based on job skills and qualifications, not past convictions. <http://bantheboxcampaign.org>