



The Fortune Society
BUILDING PEOPLE, NOT PRISONS

Combatting Housing Discrimination: Safe & Affordable Housing for Those Returning Home

I. The Problem

Since 1970, the incarcerated population in the United States has increased by 700%.¹ Indicatively, there are almost 2.3 million people incarcerated in the United States territories in different form of prisons including “1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.”² The result is that the United States incarcerates more people than any other country in the world.³ The disparate impact of this mass incarceration in the United States falls almost exclusively on people of color. While Black men comprise about 13% of the United States male population, they also account for nearly 35% of the incarcerated male population with a more than one year sentence.⁴ One of every three black boys born

¹ Brennan Center for Justice, *Changing Incentives*, <https://www.brennancenter.org/issues/end-mass-incarceration/changing-incentives> (last visited on Jan. 18, 2022).

² Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2020*, <https://www.prisonpolicy.org/reports/pie2020.html> (citing, “The number of state facilities is from Census of State and Federal Correctional Facilities, 2012, the number of federal facilities is from the list of prison locations on the Bureau of Prisons website (as of February 24, 2020), the number of youth facilities is from the Juvenile Residential Facility Census Databook (2016), the number of jails from Mortality in Local Jails, 2000-2016, the number of immigration detention facilities from Immigration and Customs Enforcement’s Dedicated and Non Dedicated Facility List (as of February 2020), and the number of Indian Country jails from Jails in Indian Country, 2016.”) (last visited Jan. 15, 2022)

³ Brennan Center for Justice, *supra* note 1.

⁴ Elizabeth Hinton et al., *An Unjust Burden, The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST., May 2018 at 2, <https://www.vera.org/publications/for-the-record-unjust-burden> (Full article, citing, for the percent of black men in the U.S. population, See U.S. Census Bureau, DATA PROFILES, Click on 2016, Select option “Nation” and then Click “Demographic Characteristics” <https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2016/>, and, for the percent of black men incarcerated in state and federal prisons, see E. Ann Carson, PRISONERS IN 2016, U.S. Dep’t of Just., 1, 15, TABLE 10 (2018), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fbjs.ojp.gov%2Fcontent%2Fpub%2Fpdf%2Fp16.pdf&clen=585399&chunk=true). One in 18 black women born in 2001 is also likely to be incarcerated sometime in her life, compared to one in 45 Latina women and one in 111 white women. Elizabeth Hinton et al., *An Unjust Burden, The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST., May 2018 at 2, <https://www.vera.org/publications/for-the-record-unjust-burden> (Full article, citing, Sent’g Project, FACT SHEET TRENDS IN U.S. CORR., 1, 5 (2017), <https://perma.cc/G3Y4-JE3L>).

in 2001 could expect to go to prison in his lifetime, as could one of every six Latino boys—compared to one of every seventeen white boys.⁵ According to a new report by The Sentencing Project, Black Americans are incarcerated in state prisons at nearly 5 times the rate of white people.⁶ Likewise, among the more than 9,000 justice-impacted individuals whom The Fortune Society (“Fortune”) serves each year, over 90% are men and women of color, primarily Black and Hispanic.

The lack of access to safe, affordable housing is the most immediate problem that people face when they return home from prison or jail. Individuals with criminal justice involvement can face an extremely harsh environment when seeking housing. First, their income challenges make it difficult for most of them to afford market rate housing in high-cost markets like New York City where the supply of affordable housing is sharply limited. As a result, housing costs end up comprising a disproportionate percentage of their income leaving them rent burdened and living in substandard housing. In addition to the high cost of housing, discrimination based on race, criminal justice involvement, and lawful source of income such as government issued housing vouchers further limit the housing that they can access.

Despite the obvious need for housing, the five million formerly incarcerated people living in the United States are almost ten times more likely to be homeless than the general public.⁷ In New York City alone, homelessness among the formerly incarcerated is particularly acute. In 2017, about 54%, or 5,000 of the approximately 9,300 people paroled from state prisons went directly to shelters—up from 23% just three years earlier.⁸ While New York City’s Fair Chance Act ostensibly prevents discrimination against people with criminal records in employment since October 2015, there are few protections for people with criminal records seeking housing.

Discriminatory practices based on criminal records contribute to the growth of the “prison to shelter” pipeline— the growing rates of formerly incarcerated people living in homeless shelters or on the streets because they cannot secure housing. The disparate impact of mass incarceration on individuals of color, impeding people from safe and affordable housing based solely on a criminal conviction, has a

⁵ The Sent’g Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System*, 1 (Mar. 2018) (citing Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 supp. 3 PRISON J. 87S, 88S (Sept. 2011)), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>

⁶ Ashley Nellis, PhD., *The Color of Justice, Racial and Ethnic Disparity In State Prisons*, THE SENT’G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁷ Louis Coulote, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE, Aug. 2018, <https://www.prisonpolicy.org/reports/housing.html>. (last visited Jan. 15, 2022)

⁸ Dale Chappell, *New York’s Prison-to-Shelter Pipeline is Poor Option for Parolees*, PRISON LEGAL NEWS, Nov. 6, 2018, at 54, <https://www.prisonlegalnews.org/news/2018/nov/6/new-yorks-prison-shelter-pipeline-poor-option-parolees/>.

disproportionate impact on Black and Latin individuals. Thus, housing discrimination based on criminal justice involvement further perpetuates the types of discrimination the Fair Housing Act (the “FHA”)⁹ was meant to counteract.

The FHA, which was passed in 1968 as Title VIII of the Civil Rights Act, “was meant to eliminate overt discrimination [,] disparities in the housing market” and residential segregation.¹⁰ Despite the economic and political gains that have been achieved since the passage of the Civil Rights Act, significant disparities still exist. For example, residential segregation still persists in U.S. metropolitan areas, and Black people continue to experience the highest segregation levels among all racial and ethnic groups.¹¹ Discrimination based on criminal justice involvement results in further segregation due in part to (i) concentrations of people with criminal justice involvement in shelters and (ii) lack of access to certain neighborhoods.

Safe and affordable housing is an essential component of successful reentry from incarceration. Studies have shown that “obtaining permanent housing means that formerly incarcerated individuals are more likely to gain employment, maintain sobriety, complete parole supervision, and achieve the necessary stability to stay safely in the community.”¹² A study of men returning to the Cleveland metropolitan area found that obtaining stable housing within the first month after release inhibited re-incarceration.¹³ As stated in an Urban Institute study, “The importance of finding a stable residence cannot be overestimated: men who found such housing within the first month after release were less likely to

⁹ 42 U.S.C. §§ 3601 – 3619.

¹⁰ Michela Zonta, *Racial Disparities in Home Appreciation*, CENTER FOR AMERICAN PROGRESS (July 15, 2019), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/> (last visited Oct. 29, 2021)

¹¹ *See Id.* (citing Jenny Schuetz, *Metro areas are still racially segregated*, THE BROOKINGS INSTITUTION (Dec. 8, 2017), <https://www.brookings.edu/blog/the-avenue/2017/12/08/metro-areas-are-still-racially-segregated/>); John R. Logan and Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, (Providence, RI: Brown University, 2011), available at <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf>. *See also* Joseph P. Williams, *Segregation’s Legacy*, U.S. NEWS & WORLD REPORT (Apr. 20, 2018), <https://www.usnews.com/news/the-report/articles/2018-04-20/us-is-still-segregated-even-after-fair-housing-act>).

¹² Scarlet Neath, *Recapping our Homeward Bound Blog Series*, VERA INST. OF JUST., <https://www.vera.org/blog/recapping-our-homeward-bound-blog-series> (last visited Oct. 29, 2021). *See also* Margaret diZerega & Sandra Villalobos Agudelo, *Piloting a Tool for Reentry: A Promising Approach to Engaging Family Members*, VERA INST. OF JUST. 4 (Mar. 2011), <https://www.vera.org/publications/piloting-a-tool-for-reentry-a-promising-approach-to-engaging-family-members>.

¹³ Nat’l Hous. L. Project, *The Importance of Stable Housing for Formerly Incarcerated Individuals*, 40 Hous. L. BULL. 60, 61 (2010), available at https://www.nhlp.org/files/NHLP%20Bull%20Feb10_FINAL-1.pdf. (citing Christy A. Visher & Shannon M.E. Courtney, *One Year Out: Experiences of Prisoners Returning to Cleveland*, THE URB. INST., 1, 10 (Apr. 2007), available at <https://www.urban.org/sites/default/files/publication/43021/311445-One-Year-Out-Experiences-of-Prisoners-Returning-to-Cleveland.PDF>

return to prison during the first year out.”¹⁴ A study of men returning to Chicago reinforces the idea. Study participants who reported living in their own apartment or house two months after release faced a lower risk of re-incarceration.¹⁵ Moreover, a study of over 40,000 individuals returning to New York City from state correctional facilities reveals the correlation between shelter use and risk of recidivism.¹⁶ Individuals who entered a homeless shelter within the first two years after release faced a higher risk of re-incarceration.¹⁷ Quite properly, housing has been called the “lynchpin that holds the reintegration process together.”¹⁸ With greater access to housing for all, there are fewer crimes and thus increased community safety.

Unfortunately for those with criminal justice involvement, the use of background screenings by landlords during the tenant screening process creates an additional barrier to housing.¹⁹ “In today’s age of online public records and digital transmission, a rental applicant’s complete residential history, credit report, criminal record, civil litigation background, and other information are available within hours or even minutes online.”²⁰

The ease and use of screening reports to exclude people with criminal justice records from obtaining quality housing exacerbates an already challenging situation, but is often defended by housing providers who contend that it improves public safety. In reality, the assumption that a criminal record is accurately predictive of a future problematic tenancy is not supported by social science research.²¹

¹⁴ *Id.*

¹⁵ (citing Jennifer Yahner & Christy Visser, *Illinois Prisoners’ Reentry Success Three Years After Release*, THE URB. INST., 1, 3 (Aug. 2008)), available at <https://www.urban.org/sites/default/files/publication/31981/411748-Illinois-Prisoners-Reentry-Success-Three-Years-after-Release.PDF>

¹⁶ *Id.* (citing Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL’Y 139 (2004))

¹⁷ *Id.* (citing Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL’Y 139, 147 (2004)).

¹⁸ Jeremy Travis, BUT THEY ALL COME BACK: FACING CHALLENGES OF PRISONER REENTRY 219 (2005), available at <https://www.ojp.gov/pdffiles1/nij/181413.pdf> See also National Housing Law Project, *The Importance of Stable Housing for Formerly Incarcerated Individuals*, HOUSING LAW BULLETIN, Vol. 40, available at <http://nhlp.org/files/Page%208%20Doc%201%20NHLP%20Bulletin%20Article%20Reentry.pdf>

¹⁹ Ariel Nelson, *Fertile Ground for FCRA Claims: Employee & Tenant Background Checks*, NATIONAL CONSUMER LAW CENTER, (Dec. 16, 2019), <https://library.nclc.org/fertile-ground-fcra-claims-employee-tenant-background-checks>. (showing that 90% of landlords contract with third parties to perform background checks, not including those landlords that perform background checks themselves).

²⁰ Eric Dunn and Marina Grabchuk, *Background Checks and Social effects: Contemporary Residential Tenant-Screening Problems in Washington State*, Vol. 9, Issue 1, SEATTLE CENTER FOR SOCIAL JUSTICE 319, 320 (Fall/Winter 2010), available at <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1086&context=sjsj> (last visited Oct. 29, 2021).

²¹ Merf Ehman and Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, N.Y. UNIV. J. OF LEGIS. & PUB. POL’Y QUORUM 1, 20 (2015), available at http://roominate.com/blog/fair_chance_housing/crystal_ball.pdf, See also Kimberly Burrowes, *Can Housing Interventions Reduce Incarceration and Recidivism?*, HOUSING MATTERS, AN URBAN INSTITUTE INITIATIVE (Feb. 27, 2019)

There is simply no empirical evidence establishing a relationship between the existence of a criminal record and an unsuccessful tenancy.²² When controlling for other factors, like level of substance abuse, length of time of being homeless, and educational level it becomes clear in many studies that having legal system involvement is not an accurate predictor of being a bad tenant.²³ Some courts have evaluated evidence intended to demonstrate an empirical link between legal system involvement and the propensity for tenant dangerousness and such courts have similarly found that there is no such link.²⁴ In fact, communities benefit when there is greater access to safe and stable housing, not just because such access

available at <https://housingmatters.urban.org/articles/can-housing-interventions-reduce-incarceration-and-recidivism> (noting that the results of the Returning Home Ohio Pilot Project showed that participants receiving supportive housing services were forty percent less likely to be rearrested).

²² *Id.* (noting that there has been little discussion on the predictive value of a criminal record in the housing context and concluding, based upon the relevant sociological research on the relationship between justice history and the ability to meet the obligations of tenancy, that an applicant's criminal record should be absent from the analysis of whether a future crime was foreseeable by a landlord because the mere presence of a record does not implicate foreseeability. Two methodologically rigorous independent studies indicated no correlation between a criminal record and a future problematic tenancy.); *See also*, Daniel K Malone, M.P.H., *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults With Behavioral Health Disorders*, 60 No. 2 PSYCHIATRIC SERVICES, 224, (Feb. 2009) (finding, in a supportive housing study, that the presence of justice history is not predictive of the potential for housing success), *See also* Megan C. Kurlycheck, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?* 5.3 CRIMINOLOGY & PU. POL'Y 483 (2006), available at http://clerk.seattle.gov/~cfpics/cf_320351g.pdf, *See also*, Bill Keller, *Seven Things To Know About Repeat Offenders*, THE MARSHALL PROJECT (Mar. 9, 2016), <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders> (illustrating "recidivism" numbers may be calculated in very different ways, possibly based on, among other factors, re-arrests, re-convictions or re-incarcerations); *See* NYS Department of Corrections and Community Supervision ("DOCCS"), *Press Release: Return Rate for Parolees Committing New Felony Crimes Hits Historic Low* (Nov. 24, 2014), https://www.nycourts.gov/reporter/webdocs/Recidivism_Rates_2010.pdf (showing that ninety one percent (91%) of people with criminal justice involvement, released in 2010, were not sent back to prison based on a new felony conviction within three years of their release), *Cf.* Cael Warren, *Success in Housing; How much Does Criminal Background Matter*, WILDER RESEARCH 1, 21 (Jan. 2019), available at <https://abfe.issuelab.org/resource/success-in-housing-how-much-does-criminal-background-matter.html> (Finding that most criminal justice involvement is not predictive of housing success, but that certain criminal justice involvement might be, though also noting that certain factors that could not be controlled for, including employment status, educational, mental health or substance abuse diagnoses, and thus any predictive value of the study might be limited/questioned).

²³ *See* Merf Ehman and Anna Reosti, *supra* note 21 (surveying studies that, after controlling for other factors, found that spending time in prison or jail is not predictive of successful reentry and participation in supportive housing).

²⁴ *See Id.* at 16 (citing *See Bannum Inc., v. City of Louisville*, 958 F.2d 1354, 1360-61 (6th Cir. 1992) (noting that city was unable to show that occupants who had been incarcerated were more likely to commit crimes than those community residents without a criminal record); *See* *Open Homes Fellowship v. Orange Cnty*, 325 F. Supp. 2d 1349, 1361 (M.D. Fla. 2004) (Concluding that any fears relating a substance abuse housing facility that accepted men from prisons or jails were unfounded and based on speculation); *See also*, *Davenport v. D.M. Rental Props.*, 217 N.C. App. 133, 718 S.E.2d 188 (N.C. 2011) (noting that a landlord cannot reasonably be expected to predict from a criminal record the danger of tenants and that blanket bans against people with legal system involvement would likely lead to more homelessness to the detriment of public safety).

reduces recidivism and homeless status crimes (thus improving community safety), but also because, at least among those with severe mental illness, there is less victimization.²⁵

II. The Fortune Housing Initiative

In response to the housing shortage facing individuals upon their reentry from incarceration, Fortune has developed a continuum of housing options for individuals returning home which include the following: (1) The Fortune Academy or “The Castle,” which is comprised of an emergency housing unit and a “phased permanent” unit that serves individuals who are ready to live independently²⁶; and (2) “Castle Gardens,” which provides supportive and affordable permanent housing that integrates people who have spent time in prison or jail with other low-income families.²⁷ However, the demand for housing for individuals with criminal justice involvement substantially exceeds the capacity that Fortune can supply, which has resulted in Fortune seeking housing options for this population by developing relationships with landlords and housing providers in the New York City area.²⁸

As Fortune has developed its own housing while also cultivating relationships with private landlords, Fortune has seen how discrimination based on criminal history has kept justice-impacted individuals out of the housing market. In response to this discrimination, and as a part of the Fortune Housing Discrimination Initiative (referred to herein as the “Fortune Housing Initiative”), Fortune began working with and advocating for dozens of participants who have faced and, in some cases, continue to face housing discrimination based on criminal justice involvement.²⁹ Fortune’s partnerships with other

²⁵ Laurence Roy, Ph.D., Anne G. Crocker, Ph.D., Tonia L. Nicholls, Ph.D., Eric A. Latimer, Ph.D., and Andrea Reyes Ayllon, M.Sc., *Criminal Behavior and Victimization Among Homeless Individuals With Severe Mental Illness: A Systematic Review*, Psychiatric Services, (June 1, 2014), available at <https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201200515> (Rates of criminal behavior, contacts with the criminal justice system, and victimization among homeless adults with severe mental illness are higher than among housed adults with severe mental illness), *See also* Kimberly Burrowes, *supra* note 21 (noting that after a year of delivering the service, the Milwaukee Wisconsin Housing First Program led to a decrease in municipal violations by eighty two percent, while the number of people experiencing homelessness decreased from 1,521 to 900).

²⁶ In Fiscal Year 2020, of the 109 participants who exited the emergency housing, 83% moved to transitional or permanent housing; of the 47 who left the transitional/phased-permanent housing, 75% moved to permanent housing and 4% moved to residential treatment facilities.

²⁷ Of the residents in the 63 supportive housing units in Castle Gardens, 97% remained housed for two or more years; 88% remained housed for 3-10 years; and 96% remained self-sufficient.

²⁸ Fortune has also opened an additional emergency transitional building – Freedom House – which was created to serve individuals released directly out of Rikers Island. In addition, Fortune also has a “scattered-site” program, placing participants in housing throughout New York City (the “City” or “NYC”). In this program, Fortune leases apartments and pays the rent. Fortune has developed relationships with smaller landlords to facilitate its scattered-site housing. This has led to relationships with about 100 landlords. Many landlords however, especially larger landlords, are unwilling to form relationships with Fortune and its participants based on criminal justice involvement policies.

²⁹ The Fortune Housing Initiative formally began on January 4, 2021 and is funded by a grant from the Robin Hood Foundation (<https://www.robinhood.org/>).

non-profits, government agencies, and fair housing organizations have allowed it to better understand that this problem is not limited to New York City and is prevalent throughout the United States.

This White Paper examines the range of possible legislative and enforcement solutions to the problem of housing discrimination based on criminal justice involvement. This White Paper examines some of the existing legislative solutions which predominantly employ two models, the “Ban the Box” model and the Fair Chance model. As result of our analysis, we have concluded that the best legislative solutions for reducing housing discrimination based upon criminal justice involvement includes the following: (i) a simple version of a Fair Chance law which prohibits the consideration of criminal justice history at any point in the housing application process and (ii) a First-In-Time rule for market rate housing, which would require that the first qualified people to apply be accepted by market rate housing providers. Then, in order to ensure proper implementation and enforcement of the proposed legislative solutions, this White Paper sets forth four critical enforcement strategies including (i) outreach and education of the public at large, (ii) outreach and education of the real estate industry, (iii) partnerships among governmental and non-governmental organizations, and (iv) advocacy, testing, and strategic litigation. We conclude that these legislative and enforcement solutions, together, give us the best path for overcoming housing discrimination, institutional exclusion³⁰ and segregation based upon criminal justice involvement.

III. Current Landscape of Legislative Problems

The solution to housing discrimination and the resulting homelessness due to criminal justice involvement will require the enactment of legislation. It is important to recognize, however, that the mere existence of laws prohibiting housing discrimination based upon criminal justice history will not be sufficient to end such discrimination. Nevertheless, a clear and concise law targeted at ending housing discrimination, while not sufficient on its own to eradicate housing discrimination based on criminal records, would be a powerful starting point for effective enforcement.

In the area of housing discrimination based on criminal justice involvement, there are a number of legislative solutions that have already been proposed and in some cases enacted into law across the country.³¹ As noted below however, many of these laws contain structural flaws that impede their implementation and effectiveness.

³⁰ This type of housing discrimination may be seen as a part of a broader movement of society over the last few decades, deemed “institutional exclusion.” Institutional exclusion assumes that people are irredeemable and uses “what’s on paper” risk mitigation methodologies that tend to dehumanize people rather than depicting them as individuals. See David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 5 (Winter 2008).

³¹ As of the writing of this White Paper, there are fourteen proposed or existing laws nationwide—city, county, and state-- that prohibit housing discrimination based on criminal justice involvement in some capacity. These fourteen

A. The “Ban the Box” Model

The original Ban the Box legislative campaign in the area of employment was initiated in 2003, by a grassroots coalition called All of Us or None³² and by January 2006, the Ban the Box model was required for all public employment and housing applications in San Francisco.³³ The model rapidly spread, and currently, 37 states, the District of Columbia, and over 150 cities and counties have adopted “Ban the Box” policies in the employment field.³⁴ San Francisco was the first city to use the model in the area of housing discrimination based on criminal records.³⁵

The Ban the Box model has been applied to housing and has several basic elements. First, housing providers are not allowed to inquire about an applicant’s criminal justice involvement until *after* a conditional offer or lease is provided (as long as the applicant has met the providers’ financial and other tenant criteria). Second, upon a conditional offer being made, and generally after notifying applicants that a background check will be conducted, housing providers may then conduct background screenings. Depending on the state, these background screening inquiries may be limited by look-back periods (crimes beyond a certain number of years may not be considered), categories of crimes (generally the more categories of crimes that may be used to deny people or the broader the language, the less protective of the possible tenant) or categories of housing (some limit all of the protections to affordable housing only).

laws include those in the following locations: (1) Ann Arbor, MI, (2) Berkeley, CA, (3) Champaign, IL, (4) Cook County, IL, (5) Detroit, MI, (6) Minneapolis/St. Paul, MN (7) Oakland, CA, (8) Portland, OR, (9) Richmond, CA, (10) San Francisco, CA, (11) Seattle, WA, (12) The State of New Jersey, (13) Urbana, IL, and (14) Washington, DC. Please see [Appendix 1](#) for a full copy of thirteen of the fourteen laws listed above as well as the NYC Fair Chance for Housing Act, as originally proposed but not passed in 2021. The City of Detroit ordinance may be found here: <https://detroitmi.gov/news/detroit-city-council-passes-councilmember-ayers-fair-chance-housing-ordinance>.

³² Stocker, Jennifer. *Ban the Black Box: Criminal Background Screening and the Information-Withholding Problem*, 96 WASH. U. L. REV. 859, 862 (2019) (citing Linda Evans, Legal Service for Prisoners with Children, BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY 10 (2016), <http://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf>).

³³ Legal Services for Prisoners with Children, *Ban the Box Historical Timeline*, <https://prisonerswithchildren.org/wp-content/uploads/2019/08/BTB-timeline-final.pdf> (last visited Oct. 29, 2021).

³⁴ National Employment Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Housing Policies*, <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (last visited Oct. 29, 2021).

³⁵ See City of San Francisco, *Human Rights Commission Celebrates Passage of Fair Chance Ordinance*, Mar. 6, 2014, <https://sf-hrc.org/news-release/human-rights-commission-celebrates-passage-fair-chance-ordinance> (last visited July 14, 2021); See also Joe Watson, *Ban the Box” Movement Spreads Nationwide*, PRISON LEGAL NEWS, Oct. 10, 2014 <https://www.prisonlegalnews.org/news/2014/oct/10/ban-box-movement-spreads-nationwide/>

Although San Francisco refers to its housing ordinance as a “Fair Chance” ordinance, we refer to it and other similarly structured ordinances as examples of the Ban the Box model, based on the elements and substance of the laws, not the titles.

Unfortunately, the Ban the Box model often does nothing more than delay potential discrimination: while a criminal background check must wait until after a conditional offer of housing has been made, at that point, it may still be used to discriminate against individuals with criminal records.

San Francisco's Ban the Box ordinance seeks to prevent housing discrimination based upon criminal justice involvement. However, the ordinance has been criticized as being inherently "toothless."³⁶ Despite the efforts of the San Francisco Human Rights Commission ("SFHRC") to (i) educate the public and (ii) conduct some testing for discrimination, the SFHRC processes the relatively few claims that are submitted and generated from the complex procedural enforcement mechanisms built into the law. This is due to several limitations embedded in the law. First, the law only applies to "affordable housing" which greatly limits the breadth of the law by exempting market-based housing. In addition, even "affordable housing" is defined somewhat narrowly,³⁷ which further limits the reach of the law. Finally, any convictions from the last seven years may be used to exclude an applicant—although the screening does not happen until after a conditional offer and the individualized assessment process. The individualized assessment process does not necessarily restrict discrimination so long as the proper procedures are followed by a housing provider. The general consensus among the experts in San Francisco is that changes to the law are needed to improve its efficacy and enforcement efforts. Karen Clopton, Chair of the SFHRC, noted that the SFHRC is supportive of creating broader protections for people with criminal justice involvement seeking affordable housing.³⁸

Washington, D.C. and Detroit have also enacted Ban the Box ordinances which are intended to curb housing discrimination based upon criminal justice history. Although there are some differences between these laws and the San Francisco model, the impact of these laws has also been called into question.³⁹ The Washington, D.C. Law, which passed in 2016, did not face very much real estate industry opposition, in part because, according to Kate Scott, the Executive Director of the Equal Rights Center (the "ERC"), it did not appear to really change the discriminatory landscape of Washington, DC.⁴⁰ There is a seven year look-back period and a complex procedural structure which includes an individualized assessment. In Detroit, the government division tasked with the law's enforcement does not receive

³⁶ Interview with Mary Prem, Founder and Executive Director of Housing Equality Law Project ("HELP"), over Zoom (Jun. 29, 2021).

³⁷ Affordable housing in San Francisco only includes those housing providers who receive city funding, not those who receive tax incentives and develop new affordable housing. San Francisco, CA., POLICE CODE art. 49, Ordinance No. 17-14 (2014).

³⁸ Telephone interview with Karen Clopton, Chair of the SFHRC (June 25, 2021).

³⁹ Although the State of New Jersey recently passed a Ban the Box modeled law, not enough time has passed to verify the limitations in the law. Fair Chance in Housing Act, N.J. ALS 110 (enacted Jun. 18, 2021). As in several jurisdictions, the New Jersey law is a Ban the Box modeled law despite the fact that it is title uses the words "Fair Chance."

⁴⁰ Interview with Kate Scott, Executive Director of the ERC, over Zoom (Jun. 15, 2021).

many claims originating from the Ban the Box styled law.⁴¹ Steve Tomkowiak, Executive Director of the Fair Housing Center of Metropolitan Detroit, noted that the law, despite the intention to protect people with criminal justice involvement from housing discrimination, (i) does not seem to protect against much of the discrimination against people with criminal justice involvement, (ii) is complex, and (iii) is full of gaps.⁴²

Ban the Box laws tend to be ineffective. Such laws are more limited in the breadth of their protections (often including more carve-outs or exceptions), too often merely delay the possible use of criminal justice background screenings to exclude people, and may increase discrimination based on race.

B. “Individualized Assessments”

In cities with the Ban the Box laws, it is generally required that housing providers use “individualized assessments” in reviewing the criminal history of an applicant. At first glance an individualized assessment may be viewed as a mechanism to dissuade landlords from automatically discriminating against individuals who have a criminal record. However, many of the laws define “individualized assessments” in a manner that focuses on the crime itself. This backward looking focus tends to define people based on their past crimes.

Detroit, Portland (OR.), Richmond (CA.), San Francisco, Washington, D.C., and the State of New Jersey, all have ordinances that at least procedurally, require the use of individualized assessments.⁴³ However, given the consideration of criminal justice records and the housing provider’s discretion over who to accept and who to reject, there is, ultimately, no way to enforce the legitimacy of these so-called individualized assessments. Matt Oglander, Senior Investigator and Mediator for SFHRC, noted, for example, that in San Francisco, if housing providers follow the procedural requirements, the ordinance does not require housing providers to use predictive risk and needs assessment tools.⁴⁴

As evidenced by the experiences in the aforementioned cities and states, the problem with individualized assessments is that no matter the procedural requirements for such assessment, they are (i) still based on the landlord’s less than expert assessments of an individual’s current danger to the

⁴¹ Interview with Steve Tomkowiak, Executive Director, Fair Housing Center of Metropolitan Detroit (“FHCMD”), over Zoom (Jun. 18, 2021).

⁴² Interview with Steve Tomkowiak, *supra* note 41.

⁴³ Detroit, MI., CITY CODE, art. V, §§ 26-5-1 – 26-5-20 (1984); Portland, Or., CITY CODE, 30.01.86(D) (2020); Richmond, CA., MUNICIPAL CODE, Article VII, Chapter 7.110.050(e) (2016); San Francisco, CA, POLICE CODE, *supra* note 37; Washington D.C., DC Law 21-259 (2016).

⁴⁴ Interview with Matthew Oglander, Senior Investigator and Mediator for SFHRC, over Zoom (Jun. 30, 2021).

community and (ii) subject to the problem of implicit biases. The statutorily required analysis tends to be based almost exclusively on a person's past crime. In many cases such an assessment, by its very nature, will fail to properly consider who such people are today due to its backward-looking focus.

Finally, many of the laws that employ individualized assessments also contain "notice" provisions that inform people that there will be a background check performed, which often appear on apartment or housing applications. The notice of background checks may also have a chilling effect on applications as people with criminal justice involvement refrain from applying or completing applications at all, based on the assumption that they will not have a fair chance at securing a new home. This is something we have observed in our work for the Fortune Housing Initiative, both in the context of criminal justice screening notices⁴⁵ and notices of source of income requirements.⁴⁶

C. Complexity

Many of the current legislative solutions are complex in nature which makes them difficult to implement and enforce. In addition, this complexity may also have a chilling effect, inhibiting people from bringing claims of housing discrimination.

In Portland, for example, the Fair Chance for Housing law, which numerous different landlords fought against "tooth and nail," apparently went through 25 different drafts after each landlord met with its primary sponsor.⁴⁷ This resulted in a complex law that touches on almost every aspect of the housing application process. At its core, the law states that in order to screen legally, landlords must either use individualized assessments or "low barrier criteria." The latter has eighteen different restrictions on looking into criminal history, credit history, and rental history. However, Beck Strauss, a

⁴⁵ In several of the cases and in discussions with shelter staff regarding many other cases, it has become clear that people sometimes give up on applying for housing or do not apply in the first place where it is explicitly known that housing providers use background checks. One of Fortune's participants, referred to here as Participant Y, after being rejected exclusively based on criminal justice involvement about five times, no longer ignore the notices. Instead he stopped applying where he saw such notices because he was "fed up with getting the run around." He ended up giving up completely, and moved into a relative's apartment despite it being a bad situation for him. Another participant, Participant Z, refused to apply for an apartment in the fall of 2020 because of several notices regarding a background check because he "thought that it wouldn't be worth it" and upon reflection he is happy that he did not apply because he says that he "saved some money at least." He's still living in a shelter and wants to get out as soon as possible.

⁴⁶ In the context of source of income, Participant X was originally going to refrain from applying for an apartment due to a notice regarding proving source of income. As part of the Fortune initiative, we helped him advocate on behalf of himself and, eventually, he gained access to the apartment. If it were not for our guidance, Participant X would not have even applied due to a source of income notice. There were facts indicating that there was a powerful source of income based cooling or chilling effect, one that had lasted for years. The owner purchased the complex in 2017 and Participant X was the first Section 8 applicant the leasing office had heard of applying at all, and he applied in 2021.

⁴⁷ Telephone interview with Katrina Holland, Executive Director, JOIN (June 9, 2021).

staff attorney at the Oregon Law Center noted that this “low barrier screening criteria” process was complex and difficult to enforce: instead of following its new rules she noted “landlords are just keeping their own criteria for an individualized assessment and are not looking at the low barrier track.”⁴⁸

Meanwhile, in San Francisco, the Senior Investigator and Mediator of the SFHRC Mr. Oglander, noted that one of the main problems with the current law seems to be that people who would benefit from the protections of the local ordinance are not aware of the law or how to file a complaint.⁴⁹ The application procedures include receiving a conditional approval for housing, then undergoing a subjective individualized assessment, a notice of the basis for denial, a fourteen day period to present mitigating evidence, and then receiving actual notice of the decision.⁵⁰ This is a complex process that may result in confusion or frustration, in part because the law mandates certain procedures and official notices but does not require housing providers to explain their reasoning for the rejection of an applicant after considering evidence of rehabilitation or other mitigating factors.⁵¹

In Detroit, the complexity of the law is partly due to (i) the many exceptions of the law, which create ambiguity; (ii) a complex Ban the Box modeled/individualized assessment process⁵²; and (iii) the ambiguity of the law based in part on the definition of “directly-related conviction” which is defined as including unresolved arrests or convictions that have a “direct and specific negative bearing on the health, safety, or right to peaceful enjoyment of the premises.”⁵³

The complexity of these laws combined with the stated exceptions, can create difficulties for both those who desire to pursue claims under the laws and for those charged with enforcing them.

IV. Legislative Solutions

Laws targeted to prevent housing discrimination based upon criminal justice involvement that utilize the “Fair Chance” model have the potential to be a simple, effective and easily enforceable deterrent to housing discrimination based upon criminal justice history. The best versions of fair chance

⁴⁸ Telephone interview with Beck Strauss, Staff Attorney, Oregon Law Center (June 3, 2021). In another interview, Kimberly McCarty, Executive Director of the Community Alliance of Tenants in Portland, also said that ““while I was at the Portland Housing Bureau, I heard from landlords that they felt that the low-barrier method is overly complex and a preference for their own individualized assessments.”. Telephone interview with Kimberly McCarty, Community Alliance of Tenants (June 17, 2021).

⁴⁹ Interview with Matthew Oglander, *supra* note 44.

⁵⁰ San Francisco, CA., POLICE CODE, *supra* note 37 at §4906.

⁵¹ San Francisco, CA., POLICE CODE, *supra* note 37 at §4906(h)(i) (setting forth a notice of adverse action decision, but no requirements for reasons or explanations of the decision).

⁵² See Detroit Division of Civil Rights, Inclusion and Opportunity (“CRIO”), *Fair Chance Process* (2020) (last visited on Aug. 4, 2021) (this pamphlet explains the eight step process in a way which is meant to help people better understand it), <https://detroitmi.gov/sites/detroitmi.localhost/files/2020-12/FairChanceGraphicCRIO%20%281%29.pdf>

⁵³ Detroit, MI., CITY CODE, *supra* note 43.

laws should be passed where it is politically possible. Given that there are many legislative bodies currently considering such proposals, and others that have recently passed fair chance laws, now is like the right time.⁵⁴

A. Fair Chance for Housing

Laws based upon the “Fair Chance” model do not simply delay background screenings or discrimination. Rather, various “Fair Chance” model laws seek to completely eliminate the consideration of criminal justice involvement from the housing application process.⁵⁵ Fair Chance laws do not allow inquiries into, nor adverse decisions based on, criminal justice involvement.⁵⁶ Finally, Fair Chance laws generally prohibit advertisements or notices that state that those with criminal justice involvement will be denied housing or apartments, the goal being to decrease the chilling effect caused by such notices.

While there are several forms of Fair Chance laws in the area of housing discrimination based upon criminal justice involvement, we believe that the originally proposed Fair Chance for Housing Act (the “NY FCHA”), in the form originally submitted before the New York City Council but not passed in 2021, provides the highest level of deterrence against housing discrimination based upon criminal justice history.⁵⁷ The bill seeks to prohibit housing discrimination on the basis of arrest or criminal record and was drafted in a way to avoid the major problems with other legislation.⁵⁸

The NY FCHA’s language is simpler and clearer than the language of most other Fair Chance laws that currently exist. The NY FCHA sets forth that “It shall be an unlawful discriminatory practice for any real estate broker, landlord, or employee or agent thereof to make a criminal history inquiry regarding an applicant or to take adverse action against an applicant for having been arrested or convicted of one or more criminal offenses.”⁵⁹ Second, the bill bans discriminatory advertising, stating that landlords cannot “declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation in such housing accommodation based on a person’s arrest or criminal conviction record.”⁶⁰

⁵⁴ See e.g., Minneapolis, MN. CODE OF ORDINANCES, Title 12, Chapter 244.2030 (effective 2020); Portland, Or., CITY CODE, 30.01.86 (effective 2020); Oakland, CA. MUNICIPAL CODE, ch. 8.25 (effective 2020); Berkeley, CA., MUNICIPAL CODE, ch. 13.106 (effective 2020).

⁵⁵ See e.g., Seattle, WA., MUNICIPAL CODE Sec 14.09 (2018), Berkeley, CA., MUNICIPAL CODE, *supra* note 54, and Oakland, CA., MUNICIPAL CODE *supra* note 54; NYC proposed ordinance, Fair Chance for Housing Act, Int. 2047-2020.

⁵⁶ See e.g., Seattle, WA., MUNICIPAL CODE, *supra* note 55; Berkeley, CA., MUNICIPAL CODE, *supra* note 54, and Oakland, CA., MUNICIPAL CODE, *supra* note 54.

⁵⁷ NYC proposed ordinance, Fair Chair for Housing Act, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ *Id.* at Section 1(b).

⁶⁰ *Id.* at Section 1(c).

While the ban on discriminatory advertising has been used in other Fair Chance laws, the first part of the NY FCHA is completely unique. While the proposed law acknowledges that landlords are permitted to do background checks “pursuant to any federal or state law or regulation that requires consideration of criminal history,” the NY FCHA completely bars landlords from making any other use of the background screenings (other than for the rental of a landlord’s personal residence where he or she actually lives).⁶¹ This language also removes the problem of having numerous exceptions. Whether someone has a felony crime or a misdemeanor, a violent crime or a nonviolent crime, or whether it occurred two years ago or ten years ago, landlords simply cannot run criminal background checks at all, other than those required under federal or, where applicable, state law.⁶² Additionally, New York’s proposed law does away with the use of an “individualized assessment,” which will in itself create more opportunities for housing because landlords would have no knowledge of the legal system involvement.

In terms of enforcement, the NY FCHA does not require government investigations as a precondition for allowing an aggrieved candidate for housing to bring a private cause of action. This feature greatly strengthens the potential impact of the law. Large, multi-billion-dollar corporations are more likely to take this risk of litigation seriously, given the inherent risk of potentially impactful reputational and financial damage.⁶³ The ability to advance private causes of action under proposed this law will serve to enhance the enforcement that will be undertaken by the City of New York.

⁶¹ *Id.* at Section 1(d)(1).

⁶² The U.S. Department of Housing and Urban Development (HUD) explicitly requires two bans based on criminal activity. HUD requires that all Public Housing Authorities (PHAs) establish lifetime bans on the admission to the Public Housing and Housing Choice Voucher (Tenant-Based Section 8) programs for Individuals found to have manufactured or produced methamphetamine on the premises of federally assisted housing and sex offenders subject to a lifetime registration requirement under a State sex offender registration program 24 CFR 960.204, 24 CFR 982.553; also see 42 USC 1437(n)(f)(1); 42 USCA 13663(a).

⁶³ Robert G. Schwemm, *Fair Housing Cases Involving Testing: A Legal Review Of Reported Federal Court Decisions 1968 • 1991*, THE URBAN INSTITUTE (July 1992) (surveying cases whereby private parties and fair housing organizations enforced rights via litigation, effected changes in landlord policies, and exposed discriminatory policies that may have not been otherwise revealed to the public).

B. First in Time – Seattle Leading by Example

On November 14th, 2019, the Washington State Supreme Court upheld new tenant screening requirements for properties located within the City of Seattle – the First-In-Time Law (the “FIT Rule”).⁶⁴ The FIT Rule requires housing providers to give notice of any screening criteria. The Seattle Fair Chance Housing law prohibits housing providers from inquiring, screening, or taking an adverse action against applicants with a criminal record except information on the sex offender registry.⁶⁵ So the FIT Rule screening criteria cannot include a criterion that a person must pass a criminal record screening or ask about a person’s criminal history on the application or criteria.⁶⁶

In terms of process, the FIT Rule requires that (i) landlords record the order of applications received and (ii) accept the application of the first qualified applicant who provides a completed application.⁶⁷

We recommend that the FIT Rule be modified to cover only market rate housing, with carve-outs for supportive and affordable housing, because the needs of the supportive and affordable housing applicants ought to be given substantial weight in the selection process.

The combination of a Fair Chance Housing law with a First-In-Time Rule for market rate housing would create a legal structure which could lead to greatly reduced housing discrimination against individuals with criminal justice involvement.⁶⁸

⁶⁴ See *Chong Yim v City of Seattle*, 194 Wash 2d 651, 451 P3d 675 (2019).

⁶⁵ Seattle, WA., MUNICIPAL CODE, *supra* note 55.

⁶⁶ *Id.*

⁶⁷ Seattle Office For Civil Rights, *First-In-Time*, <https://www.seattle.gov/civilrights/civil-rights/fair-housing/first-in-time> (last visited Oct. 29, 2021)

⁶⁸ In Seattle, for example, for effective enforcement, the SOCR added two staff members to help enforce the FIT Rule. Daniel Beekman, A primer on Seattle’s new first-come, first-served renters law, SEATTLE TIMES, Aug. 12, 2016, available at <https://www.seattletimes.com/seattle-news/politics/a-primer-on-seattles-new-first-come-first-served-renters-law/>

(“According to SOCR, it will need to add two staffers to handle work related to the first-come, first-served policy — to the tune of more than \$200,000 next year.”)

V. Enforcement Solutions

While laws that model the NY FCHA and the FIT Rule for market rate housing would avoid many of the problems presently found in existing housing discrimination laws, it is likely that without strong enforcement landlords and other actors in the housing process will not change their behaviors.⁶⁹

For example, the FHA has been federal law for 53 years, yet it is still regularly violated, which necessitates government-initiated enforcement actions. In 2018, the National Fair Housing Alliance (“NFHA”) reported that more than half a million housing discrimination complaints had been processed since 1996, when NFHA first began collecting complaint data.⁷⁰ As the NFHA concluded in its report out on the fifty-year anniversary of the FHA,

The Fair Housing Act has the potential to be one of the most powerful laws in the country, but its effectiveness has been stymied by entrenched policies and practices that perpetuate discrimination and segregation; ineffective enforcement by the Department of Housing and Urban Development (HUD) and Department of Justice (DOJ); and inadequate allocation of resources to public and private fair housing programs at all levels.⁷¹

Regardless of the intent or the language of the law in question, vigorous enforcement has always been the deciding factor as to whether anti-discrimination laws are effective in American society. Through conversations with dozens of advocates, government officials, and academics across the country, Fortune’s research has revealed that there are four enforcement strategies that have proven to be the most effective (some for decades) in enforcing housing discrimination laws.

A. Education and Outreach to the Public

Education and outreach to the public serves a vital role in fair housing enforcement: it informs consumers about their rights and teaches them how to recognize and report possible discrimination.⁷² On a national level, the U.S. Department of Housing and Urban Development (“HUD”) has made outreach and education a priority, stating in one report that:

⁶⁹ Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1458-1459 (1998).

⁷⁰ National Fair Housing Alliance, *Press Release: New Report Analyzes 50 Years of the Fair Housing Act and Calls for Stronger Enforcement of Fair Housing Laws*, (April 30, 2018), <https://nationalfairhousing.org/2018/04/30/new-report-analyzes-50-years-of-the-fair-housing-act-and-calls-for-stronger-enforcement-of-fair-housing-laws/> (last visited Oct. 29, 2021).

⁷¹ *Id.*

⁷² National Fair Housing Alliance, *MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY – 2018 FAIR HOUSING TRENDS REPORT* (2018), available at <https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report-4-30-18.pdf>.

As the federal agency responsible for enforcing the Fair Housing Act, HUD has a strategic interest in improving the level of public awareness of and support for fair housing law and in facilitating use of the Act's enforcement provisions where housing discrimination is thought to occur. To do so, the Department has for many years aided state and local agency and nonprofit group efforts to conduct fair housing outreach and education programs, and publicized cases where enforcement efforts resulted in charges of housing discrimination.⁷³

Thus, the HUD Fair Housing Initiatives Program ("FHIP") which funds many of the activities of the fair housing organizations across the United States, is instrumental in outreach efforts at the national level, state and local levels.

At the state and local levels, outreach and education is a strategy used both by those jurisdictions with the Ban the Box model and the Fair Chance laws. In Portland, Oregon the city provides funding to the Fair Housing Council of Oregon (FHCO), a "statewide civil rights organization whose mission is to eliminate housing discrimination through access to enforcement and education."⁷⁴ FHCO's education efforts take on many different forms. For tenants with criminal convictions, one example of Portland's educational outreach includes a public guide that its staff presents to different groups of people--city officials, landlords, shelters, nonprofits, and others⁷⁵—entitled *Moving Forward with a Past: A guide to help people with criminal histories to know their housing rights and responsibilities while looking for housing* (2018).⁷⁶

B. Education and Outreach to The Real Estate Industry

Real estate professionals may not understand or know of new laws and that may lead to the continuation of discriminatory housing policies. Therefore, it is also necessary to provide education and outreach to the real estate industry.

In Minneapolis, the Department of Regulatory Services manages the operation of its recently-passed fair chance law. As Kellie Jones and Christina Dowling stated, "We have done lots of webinars, including one in Spanish, and sent out emails about the ordinance to the approximately 8,000 email addresses we have for property owners and managers. Getting the word out is the most important technique we use."⁷⁷ HousingLink, a non-profit organization, provides landlords with a "Micro-Training on

⁷³ Martin D. Abravanel, DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW, The Urban Institute (Feb. 2006).

⁷⁴ FHCO, *The Work We Do*, <http://fhco.org/index.php/about-fhco/the-work-we-do> (last visited on Oct. 29, 2021).

⁷⁵ Telephone Interview with Isidro Reyes, Statewide Enforcement and Intake Coordinator at FHCO (June 6, 2011).

⁷⁶ FHCO, MOVING FORWARD WITH A PAST: A GUIDE TO HELP PEOPLE WITH CRIMINAL HISTORIES TO KNOW THEIR HOUSING RIGHTS AND RESPONSIBILITIES WHILE LOOKING FOR HOUSING 22 (2018), available at <http://fhco.org/index.php/information-for-housing-consumers/criminal-history>

⁷⁷ Telephone interview with Kellie Jones and Christina Dowling, Minneapolis Regulatory Services (June 31, 2021).

the Minneapolis Renter Protections Ordinance,” so that landlords can “understand how the ordinance will impact your operations.”⁷⁸

In Portland, this education effort comes from the largest landlord in all of Oregon: MultiFamily Northwest, which received a grant along with the Oregon Law Center that allowed it to train other landlords— first on the 2016 HUD Guidance, and then in 2019, on the Portland ordinance.⁷⁹

In Seattle, the SOCR has likewise undertaken substantial efforts to educate, train and inform the real estate industry as well as criminal record screening companies.⁸⁰ In particular, Michael Chin and Erika Pablo of the SOCR noted the importance of their efforts to educate the screening companies.⁸¹ These efforts were so effective that screening companies conducting substantial business in Seattle began to refrain from unlawfully checking or providing to landlords criminal justice involvement information.⁸² The experience in Seattle indicates that targeted efforts to educate the most relevant industry groups can have a definitive impact on the discriminatory behavior of such groups.

C. Partnerships

Another key enforcement strategy of fair chance for housing laws is the creation of partnerships between and among governmental agencies and non-profit (including fair housing) organizations. This collaboration expands the impact of enforcement efforts due to there being an increased availability of resources – both financial and in terms of enforcement tools – to support the enforcement of Fair Chance housing laws.

Non-profits often receive funding from different sources which may include private funders, FHIP or the HUD Fair Housing Assistance Program (“FHAP”).⁸³ The Fortune Housing Initiative is an example of such a partnership. Fortune has created an informal partnership with the New York State Division of Housing and Community Renewal (the “DHCR”), which is funded by New York State. As a result of this informal partnership, the DHCR assists Fortune’s participants in obtaining an individualized review during the housing process in DHCR supported housing projects. This is an extremely effective partnership

⁷⁸ HousingLink, *Landlord Education*, <https://www.housinglink.org/List/landlord-education> (last visited Oct. 29, 2021).

⁷⁹ For various programs, refer to <https://www.multifamilynw.org/educational-offerings##> (last visited Oct. 29, 2021)

⁸⁰ Interview with Michael Chin, Civil Rights Enforcement Manager at the SOCR, and Erika Pablo, Senior Civil Rights Strategic Advisor at the SOCR, over Zoom. (July 26, 2021).

⁸¹ *Id.*

⁸² *Id.*

⁸³National Low Income Housing Coalition, *ADVOCATES' GUIDE '21: A PRIMER ON FEDERAL AFFORDABLE HOUSING AND COMMUNITY DEVELOPMENT PROGRAMS AND POLICIES 7-5 and 7-6* (2021), available at <https://nlihc.org/explore-issues/publications-research/advocates-guide>

because the DHCR, a state government division, has the ability to leverage enforcement tools that are unavailable to Fortune.

D. Advocacy/Testing/Enforcement Actions and Strategic Litigation

One of the critical ways in which fair chance for housing laws can be enforced is through the employment of well-established forms of advocacy, testing, or strategic litigation.⁸⁴

1. Advocacy

Advocacy in the area of fair housing includes not only public policy advocacy – for better, fairer laws, rules and regulations—but also direct advocacy for participants or clients who have faced or are facing discrimination.⁸⁵ Sometimes a component of broader social work and services, client advocacy on housing typically involves the counseling of clients and the creation of individualized action plans aimed at achieving their housing goals.⁸⁶ The work that The Fortune Housing Initiative did for one of our participants is illustrative.

Despite achieving retroactive Youth Offender status, Participant X continued to be denied apartments for about two years based on (i) screening company reports not properly updating their screening report records, (ii) criminal justice involvement-based discrimination, and (ii) lawful source of income-based discrimination. Fortune began advocating on behalf of Participant X and after several months, we were successful in getting certain landlords to reverse their denials or otherwise remove barriers. In conjunction with other enforcement tools, direct advocacy can be a very effective method for advancing an individual’s ability to obtain housing and to support the enforcement of fair chance laws.

2. Testing

⁸⁴ See e.g., Fair Housing Center of Central Indiana, *Advocacy Program*, <https://www.fhcci.org/programs/advocacy/> (last visited Oct. 29, 2021). (discussing advocacy, testing and strategic litigation in Indiana); The Westchester County Human Rights Commission, *Fair Housing*, <https://humanrights.westchestergov.com/file-a-complaint/fair-housing> (last visited Oct. 29, 2021) (advising those who may be facing discrimination to consider contacting advocacy organizations before filing complaints).

⁸⁵ See e.g., Housing Opportunities Made Equal, Inc., *Housing Issues*, <https://www.homeny.org/fair-housing> (last visited on July 31, 2021); Fair Housing Justice Center, *Fair Housing Policy Initiatives*, <https://www.fairhousingjustice.org/our-work/fair-housing-policy-initiatives/> (last visited on July 31, 2021); Housing Equality Law Project, *Services*, <http://www.housingequality.org/services.html> (last visited on July 31, 2021).

⁸⁶Lisa E. Cox, Carolyn J. Tice and Dennis D. Long, INTRODUCTION TO SOCIAL WORK: AN ADVOCACY-BASED PROFESSION 58 (2d Ed. 2019). See also Housing Equality Law Project, *supra* note 85.

“Testing” is a powerful instrument for documenting housing discrimination and has been used by fair housing and other non-profits for decades.⁸⁷ In fact, in the fair housing enforcement context, testing has proved to be the single most effective investigative tool for collecting evidence of illegal housing discrimination.⁸⁸

A testing investigation involves sending actors or other disinterested individuals to “apply” for housing with the characteristics of a real group of individuals (i.e., based on race, gender, low source of income, or criminal conviction.) Testing typically has three characteristics. First, at least one person participates in the investigation. Second, the investigation is covert. And, third, the investigation is conducted to obtain a comparison. Testing is conducted to compare how different types of people are treated by a housing provider and/or to compare the practices of a housing provider against the requirements of fair housing laws.⁸⁹ Finally, testing is also a valuable research method for understanding housing market practices and the varied experiences of particular groups of home seekers.⁹⁰

It is clear that testing is an important tool, as it may unearth additional evidence of discrimination that may be used in litigation, enforcement actions or settlement discussions.⁹¹ In fact, there is a long history of cases and decisions that have relied on evidence resulting from testing to reach conclusions on important issues of discrimination.⁹² It has been stated that federal courts have uniformly recognized the value of testing in corroborating complaints of housing discrimination, regardless of whether the testing was informally arranged by an individual complainant, conducted by an established fair housing group, or conducted by a government enforcement agency.⁹³ Given the effectiveness and long history of testing for housing discrimination, it is no surprise that testing is used in almost all jurisdictions that currently have fair housing organizations.⁹⁴ And where it is not used or used sparingly (for example, the San Francisco Human Rights Commission), it may be either because other organizations in the area perform testing using

⁸⁷ See Fred Freiberg, *Symposium On Fair Housing Testing: A Test of Our Fairness*, 41 URB. LAW. 239 (2009) (Fred Freiberg, one of the national leaders on testing, discussing his personal experience working with others in testing since the 1970s).

⁸⁸ Fred Freiberg and Gregory D. Squires, *Changing Contexts and New Directions for the Use of Testing*, 17 CITISCAPE 87, 87 (2015)

⁸⁹ Fred Freiberg, *supra* note 87 at 239.

⁹⁰ Fred Freiberg, *supra* note 88 at 87.

⁹¹ See Robert G. Schwemm, *supra* note 63; Fred Freiberg, *supra* note 87.

⁹² *Id.*

⁹³ Fred Freiberg, *supra* note 87 at 241 (citing *4 Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 n.19 (5th Cir. 1979); *Wharton v. Knefel*, 562 F.2d 550, 554 n.18 (8th Cir. 1977); *Zuch v. Hussey*, 547 F.2d 1168 (6th Cir. 1977); *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 650 (N.D. Cal. 1973), (9th Cir. 1975); *United States v. Wisconsin*, 395 F. Supp. 732, 734 (W.D. Wis. 1975)).

⁹⁴ See National Fair Housing Alliance, *Find NFHA's Operating and Supporting Members*, <https://nationalfairhousing.org/find-nfha-operating-supporting-members/> (last visited on Jul. 30, 2021) (showing a map of NFHA members, most of which conduct testing themselves or in combination with partnerships)

FHIP or FHAP funding,⁹⁵ or because the current law has led to a dearth of discrimination claims (for example, with regards to the Detroit Division of Civil Rights, Inclusion and Opportunity receiving claims).⁹⁶

In Seattle, the SOCR established a robust testing program in 2016 with help from Fred Freiberg, a national expert in the area of testing and former Executive Director of the Fair Housing Justice Center (“FHJC”). Since 2016, the SOCR has performed testing to help combat housing discrimination of different types, including criminal justice involvement.⁹⁷ The testing program that the SOCR established in Seattle is similar in methodology (including using actors) to the program used by the FHJC.⁹⁸ According to Michael Chin, the successful establishment of robust testing in Seattle is the result of the agency having the resources and training required to enforce the law. Indeed, because of how strong the enforcement strategies and efforts are at the SOCR, there is less of an urgent need for or reliance on outside organizations to achieve enforcement objectives.⁹⁹

According to Mr. Chin, the testing program is extremely effective and far superior to the exclusively complaint-based model, which brings in fewer instances of discrimination and does not allow for systematic investigations.¹⁰⁰ Mr. Chin explained that there are fewer complaints than one might expect because (i) of the stigma people feel due to their background and (ii) those who face this kind of discrimination usually have higher-order needs that they are facing, including finding a safe place to live or a job, or keeping their existing job.¹⁰¹ Currently the SOCR undertakes about 200 tests per year.¹⁰² Mr. Chin refers to testing as “pro-active enforcement,” and the testing work of the SOCR is one of the reasons the SOCR is seen as one of the leaders in Fair Chance law enforcement.¹⁰³

3. Strategic Litigation

Strategic litigation plays an important role in enforcing housing discrimination laws. The federal government is limited in its ability to bring enforcement actions under the FHA.¹⁰⁴ As Robert G. Schwemm noted,

The government generally brings far fewer cases and receives substantially less relief than private attorneys. In both housing and employment, the government has concentrated

⁹⁵ Interview with Karen Clopton, Chair of the SFHRC, over Zoom (Jun. 30, 2021); Interview with Matt Oglander, *supra* note 44.

⁹⁶ Interview with Steve Tomkowiak, *supra* note 41.

⁹⁷ Interview with Michael Chin, Civil Rights Enforcement Manager at the SOCR, over Zoom (April 26, 2021).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL’Y REV. 375, 376 (1988)

its efforts on individual cases, focusing primarily on family status housing cases and age discrimination employment cases. The discrepancies between the two enforcement groups arise [...] from bureaucratic pressures that prod government attorneys to bring easy and noncontroversial cases as a means of avoiding the conflict that so readily accompanies civil rights enforcement.¹⁰⁵

This increase in private causes of action has led to the growth of local, private fair housing organizations that provide the resources necessary for victims of housing discrimination to assert their rights in court.¹⁰⁶ One measure of the importance of these local organizations is the uneven distribution of housing discrimination cases throughout the country. Cities that have private fair housing organizations generate a much higher incidence of reported cases.¹⁰⁷ Therefore, the resources supporting these efforts is critical.

Despite all of the challenges different organizations face nationwide, government agencies, fair housing organizations and non-profits are all actively using strategic litigation in this field. Fortune, for example, has successfully brought a lawsuit against a landlord whose policy prohibited anyone with a criminal record from renting an apartment or living at their apartment building.¹⁰⁸ The case was settled in 2019 for \$1 million and received national attention from advocates and the real estate industry.

In May of 2016, the SOCR, a government agency, filed a lawsuit against 23 landlords, alleging various types of housing discrimination based upon disabilities, section 8 vouchers, and family status evidenced by results of their governmental testing.¹⁰⁹ Mr. Chin explained that not many complaints have come in regarding discrimination based on criminal justice involvement, so testing will likely be critical to unearthing patterns of such discrimination in Seattle.¹¹⁰ Although the Seattle Fair Chance law does not allow for a private right of action, Mr. Chin explained that this was the result of a political concession and argued that private rights of action are useful enforcement tools, in part because (i) such lawsuits are more likely to get the attention of landlords and housing providers than actions by civil rights or human rights organizations alone and (ii) it allows the private individuals to be represented by their own attorneys.¹¹¹

Conclusion

¹⁰⁵ *Id.*

¹⁰⁶ Robert G. Schwemm, *supra* note 104, at 381

¹⁰⁷ *Id.*

¹⁰⁸ *The Fortune Society vs. Sandcastle Towers Housing Development Fund*, (E.D.N.Y. 2015) (No. 1:14-cv-6410), available at <https://www.relmanlaw.com/cases-fortune>.

¹⁰⁹ Seattle Office for Civil Rights, *2015 Fair Housing Testing*, <http://www.seattle.gov/civilrights/civil-rights/fair-housing/testing> (last visited Oct. 29, 2021).

¹¹⁰ Interview with Michael Chin, *supra* note 97.

¹¹¹ *Id.*

Housing discrimination against people with criminal justice involvement is a national problem that impacts millions of people. Such discrimination has a disparate impact on people of color and leads to systematic, institutional exclusion, segregation and homelessness. Numerous attempts have been made to combat this problem, first in the form of Ban the Box-modeled laws and, later with Fair Chance laws. However, many of these laws are problematic. Passing simple Fair Chance laws that do not allow for the consideration of criminal justice involvement at any point in the housing application process would result in the strongest deterrent to these discriminatory practices. The FIT Rule for market rate housing would also work well in combination with Fair Chance laws, promoting a first come, first serve application process devoid of discrimination, all while meeting a market rate housing provider's minimum financial requirement.

Beyond the enactment of legislation, there must be effective implementation and enforcement of these laws which can be supported by outreach, education, advocacy and strategic litigation. Partnerships among governmental organizations, fair housing organizations and like-minded non-profits are also critical as each type of organization plays an important role in combatting housing discrimination.

Based upon our findings, we would also recommend that more resources and staff be allocated to governmental civil rights units and human rights organizations so that they can be better positioned to take on the complex problem of housing discrimination against people who have spent time in prison or jail. At this moment in time, organizations striving to eliminate housing discrimination based upon criminal justice records face daunting challenges. However, there stands before all of us a tremendous opportunity to, with the right legislation and proper enforcement strategies, finally begin the process of ending institutional exclusion and segregation of individuals who have criminal justice involvement and who need safe and affordable housing.