



On April 4, 2016 HUD'S Office of General Counsel released
Guidance on Application of Fair Housing Act Standards to the
Use of Criminal Records by Providers of Housing and Real
Estate Related Transactions



100 million U.S. Adults have a criminal record

$1/3$ of U.S. Population

2012 Bureau of Justice Statistics



Across the United States,
African Americans and
Hispanics are
ARRESTED
CONVICTED
and
INCARCERATED
at rates
DISPROPORTIONATE
to their share of the general
population.

Consequently,
criminal records-based
barriers
to housing are likely to
have a
DISPROPORTIONATE
impact on
minority home seekers.

African Americans represent

12%

Of total
population of
drug users

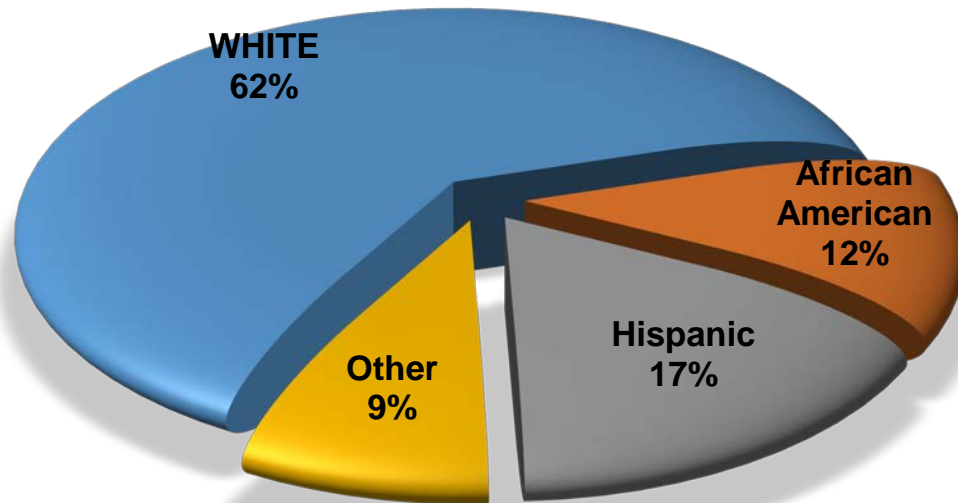
38%

Of those arrested
for drug offenses

59%

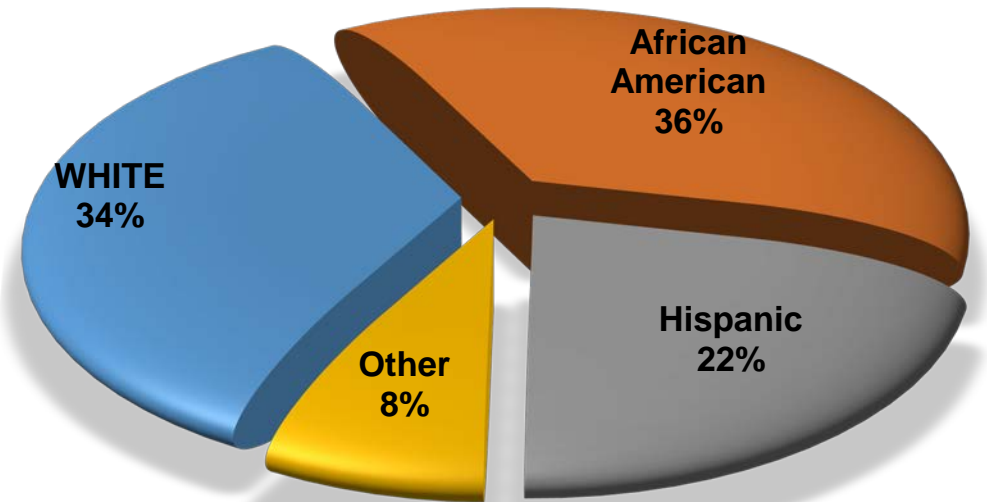
Of those in state prison
for drug offenses

US POPULATION



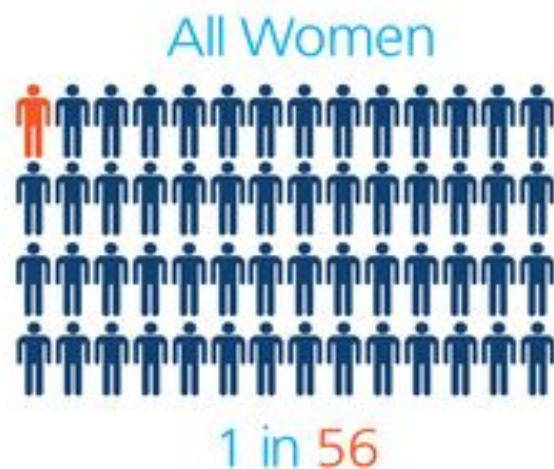
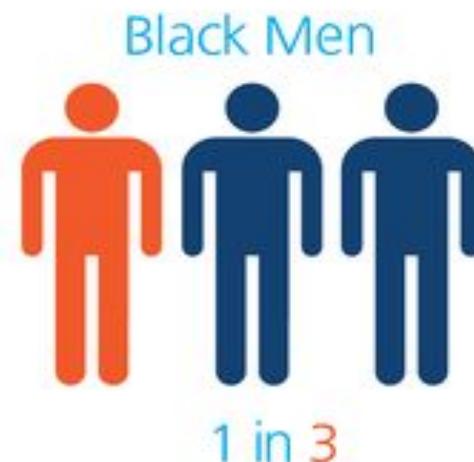
US Census Data 2014

US PRISON POPULATION



Bureau of Justice Statistics, Prisoners in 2014

Lifetime Likelihood of Imprisonment



Source: Bonczar, T. (2003). *Prevalence of Imprisonment in the U.S. Population, 1974-2001*. Washington, D.C.: Bureau of Justice Statistics

Over **95%**
of current inmates
will be released at some point.

Bureau of Justice Statistics, U.S. Dept of Justice, Reentry Trends in the U.S.

All Criminal Records are not the same!

- **Arrested v. Convicted**
- Felony - Misdemeanor - Summary Offense
- Length of time since crime was committed
- Severity of the crime

Nature, Severity and Recency

- **BLANKET BANS** no matter when conviction occurred, with no consideration of what underlying conduct entailed or what the convicted person has done since then will be unable to meet the burden of proving a substantial, legitimate, nondiscriminatory interest.
- **DECISIONS MUST BE MADE ON A CASE BY CASE BASIS**
- Must consider nature and severity of conviction.
- Must consider amount of time that has passed since the criminal conduct occurred.

Recidivism

Research shows that **over time**, the likelihood that a person with a prior criminal record will engage in additional criminal conduct **decreases until it approximates the likelihood that a person with no criminal history will commit an offense.**

6-7 years*

* 6-7 years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record.

Megan C Kurlychek et al., Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 Criminology and Public Policy 483 (2006)



Less Discriminatory Alternative

INDIVIDUALIZED ASSESSMENT OF RELEVANT MITIGATION INFORMATION beyond that contained in an individual's criminal record is likely to have a LESS discriminatory effect than categorical exclusions that do not take such additional information into account.*

- Facts or circumstances surrounding the criminal conduct
- The age of the individual at the time of the conduct
- Evidence that the individual has maintained a good tenant history before/after the conviction or conduct
- Evidence of rehabilitation efforts



Exclusions Because of Prior Arrest

HUD Guidance for Public Housing Agencies and Owners of Federally –Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions (HUD PIH Notice 2015 -19):

Arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing.

Supreme Court: “the mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person and was apprehended of an offense.”
Shware v Bd. Of Bar Examiners, 353 US 232, 241 (1957)

“ A mere arrest especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct” *United States v. Zapete-Garcia, 447 F. 3rd 57, 60 (1st Circ, 2006)*

HUD: Exclusions because of prior arrest cannot prove that the exclusion actually assists in protecting resident safety and/or property.

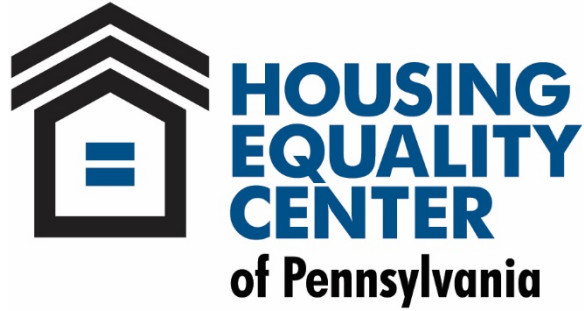


Exemption from Fair Housing Act Liability

Section 8097 (b) of the Fair Housing Act provides that the Act does not prohibit “conduct against a person because such person has been ***convicted***...of the ***illegal manufacture or distribution*** of a controlled substance...”

Housing providers will NOT BE LIABLE under the Act for excluding individuals because they have been convicted of one or more of the specified drug crimes, regardless of any discriminatory effect that may result from such a policy.

Limitation: *Conviction for drug manufacturing and distribution only.*
Does not include *arrest* for such offenses or *conviction for possession.*



Disability-Related Criminal Behavior

The Fair Housing Amendments Act defines disability as a physical or mental impairment which substantially limits one or more major life activities. Includes people who have a history of an impairment and people who are perceived as having an impairment. Includes those recovering from addiction. Current users of illegal drugs are not covered.

Housing providers must make **reasonable accommodations** for people with disabilities. A **reasonable accommodation** is a change in rules, policies, practices, or services that enables a person with a disability equal opportunity to use and enjoy a dwelling.



Disability-Related Criminal Behavior

If an individual has a criminal record due to conduct that resulted **directly** from a mental health disability or addiction and can demonstrate that they have received treatment or medication that has eliminated the behavior that led to the criminal conduct, the individual can request a reasonable accommodation to make an exception to the providers ordinary criteria regarding criminal background.

Direct Threat

The Fair Housing Act does **not** require that housing providers rent to anyone who constitutes a “direct threat” to the health or safety of others or a risk of substantial damage to the property of others.

However, housing providers **may not** deny housing to people with disabilities based on fear, speculation, or stereotypes about a particular disability or stereotypes about disabilities in general.

Denying an individual housing or evicting an individual because of a direct threat must be based on reliable and objective evidence.

Direct Threat

The direct threat assessment must take into account the nature and severity of the risk of injury as well as the probability that an injury will occur and whether there are any reasonable accommodations that would eliminate the direct threat.

Even in cases of tenants who **do** in fact present a “direct threat” due to their disabilities, these tenants are entitled to a determination whether any reasonable accommodation would mitigate any risk posed by their disability-related behaviors prior to eviction.

Summary of HUD Guidance

- Because of **widespread racial and ethnic disparities in the U.S. criminal justice system**, criminal history-based restrictions on access to housing are likely **disproportionately to burden African Americans and Hispanics**.
- The Fair Housing Act does not prohibit housing providers from **appropriately** considering criminal history information when making housing decisions, however **arbitrary and overbroad criminal history-related bans** are likely to **lack a legally sufficient justification**.
- Thus, discrimination resulting from a policy or practice that denies housing to a anyone with a prior arrest of any kind of criminal conviction **cannot be justified**, and therefore such a practice would **violate the Fair Housing Act**.

Summary of HUD Guidance

- Policies that exclude persons based on criminal history **MUST** be tailored to serve the housing provider's **SUBSTANTIAL, LEGITIMATE, NON DISCRIMINATORY INTEREST** and take into consideration such factors as the type of the crime and length of the time since conviction.
- When a policy or practice excludes individuals with only certain types of convictions, a housing provider will still bear the burden of proving that any discriminatory effect caused by such policy or practice is justified by a connection to being a successful tenant. Such determination must be made on a **case-by-case basis**.
- **Selective use** of criminal history based on race, national origin, or other protected characteristics violates the Act.



The Fortune Society vs. Sandcastle Towers Housing Development Fund, Inc.

Filed October, 2014 in the U.S. District Court for the Eastern District of New York.

Sandcastle Towers refused to rent to Fortune Society's clients when they learned that Fortune Society was a nonprofit which served formerly incarcerated people. Sandcastle stated that they enforced a policy of prohibiting anyone with a criminal records from renting an apartment or living at the Sandcastle

Precedent setting \$1.1875 million settlement and landmark federal civil rights case

Lawsuits can be brought against private landlords who impose blanket bans on renting apartments to people with criminal records.



Federal Lawsuit Against Sterling Glen Apartments

300 unit Apartment Complex in Chesterfield, Virginia.

Lawsuit alleged that the criminal background policy was overly restrictive, disproportionately impacted communities of color, violating federal and state law, carrying over inequities from the criminal justice system to housing. The lawsuit sought to change the criminal record policy of Sterling Glen Apartments

Alleged criminal records policy denied housing to anyone with any type of felony conviction and even anyone with a record where adjudication was withheld or deferred. Anyone with an active status on probation or parole was also denied housing.

Pratt, Sara. (2020). *Civil Rights Considerations in Relying on Criminal Backgrounds* [PowerPoint]

Sterling Glen Apartments Model Criminal Records Policy

1. Qualify on factors other than criminal background first - income and credit score. Provide a tentative acceptance, contingent on a criminal background check.
2. After receipt of the background check, determine whether there is a covered criminal background. If there is not, accept and house the applicant.
3. If there is a covered criminal background, offer the applicant in writing the opportunity for an individualized assessment and conduct the assessment. Applicant has 14 days to provide the information. Can include recommendations or assurances from employers, probation officers, case managers, recovery centers, transitional housing entities, family members or the applicant. Can be in writing or done verbally.
4. Provide the final decision in writing. Retain all records.

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Sterling Glen Apartments Model Criminal Records Policy

Covered Crimes:

Felony criminal convictions within the past five years related to the following categories of offenses:

- (1) property offenses
- (2) major drug offenses
- (3) fraud offenses
- (4) major violent offenses against persons and
- (5) sex offenses

NOT covered:

Arrests, charges, expunged convictions, convictions reversed on appeal, vacated convictions, offenses where adjudication was withheld or deferred, pardoned convictions, sealed juvenile records.

Individuals will not be treated differently based on whether the applicant is on probation or parole.

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Sterling Glen Model Criminal Records Policy – Individualized Assessment

Individualized Assessment:

- Facts or circumstances surrounding the criminal conduct
- The age of the individual at the time of the conduct
- Evidence that the individual has maintained a good tenant or employment history before and/or after the conviction or conduct
- Evidence of rehabilitation efforts
- Any information about the applicant that indicates good or bad conduct since the offense
- Whether the conduct/conviction arose from the applicant's status as a survivor of domestic violence, sexual assault, stalking, or dating violence
- Whether the conduct/conviction arose from an applicant's disability, including mental illness
- Any other information related to whether the applicant's specific criminal history creates the potential that the property's current residents, employees, or property will be exposed to a heightened risk of crime.

Is there an error in the criminal record?

Pratt, Sara. (2020). *Civil Rights Considerations in Relying on Criminal Backgrounds* [PowerPoint]

Best Practices

- Don't rely on the fact of an arrest to make an adverse decision
 - This applies to applicants or current tenants; if a current tenant make a decision based on conduct, not arrest
 - Recommend that you don't ask about arrests on the application; it's not illegal to ask about arrests but someone is going to want to know why you're asking. What's your answer?
- Don't use a blanket ban based on any type of conviction
 - This criteria sweeps too broadly, it will likely disqualify qualified applicants and possibly draw a civil rights complaint
- Don't use an unreasonably long look back period
 - No to a 99 year look back period
 - No to a 20 year look back period
 - No to having the same look back period for felonies/misdemeanors/some misdemeanors
 - The conduct varies on the severity of the crime
 - The conduct varies based on the nature of the conduct

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Best Practices

- Don't evict a successful tenant because you discover a conviction on her or his record after admission (or after years of tenancy)
- Don't forget to think about reasonable accommodations if the applicant or tenant has a disability
- Don't forget to offer an "individualized assessment"

Best Practices

- Do have a clear policy and apply it consistently.
- Do distinguish between different types of convictions and how the conduct is related to being a good tenant.
- Do train your staff on how to apply your policy
 - Audits show high levels of unequal treatment based on race to applicants with similar criminal histories
 - Up to 50% of the time audits testing showed black applicants with an acknowledged criminal background are treated worse than white applicants with the same or similar criminal background
- Do have a clear policy and practice that allows every applicant with a criminal background that you intend to reject to be offered the opportunity to make her or his case for admission/continued tenancy before rejection.

Best Practices

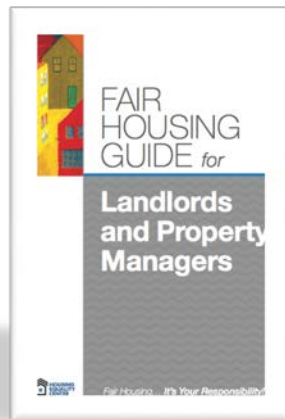
- An “individualized assessment” should be offered and performed by one person so outcomes are consistent and it should be done by someone who was not the original decision maker.

Pratt, Sara. (2020). *Civil Rights Considerations in Relying on Criminal Backgrounds* [PowerPoint]

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Fair Housing is Good Business

- Contact Housing Equality Center of PA for a confidential review and assessment of specific circumstances

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