VI. HOUSING

A. THE LAW AND ITS EFFECTS

Access to housing is widely recognized as central to the stability of individuals and their communities. The Universal Declaration of Human Rights, ratified by the United Nations in 1948, acknowledges housing as a fundamental human right, and several international treaties and documents have recognized this as well. Although New York State has not embraced the right to permanent housing, it has outpaced the federal government by recognizing a constitutionally protected right to adequate shelter.

This Chapter examines the barriers to securing and maintaining housing in New York State for people who have been arrested or incarcerated. Part 1 outlines the current state of affordable housing in New York – a necessary context for this report. Part 2 examines barriers to housing in the private housing market, and Part 3 does the same for the subsidized or public housing context, focusing particularly on conventional public housing projects. Part 4 concludes with some possible effects of barriers to housing for people with arrests or criminal records.

1. Affordable Housing in New York State

Although New York provides emergency shelter for its residents, the state faces a severe permanent affordable housing shortage. This problem is only growing more significant over time. Across New York State, an extremely low-income household can afford only half the cost


of “fair market rent.” A worker earning minimum wage can only afford a third of the actual fair market rent for the state; in order to afford a two bedroom apartment, she would have to work 121 hours a week. In 1999, at least 40.5% of all New York households paid more than 30% of their income in rent.

In recent years, significant cutbacks in public housing programs in the state have increased competition in the affordable private housing market. In 2005, over 128,000 families were on the waiting list for Section 8 vouchers in New York City alone – a list that has been closed since 1994 as the few recycling vouchers are reserved for the direst situations, such as to house victims of domestic violence. Even as the government provides less funding for this program, private landlords have increasingly chosen to avoid Section 8 tenants and the

594 National Low Income Housing Coalition, Out of Reach 2004 (2004), available at www.nlihc.org/oor2004/data.php?getState=on&state%5B%5D=NY. Extremely low income is defined as 30% of the Area Median Income. Fair market rent is generally defined by the U.S. Department of Housing Preservation and Development as the 40th and 50th percentile rent for a two-bedroom apartment according to the most recent U.S. Census data.

595 Id.

596 Census data is available at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF3_U_DP4&ds_name=DEC_2000_SF3_U&geo_id=04000US36. Regional statistics also show a shortage in affordable housing. For instance, one third of renters in the Hudson Valley pay more than 30% of income in rent, defined by the Census Bureau as a rental burden. Most potential homebuyers in the region cannot afford the median monthly costs of ownership. David M. Muchnick, The Crisis of Affordable Housing for Hudson Valley’s Working People (Sept. 2003) (prepared for the AFL-CIO). In New York City, nearly a quarter of renters spent more than 50% of their income in rent in 2000. Women’s City Club of New York, New York City’s Affordable Housing Crisis 3 (2004), available at http://www.housingfirst.net/housingres.html.

597 Fiscal Year 2005 represented a 0.8% reduction in federal Department of Housing and Urban Development (HUD) funding, and the proposed budget for 2006 would cut funding an additional 11.6%. National Low Income Housing Coalition, 2/28/2005, http://www.nlihc.org/news/2-28-05chart.pdf. New York City received a $23 million loss in Section 8 funding and vouchers administered by New York State’s Division of Housing and Community Renewal were reduced by $1.8 million. David W. Chen, Cut in U.S. Housing Aid Raises Concerns for Poor, N.Y. TIMES, Jan. 27, 2005. In 2003, three quarters of households eligible for public housing assistance did not receive it because of limited supply. Harvard University Joint Center for Housing Studies, The State of the Nation’s Housing 29 (2004).

598 New York City Housing Authority, PHA Plan – Draft: Annual Plan for Fiscal Year 2006, at 24 (2005), available at http://www.nyc.gov/html/nycha/html/about/agencyplan.shtml. The federal Section 8 program provides rent subsidies to income qualifying individuals and families, to be administered by the states. A Section 8 voucher allows a household to pay one third of its income in rent, the remainder of the rent to be paid by the government.
attendant government bureaucracy. Similar waiting lists exist for conventional public housing, which are no longer being constructed, and Mitchell-Lama middle-income units, which are turning over to market-rate housing.  

Exacerbating the effects of these government rollbacks, the rent regulation laws in New York City were modified in 1997 to allow owners to drastically increase rents in regulated buildings upon vacancy. During a stable tenancy, landlords can also raise rent regularly according to a formula set by the Rent Guidelines Board. Once rents reach $2000, the apartment becomes unregulated. As the result of the relaxation of rent regulation, between 1994 and 2003 at least 118,113 New York City units became destabilized, and the rate of deregulation has been increasing over time. Buildings constructed throughout the state since 1974 or with fewer than six units avoid regulation altogether.

As the amount of regulated or subsidized housing has decreased, the number of New Yorkers looking for housing has risen and average wages have declined. Between 1990 and 2000, New York City population increased almost 10%, and the vacancy rate has remained

599 The waiting list for conventional public housing in New York City in 2005 was over 149,000 families. Id. at 25. The Mitchell-Lama program, which subsidized the creation of moderate-income affordable housing in New York City, is currently reaching maturation, allowing building owners to opt out of the program and sell their buildings to be used for non-affordable market rate housing. As the result of these buy-outs, tens of thousands of New Yorkers now cannot afford to live in the apartments where they resided for years. See Office of the State Comptroller, Mitchell-Lama Buyout Program Report (2005) and accompanying press release.


601 NYC Rent Guidelines Board, Changes to the Rent Stabilized Housing Stock in New York City in 2003, at 9 (2004), available at http://www.housingnyc.com/html/research/cresearch.html#bookpdf. This study notes that, due to non-mandatory reporting of certain types of deregulation, these numbers represent a floor and could in fact be much higher.

602 See http://www.housingnyc.com/html/resources/dhcr/DHCR1.html for more information on rent stabilization and rent control. Fifty-one New York municipalities have some form of rent control, for which a person must have been living in the apartment continuously since July 1, 1971. New York City has continued to
extremely low – currently lower than 3%. Incomes of New Yorkers have not kept pace with rising housing costs. Although New York City provides the most alarming data, New York State faces similar issues. For instance, New York State’s population rose 5.5% between 1990 and 2000, and in 1999 median household income was only $43,393 with 14.6% of individuals living below the poverty line. As affordable housing becomes scarcer, the need for it has grown more severe.

Given the lack of affordable housing, homelessness in New York remains an ever-growing problem. Homelessness is particularly pressing for individuals involved in the criminal justice system. Incarceration almost invariably leads to loss of stable housing, as incarcerated individuals are considered to have vacated their apartments or homes. When a

regulate through rent stabilization rules, which have been eroded over time as discussed above. See www.housingnyc.com for information on New York City rent regulation and affordable housing generally.


Inflation-adjusted wages in New York City decreased 1.5% in 2003 in addition to a 5% drop in 2002. New York City is ranked 11th highest in rental rates nationwide – the average rent having risen 33% from 1975 to 1999 – but 37th in median household income – income having risen only 3% during the same time period. See NYC Rent Guidelines Board, supra note 603, at 4; Policy Link and Pratt Institute Center for Community and Economic Development, Increasing Housing Opportunity in New York City (2004), available at www.policylink.org/pdfs/NYIZ-Summary.pdf.

In February 2005, 36,200 people slept each night in New York City homeless shelters and thousands more spent the night in public places or doubled up temporarily with relatives. The City’s number of homeless single adults has increased 41% since 1994, and currently nearly one in twenty of all New York City residents (one in ten of the city’s black population) have utilized the shelter system. See http://www.coalitionforthehomeless.org/advocacy/basic_facts.html
person returns to her community after her release from prison or jail, she usually finds herself homeless, relying on local shelter systems or the generosity of family members or friends. In New York City, over 30% of single adults in the shelter system were recently released from local jails (substantially more if prisons are included), and many cycle between shelters and incarceration. Those recently released from prison face significant hurdles to accessing appropriate housing, including federal bars to subsidized housing, landlord discrimination, and a general absence of affordable housing in New York State.

Research indicates that homelessness is also directly linked to re-incarceration of people who have served jail or prison sentences. For instance, homeless individuals on parole have been shown to be seven times more likely to abscond after the first month of release than those located in more permanent housing. Access to affordable housing has also been linked to decreased crime rates in low-income communities where people with criminal records often reside. Although reconnection with family members and establishing community connections can help reduce re-incarceration, legal bars to allowing a family member back into the home after a conviction often make this impossible.

New York does not provide a right to counsel in housing matters, which compounds the difficulties faced by those re-entering from prison or jail and their family members who would

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610 See http://www.housingfirst.net/housing_safety.html.

take them in. Family members often must defend their rights to their private or government-subsidized homes without the benefit of counsel. Tenants are unable to effectively defend their rights when faced with the morass of applicable federal, state, and local laws, adjudicators who expect them to understand a legalistic culture and language, and experienced counsel who represent the public housing authority or other landlords. Tenant success in such cases is low, resulting in often unwarranted eviction and homelessness. For instance, a study in New York City showed that represented tenants avoided eviction in 90% of cases, whereas unrepresented tenants would have been evicted in 85% of those cases. Thus, even when a landlord or housing authority incorrectly brings eviction proceedings against an individual or family for perceived criminal activity, the tenants are often unable to defend the home that is rightfully theirs.

2. Private Housing

In this section, we describe the barriers to securing and maintaining private housing in New York State for people with arrests or criminal records. Unlike with publicly subsidized housing, private landlords are able to exert substantial individual control over whom to choose for tenancy. Part B outlines the barriers to securing private housing faced by people with criminal histories. New York laws regulate tenancy once a person is selected, and provide landlords with numerous rights over people with arrests or criminal records. City and state programs and laws also encourage landlords to evict people who have been arrested or convicted

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612 Studies show that, while 98% of landlords are represented in Housing Court, only 12% of tenants are. See Laura Abel, Make ‘You Have a Right to a Lawyer’ a Reality in Housing Court, Tenant Inquilino, Mar. 2005, at 3-4, available at http://www.brennancenter.org/presscenter/oped_2005/oped_2005_0406b.html.

613 Barbara Mule & Michael Yavinsky, Saving One’s Home: Collateral Consequences for Innocent Family Members 1-2, 16-18, n.42 (unpublished manuscript).
of a crime in many cases. Part C describes the legal means used to evict households that have a member with criminal or arrest records.

a. **Barriers to securing private housing**

Due to the scarcity of affordable housing and its extremely high demand, individuals charged with crimes and their families often encounter great difficulty in securing and maintaining stable housing, especially as New York State and City human rights laws provide no protection against discrimination by landlords based on criminal record.614 In this context, people with criminal records encounter significant barriers to securing housing, as landlords rely on their concerns about public safety and the general stigma attached to criminal histories in deciding which tenants to accept into their buildings. In addition to trying to ensure consistent rent payment, landlords also want to protect themselves from liability to other tenants for housing a “known criminal” in the building, and from government forfeiture for allowing the building to be used for illicit purposes.615

Private landlords and non-profit housing developers often inquire into individual’s background and deny housing to those with criminal records.616 Landlords can access such information without the applicant even knowing. Criminal convictions are often listed in

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614 See N.Y. EXEC. LAW § 296(5) (2004); N.Y.C. ADMIN. CODE § 8-107(5)(a).


commercial credit reports, or can be easily accessed through the Office of Court Administration
statewide criminal record search, the Department of Correction inmate locator, or background
checks conducted by private agencies.617 These records are often rife with bureaucratic errors,
such as listing arrests that resulted in dismissals or non-criminal convictions that should be
automatically sealed, including incomplete entries of cases that were disposed of, or reporting
data that is completely erroneous.618 Human Rights Watch reports that private landlords are
following the lead of public housing authorities in denying housing to those with criminal
records and their family members, effectively eliminating access to housing altogether.619

These multiple bars to securing and maintaining private housing are compounded by the
recently released person’s difficulty paying security deposits and broker’s fees, lack of personal
and employment references, poor credit history, parole restrictions limiting contact with the
harmful influences of certain family members or friends, and public housing restrictions that
restrict people with criminal records from moving in with their family members.620

617 The Office of Court Administration search is publicly available for $52 at
http://www.courts.state.ny.us/apps/chrs/. The Department of Corrections allows anyone to look up an individual’s
incarceration in New York State for free at http://nysdocslookup.docs.state.ny.us/kinqw00.

618 See Criminal Procedure Law §§ 160.50, 160.55 for rules on the sealing of records in New York state when
the outcome is favorable to the defendant. The most recent study on criminal record accuracy found that 87% of
New York Division of Criminal Justice Services rap sheets contained at least one mistake or omission and 41%
contained more than one error. Legal Action Center, Study of Rap Sheet Accuracy and Recommendations to
Improve Criminal Justice Recordkeeping, i (1995); see also Legal Action Center, Setting the Record Straight 3-5

619 Human Rights Watch, supra note 592, at 19.

620 See Travis, supra note 611, at 35-36.
b. Barriers to maintaining private housing
   
i. Bawdy House Laws

Once a person with a criminal record has secured housing, New York law allows – and even sometimes encourages – eviction upon criminal charges.\(^\text{621}\) Such evictions can occur upon an individual’s first arrest, even if she has no prior record. Private landlords can bring such eviction proceedings under the “Bawdy House” law for using the premises “as a bawdy-house, or house or place of assignation for lewd purposes, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.”\(^\text{622}\) In these cases, the landlord must prove by a preponderance of the evidence that the resident engaged in illegal conduct through a business on more than one occasion involving the premises \(^\text{623}\) with the participation, knowledge, or passive acquiescence of one or more of the tenants of record.\(^\text{624}\) Cases are most often brought for drugs, prostitution, or gambling offenses.\(^\text{625}\)

The District Attorney (“D.A.”) often serves a Demand Letter on the landlord at the moment criminal prosecution begins, requiring that the landlord begin eviction proceedings. This letter includes various threats, such as possible inclusion in the criminal case, significant financial sanctions, and/or forfeiture of the entire property in order to “elicit the cooperation of


\(^{625}\) See Mule & Yavinsky, *supra* note 613, at 13-16; Smyth, *Consequences, supra* note 621, at 8.
landlords who might be apprehensive about initiating such proceedings on their own.626

Because eviction proceedings under these statutes often begin as soon as a search warrant is executed in the apartment, evictions can occur whether or not a criminal conviction results.627

Thus, an individual who is acquitted of a crime in criminal court, or had her case dismissed outright, can still be evicted for the same charges.628 Nearly one in three people arrested in New York State are never convicted of a crime, but still face these consequences.629 It is sufficient to prove that any member of the household used the apartment to conduct an illegal business with the passive acquiescence of the tenant of record; thus, an entire family could be evicted for a guest’s illegal activity.630 In New York City, the District Attorneys’ Narcotics Eviction Programs assist landlords in bringing such actions.631 Tenants, often unrepresented, have little chance of success against the significant resources and support available to landlords in these cases. Since the inception of the Manhattan DA’s program in 1988, tenants have been evicted from over 6,000 locations.632 In 2003, the Bronx DA effected the removal of over 100 tenants,


628 This can occur because civil proceedings do not need to reach the standard of proof required for criminal convictions.

629 In 2004, only 67.3% of felony arrests statewide resulted in a conviction. See New York State Division of Criminal Justice Services, Dispositions of Felony Arrests New York State, available at http://www.criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.htm.

630 N.Y. REAL PROP. ACTS LAW § 711(5); see also supra note 622.


and its official policy is to pursue eviction “[e]ven when criminal prosecution of a drug dealer fails to result in a conviction.” 633

Although the Narcotics Eviction Program states that it “reviews each case individually and is careful not to seek eviction where fairness requires a different remedy,” tenants’ attorneys report that this is not always the case. In one case, Karen 635 worked on the night shift at a hospital, and had lived in her Bronx apartment for over thirty years. She had never had any trouble with the landlord or the law, but had recently taken her son, James, into her home. Because James worked and kept his room clean with the door open, Karen never had any cause for concern until he was arrested dealing drugs in another neighborhood. When the police found drugs hidden in small containers in the back of his closet, James was arrested and incarcerated. James and his mother immediately agreed that he could not return to her home. Nonetheless, the D.A. and landlord initiated eviction proceedings against Karen and her fourteen-year-old daughter. Karen fought the eviction for over a year during which the D.A. refused to settle, citing a zero tolerance policy for drug arrests. In the end, the case settled twenty minutes before the trial began, on the stipulation that Karen had suggested originally – that James not be allowed back into the apartment. If she had not been represented, she would likely have had to move. 636

Similarly, Susan and her husband, Paul, almost lost their apartment when the police entered and found multiple bags of powder. It turned out that the powder consisted of crushed eggshells for a religious ceremony, but the police also found a small bottle with cocaine residue left by a friend after a party in the apartment. Although Susan and Paul received disorderly

634 NY County DA Report, supra note 631.
635 Names have been changed.
636 Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.
conduct violations, their eviction case dragged on for a year and a half before it settled with the assistance of their attorney.637

ii. Other Eviction Options: Nuisance and Substantial Obligation of the Lease

In addition to Bawdy House cases, private landlords can also evict tenants under a common law nuisance theory, under the New York City Nuisance Abatement Law, or as a violation of a “substantial obligation” of the lease for alleged criminal behavior of the tenant of record or another resident.638 In one nuisance case, an elderly, disabled tenant was almost evicted due to the actions of her guest and caretaker, an elderly man. After significant drinking, he ended up in an argument with a neighbor. The guest was arrested for a violation, but the landlord brought a nuisance claim to vacate the apartment that was only dropped after the tenant’s attorney’s intervention.639 In rent controlled or stabilized buildings, incarceration may also lead to non-primary residence holdover proceedings if a tenant is vacant from a regulated apartment for over 180 days.640

iii. De Facto Eviction: Non-renewal and Temporary Restraining Orders

Often, a landlord does not have to take any affirmative action at all to remove a tenant. When the tenant does not have a rent-regulated apartment, the landlord can refuse to renew the tenant’s lease after learning of an arrest. Many tenants fail to challenge such actions, even if

637 Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.


639 Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.

they have been living in the apartment for years. For instance, one family faced eviction when a tenant broke a railing during an argument with the landlord over repairs. The landlord immediately stopped renewing the month-to-month lease until the tenants’ attorney was able to negotiate for them to stay until they could find another place to live.641

Temporary restraining orders also de facto evict many tenants from their homes. For instance, when the complaining witness to a criminal charge lives in the same apartment as the defendant, judges routinely issue restraining orders that bar the tenant from re-entering the apartment, even when that person is the rent-paying tenant of record and regardless of whether the complaining witness even requests such an order. Such situations render the individual homeless while he awaits trial.642 Additionally, one New York City legal services office reported an initiative by the police to remove individuals with drug, prostitution, and chop-shop arrest records from their apartments through restraining orders and the New York City Nuisance Abatement Law. In these cases, the police department files an action against the landlord for maintaining a public nuisance.643 Months after a tenant’s arrest for a minor drug possession charge, the police department claims that there is an immediate need for the tenant to be removed from the premises and obtains an emergency temporary restraining order.644 The police department and the D.A. come to the apartment at night and lock the individual out before she has a chance to remove any of her belongings, and place a police lock on the door. By the time the police allow the individual to return to remove her belongings, the apartment has often been

641 Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.
642 Interview with Bronx attorney who represents tenants who cannot afford legal representation, June 2005.
643 N.Y.C. ADMIN. §§ 7-701-722. Under the Public Nuisance Law, a landlord can be held liable for up to one thousand dollars per day that the public nuisance has been intentionally maintained or can be served with a permanent injunction requiring surrender of the property. N.Y.C. ADMIN. § 7-704.
broken into. In one case, a woman with AIDS was locked out of her apartment at ten o’clock at night and had to spend the night in the park three months after an arrest for a minor drug charge. When she returned, her cats were missing as well as most of her personal belongings. Later, she received a non-criminal violation for disorderly conduct and her criminal charges were dropped. However, she had lost her home, her pets, and her trust in her service providers; she remained unreachable by her attorney and the housing agency that had found her the apartment.645

3. Public Housing

This section considers the eligibility and termination rules for both conventional public housing and housing choice voucher programs (often referred to as “section 8” programs), which are administered by the US Department of Housing and Urban Development (“HUD”). Conventional public housing provides rental housing for eligible low-income families, the elderly, and persons with disabilities. The Housing Choice Voucher program provides assistance to very low-income families, older adults, and people with disabilities in the private market.646 In New York and other states, conventional public housing and most of the voucher programs are managed by local Public Housing Authorities (“PHAs”).

Part B reviews the development and current state of the laws excluding people who have engaged in criminal activity from accessing public housing. Part C discusses the policy reasons behind these exclusionary rules.

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644 N.Y.C. ADMIN. §7-707(a) allows a judge to sign an order granting police authority to remove a tenant upon a showing of drug activity on the premises.

645 Conversation with Lisa Isaacs, Esq., Unit Director, Queens Legal Services Corp., June 3, 2005.

a. Federal and local restrictions on access to public housing by people with criminal records

i. Development of Exclusionary Rules: “One Strike And You’re Out”

Federal housing laws began to target people with criminal records as early as 1988. In that year, a provision of the Anti-Drug Abuse Act mandated that all PHAs must use lease provisions that provide for evictions based upon a tenant’s criminal or drug-related activity “on or near” public housing premises.647

In 1996, this legislation was used to form the basis of a set of exclusionary laws and regulations that became known as “one strike and you’re out” rules. This initiative was launched by President Clinton in his state of the union address of that year, when he encouraged stronger enforcement of the Anti-Drug Abuse Act and other laws relating to exclusion from public housing on the basis of past or present criminal activity. President Clinton stated:

I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and pedal drugs should be one strike and you’re out.648

At the same time, Congress joined the effort by enacting the Housing Opportunity Extension Act of 1996 (“Extension Act”), which expanded PHAs’ authority to evict or deny admission based on criminal activity, including, among other things, by: 1) expanding the bases for eviction to include any criminal activity or drug-related criminal activity occurring “on or off” public housing premises; 2) requiring the National Crime Information Center to provide

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647 Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the United States Code). As enacted, the 1988 statute required that public housing leases shall “provide that a public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy.” 42 U.S.C. § 1437d(l)(5) (1988).
criminal records to PHAs for screening purposes; 3) declaring that any tenants who had been evicted for drug-related criminal activity are ineligible for housing assistance for three years from the date of eviction; and 4) authorizing PHAs to evict or refuse admission to individuals who are illegally using controlled substances, or who are engaging in a pattern of drug or alcohol abuse.649

This new legislation and the Clinton initiative prompted HUD to respond by developing a set of “One Strike and You’re Out” guidelines, which required local PHAs to exercise their authority under the new legislation, and also announced plans to tie PHAs’ rating and funding levels to the strength of their screening and termination procedures.650 In 1998, the final substantive piece of legislation in the development of the “one strike” policy was put in place with the Quality Housing and Work Responsibility Act, which authorized PHAs to deny admission to any individual who, within a “reasonable time” prior to the date of eligibility for housing assistance, had engaged in “any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents.”651

Together, the three acts noted above and the HUD “one strike” guidelines and regulations form the heart of the current set of rules excluding individuals with virtually any history of criminal activity from public housing assistance. The full body of rules and regulations governing screening and eviction, however, are found in widely dispersed sections of the US

650 HUD Notice PIH 96-16 (HA) (Apr. 29, 1996).
Code and the CFR, as well as in the individual policies of the more than 3,300 PHAs throughout New York and the United States. The next section will describe in more detail many of these individual laws and regulations and the extent of the discretion granted to the PHAs. It will also look briefly at some of the screening policies implemented by the New York City Housing Authority (“NYCHA”), the largest PHA in New York State.

ii. Rules Excluding Individuals Who Have Been in Contact with the Criminal System

(a) Mandatory exclusions

Federal law requires that individuals who engage in certain prescribed criminal activity must be prohibited from accessing housing assistance and/or must have their leases terminated.

(1) Admission/eligibility

Any household with a member who is subject to lifetime registration requirements under a state sex offender registration program, and any household with a member who has been convicted of methamphetamine production on the premises of federally-assisted housing, is permanently ineligible for housing assistance.

Households that have been evicted from public housing because of the drug-related activity of a household member must be denied eligibility for housing assistance for three years from the date of the eviction, unless the affected household member has successfully completed a supervised rehabilitation program or the circumstances leading to the eviction no longer exist (e.g., the affected person is no longer a member of the household).

652 HUD states that there are approximately 1.3 million households living in public housing units, managed by 3,300 PHAs. See http://www.hud.gov/offices/pih/programs/ph/index.cfm. This number does not include those households that are relying on housing voucher programs administered by HUD and the PHAs.

653 42 U.S.C. § 13663(a) and 42 U.S.C. § 1437n(f).

654 24 C.F.R. § 982.553.
A household must be denied eligibility if a household member is currently using an illegal controlled substance, or is using controlled substances or abusing alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. A PHA may grant admission if the household can show that the affected household member has been rehabilitated; however, the PHA is not required to consider such evidence.655

(2) Termination of tenancy

If a PHA discovers that a tenant living in public housing has ever been convicted of methamphetamine production on the premises of federally-assisted housing, the tenant must be evicted.656

(b) Discretionary exclusions

Federal housing law also authorizes local PHAs to deny eligibility and to terminate the lease if any member of a household has certain kinds of criminal records (including histories of arrests).

(1) Admission/eligibility

Households with family members who have engaged in (1) any drug-related criminal activity; (2) any violent criminal activity; or (3) any other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises may be denied access to public housing or housing assistance if the criminal activity engaged in by the household member occurred within a “reasonable” time before the household seeks admission.657

Note that a general mitigation provision provides that consideration shall be given to the time, nature, and extent of the applicant’s conduct (including the seriousness of the offense) and

656 24 C.F.R. § 966.4.
that consideration may be given to factors that might indicate a reasonable probability of “favorable future conduct” such as rehabilitation or a willingness to participate in counseling programs.658

2) Termination of tenancy

PHAs have the discretion to terminate the lease of any household with a member who uses illegal controlled substances, or who abuses alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.659

PHAs have discretion to terminate the lease of any household with a member who engages in any drug-related criminal activity on or off the premises, or who engages in any criminal activity threatening the health, safety, or right to peaceful enjoyment of the premises by other tenants, or by persons residing in the immediate vicinity of the premises.660

(c) Other key provisions

PHAs have the authority – but are not required – to evict tenants for drug-related activity even if the tenant did not know, could not foresee, or could not control behavior by other occupants or guests.661

PHAs may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.”662

658 24 C.F.R. § 960.203.
662 24 C.F.R. § 966.4(l)5(iii)(A) (conventional public housing); 24 C.F.R. § 982.553(c) (2004) (analogous provision for Section 8 program).
PHAs and landlords can require the exclusion of an offending household member – including a dependent minor – as a condition of admission or continued benefits.\textsuperscript{663}

\textbf{(d) Focus on NYCHA}

The NYCHA is the largest PHA in the state and the country.\textsuperscript{664} The following two tables show the NYCHA’s eligibility rules for both conventional public housing and the housing voucher program, established pursuant to the discretion granted to it under 42 U.S.C. § 13661 and 24 C.F.R. § 982.553. In contrast to the broader standards for conventional public housing, the ineligibility period for section 8 applicants applies more narrowly to sex offenders subject to a lifetime registration requirement, persons who commit violent felonies, and persons convicted of controlled substances or alcohol-related offenses.\textsuperscript{665} In addition, the NYCHA keeps a separate shortlist of less serious crimes that it will disregard when determining eligibility.\textsuperscript{666}

\begin{footnotesize}
\textsuperscript{663} 24 C.F.R. § 960.203.


\textsuperscript{665} See New York City Housing Authority, Applications Manual, Chap VI, Sec. II, Subsec. E; \textit{Id.} at Ex. FF, “Standards for Admission: Conviction Factors & End of Ineligibility Periods – Section 8 Housing Assistance Program”; \textit{Id.} at Ex. HH, “Overlooked Offenses – Section 8 Housing Assistance Program.”

\textsuperscript{666} See \textit{id.} at Ex. H, “Overlooked Offenses – Public Housing Program.”
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<td>(including completion of probation/parole and payment of fine)</td>
</tr>
<tr>
<td>Subject to a lifetime registration requirement under a state sex offender registration program</td>
</tr>
<tr>
<td><strong>Felonies</strong></td>
</tr>
<tr>
<td>Class A, B, and C</td>
</tr>
<tr>
<td>Class D and E</td>
</tr>
<tr>
<td><strong>Misdemeanors</strong></td>
</tr>
<tr>
<td>Class A</td>
</tr>
<tr>
<td>(5 years if 3+ convictions for Class A m/d or felonies within last 10 years)</td>
</tr>
<tr>
<td>Class B or unclassified</td>
</tr>
<tr>
<td>(4 years if 3+ convictions for m/d or felonies within last 10 years)</td>
</tr>
<tr>
<td><strong>Violations or Infractions</strong></td>
</tr>
<tr>
<td>Violations or DWI</td>
</tr>
<tr>
<td>(3 years if 3+ convictions for felonies, m/d, violations or DWI infractions within last 10 years)</td>
</tr>
<tr>
<td><strong>Multiple Convictions</strong></td>
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</tbody>
</table>
### NYCHA Section 8

<table>
<thead>
<tr>
<th>Criminal Conviction</th>
<th>Years After Serving Sentence</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>(including completion of probation/parole and payment of fine)</td>
</tr>
<tr>
<td>Subject to a lifetime registration requirement under a state sex offender registration program</td>
<td>Until the convicted person is no longer subject to a lifetime registration requirement</td>
</tr>
<tr>
<td><em>Violent Behavior, Controlled Substances or Alcohol Related Offenses</em></td>
<td></td>
</tr>
<tr>
<td>Class A, B, and C</td>
<td>6 years</td>
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<tr>
<td>Class D and E</td>
<td>5 years</td>
</tr>
<tr>
<td><em>Controlled Substances or Alcohol Related Offenses</em></td>
<td></td>
</tr>
<tr>
<td>Class A Misdemeanors</td>
<td>4 years</td>
</tr>
<tr>
<td></td>
<td>(5 years if 3+ convictions for Class A m/d or felonies within last 10 years)</td>
</tr>
<tr>
<td>Class B or Unclassified Misdemeanors</td>
<td>3 years</td>
</tr>
<tr>
<td></td>
<td>(4 years if 3+ convictions for m/d or felonies within last 10 years)</td>
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<tr>
<td>Controlled Substances or Alcohol Related Offenses</td>
<td></td>
</tr>
<tr>
<td>Violations or DWI</td>
<td>2 years</td>
</tr>
<tr>
<td></td>
<td>(3 years if 3+ convictions for felonies, m/d, violations or DWI infractions within last 10 years)</td>
</tr>
<tr>
<td><em>Multiple Convictions</em></td>
<td>Ineligible for longest applicable period.</td>
</tr>
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</table>
Chapter VI: Housing

b. The policy reasons for excluding people with criminal records from public housing

i. Public Safety

Since 1988, legislative initiatives restricting people with criminal records from access to public housing have been motivated by a desire to increase public safety. In 1996, President Clinton focused on the safety of families living in public housing projects when he urged HUD and the PHAs to more actively enforce a “one strike” policy:

In my State of the Union address I challenged local housing authorities and tenant associations to adopt this one strike and you’re out policy, to restore the rule of law to public housing. To simply say, if you mess up your community you have to turn in your key; if you insist on abusing or intimidating or hurting other people you’ll have to live somewhere else. … There is no reason in the world to put the rights of a criminal before those of a child who wants to grow up safe or a parent who wants to raise that child in an environment where the child is safe, in no danger of being shot down in a gang war, and can’t be stolen away by drug addiction.  

HUD also focuses on safety concerns as the driver of its “one strike” and other policies designed to exclude from public housing people who have come into contact with the criminal system. For example, HUD’s 1996 notice to PHAs informing them of changes to various screening, lease, and eviction provisions mandated by the “Housing Opportunity Program Extension Act of 1996” states that, “these requirements are consistent with the Department’s determination to take every reasonable step to help HAs promote safer public and assisted housing.”

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668 HUD Notice PIH 96-27 (May 15, 1996).
In addition to being motivated by concerns about public safety, HUD officials have also argued that “one strike” policies have in fact caused crime to drop on public housing premises and in surrounding neighborhoods. In 1997, more than a year after the “one strike” initiative was implemented, Secretary of Housing and Urban Development Andrew Cuomo stated in a press release that, “[d]rug dealers and other criminals are entitled to only one kind of government housing – a prison cell. The sooner we can get them out of public and assisted housing, the better. As a result of the President’s zero tolerance of crime in public housing, we’re making dramatic progress in reclaiming crime-infested neighborhoods around the nation.”

Nevertheless, despite the clear concern about public safety and the motivations behind these policies, no studies exist showing any causal link between the exclusion of people with criminal records and reduced crime in or near public housing. Moreover, the broad exclusions outlined above mostly affect people charged with non-violent, minor offenses. In 2004 in New York State, more than two-thirds of adult arrests were for misdemeanors, while less than 9% were for violent felonies. To give some context of the effect of these exclusions, 44,768 people in New York City alone in 2004 were convicted of Disorderly Conduct, P.L. § 240.20, a non-criminal violation. Each of them is now presumptively ineligible for public housing in

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670 See Human Rights Watch, supra note 592, at 35 (finding no direct evidence in the literature, even after repeated requests to HUD and various PHAs).

671 New York State Division of Criminal Justice Services, Adult Arrests: 1994 - 2004, available at http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/index.htm. Numbers were similar for New York City: almost two-thirds of adult arrests were for misdemeanors and only 10% were for violent felonies. Id.

672 New York State Division of Criminal Justice Servs., Computerized Criminal History System (as of April 2005).
New York City for an average of three years – two years after the completion of their typical sentence to a one-year conditional discharge.

ii. **Distributing a Scarce Resource**

Although public safety is most often stated as the prime concern of restrictions on access to public housing, it is not the only concern. The HUD and PHAs are acutely aware that public housing is a scarce resource, and restrictions on access based on a person’s criminal record are sometimes promoted as a method of rationing that resource. For example, the HUD notice introducing the “one strike” initiative to PHAs explained that:

> Because of the extraordinary demand for affordable rental housing, public and assisted housing should be awarded to responsible individuals... At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules. There are many eligible, law-abiding families who are waiting to live in public and assisted housing and who would readily replace evicted tenants.

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At around the same time, in a letter responding to questions raised at a HUD conference on the legal issues generated by the one strike initiative, HUD Associate General Counsel Robert S. Kenison stated that, “[b]ecause the number of public housing units far exceeds the demand for those units, HUD considers a tough but straight-forward One Strike approach necessary to ensure that only law abiding tenants have access to this limited resource.”

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These pronouncements make clear that HUD’s exclusionary policies are not only rooted in a concern for public safety; they are also promoted as a system to reward law-abiding persons and to punish those who have engaged in criminal activity.

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4. Consequences of Barriers to Housing

a. Eviction cases and hearings affect ongoing criminal cases

Eviction cases can have a serious impact on the outcome of the individual’s criminal case. In testifying in Housing Court or a PHA administrative hearing, a tenant will often go on the record about facts relating to a pending criminal matter. In actions brought by the Narcotics Evictions Program, representatives from the D.A.’s office observe and participate in housing court proceedings, providing a direct connection between the criminal and civil case. In contrast, the individual’s criminal defense attorney often remains unaware of such civil proceedings and unable to assist the client in strategic decision making.675

b. Screening and eviction rules cast a wide net

Although safety is one of the goals of the laws restricting access to public housing, to the extent the regulations and policies of HUD encourage PHAs to screen and evict persons based on a broad definition of criminal activity (which can include simply being arrested), and to deny admission to persons years after they have completed a sentence for past criminal activity, these rules cast a net that can exclude people who may very well be good tenants.

PHAs do have the option to, and in some circumstances are required to, consider certain mitigating factors that allow for a more nuanced and appropriate response to a person’s criminal activity that includes an individualized review of that person’s suitability as a tenant.676 But there is at least some tension between the exercise of this discretion, and HUD incentives to

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676 See the general mitigation provisions for PHAs’ screening procedures at 24 C.F.R. § 960.203.
successfully screen and evict those with criminal records.\textsuperscript{677} Similarly, in the private market, District Attorney incentives to evict tenants from private buildings may conflict with any interest in considering mitigating factors.

In addition, persons who have been denied access to public or private housing or who have been evicted based on their criminal activity or the criminal activity of a household member must negotiate a complex set of procedures in order to challenge any decision or eviction, usually without the help of an attorney.\textsuperscript{678} Proper representation is important even at the earliest stages of the procedure, as courts have very limited review powers once an administrative decision has been made.\textsuperscript{679}

c. Lack of access to stable housing may have a negative effect on children and families

Laws excluding people with criminal records from accessing housing may have unintended consequences for the families of those individuals, including their children. For example, without access to stable, affordable housing, it is unlikely that a person leaving prison would be able to be reunited with his or her children.\textsuperscript{680} Similarly, a family may be faced with eviction even if just one member of the household engages in criminal activity; indeed, an

\textsuperscript{677} For example, the Public Housing Management Assessment Program evaluates PHAs and assigns points based on a number of quantitative indicators, which are ultimately linked to funding levels. Indicator #8, “Security,” states that PHAs must establish eviction and screening guidelines and must be able to document that it “successfully” screens out applicants and/or “appropriately” evicts tenants who have engaged in criminal activity. 24 C.F.R. § 901.45.

\textsuperscript{678} See Mule & Yavinsky, supra note 613, at 17. Mule and Yavinsky note that approximately 10% of tenants are represented in judicial eviction proceedings statewide, and that the same statistic applies to tenants appearing at administrative hearings at the New York City Housing Authority. Research also shows that represented tenants are more likely to achieve a successful outcome in eviction proceedings. See Carol Seron, et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: results of a Randomized Experiment, 35 L. & SOCY REV. 419 (2001).

\textsuperscript{679} Mule & Yavinsky, supra note 613, at 7-8.

individual engaging in proscribed activity merely has to be under the tenant’s control for the
PHA or landlord to have the authority to evict.681

In addition, although families are often a key source of support for people who have left
prison and are trying to reintegrate into their communities, exclusion rules can prevent people
leaving prison from returning to live with their families if their families are receiving public
housing assistance.682

d. Lack of access to stable housing may increase recidivism

A growing body of evidence shows that people leaving jail or prison often have difficulty
finding stable housing. For example, in New York City up to 20% of people released from city
jails each year are homeless or have unstable housing arrangements.683 A draft of a study
prepared by the NYC department of Homeless Services also found that more than 30% of single
adults entering shelters under the Department of Homeless Services are persons recently released
from city and state correctional institutions.684 Studies in other jurisdictions have shown similar
trends.685

681 See HUD v. Rucker, 535 U.S. 125 (2002) (holding that PHAs have the authority to evict even if the tenant
had no reason to know of the household member’s conduct). Note, however, that NYCHA policies prevent it from
evicting a tenant if the person who committed the offense has been removed from the tenant's household by the time
of the administrative hearing.

682 See M. Bobbitt & M. Nelson, The Front Line: Building Programs that Recognize Families' Role in Reentry 2-3 (2003), available at http://www.vera.org/publications/publications_5.asp?publication_id=249; see also

683 Supportive Housing Network of New York, Blueprint to End Homelessness in New York City 13 (2002).

684 See NYC Dep’t of Homeless Services, Summary of DOC/DHS Data Match (draft of data analysis
submitted for review as part of the New York City Department of Correction and Department of Homeless Services

685 A 1997 California study found that an estimated 30-50% of parolees in metropolitan areas such as San
Francisco and Los Angeles were homeless. See California Dep’t of Corrections, Prevention Parolee Failure
In addition, there is some evidence showing that a lack of stable housing is linked to recidivism. For example, a recent study tracked almost 50,000 individuals who were released from New York State prisons and returned to New York City between 1995 and 1998. It found that 11% of these individuals entered a city homeless shelter, and 33% of that group was re-incarcerated within two years of their release. Further, risk of reincarceration increased 23% with prerelease shelter stay, and 17% with post release shelter stay.686

This quantitative evidence can be supplemented with strong experiential evidence that stable housing is a factor in success after leaving prison.687 The logic of this position was expressed by President George Bush in his 2004 state of the union address, when he introduced a new re-entry initiative for people leaving prison:

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.688

B. POSSIBILITIES FOR CHANGE

The recommendations presented below are directed toward improving public safety and reducing public costs by reducing barriers to housing for people with criminal arrests or records. As discussed in Part A, the provision of housing is central to an individual’s stability. Without housing, it is difficult to raise a family, hold down a job, or maintain connections to a community. Although public safety concerns provide the justification for barring people with

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686 Metraux & Culhane, supra note 609, at 148. Another study by Metraux and Culhane for the Corporation for Supportive Housing in New York showed that the use of state prisons and city jails dropped by 74% and 40%, respectively, when people with mental illness and past criminal records were provided supportive housing. Dennis Culhane, Stephen Metraux, & Trevor Hadley, The New York, New York Agreement Cost Study: The Impact of Supportive Housing on Services Use for Homeless Mentally Ill Individuals 4 (2001), available at http://www.csh.org/html/NYNYSummary.pdf.


criminal records from housing, it is in fact much safer to provide them with a place to live. The barriers discussed above assume that the person will disappear entirely if not given housing; instead she will likely move to a homeless shelter or double up in an apartment with people that might include influences she would rather avoid. People with criminal records or arrests do not vanish when they are denied housing; instead they are forced to keep moving around, often within the very same neighborhood that has been “rid” of them.

Providing housing opportunities is also far less costly than funding homelessness programs, shelters, corrections beds, and the criminal justice system in general. Although these funding priorities are not generally seen as direct tradeoffs, research shows that anti-eviction measures would result in a large net savings, as they prevent homelessness. Information on recidivism for those living in shelters indicates that similar savings could be calculated within the criminal justice system if stable housing becomes available.

Because access to federally funded public housing is extremely limited, people with arrests and convictions must turn to the private market for housing. As described in Part A, the process of securing and maintaining private housing is very difficult for people with criminal histories. Until the criminal justice system prioritizes housing upon release, the government creates more affordable housing open to people with criminal records, and private landlords are obligated to allow people with criminal backgrounds irrelevant to being a good tenant into their buildings, the people who are among the most in need of stable housing will be least likely to get it. The recommendations below work hand in hand to address these issues and eliminate the various barriers to private housing faced by people with criminal or arrest records and their families.

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689 See, e.g., Abel, supra note 612, at 3-5 (citing a study by the New York City Human Resources Administration).
1. **State Legislative Remedies: Protect People with Criminal Records from Unjust Discrimination**

- Pass human rights law limiting discrimination based on criminal accusations. Pass New York State law modeled on the employment discrimination law (NY Exec Law § 296(16)) prohibiting denial of or eviction from housing based on a criminal case with a favorable disposition or an accusation with a pending criminal case.

- Pass human rights law limiting discrimination based on criminal convictions. Pass New York State law modeled on New York Corrections Law §§ 750-755 and federal Fair Housing Act, 42 U.S.C. § 3613, to prohibit unfair discrimination against individuals with criminal records and their households. Such a statute would include a requirement that Certificates of Relief from Disabilities be considered in making decisions about housing, that applicants may only be screened for convictions legitimately related to public safety concerns, and that tenants may only be evicted for similar convictions.

- Guarantee a private right of action and attorney’s fees. Pass New York State law combining New York Corrections Law § 755 and federal Fair Housing Act, 42 U.S.C. § 3613, to allow for enforcement of the above provisions through a choice of the Human Rights Commission or a private right of action in Civil Court. Include a provision allowing for the award of plaintiff’s attorney’s fees to promote private attorneys general.

- Pass New York State legislation limiting evictions of households based on one member’s criminal conviction. Pass legislation prohibiting an entire household’s eviction, even if the person with a criminal record would be evicted under the above provisions, as long as that occupant’s tenancy is terminated.

- Amend the Bawdy House Law. Have it reflect the above revisions.
Pass New York State legislation providing landlord protection for negligence liability for having tenants with criminal records. If the non-discrimination provisions above are adopted, the legislature should include an incentive for landlords. It should be an affirmative defense to negligence theories of premises liability if a landlord or housing owner can demonstrate that it complied with the balancing test set forth above.\(^{690}\)

2. Federal Legislative Remedies: Reduce Barriers to Public Housing Subsidies for People with Criminal Records and People Leaving Incarceration

- Repeal all federal laws requiring PHAs to automatically exclude or evict certain types of people with criminal charges or convictions. See Section A above for mandatory exclusions/terminations. Persons and households subject to mandatory exclusions/terminations include: 1) any person subject to lifetime registration requirements under a state sex offender registration program; 2) any person who has been convicted of methamphetamine production on the premises of federally-assisted housing; 3) any person who has been evicted from public housing because of drug-related activity in the past three years; and 4) any person who is currently using an illegal controlled substance, or is using controlled substances or abusing alcohol in a way that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents. Instead, all admission and eviction determinations should be individualized.

- Pass federal or state law requiring PHAs to conduct an individualized assessment of each applicant with a criminal record before making a decision about admission or eviction.

- Pass federal or state law providing that PHAs must consider all mitigating factors before making a decision about admission or eviction. In addition to the mitigating factors

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\(^{690}\) See Chapter II, Employment, supra for additional discussion.
already listed in the general mitigation provisions, PHAs must consider: 1) the best interests of any minor children of the applicant or tenant; 2) any evidence of rehabilitation; and 3) whether exclusion will render the applicant homeless. (For general mitigation provisions, see 24 C.F.R. § 982.552(c)(2) (section 8); 24 C.F.R. § 960.203 (admission); 24 § C.F.R. 966.4(l)(5)(vii)(B) (termination).)

- Pass federal or state law requiring that PHA screening and eviction guidelines can only consider criminal activity that is relevant to being a good tenant.

3. Purpose and Justification for Legislative Changes

Passing the state and federal legislation described above would curtail current discrimination against individuals with criminal records and/or arrests very similar to the protections that New York State already provides in the employment context. Such provisions reflect recommendations that have been put forward by a number of organizations working on these issues, but as of yet no such measures have been passed. Barring eviction based on investigation, arrest, or favorable disposition would limit evictions and tenant screening based on actions that the criminal justice system deems insufficient to warrant severe punishment. Additionally, such legislation would limit the eviction of entire households based on one member’s conviction. Thus, families would not become homeless based entirely upon the actions of one member of the household.

691 N.Y. EXEC. LAW § 296.16; N.Y. CORRECT. LAW §§ 750-755.
Limiting screening and evictions to those where the convictions would directly threaten the safety and welfare of other tenants or the property would ensure that individuals are able to secure and maintain housing despite low-level offenses or offenses that occurred far in the past. Additionally, requiring landlords to consider Certificates of Relief from Disabilities would make such certificates meaningful by limiting housing consequences to those in which public safety is truly threatened. The American Bar Association Criminal Justice Standards support such prohibition of “discretionary disqualification of a convicted person from…housing…unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.”

Currently, discrimination based on criminal records has a disparate impact on protected racial classes because those with criminal records are disproportionately people of color. Creating protective legislation would close the loophole in current anti-discrimination law that allows such discrimination to take place. As discussed in Part A, inability to secure and maintain housing can be as severe as fines and imprisonment for the individuals involved, public safety can be compromised by such disproportionate punishments, and public costs are raised by the resulting homelessness and returns to incarceration. Instead of allowing high recidivism and crime rates by enforcing a virtual bar to housing, the above laws would create opportunities for individuals accused or convicted of a crime and their families to maintain a minimum level of stability.

New York does not currently provide a private right of action for discrimination under NY Correct. Law §§ 750-755. This barrier to filing suit limits effective enforcement of these

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anti-discrimination laws. The state and federal Fair Housing Acts allow a private right of action for discrimination, as well as an administrative remedy, illustrating that this design is feasible.

Granting a private right of action in housing cases might be difficult given the need for consistency in the law. One response would be to amend the Human Rights Law and Corrections Law Article 23-A generally to allow for private enforcement and attorneys fees.

Similarly, the allowance for attorney’s fees in such cases would enable individuals to effectively file suit, because the vast majority of people who face housing discrimination based on criminal record are unable to afford to hire an attorney. Allowing for attorney’s fees awards in such suits would make it possible for such individuals to secure effective representation.

As discussed in Part A: Public Housing, federal law currently requires public housing authorities (“PHAs”) to screen and evict tenants based on certain criminal convictions. Federal law also gives some discretion to PHAs in making screening or eviction determinations about other criminal arrests or convictions. The above recommended laws (those directed toward state legislation) would interact with the federal law, but they would not contradict it. The mandatory exclusions under federal law all fit neatly into the exception for allowing screening or eviction of tenants who threaten the safety or welfare of the tenants or property. All other limits on discretion function similarly to other state laws that regulate the PHAs, including the New York Human Rights Law which includes provisions such as one prohibiting discrimination based on sexual orientation, which does not exist in federal law, and the rent stabilization regulations.

694 See Chapter II, Employment, supra.

695 See, e.g., N.Y. EXEC. LAW § 296.2-a(b).
Consideration would need to be given to whether small building owners would be exempted from such a statute, or from the private right of action included therein. Some might be concerned that these provisions would be unreasonably punitive for small business owners and landlords. However, this legislation should be considered a valuable source of protection for civil rights, and such an award is easily avoidable for business owners and landlords who choose not to discriminate. A provision could limit application to landlords of a certain size, tracking the Multiple Dwelling Law or state Fair Housing Act.

Consideration would need to be given to whether to include home ownership, housing brokerages, and mortgage lenders, in addition to landlords, under the umbrella of such a statute. Such inclusion would widen the net of the law, increasing possible legal claims and burdens on attorneys and the courts. However, failing to include such parties would limit the impact of such legislation to a very specific set of circumstances, failing to address the root problem – that those with criminal records find it extremely difficult to secure housing. For instance, if brokers were allowed to discriminate, landlords could often avoid such liability by hiring a discriminatory brokerage. The federal Fair Housing Act includes all such entities within its purview.

The legislative solutions discussed above are relatively cost-free, but afford necessary protections to people attempting to secure and maintain housing after involvement with the criminal justice system. Although claims under such statutes would have attendant court costs, such costs seem necessary to protect the rights of individuals and families. The added procedural protections for PHAs would also increase the administrative burden of these agencies. However, many of these protections are already provided by NYCHA, by far the largest PHA in New York, proving that they are feasible.
4. **Housing Development: Guarantee Each Person Leaving Incarceration a Place To Live**

Develop transitional supportive housing for people rendered homeless by incarceration.⁶⁹⁶ People leaving prison or jail have been recognized as often having a variety of special needs. Studies show that the rate of mental illness among people who are incarcerated is two times that of people who have never been incarcerated.⁶⁹⁷ 151,000-197,000 people released from U.S. correctional facilities each year are HIV positive and millions suffer from other infectious diseases. ⁸⁰% of people in prison report a history of substance abuse.⁶⁹⁸ Even people who do not have these problems have been found to benefit greatly from support services after leaving the institutionalized environment of a prison or jail. Currently, the vast majority people leaving incarceration do not have access to transitional housing programs or halfway houses. For those that do, access is mostly limited to those with a diagnosed mental illness or HIV.

A few examples do exist, including the Fortune Society’s Fortune Academy in New York.⁶⁹⁹ The supportive housing model provides a variety of support services and programming either onsite in congregate facilities or off-site in scatter-site programs. Temporary transitional programs usually function through a congregate model, as they provide peer support and group activities for residents. Providing such housing on a temporary basis to people returning from prison or jail would both meet the goal of providing each person being released from

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⁶⁹⁷ 8-16% of people incarcerated need psychiatric services. CSH Report, *supra* note 696, at 2.

⁶⁹⁸ *Id.*

⁶⁹⁹ See www.fortunesociety.org/services.htm#housing for a description of the program.
incarceration with housing and provide those who need them with stabilizing services and structure.

Unless a new funding stream were created for this project, agencies would need to cobble together funding, which is available only from a very limited number of sources and would have to be augmented by state and local governments in order to become widely available. Some funding could be provided through the Department of Correctional Services by involving the transitional housing provider in post-release supervision.\(^{700}\)

The social service agencies that usually develop supportive housing might have difficulty working with the criminal justice system because of different approaches to rules, policy advocacy, and attitudes toward the people that they are trying to serve. The two types of agencies also usually focus on different goals that might conflict – public safety versus client needs.\(^{701}\) However, significant benefits can be realized from a relationship between community based housing providers and the criminal justice system, including (but not limited to) greater coordination that would lead to a much smoother transition from incarceration to post-release living.

Providing only temporary housing has serious costs as well as benefits. Such housing could be seen by individuals involved as one more way station in an institutionalized environment, as opposed to an actually necessary service. Many people would far prefer to move directly from incarceration into a permanent, stable home. Additionally, although many would benefit from structure and services, some people returning from incarceration do not want or need such services. Furthermore, being grouped together with other people returning home,

\(^{700}\) See CSH Report, \textit{supra} note 696, at 24-30 for a comprehensive discussion of funding options.
while providing important peer support, might also prolong an individual’s association with the criminal justice system and the attached stigma.

However, a large number of people would benefit from such housing. The temporary nature of the housing, although problematic in some ways, limits the negative impact of grouping people with criminal records together for a protracted period and allows them the stability and time to secure appropriate permanent housing and get on with their lives. Such an option is clearly preferable to sending people to homeless shelters, and in many cases would provide the help that individuals need. Additionally, if other affordable housing became available, supportive housing would only add an option for those who need it.

Creating congregated housing developments for people returning from prison or jail would likely encounter great community opposition. Such opposition can be countered by careful planning and involvement of the community, as evidenced by the Fortune Society’s project and described by the Corporation for Supportive Housing.702

5. Develop Permanent Supportive Housing for People Returning from Prison or Jail

For the reasons discussed directly above, many people with criminal records would greatly benefit from wider access to permanent supportive housing options. Such services are currently almost entirely limited to people with specific health needs, and often conduct screening that de facto excludes people with criminal records or open cases. However, moves are being made to create more such housing opportunities for people with criminal backgrounds,

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such as the permanent housing provided by Fortune Society in the same facility as its temporary housing described above.703

Permanent supportive housing specifically geared toward people with criminal records might segregate people with criminal records from the general population and further stigmatize them. Such concerns could, however, be countered by focusing on creating housing under the scatter-site model, which would house people in existing apartments while subsidizing their rent and providing social services.

Many advocates might not be comfortable with such a model because it relies on the premise that people with criminal records have long-term special needs based entirely upon their involvement with the criminal justice system. Instead, it might be better to focus on creating more supportive housing generally and eliminating the barriers that people with criminal records face in trying to access such housing. This could be effected in part through passage of the above legislation.

6. **Encourage Housing Developers to Create Housing Open to People with Criminal Records**

In addition to creating new housing opportunities specifically for people with criminal backgrounds, housing developments built for low-income individuals generally should be encouraged to open their application processes to people with criminal records and perhaps even recruit this population specifically to fill vacancies. Often such developments, because they are in very high demand, screen for criminal background in accepting applicants. Currently, though, Fifth Avenue Committee CDC ("FAC") in Brooklyn, NY operates a program for people

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703 See www.fortunesociety.org/services.htm#housing.
returning from prison or jail. One component of this program is giving their clients priority in FAC’s housing vacancies.\(^{704}\)

Such reform efforts might meet resistance from housing developers and other tenants in low-income housing developments. However, non-profit organizations engaged in community development are likely to have a better understanding of the importance of stable housing for people with criminal records and might be more open to housing such individuals than other private landlords. Additionally, such projects would meet with less community opposition and would avoid much of the stigma of congregate supportive housing, as described above. Access to such housing would allow people returning from prison or jail the opportunity to gain stability and live a “normal” life at home. This model, however, would not provide services that some individuals might find necessary, except on an ad hoc basis as the developer is able to provide them.

Similar to problems faced by supportive housing facilities, non-profit housing developers might be reluctant to engage with the criminal justice system – something they might have to do if reaching out to people while they are incarcerated.\(^{705}\)

Such encouragement would have to take a concrete form, and could work hand in hand with the anti-discrimination legislation discussed above. One option for realizing the desired outcome would be to provide tax incentives for developers to recruit a percentage of people with criminal backgrounds into their projects. Additionally, a statewide organizer could conduct outreach and coordination for such efforts.

\(^{704}\) See Rodberg, supra note 701; see also program description at http://www.fifthave.org/CriminalJustice/CrimJusticeProgramOverview.htm.

\(^{705}\) Id.
7. Prioritize the Creation of Affordable Permanent Housing in New York State. Increase Federal and State Funding for Programs such as Section 8 and Conventional Public Housing

The affordable housing crisis in New York is at the root of many of the barriers to housing for people with criminal backgrounds. Landlords would not be able to be so selective if the demand for their housing were lower and non-profits would be more likely to reach out to people returning from prison or jail to fill their beds. Instead, in the current competitive climate, only people with no problems or barriers arising out of a criminal background are able to secure low cost housing; all others are screened out. Many programs to protect, encourage, and create affordable housing have been developed over the years, and state and local governments must prioritize them through increased funding in order to alleviate the ever growing need for housing in New York State.  

Coalitions have been working on the issue of affordable housing for years, and always encounter great opposition because of the fiscal burden of adequately funding these programs. Many would posit, however, that the costs of affordable housing are outweighed by the costs of homelessness and the related lack of stability and need for services that it brings.

8. Provide Better Transitional Planning Prior to Release from Prison or Jail

Many groups working on the civil consequences of criminal convictions focus heavily on the need for improved discharge and transitional planning services prior to release from jail or

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706 See the New York State Division of Housing and Community Renewal website at http://www.dhcr.state.ny.us/general/affhsg.htm/ for an overview of some of the existing affordable housing programs in New York State.

707 For organizations working on this issue see, e.g., New York State Association for Affordable Housing at http://www.nysafah.org/aboutus.html and Association of Community Organizations for Reform Now at http://www.acorn.org/index.php?id=2716.
prison. Such groups propose the following. Transition/discharge planners should work with community-based organizations to be aware of the full range of housing available and the legal restrictions to such housing, and keep a resource guide of appropriate housing options.

Transition planners should individually assess incarcerated people prior to release to determine specific housing needs and availability of housing to meet these needs. Although every effort should be made to secure housing prior to release, this date should not be delayed due to the unavailability of housing.

All people leaving prison or jail should leave with a feasible housing plan. Transition planners should work collaboratively with service providers in the community, other involved government agencies providing financial, health, and housing assistance, and parole or probation officers to ensure a smooth transition from incarceration to the community. Efforts are being made across the country to improve discharge planning along the lines described above.

Improving transitional planning would be a cost effective way to improve re-entry prospects for those leaving prison or jail. Costs would mostly involve increased training for discharge planners and potential increase in discharge planning staff to meet the needs described above.

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709 Some states actually do not release people until appropriate housing is found. See Rodriguez & Brenner, supra note 687, at 4. The Statewide Reentry Policy Council recommends not following this approach, as it further penalizes the incarcerated individual for a lack of housing that is out of their control. RPC Report, supra note 608, at Policy Statement 19.

710 See supra note 708.
This proposal, although an important step, would likely not have a large effect on housing for people returning from prison or jail unless combined with the other recommendations. First, the results would necessarily be extremely limited, due to the overall lack of affordable housing stock in New York State and the additional barriers faced by people with criminal records, as described in Part A. In the current state of the housing market, transitional planners can do little to address the true needs of people who are incarcerated. Second, an entire culture in the jail and prison system would have to be reformed. Employees of the criminal justice system would have to refocus on providing comprehensive assistance to people who are incarcerated and working with community organizations instead of the adversarial posture that correctional workers are taught to have toward inmates. Third, community groups might be reluctant to working with the criminal justice system, which might have very different priorities. Nonetheless, it is essential that these issues are addressed and that efforts be made to move toward providing a successful and community based transition out of prison or jail. Solutions include subcontracting transitional or discharge planning to community-based organizations.

9. **Provide Housing Stipends for the Period Directly after Release**

One of the important barriers to housing for people returning from incarceration is inability to pay the fees associated with securing a new apartment, such as broker’s fees and security deposits, as most people returning from incarceration lack financial savings. Paying the first few months’ rent is also very difficult while the individual looks for employment and other sources of income. In New York State, people who are eligible for public assistance can apply for a “one-shot deal” to assist with the costs of security deposit, broker’s fee, first month’s rent, and/or moving expenses. Such assistance is either provided in grant form or will have to be paid back in installments. Regardless, many people leaving jail or prison have a very difficult time accessing such benefits, especially under a tight timeframe as they attempt to secure housing.
quickly.\textsuperscript{711} Even when they are able to access such assistance, it is extremely limited and will not cover the first few months’ rent.

Some states have implemented programs to provide funding for these needs. For instance, Allegheny County State Forensic Services provides for the first three months of living expenses for people with mental illness once they are released from prison.\textsuperscript{712} Providing such funding for all people leaving incarceration would allow them to access housing immediately upon release instead of having to remain homeless until they can secure a job and save enough funds to move.

Such programming would likely encounter serious opposition as lawmakers prioritize funding for social services. It might seem counterintuitive to some to provide this sort of expanded funding to “criminals” while people who have not committed crimes go unassisted. This concern might be alleviated by providing such funding to the homeless population in general (including incarcerated people in this population, as discussed above). However, it would become quite costly.

10. Provide Housing Case Management for People Rendered Homeless as the Result of Criminal Arrest or Conviction

Such services could be included in a one-stop community center for people with criminal convictions (generally applicable).\textsuperscript{713} Housing assistance has been proven to be an effective way to enable homeless people to access housing and is currently provided by a variety of organizations. Funding housing case managers specifically for people with criminal

\textsuperscript{711} See supra Chapter IV, Benefits.

\textsuperscript{712} See Allegheny County State Forensic Program (description available at http://www.county.allegheny.pa.us/dhs/BH/acsfp.html; see also RPC Report, supra note 608, at Policy Statement 19 for additional examples of financial assistance provided to people upon release from prison.

\textsuperscript{713} See, e.g., Rodriguez & Brenner, supra note 687; New Jersey Public Policy Research Institute, Coming Home for Good, supra note 696.
backgrounds would create a resource that is knowledgeable about the barriers and programs that are open to this hard to house population. Case managers with such a knowledge base would help people with criminal backgrounds navigate the complicated path to securing a stable home. For example, the Vera Institute for Justice’s Project Greenlight provided housing assistance to its clients. This program worked together with the correctional system to identify people living in prison who needed assistance and to provide comprehensive services, including housing placement, for them.

Funding case managers throughout the state to work fulltime on housing people with criminal records would carry a significant cost in salaries and resources. Such a program could also be seen as duplicative, because some might claim that transition planners, resource guides, and general social services should be sufficient to assist a person in finding housing. However, others would argue that providing such assistance is necessary, given the state of constant change in the housing market and the specificity of the knowledge necessary to quickly house a person with a criminal record. Additionally, such assistance greatly increases the ability of people to be housed without the costs of building additional housing or providing ongoing social services.

11. Provide Training to People in Jail or Prison on Finding and Maintaining Housing; Teach People About Their Housing Rights under Federal, State, and Local Law

Housing rights and skills workshops should take place in jails and prisons prior to release, as well as in criminal defense offices for defendants and their families while an individual is facing criminal charges.

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714 Rodriguez & Brenner, supra note 687.
715 Id.
Costs are attached to such training programs, in terms of trainer’s time, training materials, recruitment, and space.

12.  Generally

- Lift LSC limitations to allow civil legal services attorneys to fully represent their clients in all relevant matters.
- Institute more collaboration between civil legal services and criminal defense practices to address all of the client’s legal needs.717
