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### **BREAKING THE CYCLE OF HOMELESSNESS AND INCARCERATION: PRISONER REENTRY, RACIAL JUSTICE, AND FAIR CHANCE HOUSING POLICY**

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*This article is the first to systematically demonstrate that fair chance housing ordinances constitute an innovative policy response to the confluence of two critical problems—mass incarceration and homelessness, both of which disproportionately affect people of color. The ordinances restrict landlords from investigating the criminal history of home-seekers, and, to date, have been enacted in fifteen localities nationwide. The object of the legislation is to support prisoner reentry into society by barring discrimination against former offenders in the rental market and reducing housing barriers that limit life chances and cause recidivism. This article analyzes the emergence, development, and provisions of the fair chance housing ordinances. It considers the local initiatives in the context of evolving federal and state efforts to counter housing discrimination based on criminal history. It also addresses “ban the box” employment statutes that provided a precedent for the housing initiatives and the grassroots urban activism that*

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*inspired the policy. And it analyzes legal challenges to the legislation mounted by landlords. This article focuses on the fair chance housing legislation adopted in Seattle as a case study, examining a “first-in-time” 2016 ordinance that counters implicit bias by requiring landlords to select the first qualified applicant and a 2017 ordinance that defines ex-offenders as a protected class. The article proposes an exemption from these policies for small rental properties occupied by the landlord and finds that fair chance housing policy must be paired with heightened enforcement of civil rights laws, to prevent use of race as a proxy for criminal history, as well as with measures to increase the supply of low-income housing.*

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## INTRODUCTION

After his release from prison he was homeless. A 45-year-old Black man, Adrian Laster lived on the streets of Seattle, excluded from rental housing upon his reentry into free society.<sup>1</sup> His crimes were non-violent drug offenses, but landlords turned him away. Stigmatized because of his criminal history, he joined the city's homeless population, composed disproportionately of people of color. “‘I wish I could erase the felonies but I can’t,’ Laster said. ‘I think everybody deserves a chance.’”<sup>2</sup>

Prisoner reentry is an urgent policy issue, brought to the fore by public concern with both the moral wrongs and fiscal costs of a system of mass incarceration that has become entrenched during the past half century—a system that has institutionalized racism by disproportionately imprisoning people of color.<sup>3</sup> Among the direst problems confronted by former offenders on reentering society is homelessness. That problem was all the more acute during the Covid-19 public health crisis, as hundreds of thousands of inmates, released from jails and prisons across the country to limit outbreaks of the coronavirus, searched for stable and affordable housing.<sup>4</sup> Criminal history disadvantages such home-seekers in the rental housing market, inhibiting prisoner reentry.

This article examines innovative local anti-discrimination legislation that addresses the confluence of mass incarceration and homelessness. The measures—known as fair chance housing ordinances—restrict the use of

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<sup>1</sup> Kelsey Hamlin, *Seattle Could Be First in the Nation to Stop Rental Criminal History Discrimination*, S. SEATTLE EMERALD (Aug. 10, 2017), <https://southseattleemerald.com/2017/08/10/seattle-could-be-first-in-the-nation-to-stop-rental-criminal-history-discrimination/> [https://perma.cc/HYL9-V986].

<sup>2</sup> *Id.*

<sup>3</sup> For an analysis of the American prison system as a tool of racial and social control, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); ROBYNN J.A. COX, ECON. POL’Y INST., *WHERE DO WE GO FROM HERE? MASS INCARCERATION AND THE STRUGGLE FOR CIVIL RIGHTS* (2015), <https://www.epi.org/publication/where-do-we-go-from-here-mass-in-carceration-and-the-struggle-for-civil-rights/> [https://perma.cc/4Y7V-PU4G].

<sup>4</sup> *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> [https://perma.cc/4XFS-78XM]; Wanda Bertram, *Returning from Prison and Jail is Hard During Normal Times—It’s Even More Difficult During COVID-19*, PRISON POL’Y INITIATIVE, (Sept. 2, 2020), <https://www.prisonpolicy.org/blog/2020/09/02/covidreentry/> [https://perma.cc/HH2H-6H7B]; Linda So, Brad Heath, Jason Szep, Ned Parker & Peter Eisler, *Special Report: As Jails Free Thousands among COVID-19, Reform Push Takes Root*, REUTERS (Oct. 28, 2020), <https://www.reuters.com/article/us-usa-jails-release-specialreport/special-report-as-jails-free-thousands-amid-covid-19-reform-push-takes-root-idUSKBN27D1RX> [https://perma.cc/6CBF-AHYF].

criminal history in denying access to rental housing. To date, the ordinances have been enacted in fifteen localities across the nation, all but one since 2014, and related bills have been introduced in statehouses and Congress. The ordinances aim to support prisoner reentry into society and reduce structural barriers to housing that limit life chances, combatting both homelessness among people with criminal records and the risk of recidivism that is heightened by homelessness.<sup>5</sup>

People of color are disproportionately caught in what the United States Interagency Council on Homelessness has termed a “cycle of homelessness and incarceration,” this article reveals.<sup>6</sup> By disrupting that cycle, this article argues, the fair chance housing ordinances constitute a potent challenge to both systemic racism and discrimination based on criminal history. Notably, the ordinances build on a foundation laid by the Fair Housing Act of 1968 (FHA) but reach beyond the Act’s protections to target bias against formerly incarcerated persons. This article analyzes the emergence, development, and provisions of the ordinances, examining local initiatives in the context of evolving federal and state efforts to counter bias against ex-offenders in the housing market. In particular, it considers guidance from the U.S. Department of Housing and Urban Development (HUD) concerning disparate racial impact as a consequence of rental housing exclusion based on criminal history. The article also shows how “ban the box” employment measures, aimed at countering discrimination against ex-offenders in the labor market, have provided a model for the housing ordinances. And it takes account of the grassroots activism that inspired the fair chance housing policy by highlighting the interconnected wrongs of homelessness, mass incarceration, and racial injustice.

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<sup>5</sup> There is a dearth of legal scholarship about these ordinances. The *Harvard Law Review* published a comment in 2018 concerning the Seattle ordinance. *Housing Law—Criminal Screening of Tenants—Seattle Bans the Use of Criminal History in Rental Decisions—Seattle, Wash., Ordinance 125393 (Aug. 23, 2017)*, 131 HARV. L. REV. 1844 (2018). Additionally, legal scholar Valerie Schneider describes the problem of discrimination against ex-offenders and briefly analyzes the District of Columbia’s ordinance while noting that Seattle “passed an even more aggressive law.” Valerie Schneider, *Racism Knocking at the Door: The Use of Criminal Background Checks in Rental Housing*, 53 U. RICH. L. REV. 923, 942–47 (2019). Finally, the ordinances are the subject of one article in a public policy journal. See Marie Lawrence, *Locked Up or Locked Out: How Insecurity Undermines Criminal Justice*, KENNEDY SCH. REV. 17 (Oct. 20, 2017), <https://ksr.hkspublications.org/2017/10/10/locked-up-or-locked-out-how-housing-insecurity-undermines-criminal-justice-reform/> [<https://perma.cc/G7WS-47V4>] (arguing that cities should pass fair chance housing ordinances so that landlords cannot reject applicants just because they have a criminal record).

<sup>6</sup> *Reduce Criminal Justice Involvement*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 16, 2019), <https://www.usich.gov/solutions/criminal-justice/> [<https://perma.cc/PH4X-K49Y>].

This article focuses on the fair chance housing legislation developed in Seattle as a case study. The city has adopted a pair of ordinances distinctive in both establishing new civil rights protections for people with a criminal history and expanding restrictions on the prerogatives of owners of rental property. A 2016 ordinance created a “first-in-time” rule expressly intended to counter implicit bias by requiring landlords to offer rental units to the first qualified applicant.<sup>7</sup> A 2017 ordinance created a novel suspect classification, defining people with a criminal history as a class protected from housing discrimination.<sup>8</sup> Both provisions were unprecedented, setting Seattle at the forefront of achieving criminal justice and anti-discriminatory housing reform, and both have been subject to legal challenge by property owners.

This article argues that fair chance housing legislation modeled on the Seattle ordinances is needed to promote prisoner reentry by breaking the cycle of homelessness and incarceration. But the article also proposes an exemption for small rental properties occupied by the landlord, parallel to that in the FHA, and finds that fair chance housing policy must be paired with heightened enforcement of civil rights laws to prevent use of race as a proxy for criminal history as well as with regulations and incentives to increase the supply of low-income housing in rental markets.

This article proceeds as follows: Part I introduces the conjoined problems of homelessness and mass incarceration that impede prisoner reentry and disproportionately harm people of color. Part II surveys federal, state, and local policy responses to housing discrimination against ex-offenders and traces the emergence and development of local fair chance housing policy. Part III focuses on the Seattle ordinances, analyzing the rules that wholly bar use of most criminal history to disqualify applicants for rental housing and providing an account of the local activism that led to the legislation’s adoption. Part IV addresses legal challenges to the Seattle ordinances mounted by landlords in a pair of cases both captioned *Yim v. City of Seattle*, involving due process, First Amendment, and Takings Clause claims. The first-in-time challenge reached the U.S. Supreme Court, where the Ninth Circuit’s rejection of the challenge was denied review; the fair chance case remains pending in the Ninth Circuit after the ordinance was upheld in the District Court.<sup>9</sup> Part V concludes by arguing that Seattle’s fair chance housing legislation stands as a model for prison reentry policy while also proposing exemptions to blunt challenges such as in *Yim v. City of Seattle*; it argues for heightened enforcement of anti-discrimination laws to prevent the use of race as a proxy for criminal history and it calls for measures

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<sup>7</sup> SEATTLE, WASH., CODE § 14.08.050 (2020).

<sup>8</sup> *Id.* §§ 14.09 (2020).

<sup>9</sup> *Yim v. City of Seattle*, 451 P.3d 675, 694 (2019), *cert. denied*, 140 S. Ct. 2675 (2020); *Yim v. City of Seattle*, No. 2: 18-cv-00736-JCC, at \*15 (W.D. Wash. July 6, 2021).

to increase the supply of affordable rental property in city housing markets. Fair chance housing policy, this article shows, affords a weapon against landlord prerogatives that thwart prisoner reentry.

## I. HOMELESSNESS AND INCARCERATION

Cities such as Seattle are hard places for people with criminal records to escape homelessness, inhibiting their reentry from prison into society—especially if they are people of color. In some urban areas, half of the population on parole is homeless, with ex-offenders concentrated in communities of color<sup>10</sup> in underserved neighborhoods.<sup>11</sup> The experience of imprisonment and the stigma attached to a criminal history compound the risk of homelessness in cities where there is a dearth of low-income housing.<sup>12</sup> Throughout the nation, homelessness and incarceration are intertwined, with people of color disproportionately affected by discrimination against former offenders in the urban rental housing market.

### A. National Trends

Nationwide, urban homelessness has been on the rise since 2014, driven by surges in the most populous cities, particularly on the West Coast.<sup>13</sup> According to the most recent comprehensive aggregation of local point-in-time (PIT) counts of homelessness mandated by HUD—the *2019 Annual Homeless Assessment Report to Congress*—more than half a million people were found to be experiencing homelessness.<sup>14</sup> A report by the National Low Income Housing Coalition indicates that no state has an adequate supply of affordable housing and there is a shortage of nearly 7 million affordable rental

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<sup>10</sup> Monica L. Ricci & Carolyn McNamara Barry, *Challenges of Reentering Society for Incarcerated African-American Men* 17 MOD. PSYCH. STUD. 13, 15 (2011).

<sup>11</sup> NINO RODRIGUEZ & BRENNER BROWN, VERA INST. OF JUST., PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 2, (Dec. 2003), [https://www.prisonpolicy.org/scans/vera/209\\_407.pdf](https://www.prisonpolicy.org/scans/vera/209_407.pdf) [<https://perma.cc/36JH-NM2Y>].

<sup>12</sup> Elayne Weiss, *Housing Access for People with Criminal Records*, NAT'L LOW INCOME HOUS. COAL. 6–27 (2016); [https://nlihc.org/sites/default/files/AG-2019/06-07\\_Housing-Access-Criminal-Records.pdf](https://nlihc.org/sites/default/files/AG-2019/06-07_Housing-Access-Criminal-Records.pdf) [<https://perma.cc/5QBT-CSM3>]; Hensleigh Crowell, *A Home of One's Own: The Fight Against Illegal Housing Discrimination Based on Criminal Convictions and Those Who Are Still Left Behind*, 95 TEX. L. REV. 1103, 1104 (2017); Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration*, N.Y.U. J. OF LEGIS. & PUB. POL'Y QUORUM 1, 20 (2015).

<sup>13</sup> *Homelessness in US Cities: California is Facing a Crisis*, CITY MAYORS SOC'Y, <http://www.citymayors.com/society/usa-cities-homelessness.html> [<https://perma.cc/3MW-H-ALYH>].

<sup>14</sup> U.S. DEPT. OF HOUS. & URBAN DEV., 2019 ANNUAL HOMELESS ASSESSMENT REPORT 1 (2020), <https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf> [<https://perma.cc/JJ9H-5BBA>].

units available to people with incomes at or below the poverty level.<sup>15</sup> Homelessness has expanded with the rise in housing rental costs.<sup>16</sup> And studies of the economic toll of the coronavirus pandemic project homelessness to dramatically increase nationwide.<sup>17</sup> The disparate racial impact of homelessness is highlighted in the 2019 PIT count: Black and Hispanic people account for 40 percent and 22 percent, respectively, of the homeless population, but only 13 percent and 18 percent, respectively, of the U.S. population.<sup>18</sup>

The confluence of homelessness and incarceration is well documented. The U.S. Interagency Council on Homelessness finds that tens of thousands of people are “caught in a revolving door between the streets, shelters, and jails.”<sup>19</sup> A 2020 report by the Urban Institute on the “homelessness-jail cycle” indicates that people living on the streets are more likely to interact with the criminal justice system, facing greater risk of arrest and conviction for minor offenses, and that people with criminal records are more likely to face housing discrimination and experience homelessness.<sup>20</sup> Almost 50,000 people entering homeless shelters annually have just been released from prisons or jails.<sup>21</sup> The United States imprisons two million people, a total that has soared 500 percent over the last four decades.<sup>22</sup> Nearly a third of the nation’s adult population—approximately 77 million people—have some type of criminal record.<sup>23</sup> Although about 650,000 inmates are released from prison each year, a majority return within three years, as

<sup>15</sup> NAT’L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE RENTAL HOMES 2* (2018), <http://nlihc.org/gap> [<https://perma.cc/3GD7-9885>].

<sup>16</sup> Chris Glynn, Thomas H. Byrne & Dennis P. Culhane, *Inflection Points in Community-Level Homeless Rates*, 15 *ANNALS OF APPLIED STATISTICS* 1037, 1043 (2021), [https://wp-tid.zillowstatic.com/3/Homelessness\\_InflectionPoints-27eb88.pdf](https://wp-tid.zillowstatic.com/3/Homelessness_InflectionPoints-27eb88.pdf) [<https://perma.cc/P8QA-DD9J>].

<sup>17</sup> *Analysis on Unemployment Projects 40-45% Increase in Homelessness This Year*, CMTY. SOLUTIONS (May 11, 2020), <https://community.solutions/analysis-on-unemployment-projects-40-45-increase-in-homelessness-this-year/> [<https://perma.cc/54M4-CJVJ>].

<sup>18</sup> 2019 ANNUAL HOMELESS ASSESSMENT REPORT, *supra* note 14, at 1.

<sup>19</sup> *Reduce Criminal Justice Involvement*, *supra* note 6.

<sup>20</sup> *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, URBAN INST. (Sept. 16, 2020), <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it> [<https://perma.cc/9PE5-DHJH>].

<sup>21</sup> *Reduce Criminal Justice Involvement*, *supra* note 6.

<sup>22</sup> *Trends in U.S. Corrections*, SENTENCING PROJECT (May 17, 2021), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>. The NAACP puts the total number of people held in jail and prison in the U.S. today at three million. *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/D8MB-FA9B>].

<sup>23</sup> Chidi Umez & Rebecca Pirius, *Barriers to Work: People with Criminal Records*, NAT’L CONF. ST. LEGISLATORS (July 17, 2018), <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [<https://perma.cc/JPP5-XUQE>].

recidivism fuels mass incarceration.<sup>24</sup> About a tenth of inmates experience homelessness prior to incarceration, and about a tenth of ex-offenders experience homelessness on reentering free communities.<sup>25</sup> Former prisoners are far less likely to have stable housing than people without a criminal history, and housing instability is closely correlated with recidivism.<sup>26</sup> The Prison Policy Initiative finds that formerly incarcerated people—a population of five million in the United States—are almost ten times more likely to be homeless than the general public.<sup>27</sup>

Nationwide, people of color suffer disproportionately from the cycle of homelessness and incarceration. The demographics of incarcerated people and people who experience homelessness overlap. The data indicate that both populations are “disproportionately poor minorities from urban areas.”<sup>28</sup> According to the Urban Institute, Black, Latinx, and Indigenous people are overrepresented in both populations because of “systemic and structural racism” in the housing market and criminal justice institutions.<sup>29</sup> Works such as Michelle Alexander’s *The New Jim Crow: Mass Incarceration in the Age of Color Blindness* trace the consequences of systemic racism.<sup>30</sup> Today, more than half of the incarcerated population in American prisons and jails are people of color.<sup>31</sup> Homelessness increases the risk of incarceration, and vice

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<sup>24</sup> *Prisoners and Prisoner Re-Entry*, U.S. DEP’T OF JUST., [https://www.justice.gov/archive/fbci/progmenu\\_reentry.html#:~:text=More%20than%20650%2C000%20ex%2Doffenders,during%20the%20past%2030%20years](https://www.justice.gov/archive/fbci/progmenu_reentry.html#:~:text=More%20than%20650%2C000%20ex%2Doffenders,during%20the%20past%2030%20years) [https://perma.cc/6P6P-3DCH].

<sup>25</sup> Caterina Gouvis Roman & Jeremy Travis, *Taking Stock: Housing, Homelessness, and Prisoner Reentry*, URB. INST. 8 (Mar. 8, 2004).

<sup>26</sup> *Formerly Incarcerated People Are Nearly 10 Times More Likely to be Homeless*, NAT’L LOW INCOME HOUS. COAL. (Aug. 20, 2018), <https://nlihc.org/resource/formerly-incarcerated-people-are-nearly-10-times-more-likely-be-homeless> [https://perma.cc/FF2H-A68Q]. See generally Claire W. Herbert, Jeffrey D. Morenoff & David J. Harding, *Homelessness and Housing Insecurity Among Former Prisoners*, RUSSELL SAGE FOUND. 1 J. SOC. SCI. 44 (2015) (analyzing former prisoners’ experiences with housing insecurity and homelessness); Steven D. Bell, Note, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 11 (2014) (observing that a person without stable housing is seven times more likely to re-offend after leaving prison).

<sup>27</sup> Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE, (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html> [https://perma.cc/B5W9-MAMD].

<sup>28</sup> Herbert et al., *supra* note 26, at 45.

<sup>29</sup> *Five Charts That Explain the Homelessness-Jail Cycle*, *supra* note 20.

<sup>30</sup> See generally ALEXANDER, *supra* note 3.

<sup>31</sup> *Criminal Justice Factsheet*, *supra* note 22, at 2.



*versa*—and people of color, particularly Black people, are most at risk of homelessness, incarceration, and criminal recidivism.<sup>32</sup>

Thus, homelessness has emerged as a critical problem of prisoner reentry and criminal justice. As HUD found concerning the intersection of homelessness and incarceration: “difficulties in reintegrating into the community increase the risk of homelessness for released prisoners, and homelessness in turn increases the risk of subsequent re-incarceration.”<sup>33</sup> In a directive construing the FHA, HUD further concluded that stable housing is essential to “successful reentry to society.”<sup>34</sup>

### B. Seattle

Seattle presents a microcosm of the homelessness-jail cycle. The city has one of the country’s largest homeless populations, ranking thirteenth, behind New York City, Los Angeles, and San Francisco.<sup>35</sup> According to the most recent point-in-time count, conducted on a single day in January 2020, almost 12,000 people were experiencing homelessness in Seattle/King

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<sup>32</sup> Carol L. M. Caton, Carol Wilkins & Jacquelyn Anderson, *People Who Experience Long-Term Homelessness: Characteristics and Intervention*, in TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 4-1, at 4-31 (2007), <https://aspe.hhs.gov/reports/toward-understanding-homelessness-2007-national-symposium-homelessness-research-historical> [<https://perma.cc/LD7G-YWLE>]; *Five Charts That Explain the Homelessness-Jail Cycle*, *supra* note 20; *Prisoners and Prisoner Re-Entry*, *supra* note 24; *Trends in U.S. Corrections*, *supra* note 22, at 5; Weiss, *supra* note 12, at 6–27; Matthew Doherty, *Incarceration and Homelessness: Breaking the Cycle*, DISPATCH, Dec. 2015, [https://cops.usdoj.gov/html/dispatch/12-2015/incarceration\\_and\\_homelessness.asp](https://cops.usdoj.gov/html/dispatch/12-2015/incarceration_and_homelessness.asp) [<https://perma.cc/9LJP-GC23>]; Herbert et al., *supra* note 26, at 45; Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL’Y 139, 140–41 (2004); Crowell, *supra* note 12, at 1104; Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RES. 1196, 1203 (2011).

<sup>33</sup> OFFICE OF PUB. & INDIAN HOUS., U.S. DEP’T OF HOUS. & URB. DEV., GUIDANCE ON HOUSING INDIVIDUALS AND FAMILIES EXPERIENCING HOMELESSNESS THROUGH THE PUBLIC HOUSING AND HOUSING CHOICE VOUCHER PROGRAMS 8 (June 10, 2013) <https://www.hud.gov/sites/documents/PIH2013-15.PDF> [<https://perma.cc/L8YT-LQVT>].

<sup>34</sup> U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF THE FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1 (Apr. 4, 2016), [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [<https://perma.cc/5TEG-V348>].

<sup>35</sup> Doug Carlin, *15 Cities with Highest Homeless Rate in the US [Report 2022]*, USA BY NUMBERS (Feb. 15, 2022), <https://usabynumbers.com/cities-with-highest-homeless-rate/> [<https://perma.cc/8CKH-FEQ5>].

County, a 5 percent increase from the prior year.<sup>36</sup> Nearly half of the city's homeless population was unsheltered, and more than a third were experiencing chronic homelessness, meaning they slept in places unfit for human habitation or in emergency shelters for a year or longer.<sup>37</sup> Chronic homelessness had increased 52 percent from the count taken in 2019.<sup>38</sup> Likewise, the jail bookings of people experiencing homelessness have been on the rise in Seattle, according to records of the city's police department. The offenses are mainly nonviolent crimes, including theft, narcotics possession, loitering, and trespassing.<sup>39</sup>

Over the course of the past decade and a half, Seattle's homeless population has increased at a rate twice that of the city's general population, with unsheltered homelessness rising most sharply. Meanwhile, rents in Seattle have far outpaced wages, at a rate exceeding the national average, driven mostly by the booming technology industry.<sup>40</sup> "We are this prosperous city in the most prosperous country in the world and yet we have thousands of people sleeping in tents and doorways," Seattle's former mayor, Jenny Durkan, acknowledged.<sup>41</sup> "Seattle's homelessness crisis has been years in the making, and its roots run deep, touching racial inequity, economic disparities, mental health treatment, rising housing costs . . . and so much more."<sup>42</sup> In 2021, the city budgeted nearly \$149 million for services addressing the

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<sup>36</sup> *Count Us In: Seattle/King County Point-in-Time Count of Individuals Experiencing Homelessness*, VN RSCH. 5 (Jan. 2020), <https://regionalhomelesssystem.org/wp-content/uploads/2020/06/Count-Us-In-2020-Final.pdf> [<https://perma.cc/EHV8-AXWB>]. In Seattle alone, the count was just over 8,000 on January 24, 2020. Nick Bowman, *Latest Count Indicates Possible Rise in King County Homeless Population*, MYNORTHWEST (July 2, 2020), <https://mynorthwest.com/1994768/homeless-count-king-county-seattle-2020/> [<https://perma.cc/5TQJ-MM77>].

<sup>37</sup> *Count Us In: Seattle/King County Point-in-Time Count of Individuals Experiencing Homelessness*, *supra* note 36, at 15.

<sup>38</sup> *Id.*

<sup>39</sup> David Kroman, *In Seattle, 1 In 5 People Booked Into Jail Are Homeless*, CROSSCUT (Feb. 19, 2019), <https://crosscut.com/2019/02/seattle-1-5-people-booked-jail-are-homeless> [<https://perma.cc/72CM-D9SG>].

<sup>40</sup> Florentina Sarac, *On the Edge of Affordability: Rents Set to Outpace Wages in Top Emerging IT Hubs*, RENTCAFE, (Mar. 20, 2019), <https://www.rentcafe.com/blog/rental-market/real-estate-news/it-hubs/> [<https://perma.cc/52Q7-S2GU>]; Adam Rowe, *Homelessness in the Tech Haven of Seattle Rose 44 Percent in the Last 2 Years*, TECH.CO (Dec. 8, 2017), <https://tech.co/homelessness-seattle-44-percent-2-years-2017-12> [<https://perma.cc/4GFR-JPTF>].

<sup>41</sup> Cindy Barth, *Community Impact: A Look at What Other Cities Are Doing to Address Needs*, ORLANDO BUS. J. (Dec. 4, 2020), <https://www.bizjournals.com/orlando/news/2020/12/04/how-other-cities-are-addressing-community-needs.html> [<https://perma.cc/FG6G-XMQ7>].

<sup>42</sup> *Homelessness Response, The Roots of the Crisis*, City of Seattle, <https://www.seattle.gov/homelessness/the-roots-of-the-crisis> [<https://perma.cc/Y4DL-UPG7>].

homelessness crisis.<sup>43</sup> At the same time, however, local ordinances criminalize homelessness by banning camping, sitting, and lying in certain public places and living or sleeping in vehicles.<sup>44</sup>

The disparate racial impact of Seattle's cycle of homelessness and incarceration is as stark as that reflected in trends nationwide. An array of data indicates that people of color are overrepresented among those experiencing homelessness and those with criminal records, and that the disparity is most extreme among the city's Black community. "Homelessness disproportionately impacts people of color," states a report on the 2020 Seattle/King County point-in-time count.<sup>45</sup> As of that count, Black people represented 25 percent of people experiencing homelessness but only 7 percent of Seattle/King County's population; by contrast, white people represented 48 percent of the homeless population but 67 percent of the general population.<sup>46</sup> In Seattle, likewise, racial disproportionality is entrenched in the criminal justice system.<sup>47</sup> Black people are five times more likely to be arrested than are white people.<sup>48</sup> The racial disparity in rates of incarceration is even greater than that for homelessness. According to recent data for Seattle/King County, Black people represent 36 percent of the detention population and 29 percent of the jail-booking population, but just 7 percent of the general population.<sup>49</sup> And a fifth of jail bookings in Seattle were of people experiencing homelessness.<sup>50</sup> At the state level, Black people

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<sup>43</sup> CITY OF SEATTLE, WASH., 2022 PROPOSED BUDGET 195 (2022) [https://www.seattle.gov/documents/Departments/FinanceDepartment/22proposedbudget/2022\\_Proposed\\_Budget.pdf](https://www.seattle.gov/documents/Departments/FinanceDepartment/22proposedbudget/2022_Proposed_Budget.pdf) [<https://perma.cc/E54H-4RL2>] (laying out the city's budget to address homelessness).

<sup>44</sup> JOSHUA HOWARD & DAVID TRAN, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE 2–3 (Sara K. Rankin ed., 2015). See NAT'L CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9 (2019) (discussing the growth of laws that criminalize homelessness).

<sup>45</sup> *Count Us In: Seattle/King County Point-in-Time Count of Individuals Experiencing Homelessness*, *supra* note 36, at 10.

<sup>46</sup> *Id.*; *Quick Facts, Seattle City, Wash.*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/seattlecitywashington/RHI125219#RHI125219> [<https://perma.cc/7UQ6-3FK4>].

<sup>47</sup> Alexes Harris, Racial Disproportionality in the Criminal Justice System, Presentation to City of Seattle 14 (July 23, 2013) [https://www.seattle.gov/documents/Departments/Housing/PropertyManagers/ManagementResources/CriminalJusticeSystemDisparities\\_07-23-13.pdf](https://www.seattle.gov/documents/Departments/Housing/PropertyManagers/ManagementResources/CriminalJusticeSystemDisparities_07-23-13.pdf)

<sup>48</sup> *Id.*

<sup>49</sup> KING CNTY., DEP'T OF ADULT & JUV. DET., DETENTION AND ALTERNATIVES REPORT 1–2 (May 2018), [https://www.kingcounty.gov/~media/courts/detention/documents/KC\\_DAR\\_Monthly\\_Breakouts\\_09\\_2018.ashx?la=en](https://www.kingcounty.gov/~media/courts/detention/documents/KC_DAR_Monthly_Breakouts_09_2018.ashx?la=en) [<https://perma.cc/M6HP-NCEQ>].

<sup>50</sup> Kroman, *supra* note 39.

comprise 17 percent of prison inmates but only 4 percent of the general population.<sup>51</sup>

In Seattle, as nationwide, the racial disparities that structure both homelessness and incarceration pervade prisoner reentry as well. People of color are vastly overrepresented among the nearly 1,500 former offenders annually released from prison into the city, where many experience homelessness.<sup>52</sup> The adversity they face in reentry is reflected in the homelessness experienced by Adrian Laster, who waited two years for a Section 8 voucher providing rental assistance, as he lived on Seattle's streets and in shelters. But the voucher could not overcome bias against people with a criminal history in Seattle's tight rental market. "I got a voucher," he said. "I got denied."<sup>53</sup>

### *C. Homelessness, Housing Discrimination, and Criminal Background Checks*

A multitude of social, economic, and legal factors accounts for homelessness among formerly incarcerated people. Those range from unemployment, poverty, and debt to domestic violence, lack of social networks, substance abuse, and mental and physical challenges.<sup>54</sup> They also include inadequate public assistance—both pre-release services and post-prison programs providing supportive and transitional housing and “wrap-around” services—as well as the growing shortage of private rental housing available to people living at or below the poverty level, especially in urban areas.<sup>55</sup> Access to housing is further restricted by a “one strike” rule that

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<sup>51</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT, 20 tbl.5 (Oct. 13, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/MD7Q-7FM7>].

<sup>52</sup> Harris, *supra* note 47, at 17.

<sup>53</sup> Hamlin, *supra* note 1.

<sup>54</sup> *Count Us In: Seattle/King County Point-in-Time Count of Individuals Experiencing Homelessness*, *supra* note 36, at 31 (showing self-reported reasons for homelessness).

<sup>55</sup> Housing assistance is not a standard element of pre-release prison programs. Regarding pre-release and post-release programs, see Annelies Goger, David J. Harding & Howard Henderson, *A Better Path Forward for Criminal Justice: Prisoner Reentry*, BROOKINGS INST. (Apr. 2021), <https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-prisoner-reentry/> [<https://perma.cc/S936-6L6A>]. Regarding post-prison programs, see Casey Kuhn, *The U.S. Spends Billions to Lock People Up, But Very Little to Help Them Once They're Released*, PBS NEWS HOUR (Apr. 7, 2021), <https://www.pbs.org/newshour/economy/the-u-s-spends-billions-to-lock-people-up-but-very-little-to-help-them-once-theyre-released> [<https://perma.cc/F39W-HPHS>]. Regarding the shortage of private rental housing available to low-income people, see Andrew Aurand, Dan Emmanuel, Daniel Threet, Ikra Rafi & Diane Yentel, *The Gap: A Shortage of Affordable Homes*, NAT'L LOW INCOME HOUS. COAL. (Mar. 2021), [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2021.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf) [<https://perma.cc/4NNZ-QGAQ>].

requires eviction from public housing for criminal activity on or near the premises, coupled with the denial of Section 8 vouchers to persons convicted of certain sex and drug crimes.<sup>56</sup>

No less significant to the homelessness of former prisoners is landlord discrimination against people with criminal records—bias in the private rental market. Because private properties represent 98 percent of rentals in the nation’s housing market,<sup>57</sup> most ex-offenders without the resources to purchase a home have no option but to rent in the private market, especially if they do not qualify for public housing or supportive housing services or if such programs are oversubscribed. Currently, even existing public housing subsidies for low-income tenants largely operate through the private market in the form of vouchers.<sup>58</sup> Yet people with criminal records—whether convictions for felonies or arrests for minor offenses—face discrimination in the private rental market, if not outright exclusion. And the barrier exists not just immediately upon release from incarceration but long after imprisonment ends.

Again, Seattle exemplifies the problem. In 2017, thousands of unsheltered homeless people—55 percent of the city’s homeless population—identified their criminal history as a barrier to finding housing.<sup>59</sup> Members of the City Council termed the situation “a recipe for recidivism.”<sup>60</sup> In excluding people with criminal records, housing discrimination by landlords impedes prisoner reentry, expanding the ranks of the homeless and putting former offenders at greater risk for reincarceration.

Nationwide, there is extensive evidence of discrimination against ex-offenders in the rental housing market. In many instances, landlords have adopted a zero-tolerance policy for home-seekers who have been involved with the criminal justice system, rejecting not only applicants with prior

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<sup>56</sup> See Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* (SARGENT SHRIVER NAT’L CTR. ON POVERTY L., Feb. 2015), <https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf> [<https://perma.cc/ZCP7-57HN>] (describing how criminal convictions affect the decisions of housing providers despite HUD rhetoric). In fact, in *Dep’t Hous. & Urb. Dev. v. Rucker*, the Supreme Court held that tenants of public housing may be evicted under 42 U.S.C. § 11901(3) (1994), the Anti-Drug Abuse Act of 1988 for criminal conduct engaged in by a household member or guest. 535 U.S. 125 (2002).

<sup>57</sup> Anna C. Reosti, *Tenant Screening and Fair Housing in the Information Age* 12, (2018) (Ph.D. dissertation, University of Washington), [https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/42546/Reosti\\_washington\\_0250E\\_18778.pdf?sequence=1&isAllowed=y](https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/42546/Reosti_washington_0250E_18778.pdf?sequence=1&isAllowed=y) [<https://perma.cc/JXZ9-SJEV>].

<sup>58</sup> *Id.*

<sup>59</sup> *Council Approves Fair Chance Housing Legislation: Councilmember Herbold’s Remarks as Delivered*, CITY OF SEATTLE (Aug. 14, 2017), <http://council.seattle.gov/2017/08/14/council-approves-fair-chance-housing-legislation-councilmember-herbolds-remarks-as-delivered/> [<https://perma.cc/7MYW-NGB6>].

<sup>60</sup> *Id.*

convictions but also those who were simply arrested but never convicted of a crime.<sup>61</sup> In a 2015 survey of more than 1,000 formerly incarcerated people nationwide, which was coordinated with community-based organizations, 79 percent of respondents said that landlords summarily rejected their applications because of their criminal records.<sup>62</sup> Criminologists have conducted experimental research to gauge the impact. For example, a 2014 New York State study indicates that disclosure of a criminal conviction reduces the probability that a prospective tenant would be allowed to view an apartment by more than 50 percent.<sup>63</sup> Researchers find housing discrimination on the basis of criminal history to be “ubiquitous,” terming the effects a “New Civil Death.”<sup>64</sup>

Changing public policies, market practices, legal rules, and technical capacities have all fueled housing discrimination against people with a criminal history. Increasing exclusion has accompanied the development of mass incarceration; market-based efforts to screen and exclude parallel government-based initiatives to arrest and imprison. Landlords cite the risks of renting to former offenders in the form of unpaid rent, damage to property, and liability for injuries to other tenants. Indeed, in many states, courts have expanded landlord liability for harm one tenant causes another, if the injuries are reasonably foreseeable.<sup>65</sup> During the past half century, notes a leading tort law treatise, courts have increasingly found that a landlord’s duty of care may include measures to protect others from criminal attacks, provided the attacks are reasonably foreseeable and preventable.<sup>66</sup> State and local governments have also passed nuisance laws to pressure landlords to control crime on their property and to require criminal background checks.<sup>67</sup> In the last decade,

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<sup>61</sup> Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 183 (2009); Crowell, *supra* note 12, at 1108–10.

<sup>62</sup> Saneta deVuono-powell, Chris Schweidler, Alicia Walters, & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families* 27, ELLA BAKER CTR., FORWARD TOGETHER, RSCH. & ACTION DESIGN (Sept. 2015), <http://whopaysreport.org> [<https://perma.cc/AZ5W-49JA>].

<sup>63</sup> Douglas N. Evans & Jeremy R. Porter, *Criminal History and Landlord Rental Decisions: A New York Quasi-Experimental Study*, 11 J. EXPERIMENTAL CRIMINOLOGY 21, 30 (Mar. 2015).

<sup>64</sup> deVuono-powell et al., *supra* note 62, at 26; Crowell, *supra* note 12, at 1103; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1792 (2012).

<sup>65</sup> David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 5, 13 (2008).

<sup>66</sup> PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 442–43 (W. Page Keeton ed., 5<sup>th</sup> ed. 1984).

<sup>67</sup> See, e.g., ARK. CODE ANN. § 14-54-1705(b)(5) (2019); Emily Werth, *The Cost of Being “Crime Free”: Legal and Practical Consequences of Crime Free Rental Housing and*

many cities have adopted “crime free” rental housing ordinances that require all landlords to participate in training that conveys information about criminal screening and, in some instances, performance of criminal background checks.<sup>68</sup> City police departments train landlords to screen prospective tenants and know the risks of renting property to people with a criminal history.<sup>69</sup> These rules parallel municipal policies requiring criminal screening for all public housing applicants.<sup>70</sup>

The structure of the rental market and new information technologies have also contributed to the growing prevalence of criminal background screening. Large property management firms increasingly dominate the market, and these firms are both more visible to government than individual property owners and have greater capacity to access criminal history data.<sup>71</sup> A 2005 study conducted by the National Multi-Housing Council, a professional rental association, indicates that 80 percent of landlords screen prospective tenants for criminal histories.<sup>72</sup> “In today’s digital age, there has been widespread proliferation in the use of criminal background checks, with hundreds of companies offering over the internet low-cost criminal background checks,” finds the San Francisco Board of Supervisors.<sup>73</sup> A Google search for “criminal background check rental property” identifies numerous companies—such as [turbotenant.com](http://turbotenant.com), [mysmartmove.com](http://mysmartmove.com), [karmacheck.com](http://karmacheck.com), and [tenantbackgroundsearch.com](http://tenantbackgroundsearch.com)—offering private, investigative services.<sup>74</sup> According to public policy experts, the extension of crime control into the private rental housing market through landlord screening practices generates “institutional exclusion” that undermines

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*Nuisance Property Ordinances* 3, SARGENT SHRIVER NAT’L CTR. POVERTY L. (2013), <https://www.povertylaw.org/wp-content/uploads/2019/09/cost-of-being-crime-free.pdf> [https://perma.cc/A8ZM-GNNJ].

<sup>68</sup> Werth, *supra* note 67, at 3.

<sup>69</sup> *Id.*

<sup>70</sup> Thacher, *supra* note 65, at 16; Werth, *supra* note 67, at 3; deVuono-powell et al., *supra* note 62, at 26.

<sup>71</sup> See Francesca Mari, *A \$60 Billion Housing Grab by Wall Street*, N.Y. TIMES MAG., Mar. 4, 2020, <https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html> [https://perma.cc/D7LN-7PZY]; Jeff Andrews, *The Single-Family Rental Industry is Starting to Consolidate*, CURBED (Dec. 11, 2018), <https://archive.curbed.com/2018/12/11/18123976/single-family-rental-market-consolidate> [https://perma.cc/YM9U-F9XA]; *Consolidation Starts in Home-Rental Industry*, FIN. & COMM. (July 23, 2014) <https://finance-commerce.com/2014/07/consolidation-starts-in-home-rental-industry/> [https://perma.cc/AP3E-7H6E].

<sup>72</sup> Thacher, *supra* note 65, at 12.

<sup>73</sup> S.F., CAL., POLICE CODE, art. 49, § 4902 (2014), [http://sf-ca.elaws.us/code/poco\\_art49](http://sf-ca.elaws.us/code/poco_art49) [https://perma.cc/QWW2-KAEK].

<sup>74</sup> Google search results for “criminal background check rental property” as of April 2022.

housing access, disrupts prisoner reentry, and generates homelessness.<sup>75</sup> As criminal law scholar Bernard Harcourt notes, “risk today has collapsed into prior criminal history.”<sup>76</sup>

Exclusion of ex-offenders disproportionately disadvantages people of color, as housing discrimination based on criminal history intersects with racial disparities in the criminal justice system. Notably, applicants subject to criminal background checks are most often people of color, who are treated less favorably when found to have a criminal history.<sup>77</sup> A study of New Orleans rental housing providers found that tenant criminal background screening policies “are used as tools for [racial] discrimination” and landlord “discretionary policies are more likely to keep people of color out.”<sup>78</sup> Specifically, “the investigation revealed that of the housing providers tested, 42% discriminated on the basis of race in the way they explained or applied their criminal background screening policies” and “when policies were discretionary, case-by-case, or unclear, African Americans experienced unfavorable differential treatment 55% of the time.”<sup>79</sup> A study of landlord practices in the District of Columbia found similar discrimination against Black female homeseekers with criminal histories as compared to their white peers. Specifically, “47% of tests conducted revealed differential treatment on the part of a housing provider that favored the white female tester. Further, 28% of tests revealed a criminal records screening policy in place that may have an illegal disparate impact on the basis of race.”<sup>80</sup> And in Seattle a 2013

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<sup>75</sup> Thacher, *supra* note 65, at 5. See also Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism*, 60 BRIT. J. CRIMINOLOGY 245, 248–49 (2020); Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 319 (2010).

<sup>76</sup> Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237, 237 (2015).

<sup>77</sup> Moreover, tenant screening reports “are often littered with errors” and “can include criminal or eviction records from people with similar names.” These errors tend to arise more often with Black or Latinx applicants according to a Consumer Reports analysis of sample reports and marketing materials from eight prominent tenant screening companies. Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back From Tough Times*, CONSUMER REPS. (Mar. 11, 2021), <https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times/> [https://perma.cc/ZRR2-GRGQ].

<sup>78</sup> *Locked Out: Criminal Background Checks as a Tool for Discrimination*, GREATER NEW ORLEANS FAIR HOUS. ACTION CTR. 1, 3 (2015), [https://storage.googleapis.com/wzukusers/user-33549461/documents/5b465f279eaa5ynw5Wrs/Criminal\\_Background\\_Audit\\_FINAL.pdf](https://storage.googleapis.com/wzukusers/user-33549461/documents/5b465f279eaa5ynw5Wrs/Criminal_Background_Audit_FINAL.pdf) [https://perma.cc/K7JB-MZEA].

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Unlocking Discrimination: A DC Area Testing Investigation about Racial Discrimination and Criminal Records Screening Policies in Housing*, EQUAL RIGHTS CTR. 6 (2016), <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf> [https://



fair housing survey conducted by the city's Office for Civil Rights found differential racial treatment in 64 percent of cases, with Black applicants informed more often than white applicants of mandatory criminal background screening.<sup>81</sup> For homeless ex-offenders such as Adrian Laster, a Section 8 voucher is worth little in a rental housing market where exclusion is based on criminal history.

## II. DEVELOPMENT OF FAIR CHANCE HOUSING POLICY

The problem of prisoner reentry has drawn the attention of all levels of government—federal, state, and local—prompting varied policy responses to the difficulties faced by returning citizens in securing stable housing. Yet only local governments have begun to directly address discrimination against formerly incarcerated people in the private rental market.

### A. Federal Initiatives

The federal FHA<sup>82</sup> does not expressly bar discrimination against people with criminal histories. In fact, when the Act was being debated on the floor of the Senate in 1968, one southern Democrat urged its defeat by suggesting that racial discrimination in housing was no different than discrimination based on criminal history. “This is not solely a question of race,” Florida Senator Spessard Holland argued, “We would not sell to a convicted felon. . . . We would not sell to anyone who did not conform to the high standard of morals and the high tone of the neighborhood where we live in our little home.”<sup>83</sup> The law was nonetheless adopted and now bans housing discrimination based on “race, color, religion, sex, familial status, or national origin.”<sup>84</sup> Ex-offenders are not a protected class under the Act. On the contrary, the Act specifies that adverse action may be taken against a person convicted of certain crimes involving controlled substances.<sup>85</sup>

While the FHA did not expressly bar discrimination against individuals with a criminal history, the Obama Administration addressed such exclusion by recognizing its disparate impact on people of color. In 2016, one year after the Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* held that disparate

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perma.cc/53VM-P6K9]; Kelly Cohen, *Study Finds Racial Discrimination in D.C. Housing Market*, WASH. EXAM’R (Oct. 19, 2016), <https://www.washingtonexaminer.com/study-finds-racial-discrimination-in-dc-housing-market>.

<sup>81</sup> SEATTLE, WASH., ORDINANCE 125393, Preamble (2017).

<sup>82</sup> 42 U.S.C. § 3601.

<sup>83</sup> 114 CONG. REC. 5643 (1968).

<sup>84</sup> 42 U.S.C. § 3604.

<sup>85</sup> 42 U.S.C. § 3607(b)(4).

impact claims are cognizable under the FHA,<sup>86</sup> HUD issued *Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records*, informing all housing providers of the circumstances under which reliance on criminal history to deny housing would constitute a discriminatory practice that would violate the FHA.<sup>87</sup> The *Guidance* identifies housing as a linchpin of prisoner reentry and presents data on the disproportionate impact of mass incarceration on people of color. It also addresses the cycle of homelessness and incarceration, describing “how the increasing numbers of people leaving carceral institutions face an increased risk for homelessness and, conversely, how persons experiencing homelessness are vulnerable to incarceration.”<sup>88</sup> The *Guidance* advises that categorical exclusion of returning citizens would violate the FHA, as it would have a disparate impact on people of color disproportionately represented in the prison population: “criminal records-based barriers to housing are likely to have a disproportionate impact on minority home seekers.”<sup>89</sup> The *Guidance* provides that to avoid violating the FHA, landlords must offer proof that exclusionary practices serve a legitimate, nondiscriminatory interest; take into account ex-offender rehabilitation; and develop an individualized screening process to determine whether a tenant’s criminal history poses a present risk to the safety of persons or property.<sup>90</sup>

HUD’s *Guidance* built on earlier federal initiatives on homelessness and prisoner reentry. The Second Chance Act, which Congress adopted in 2007, provided for “coordinated supervision and comprehensive services for offenders upon release from prison, jail, or a juvenile facility, including

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<sup>86</sup> Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc., 576 U.S. 519 (2015).

<sup>87</sup> U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 34, at 2.

<sup>88</sup> *Id.* at 1 n.7.

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *Id.* at 6–7. See generally Oyama, *supra* note 61 (finding that increased landlord discrimination against applicants with criminal histories has created challenges for those with criminal records to find private housing); Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty? Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F. FOR L. & SOC. CHANGE 1, 22–24 (2016) (explaining that evictions based on criminal history have a disparate impact because people of color are disproportionately arrested); Merf Ehman, *Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies*, Col. Legal Servs. (Sept. 2015), [https://www.reentryroundtable.org/wp-content/uploads/2013/10/Upated-Disparate-Impact-Manual-2015.Final\\_.pdf](https://www.reentryroundtable.org/wp-content/uploads/2013/10/Upated-Disparate-Impact-Manual-2015.Final_.pdf) (detailing the lengthy process of litigating a disparate impact housing claim for unlawful discrimination) [<https://perma.cc/H8ND-RXU9>]; Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L. J. 421 (2018) (highlighting that HUD guidelines are deficient as they permit criminal records to be considered in housing decisions creating a disparate impact on people of color).

housing.”<sup>91</sup> The Obama administration created an Interagency Reentry Council that focused attention on the interrelated issues of homelessness, public housing eligibility, and criminal records screening.<sup>92</sup> The aim was to develop policy balancing the need for security and safety with access of returning citizens to housing, thereby promoting reentry and reducing recidivism. A marked shift also occurred in HUD’s approach to public housing, from approving landlords’ categorical exclusion of returning citizens to advising the exercise of discretion to expand housing access.<sup>93</sup> In 2013, the U.S. Interagency Council on Homelessness proposed that Public Housing Authorities (PHAs) loosen the exclusion of people with criminal records, and the Reentry Council called for fair housing policies.<sup>94</sup> HUD went further in 2015 by barring PHA admission and eviction decisions based solely on criminal history and by stating that “one strike” rules, which make a single criminal conviction disqualifying, were not mandatory.<sup>95</sup> The *Guidance* memo on FHA prohibition of criminal history screening with an unjustified disparate racial impact extended these principles to the private housing market.

From the Obama administration to the Trump administration, the priorities of the federal government on prisoner reentry shifted, from preventing homelessness to preventing crime. The Interagency Reentry Council, created in 2011 to bring federal support to the transition of former prisoners into free society, was abolished. In March 2018, it was replaced with the Federal Interagency Council on Crime Prevention and Improving

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<sup>91</sup> Second Chance Act of 2007, Pub. L. No. 110–99, § 3(b)(1), 122 Stat. 657, 658 (2008), codified at 42 U.S.C. § 1750(b)(1).

<sup>92</sup> Press Release, U.S. Dep’t of Just. Attorney General Eric Holder Convenes Inaugural Cabinet-Level Reentry Council, Office of Public Affairs (Jan. 5, 2011), <https://www.justice.gov/opa/pr/attorney-general-eric-holder-convenes-inaugural-cabinet-level-reentry-council> [<https://perma.cc/R6N2-MPA6>]; U.S. DEP’T. OF JUST., THE FEDERAL INTERAGENCY REENTRY COUNCIL: A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE 49–75 (Aug. 2016), <https://berkslancasterlebanonlink.files.wordpress.com/2017/05/firc-reentry-report.pdf> [<https://perma.cc/V4ZH-XAJA>].

<sup>93</sup> Letter from Shaun Donovan, U.S. Sec’y of Hous. & Urban Dev. & Sandra B. Henriquez, Ass’t. Sec’y for Pub. & Ind. Hous., to PHA Exec. Dirs., U.S. Dep’t of Hous. & Urban Dev. (June 17, 2011), <https://www.hud.gov/sites/documents/SOHUDREENTRYLTR.PDF> [<https://perma.cc/38YZ-RBME>].

<sup>94</sup> U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, PHA GUIDEBOOK TO ENDING HOMELESSNESS (Nov. 2013), [https://www.usich.gov/resources/uploads/asset\\_library/PHA\\_Guidebook\\_Final.pdf](https://www.usich.gov/resources/uploads/asset_library/PHA_Guidebook_Final.pdf) [<https://perma.cc/84JS-FUUW>]; U.S. DEP’T OF JUST., FED. INTERAGENCY REENTRY COUNCIL, FEDERAL INTERAGENCY REENTRY COUNCIL FACT SHEET (2017), <https://www.justice.gov/archives/reentry/file/844611/download> [<https://perma.cc/KLR6-QEEW>].

<sup>95</sup> DEP’T OF HOUS. AND URBAN DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (Nov. 2, 2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/9TZH-FVKD>].

Reentry. The announcement of the new agency came with statistics about crime: “In 2016, the violent crime rate in the United States increased by 3.4 percent, the largest single-year increase since 1991.”<sup>96</sup> Nothing was said about the increase in homelessness. The Trump administration also issued a rule in September 2020 making it more difficult to assert disparate impact claims under the FHA,<sup>97</sup> although it did not heed requests that it withdraw or weaken the HUD *Guidance*.<sup>98</sup> The rule has been challenged by fair housing advocates in an action filed in federal district court in Connecticut.<sup>99</sup> Among the allegations in the complaint, the plaintiffs assert that “HUD shirked its responsibility to address concerns that the Rule would aid landlords who use criminal backgrounds checks to deter and refuse applicants of color in escaping disparate impact liability.”<sup>100</sup> “By making disparate impact claims almost impossible to bring,” the complaint explains, “HUD protects the use of discriminatory criminal background checks, which often have devastating consequences for families.”<sup>101</sup> The Biden administration has only started to shift course. A presidential memorandum addressing housing discrimination issued on January 26, 2021 directs HUD to more aggressively enforce the FHA and to review actions under the prior administration, in particular, the effect of the September 2020 rule.<sup>102</sup>

While federal legislation addressing reentry and housing was introduced during the Obama Administration, it was not until after President Trump took office that such legislation was adopted. A 2016 congressional bill titled the *Fair Chance at Housing Act* would have codified HUD’s initiatives by revising screening and eviction standards in both public housing and the Section 8 voucher program. The legislation was intended to “reduce recidivism and prevent homelessness,” but it died in the House.<sup>103</sup> In 2018,

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<sup>96</sup> Exec. Order No. 13826, 83 Fed. Reg. 10,771 (Mar. 12, 2018). The change in emphasis mirrors the earlier transformation of federal policy traced in ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

<sup>97</sup> HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 85 Fed. Reg. 60,288 (Sept. 24, 2020) (codified at 24 C.F.R. § 100).

<sup>98</sup> *Id.* at 60,330.

<sup>99</sup> Complaint, *Open Cmty. v. HUD*, No. 3:20-cv-01587 (D. Conn. Oct. 20, 2020).

<sup>100</sup> *Id.* ¶130.

<sup>101</sup> *Id.*

<sup>102</sup> Redressing Our Nation’s and the Federal Government’s History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7,487 (Jan. 29, 2021).

<sup>103</sup> Press Release, H. Comm. on Fin. Servs, *Waters Unveils Legislation to Remove Unfair Barriers to Housing Assistance*, (Apr. 27, 2016), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=399787> [<https://perma.cc/X2ZL-XNBN>]. Representative Alexandria Ocasio-Cortez (D-NY) and then-Senator Kamala Harris (D-CA) reintroduced the bill in 2019. See *Fair Chance at Housing Act of 2019*, S. 2076, 116th Cong. (2019), <https://www.congress.gov/116/bills/s2076/BILLS-116s2076is.pdf> [<https://perma.cc/J5AF-FGV3>].

however, Congress adopted, and President Trump signed, criminal justice reform legislation titled the *FIRST STEP Act*. But the Act does not alter federal housing policy applicable to formerly incarcerated people. It simply provides for the Attorney General to make grants to state, local, territorial, and tribal governments with priority being given to applicants that include in their proposals prerelease planning for transitional housing, assistance in identifying and securing suitable housing, and specific initiatives to benefit offenders with a history of homelessness.<sup>104</sup>

To date, federal action has been limited, stopping short of a direct prohibition on using criminal history to exclude applicants from private rental housing.

### *B. Changes in Public Housing Authority Policies*

In line with HUD's directives under the Obama administration, local housing authorities have also taken steps to reduce homelessness upon reentry. PHAs have narrowed the scope of criminal records-based exclusion while also introducing pilot programs for admitting formerly incarcerated people into public housing. President Clinton summed up the policies imposed on local PHAs during the 1980s and 1990s: "If you break the law, you no longer have a home in public housing, 'one strike and you're out.'"<sup>105</sup> But under President Obama, local authorities began to experiment with exceptions to that exclusionary approach.

The reforms vary across cities, but all reject the presumption that people with criminal records should be denied housing assistance outright and implement instead a discretionary approach involving individualized determination and evaluation of mitigating factors. For example, Chicago's PHA now requires screening that considers the time since the offense, type of conviction, and engagement with social service agencies for rehabilitation.<sup>106</sup> While more limited in scope, the pilot projects providing

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<sup>104</sup> FIRST STEP Act of 2018, S.756, 115th Cong. (2018), <https://www.congress.gov/115/plaws/publ391/PLAW-115publ391.pdf> [<https://perma.cc/BAH5-JTWP>].

<sup>105</sup> Memorandum on the "One Strike and You're Out" Guidelines, 32 Weekly Comp. Pres. Doc. 584, 585 (Mar. 28, 1996). See generally Schneider, *supra* note 5, at 927–32 (tracing the development of the one-strike policy).

<sup>106</sup> Rachel Leonor Ramirez, *Chicago Housing Authority Reentry Pilot Proposal*, REENTRY COMM. CHI. COAL. FOR HOMELESS (June 21, 2013), <http://chicagohomeless.issuelab.org/resources/15676/15676.pdf> [<https://perma.cc/ND4Q-JELC>]; Lolly Bowean, *Public Housing Initiative Offers Second Chance to Some with Arrest Records*, CHI. TRIB. (May 23, 2015), <https://www.chicagotribune.com/news/ct-housing-ex-offenders-met-20150523-story.html> [<https://perma.cc/XS4W-NC5C>]; Madeline Hamlin, *In Chicago, Another Public Housing Experiment: Prison Reentry*, BLOOMBERG (Aug. 10, 2017), <https://www.bloomberg.com/news/articles/2017-08-10/giving-prisoners-another-chance-through-affordable-housing> [<https://perma.cc/5T7X-BGPR>].

target groups of formerly incarcerated people access to public housing also focus on the type of crime committed and rehabilitation efforts. For example, in 2013, the New York City Housing Authority (NYCHA) launched a two-year pilot to reconnect a sample of formerly incarcerated people with family members living in NYCHA housing.<sup>107</sup> The Vera Institute of Justice evaluated the program and found that among the eighty-five participants in the pilot, which provided assistance with reentry in addition to stable housing, only one was convicted of a new offense.<sup>108</sup> In other cities, PHAs have also begun testing whether admission to public housing and provision of wraparound services smooths reentry and reduces recidivism.<sup>109</sup> In a survey of PHA reentry programs, the Vera Institute finds that the initiatives have led to lower recidivism rates and participant progress towards self-sufficiency.<sup>110</sup> Yet these programs remain modest in size, scattered and limited to public housing.

### C. State Initiatives

At the state level, reentry measures aimed at expanding housing opportunities have placed an emphasis on ex-offenders' rehabilitation while recognizing landlords' fear of liability for tenant criminal activity. States have enacted legislation of two types, both designed to lessen landlord

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<sup>107</sup> Mireya Navarro, *Ban on Former Inmates in Public Housing is Eased*, N.Y. TIMES (Nov. 14, 2013) <https://www.nytimes.com/2013/11/15/nyregion/ban-on-former-inmates-in-public-housing-is-eased.html#:~:text=The%20New%20York%20City%20Housing,set%20to%20start%20next%20month> [<https://perma.cc/7397-RKNC>]; Margaret diZerega, *NYCHA Family Reentry Pilot: Reuniting Families in New York City Public Housing Project Overview*, VERA INST. OF JUST., <https://www.vera.org/projects/nycha-family-reentry-pilot-reuniting-families-in-new-york-city-public-housing/overview> [<https://perma.cc/37ME-6AAA>].

<sup>108</sup> John Bae, Margaret diZerega, Jacob Kang-Brown, Ryan Shanahan & Ram Subramanian, *Coming Home: An Evaluation of the New York City Housing Authority's Family Reentry Pilot Program* 13, VERA INST. JUST. (Nov. 2016), [https://www.vera.org/downloads/publications/NYCHA\\_report-032917.pdf](https://www.vera.org/downloads/publications/NYCHA_report-032917.pdf) [<https://perma.cc/RD9G-YD4B>].

<sup>109</sup> See, e.g., Mathilde Laisne, *In New Orleans, the Housing Authority Is Helping People with Criminal Convictions Rejoin Families*, VERA INST. JUST. (Mar. 30, 2016), <https://www.vera.org/blog/in-new-orleans-the-housing-authority-is-helping-people-with-criminal-convictions-rejoin-families> [<https://perma.cc/QS3B-XL36>]; Richard A. Webster, *HANO Approves New Criminal Background Check Policy*, NOLA.COM (Mar. 30, 2016), [https://www.nola.com/news/politics/article\\_eb9dc4f4-9e6c-54d2-97c9-f70df68cda14.html](https://www.nola.com/news/politics/article_eb9dc4f4-9e6c-54d2-97c9-f70df68cda14.html) [<https://perma.cc/CNM4-UGA8>]; Markesha Ricks, *Reentry Program Inks Public-Housing Deal*, NEW HAVEN IND. (Jan. 23, 2017), [https://www.newhavenindependent.org/article/prison\\_entry](https://www.newhavenindependent.org/article/prison_entry) [<https://perma.cc/Q3EZ-YFPC>].

<sup>110</sup> John Bae, Kate Finley, Margaret diZerega & Sharon Kim, *Opening Doors: How to Develop Reentry Programs Using Examples From Public Housing Authorities*, VERA INST. OF JUST., (Sept. 2017), <https://www.vera.org/downloads/publications/Opening-Doors-Full-Report.pdf> [<https://perma.cc/UJ4E-LGCP>].

concern about accepting tenants with criminal records. One authorizes corrections departments to issue “certificates of recovery,” documenting the rehabilitation of ex-offenders. Used in nine states and the District of Columbia, recovery certificates apply criteria including community service and completion of vocational, cognitive, and behavioral programs to evidence rehabilitation.<sup>111</sup>

The other state-level reform reduces the risk to landlords of renting housing to ex-offenders by preventing courts from holding landlords liable for damages caused by tenants with criminal records. Texas was first state to pass such a law. The 2015 legislation applies to harm done by ex-offenders convicted of nonviolent crimes, such as drug dealing.<sup>112</sup> While HUD’s application of the FHA increases the risk of excluding ex-offenders under the federal fair housing law, state recovery certificates and liability legislation aim to decrease the risk of renting to ex-offenders. Both state measures aim to lessen the collateral consequences of criminal convictions in the housing market, but neither represents a direct intervention into transactions in that market.

#### *D. City Initiatives: Fair Chance Housing Ordinances*

The most direct interventions into the private housing market to reduce homelessness among former prisoners have emerged at the local level—the fair chance ordinances banning categorical denial of rental housing to people with a criminal history. Though varying in scope, the city ordinances all regulate the process by which landlords gather data and make decisions about whether to rent to ex-offenders. And all aim to facilitate prison reentry into society and reduce the likelihood of recidivism.<sup>113</sup> To

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<sup>111</sup> Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014* 18–20, VERA INST. OF JUST. (Dec. 2014), [https://www.vera.org/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy\\_downloads/states-rethink-collateral-consequences-report-v4.pdf](https://www.vera.org/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-report-v4.pdf) [<https://perma.cc/4AX9-QPGF>]. See also JULIA SINGER BONSAI, UPDATED REPORT: HOUSING FOR ADULTS WITH CRIMINAL RECORDS 6–7, RSCH. RPT. 2016-R-0023, Conn. Gen. Assemb., Feb. Sess. (Conn. 2016) (advocating for such legislation in Connecticut).

<sup>112</sup> 2015 Tex. Sess. Law Serv. Ch. 651. See also Erik Barajas, *New Law Could Change to Allow Felons to Rent Apartments*, ABC13 EYEWITNESS NEWS (Aug. 6, 2015), <http://abc13.com/news/law-could-change-to-allow-felons-to-rent-apartments/907237/> [<https://perma.cc/L2EF-ZZF4>]; Crowell, *supra* note 12, at 1103, 1129.

<sup>113</sup> See, e.g., DETROIT, MICH., ORDINANCES §26-5-1 (“Housing provider SHALL NOT represent or communicate in any way that persons with arrest or conviction will not be considered for rental or lease.”) (emphasis in original).

date, fifteen local governments<sup>114</sup> have adopted such ordinances, all but one (Urbana, Illinois, in 1979) since 2014.<sup>115</sup> The most sweeping model, adopted in Seattle, bans exclusion of people with a criminal history from rental housing, excepting only registered sex offenders. But none includes a guarantee of housing assistance as an element of fair chance policy.

The city ordinances found inspiration in HUD's priorities under the Obama administration: the effort to root out homelessness, exclusionary housing practices, and bias against ex-offenders and racial minorities. "It was housing policy in HUD, during the Obama administration, which in part sparked the local campaigns," Deborah Thrope, the deputy director of the National Housing Law Project and author of the fair chance law in Richmond, California, said in a telephone interview. "The federal government believed in second chances, not one strike."<sup>116</sup> The preamble to the 2019 Minneapolis ordinance expressly cites the finding in the HUD guidance that screening out applicants with a criminal history has a disparate impact and its conclusion that "individualized assessments" are the "preferred mechanism" for providers to fairly consider applicants with a criminal history.<sup>117</sup>

The key legal precedent for fair chance housing ordinances was "ban the box" legislation that aims to curb employment discrimination against ex-offenders by banning questions about criminal history on job applications, *i.e.*, the check "box." Also known as "fair chance" reform, the ban the box

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<sup>114</sup> A few states have adopted more limited restrictions on landlords' reliance on applicants' criminal history. For example, New Jersey prohibits landlords from making an inquiry into criminal history prior to providing a conditional offer, with limited exceptions. NEWARK, N.J., CODE 2:31-3(a). Oregon bars reliance on most arrests that did not result in conviction, OR. REV. STAT. § 90.303(2), and Washington requires that a landlord notify an applicant if an application is denied based on criminal history, WASH. REV. CODE ANN. § 46:8-55. § 59.20.080(1)(c). Fair chance housing bills have also been introduced in other states but not yet passed. *See, e.g.*, PENNSYLVANIA FAIR CHANCE HOUSING ACT, NO. 912, SESSION OF 2021.

<sup>115</sup> BERKELEY, CAL., CODE § 13.106.010 *et seq.* (2020); CHAMPAIGN, ILL., CODE § 17.71 *et seq.* (1994); COOK COUNTY, ILL., CODE § 42-38 *et seq.* (2019); DANE COUNTY, WIS., ORDINANCES, § 31 (1988); DETROIT, MICH., ORDINANCES § 26-5-1 *et seq.* (2018); D.C. CODE, § 42-3541 (2017); MADISON, WIS., CODE, § 39.03 (2020); MINNEAPOLIS, MINN., CODE, tit. 12, § 244.2030 (2020); NEWARK, N.J., CODE 2:31 (2015); OAKLAND, CAL., CODE, § 8.25.010 *et seq.* (2020); PORTLAND, OR., CODE, § 30.01.086(E) (2020); RICHMOND, CAL., CODE § 7.110 (2017); S.F., CAL., POLICE CODE, § 4901 *et seq.* (2013); SEATTLE, WASH., CODE §§ 14.09 (2020); ST. PAUL, MINN., CODE, CH. 193, § 193.04; ORDINANCE 20-14 (2021); URBANA, ILL., CODE, § 12-37 (2020). The Madison and Dane County ordinances were subsequently preempted by state law. *See* 2011 WIS. ACT 108 (codified at WIS. STAT. § 66.0104(2)(a) (2015-2016)). The St. Paul ordinance was enjoined and then repealed in 2021. *See* Barth, *infra* note 41.

<sup>116</sup> Telephone Interview with Deborah Thrope, Dep. Dir., Nat'l Hous. L. Project, (Apr. 20, 2018), (hereinafter Thrope interview).

<sup>117</sup> MINNEAPOLIS, MINN., CODE, tit. 12, § 244.2030(14) and (15); *see also* RICHMOND, CAL., CODE § 7.110.030(f).



legislation has been adopted in thirty-five states, the District of Columbia, and more than 150 cities and counties since 1998.<sup>118</sup> All such laws cover public employment and laws in thirteen states and eighteen cities and counties also cover private employment.<sup>119</sup> Most of the ordinances do not prohibit all inquiry into criminal history but regulate its timing, imposing a delay in the process, restricting questions about arrests and convictions until an interview or after a conditional job offer.<sup>120</sup> Seattle adopted a ban the box measure in 2013 covering both public and private employment.<sup>121</sup> Seattle's provisions concerning private employment are more restrictive than are most others, not only regulating the timing of inquiry into criminal history but barring denial of a job based on criminal history at any time unless the employer has a legitimate business reason for refusing employment based on an applicant's criminal conviction.<sup>122</sup> Designed to promote labor market opportunity, expand income, and reduce recidivism, ban the box laws have become a centerpiece of prisoner reentry policy.

Fair chance housing policy follows the ban the box model in limiting landlord access to criminal history to afford greater market opportunity to ex-offenders. Both initiatives aim to counter the stigma of imprisonment while overcoming concerns about the risks of dealing with former offenders, and both restrict the collection and use of information, intervening in business transactions. The findings that introduce the fair chance housing ordinance in Richmond, California expressly cite its earlier ban the box ordinance "which

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<sup>118</sup> See Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Advance Employment Opportunities for People with Past Convictions*, Nat'l Employment L. Project (Oct. 2021), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2021.pdf> [<https://perma.cc/R47C-5UVX>]. See also Jemima Galan, *Banning the Box, Building a Future: How Expansion of California's Legislation Would Mend the Threaded Strands Between Recidivism and Employment in Criminally Convicted Offenders*, 37 U. LA VERNE L. REV. 343, 343 (2016); Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2804 (2015); Rachel Santitiro, *Banning the Box in New Jersey: A Small Step Toward Ending Discrimination Against Ex-Offenders*, 13 RUTGERS J. L. & PUB. POL'Y. 215, 218 (2015); Elizabeth P. Weissert, *Get Out of Jail Free? Preventing Employment Discrimination Against People with Criminal Records Using Ban-the-Box Laws*, 164 U. PA. L. REV. 1529, 1532 (2016).

<sup>119</sup> AVERY, *supra* note 118.

<sup>120</sup> *Id.*

<sup>121</sup> SEATTLE, WASH., CODE § 14.17 (2015), [https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=TIT14HURI\\_CH14.17THUSCRHIEMDE](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=TIT14HURI_CH14.17THUSCRHIEMDE) [<https://perma.cc/N853-8C9A>]. Washington State did not adopt a ban the box law until 2018. *Washington Gov. Inslee Signs Fair Chance Act, Extending 'Ban the Box' to Private Employers*, NAT'L EMPLOYMENT L. PROJECT (Mar. 13, 2018), <http://www.nelp.org/news-releases/washington-gov-inslee-signs-fair-chance-act-extending-ban-box-private-employers/> [<https://perma.cc/7TX4-6NMH>].

<sup>122</sup> SEATTLE, WASH., CODE § 14.17-020(D).

removed barriers to employment.”<sup>123</sup> But the housing market differs from the labor market. “Ban the box is the guide, but housing is intimate in ways employment is not,” said Thrope of the National Housing Law Project. “The first reaction from people who oppose restricting a landlord’s ability to screen tenants for criminal history is that they don’t want to live next to sex offenders,” she stated, explaining the challenges of relying on the ban the box precedent when linking prisoner reentry to housing access. “Opposition starts there: people feel that their choice about who to live next to is threatened by such policies.”<sup>124</sup> So pronounced is such opposition that one state, Wisconsin, has barred local governments from adopting fair chance housing ordinances, preempting two existing ordinances.<sup>125</sup>

Centrally, fair chance housing ordinances combat homelessness among ex-offenders by prohibiting the categorical exclusion of people with criminal records from consideration by landlords for rentals in the private housing market. But the ordinances vary in the controls placed on landlords’ inquiry into criminal history and use of the information discovered to deny housing. As in ban the box in employment legislation, most ordinances regulate the timing of the inquiry into criminal history during the rental process, delaying such investigation until a conditional offer of housing has been made. For example, Detroit’s ordinance provides that landlords may not

(a) Inquire about or require applicants to disclose conviction history as part of tenant screening process until the housing provider has first:

(i) Determined the applicant is qualified to rent the housing unit under all of the housing provider's criteria not related to potential past criminal convictions or an unresolved arrest; and

(ii) Provided to the applicant a conditional lease agreement that commits the unit to the applicant as long as the applicant passes the conviction history review.<sup>126</sup>

In order to ensure that ex-offenders know they will not be categorically excluded from consideration, the ordinances typically both prohibit advertising that suggests otherwise and require posting of notice of former offenders’ right to be considered.<sup>127</sup> Some ordinances also require that landlords provide written notice of that right with all applications.<sup>128</sup>

Additionally, some ordinances require that landlords consider individual circumstances, specifying the factors relevant to evaluating an

<sup>123</sup> RICHMOND, CAL., CODE § 7.110.030(o).

<sup>124</sup> Thrope interview, *supra* note 116.

<sup>125</sup> 2011 WIS. ACT 108 (codified at WIS. STAT. § 66.0104(2)(a) (2015-2016)).

<sup>126</sup> DETROIT, MICH., ORDINANCES § 26-5-5(a)(1).

<sup>127</sup> *See, e.g.*, BERKELEY, CAL., CODE § 13.106.040(A).

<sup>128</sup> *See, e.g.*, DETROIT, MICH., ORDINANCES § 26-5-8(c).

applicant's criminal history, as HUD did in advising landlords how to avoid violating the FHA. "In reviewing an applicant's criminal history . . . a housing provider shall conduct an individualized assessment," the Detroit ordinance provides, an assessment including consideration of time elapsed since conviction, whether the conviction has "specific negative bearing on the safety of persons or real property," evidence of rehabilitation or mitigating factors, and evidence of inaccuracy.<sup>129</sup> Cook County, Illinois, permits denial of housing if the landlord "conducts an individualized assessment, and the individualized assessment shows that denial based on the criminal conviction is necessary to protect against a demonstrable risk to personal safety and/or property of others affected by the transaction."<sup>130</sup> Washington, D.C. allows landlords to withdraw a conditional offer based on criminal history only "to achieve a substantial, legitimate, nondiscriminatory interest . . . in light of" the nature of the offense, the severity of the offense, the age of the applicant at the time the offense was committed, the time elapsed since the offense was committed, and any information produced by the applicant concerning rehabilitation and good conduct since the offense was committed.<sup>131</sup>

A form of due process is accorded applicants under some of the laws. The Richmond, California ordinance requires that the housing provider notify the applicant, in writing, "why the housing provider believes" each element of the criminal history relied on to deny housing "has a direct and specific negative bearing on the landlord's ability to fulfill his or her duty to protect the public and other tenants from foreseeable harm."<sup>132</sup> The Detroit law also requires that the landlord give the applicant a copy of the background check report and accord the applicant 14 days to provide evidence that it is inaccurate or of rehabilitation or other mitigating factors.<sup>133</sup>

Several ordinances limit not only the timing, but also the scope of landlords' inquiry into criminal history, restricting the types of criminal involvement a landlord may ask about or use as a basis for denying housing. Detroit, for example, bars an adverse action based on an arrest that did not lead to a conviction or that remains unresolved; participation in a diversion or deferral of judgment program; a conviction that has been dismissed, expunged, voided or invalidated; a conviction in the juvenile justice system; a misdemeanor conviction that is more than five-years old; and a violation other than a felony or misdemeanor.<sup>134</sup> Local governments impose different limits on how far back in time landlords can look in considering applicants' convictions. Richmond's ordinance is among the most restrictive. It prohibits

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<sup>129</sup> *Id.* at § 26-5-7(b).

<sup>130</sup> COOK COUNTY, ILL., CODE § 42-38(c)(5)(c) (2019).

<sup>131</sup> D.C., CODE § 42-3541.02(e)(1).

<sup>132</sup> RICHMOND, CAL., CODE § 7.110.050(f)(1)(C).

<sup>133</sup> DETROIT, MICH., ORDINANCES § 26-5-7(d).

<sup>134</sup> DETROIT, MICH., ORDINANCES § 26-5-5(a)(2).

landlords from considering convictions older than two years.<sup>135</sup> Washington, D.C. and San Francisco do not permit inquiry into convictions older than seven years.<sup>136</sup> Other cities have different look-back periods depending on the offense.<sup>137</sup>

Only a few ordinances actually bar landlords from denying housing based on criminal history excepting only a few, narrow categories of criminal conduct. Urbana, Illinois did so in 1979, but Seattle was the first major city to adopt this strict approach.<sup>138</sup> After Seattle, Berkeley, California adopted an ordinance that provides that a landlord “shall not, at any time or by any means . . . inquire about an Applicant’s Criminal History, require an Applicant to disclose their Criminal History, require an Applicant to authorize the release of their Criminal History or, if such information is received, base an Adverse Action in whole or in part on an Applicant’s Criminal History.”<sup>139</sup> The only exception to the prohibition in the Berkeley ordinance is for individuals who have been placed on the State of California’s registry of lifetime sex offenders.<sup>140</sup> Other ordinances that prohibit adverse actions based on criminal history contain broader exemptions.<sup>141</sup>

While most of the ordinances apply to all rental housing within the jurisdiction, some are more limited in applicability. Richmond, California’s ordinance, for example, applies only to “affordable housing,” defined to mean “any residential building in Richmond that has received City, State, or Federal funding, tax credits, or other subsidies connected in whole or in part to developing, rehabilitating, restricting rents, subsidizing ownership, or otherwise providing housing for extremely low income, very low income, low income, and moderate-income households.”<sup>142</sup>

Landlords living on the property at issue and those renting only small properties are exempt under some of the ordinances. For example, Champaign exempts “the rental or leasing of housing accommodations in that

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<sup>135</sup> RICHMOND, CAL., CODE § 7.110.050(a)(5).

<sup>136</sup> S.F., CAL., POLICE CODE art. 49, § 4906-4920; D.C., CODE, § 42-3541.02(e)(1).

<sup>137</sup> For example, Newark’s legislation allows landlords, after granting a conditional offer, to inquire about convictions . . . for eight (8) years following the release from post-conviction custody or the date of sentencing if the person was not incarcerated [and] disorderly persons convictions or municipal ordinance violations . . . for five (5) years following the release from post-conviction custody or from the date of sentencing if the person was not incarcerated.” NEWARK, N.J., CODE 2:31-3(a).

<sup>138</sup> URBANA, ILL. CODE, § 12-37.

<sup>139</sup> BERKELEY, CAL., CODE § 13.106.050(A)-(C) (2020).

<sup>140</sup> BERKELEY, CAL., CODE § 13.106.040(C) (2020).

<sup>141</sup> *See, e.g.*, CHAMPAIGN, ILL., CODE § 17-75(e) (exempting offenders who were imprisoned within the last five years for forcible felonies or felony drug convictions from protection against housing discrimination).

<sup>142</sup> RICHMOND, CAL., CODE § 7.110.040(b) and 070(b).

portion of a building or housing unit in which the owner, occupant or members of his/her family, occupy one of the living units and in which the owner-occupant anticipates the necessity of sharing a kitchen or bathroom with a prospective tenant, not related to the owner-occupant.”<sup>143</sup> Other ordinances create wider exemptions.<sup>144</sup>

A few ordinances reach beyond landlords to prevent blockbusting by any person based on a landlord renting to a person with a criminal history. The Cook County ordinance bars blockbusting, defined as soliciting the sale, lease or listing of residential property “on the grounds of loss of value due to the present or prospective entry into any neighborhood of any individual(s) . . . with any covered criminal history.”<sup>145</sup> The ordinance also bars “creating alarm.” Specifically, it provides that no person shall “intentionally create alarm among residents of any community . . . by transmitting communication in any manner . . . with a design to induce any person within Cook County to sell or lease the person's residential real property . . . because of the present or prospective entry into the vicinity of the property of any individual(s) with any covered criminal history.”<sup>146</sup>

Applicants for housing who believe their rights under the ordinances are violated are provided administrative and judicial remedies.<sup>147</sup> Richmond, California allows an applicant who has been denied housing based on criminal history to file an appeal with a hearing officer who has the authority to reverse the landlord's decision and such an appeal automatically requires the landlord to hold the unit open pending a determination.<sup>148</sup> Public enforcement through an administrative citation and legal action brought by the city attorney or other local officials is authorized by some ordinances.<sup>149</sup> Detroit's ordinance requires landlords to retain records of applications and related matters and permit inspection by administering and enforcing agencies.<sup>150</sup> Oakland permits organizations that are tax-exempt, have a “mission of protecting the rights of tenants or incarcerated persons,” and will fairly represent aggrieved persons to bring suit and allows collection of attorney's fees.<sup>151</sup> Common remedies include actual damages, treble

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<sup>143</sup> CHAMPAIGN, ILL., CODE § 17-75(a) (1994).

<sup>144</sup> See, e.g., COOK COUNTY, ILL., CODE § 42-38(c)(4) (2019) (exempting short-term rentals of owners' personal residences); DETROIT, MICH., ORDINANCES § 26-5-3 (2018) (exempting properties available for rent or lease when they contain four or fewer dwelling units).

<sup>145</sup> COOK COUNTY, ILL., CODE § 42-38(b)(5) (2019).

<sup>146</sup> *Id.*, § 42-38(b)(7).

<sup>147</sup> See, e.g., BERKELEY, CAL., CODE § 13.106.90 (2020) (vesting homeseekers with a right to an administrative hearing at which they can be represented by an advocate of their choice).

<sup>148</sup> RICHMOND, CAL., CODE § 7.110.050(f)(3) and (4).

<sup>149</sup> See, e.g., BERKELEY, CAL., CODE § 13.106.100(C)-(E) (2020) (providing all listed remedies).

<sup>150</sup> DETROIT, MICH., ORDINANCES § 26-5-9(a) (2018).

<sup>151</sup> OAKLAND, CAL., CODE, § 8.25.060(F) and (H) (2020).

damages, statutory damages up to three times the amount of monthly rent for the unit at issue, punitive damages, and civil penalties.<sup>152</sup> Detroit provides for imprisonment for not more than 90 days for each violation of its ordinance.<sup>153</sup>

Some of the ordinances were adopted as free-standing measures while others were adopted as amendments to local anti-discrimination or fair housing laws. Champaign, Illinois, for example, amended its human rights law to bar discrimination “by reason of . . . prior arrest or conviction record” in addition to “age, color, creed,” etc.<sup>154</sup>

Extending beyond the HUD *Guidance*, the fair chance ordinances expressly prevent the categorical exclusion of applicants with a criminal history. Some do that by delaying inquiry into criminal history, others by requiring consideration of particular circumstances, and still others by narrowing the types of criminal history a landlord can consider disqualifying.

### III. SEATTLE’S ORDINANCE—EX-OFFENDERS AS A PROTECTED CLASS

Seattle was the first major city to go beyond the ban the box in employment model by barring consideration of most criminal history at *any* stage of the housing rental process.<sup>155</sup> Since Seattle adopted its ordinance, several cities—including Berkeley and Oakland, as well as Champaign—have followed suit.<sup>156</sup> Seattle’s laws are also unique in further limiting landlord’s discretion by imposing a first-in-time requirement, mandating that landlords rent to the first qualified applicant. When the city adopted the fair chance housing ordinance, an article in the *Atlanta Black Star* called it “the most progressive housing policy passed by any major U.S. city to date.”<sup>157</sup>

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<sup>152</sup> See, e.g., BERKELEY, CAL., CODE § 13.106.100 (2020).

<sup>153</sup> DETROIT, MICH., ORDINANCES § 26-5-13(d) (2018).

<sup>154</sup> CHAMPAIGN, ILL., CODE § 17-2 (2020). See also COOK COUNTY, ILL., CODE § 42-38(b)(1) (2019) (banning distinctions in real estate transactions based on “unlawful discrimination or covered criminal history.”)

<sup>155</sup> Urbana, Illinois did the same in 1979. URBANA, ILL., ORDINANCE 7879-91 (May 10, 1979).

<sup>156</sup> BERKELEY, CAL., CODE § 13.106.010 *et seq.*; CHAMPAIGN, ILL., CODE § 17.71 *et seq.*; OAKLAND, CAL., CODE, § 8.25.010 *et seq.*

<sup>157</sup> Nadra Nittle, *Can Seattle Lead the Way in Creating Fair Housing Policy for Renters Across the Nation?*, ATLANTA BLACK STAR, Aug. 30, 2017, <https://atlantablackstar.com/2017/08/30/can-seattle-lead-way-creating-fair-housing-policy-renters-across-nation/> [https://perma.cc/7HQT-F8UE].

### A. Adoption of the Seattle Ordinance

The Seattle legislation is titled the “Fair Chance Housing Ordinance.”<sup>158</sup> Adopted in August 2017, it is designed to promote equal access in the rental housing market—to give a fair chance to people with criminal records who face severe barriers to obtaining housing. The city’s Office for Civil Rights explains that the ordinance “caps a decade-long effort to address bias against people who have served their time” and are reentering free communities.<sup>159</sup>

The effort dates to 2010 when residents of public housing and community groups pressed city officials to act.<sup>160</sup> The ordinance emerged from the work of a coalition called Fair Accessible Renting for Everyone (FARE), which is led by Columbia Legal Services and includes the Tenants Union of Washington, the Public Defender Association, the ACLU of Washington, and No New Jim Crow Seattle. It was FARE that mounted the fair-housing test showing that people of color, when posing as prospective tenants, were subject to criminal screening more often than were their white counterparts.<sup>161</sup>

Along with arguments concerning homelessness, prisoner reentry, and disparate racial impact, Seattle-based legal services lawyer Merf Ehman and sociologist Anna Reosti advanced a new rationale for the housing initiatives—that a criminal history is not statistically predictive of future risk posed by a tenant to safety and security. “A criminal record is no crystal ball,” Ehman and Reosti argued in the *New York University Journal of Legislation and Public Policy Quorum*. “There is no empirical evidence establishing a relationship between a criminal record and an unsuccessful tenancy,” the two

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<sup>158</sup> Seattle renamed the ordinance the “Fair Chance Housing and Eviction Records Ordinance” as, during the COVID-19 pandemic, the city “amended the Ordinance to also prohibit landlords from taking adverse action based on evictions occurring during or shortly after the state of emergency cause by the pandemic.” But as only the criminal history provisions of the ordinance are relevant to this article, I will refer to the ordinance as the “Fair Chance Housing Ordinance.” See Order at \*1, *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash. Aug. 28, 2018), 2018 WL 4027084 (referring to ordinance as “Fair Chance Housing Ordinance”).

<sup>159</sup> *Fair Chance Housing*, SEATTLE OFF. FOR C.R., <https://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing-law> [https://perma.cc/Rf44-URGC].

<sup>160</sup> SEATTLE, WASH., ORDINANCE 125393, Preamble.

<sup>161</sup> Sarah Anne Lloyd, *City Council Passes Law Preventing Rental Restrictions Based on Criminal Records*, CURBED SEATTLE (Aug. 14, 2017), <https://seattle.curbed.com/2017/8/14/16146136/fair-chance-housing-law-criminal-convictions> [https://perma.cc/VKC7-M7NM]; Daniel Beekman, *Seattle Rental Applicants’ Criminal Histories Virtually Off-Limits Under New Law*, SEATTLE TIMES, Aug. 14, 2017.

contended.<sup>162</sup> Ehman and Reosti demonstrated that ex-offenders posed no greater danger than other tenants, challenging the principle of “foreseeability” and the underlying assumption of the criminal screening regime.<sup>163</sup> Seattle policymakers and residents who developed and then evaluated the effectiveness of the ordinance cited Ehman and Reosti’s research.<sup>164</sup>

In 2014, then-Mayor Ed Murray and the Council convened the Seattle Housing Affordability and Livability Agenda Advisory Committee, which called for the city to focus on barriers to housing people with criminal records.<sup>165</sup> The Mayor created the Fair Chance Housing Committee in 2016, which provided support to the City’s Office of Civil Rights in drafting the bill.<sup>166</sup>

At city council hearings, advocates for people experiencing homelessness testified on behalf of the ordinance. “Regardless of my criminal history, I deserve housing,” said a spokesman for the Real Change Homeless Empowerment Project.<sup>167</sup> Members of the City Council argued that denying formerly incarcerated people a fair chance to find housing was “an extrajudicial punishment” and a “recipe for recidivism.”<sup>168</sup>

Seattle’s ordinance built on measures then on the books in only a few other major cities: San Francisco (2014), Newark (2015), and Washington, D.C. (2017).<sup>169</sup> But Seattle was the first major city to craft sweeping legislation imposing an absolute ban on exclusion of people with a criminal history from rental housing, with the exception of registered sex offenders. The Seattle legislation is also distinctive in pairing the fair chance ordinance

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<sup>162</sup> Merf Ehman and Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, N.Y.U. J. LEGIS. AND PUB. POL’Y QUORUM 1, Mar. 3, 2015.

<sup>163</sup> Lloyd, *City Council Passes*, *supra* note 161; Beekman, *Seattle Rental Applicants’ Criminal Histories*, *supra* note 161. Ehman publicly articulated that point and was one of 18 people appointed to serve on the Mayor’s Fair Chance Housing Committee in January 2016. Deborah Horne, *Seattle Forms Committee to Help Ex-cons Get Housing*, KIRO 7 (Jan. 19, 2016), <https://www.kiro7.com/news/seattle-forms-committee-help-ex-cons-get-housing/40025376/> [<https://perma.cc/9PRU-A6QC>].

<sup>164</sup> SEATTLE REENTRY WORKGROUP FINAL REPORT: PREPARED IN RESPONSE TO THE CITY OF SEATTLE RESOL. 31637, SEATTLE OFF. FOR C. R., at 35 (2018).

<sup>165</sup> *Seattle Housing Affordability and Livability Agenda: Final Advisory Committee Recommendations To Mayor Edward B. Murray and the Seattle City Council*, Seattle Housing and Livability Agenda Advisory Comm, (July 2015) at 6, 8.

<sup>166</sup> SEATTLE, WASH., ORDINANCE 125393, Preamble (2017); Horne, *Seattle Forms Committee*, *supra* note 163.

<sup>167</sup> Lloyd, *City Council Passes*, *supra* note 161; Beekman, *Seattle Rental Applicants’ Criminal Histories*, *supra* note 161.

<sup>168</sup> *Id.*

<sup>169</sup> S.F., CAL., POLICE CODE, § 4901 *et seq.*; NEWARK, N.J., CODE 2:31; D.C. CODE, § 42–3541.



with a “first-in-time” rule that requires landlords to rent housing to qualified applicants on a first-come, first-served basis.<sup>170</sup> The preamble to the ordinance declares the city’s commitment to eliminating “institutional racism.”<sup>171</sup>

### *B. Creation of a New Protected Class*

The Seattle fair chance ordinance places virtually all former offenders into a protected class. The broad provisions of the ordinance stop landlords from asking about or requiring disclosure of criminal history as well as rejecting or taking any adverse action against an applicant based on past criminal involvement of the applicant or the applicant’s family members except for local, state or national sex offender registry status.<sup>172</sup> Even in the case of registered sex offenders, the ordinance requires that landlords have “a legitimate business reason” for adverse action, defined to mean “a nexus between the [exclusionary] policy or practice and resident safety and/or protecting property,” taking into consideration the “specific circumstances of the conviction and information provided by the applicant.”<sup>173</sup> The ordinance also bars advertising, publicizing or implementing any practice that “automatically or categorically excludes all individuals with any . . . criminal history.”<sup>174</sup> It requires landlords to disclose these prohibitions on application materials, and to provide advance notice to persons subject to adverse action.<sup>175</sup> Violations of the ordinance may result in injunctive relief, an award of attorney’s fees, and civil penalties ranging from \$11,000 for the first violation to \$55,000 if the landlord has committed two or more violations during the seven years prior to the charge.<sup>176</sup> The ordinance exempts only landlords occupying part of a single family dwelling and accessory units on a lot occupied by the landlord.<sup>177</sup> The preamble of the ordinance speaks of the aim “to make Seattle more affordable, equitable, and inclusive.”<sup>178</sup>

In imposing a sweeping ban on housing discrimination against ex-offenders, Seattle’s ordinance extends beyond the ban the box employment

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<sup>170</sup> Seattle was the first jurisdiction to pair fair chance and first-in-time housing policies. In 2020, Portland, Oregon adopted a similar suite of policies. *See* PORTLAND, OR., CODE, § 30.01.086(C)(2)(a)(3) (2020); A Policy Justice Brief for Oakland Political Leaders, “Fair Chance Ordinance that removes structural barriers for people with criminal histories in applications for rental housing,” JUST CITIES, (Dec. 19, 2019).

<sup>171</sup> SEATTLE, WASH., ORDINANCE 125393, Preamble (2017).

<sup>172</sup> SEATTLE, WASH., CODE §§ 14.09.025(A)(2) and (3) and 14.09.010.

<sup>173</sup> *Id.* at §§ 14.09.025(A)(3) and 14.09.010.

<sup>174</sup> *Id.* at § 14.09.025(A)(1).

<sup>175</sup> *Id.* at § 14.09.020.

<sup>176</sup> *Id.* at §§ 14.09.090(C) and .100(B).

<sup>177</sup> *Id.* at §§ 14.09.115(C) and (D).

<sup>178</sup> SEATTLE, WASH., ORDINANCE 125393, Preamble (2017).

model; it does not exert simply temporal control of the inquiry into criminal history. Nor do its protections for ex-offenders hinge on proof of a disparate racial impact, as in HUD's *Guidance* on criminal records-based violations of the FHA. The FHA only prevents discrimination against people due to "race, color, religion, sex, familial status, or national origin" in the sale, purchase, rental, financing, or occupation of any dwelling.<sup>179</sup> The HUD memo explains that housing barriers based on criminal records violate the Act only if "their burden falls more often on renters or other housing market participants of one race or national origin over another (*i.e.*, discriminatory effects liability)." The memo states explicitly that under federal law "having a criminal record is not a protected characteristic."<sup>180</sup>

Under the Seattle ordinance, people with a criminal history are a protected class.<sup>181</sup> The Seattle law states that no person may "advertise, publicize, or implement any policy or practice" that excludes people with a criminal history.<sup>182</sup> Seattle's fair chance ordinance thus radically expands the parameters of fair housing law.<sup>183</sup>

The creation of this new protected class provides a novel tool to use against homelessness among former prisoners. The preamble to the ordinance cites the HUD guidance—on the potential for criminal record screening to have a disparate impact on people of color—recognizing that ex-offenders facing severe barriers in the rental housing market are most likely to be people of color.<sup>184</sup> But the ordinance gives protection directly to people with criminal histories. This relieves ex-offenders experiencing homelessness, such as Adrian Laster, of the burden of showing that criminal history-based disadvantages in Seattle's rental market have a disparate racial impact. This is an important policy advance because, "[t]hough disparate impact theories of liability present one avenue to address such outcomes," as the Korematsu Center for Law and Equality and ACLU of Washington argue in a pending

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<sup>179</sup> 42 U.S.C. § 3604(b).

<sup>180</sup> U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 33, at 2.

<sup>181</sup> Just after filing the challenge to the fair chance law described below, a lawyer for the Pacific Freedom Foundation attacked the ordinance in *The Seattle Times*, stating that it "makes former convicts akin to a protected class." Ethan Blevins, *Landlord Rights Trammled by Seattle Law on Renters With Criminal Histories*, SEATTLE TIMES, May 7, 2018, <https://www.seattletimes.com/opinion/landlord-rights-trammeled-by-seattles-criminal-history-law/> [https://perma.cc/PS67-DND3].

<sup>182</sup> SEATTLE, WASH., CODE §§ 14.09.010(C) (2020).

<sup>183</sup> Landlords actually suggested that the first-in-time ordinance effectively, but improperly, created a protected class. One property manager complained to a researcher: What does it mean to be a qualified applicant? Not just someone passes the criteria . . . you don't have to rent to someone who meets all of your criteria. There's no law against not renting to a jerk. If people are just abrasive, and we have multiple applicants, we're going to take the least abrasive—that is not a protected category.

Reosti, Tenant Screening and Fair Housing, *supra* note 57, at 30.

<sup>184</sup> SEATTLE, WASH., ORDINANCE 125393, Preamble (2017).

challenge to the fair chance ordinance, “the relief comes after the damage has been done, and the victims of discrimination are rarely able to attain redress because of the difficulty of bringing and proving such claims.”<sup>185</sup> Unlike individual lawsuits under the FHA, the changes in rental practices mandated by the ordinance are designed not simply to remedy but to eliminate the disparate impact that is the product of “structures and institutions that have evolved as part of the culture over time.”<sup>186</sup> The Seattle ordinance improves the chances of overlapping disadvantaged groups in the rental housing market: people with a criminal history, people who are experiencing homelessness, and people of color.<sup>187</sup>

### C. The First-in-Time Provision

A year before Seattle adopted the strict prohibition of consideration of criminal history in rental decisions, it adopted an equally novel “first-in-time” requirement limiting landlord discretion about the choice of qualified applicants. When it upheld that requirement in 2019, the Washington Supreme Court highlighted its innovative nature. “The [first-in-time] rule is unquestionably an experiment,” the Court stated.<sup>188</sup>

The 2016 ordinance requires landlords to “offer tenancy of the available unit to the first prospective occupant meeting all the screening criteria necessary for approval of the application.”<sup>189</sup> In order to enforce the requirement, the ordinance further requires that landlords provide notice to prospective applicants of “the criteria the owner will use to screen prospective occupants and the minimum threshold for each criterion that the potential occupant must meet to move forward in the application process.”<sup>190</sup>

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<sup>185</sup> Brief for Fred T. Korematsu Center for Law and Equality and ACLU of Washington as Amici Curiae Supporting Defendant at 21, *Yim v. City of Seattle*, No. 2: 18-cv-00736-JCC (W.D. Wash. Nov. 11, 2018) (citing Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 392-94 (2013) (“conducting a qualitative analysis of disparate impact claims under the FHA and finding less than twenty percent of the claims successful”)).

<sup>186</sup> *Id.*

<sup>187</sup> Like the first-in-time ordinance, the fair chance ordinance requires that the city Auditor conduct an evaluation of the measure and submit it to the City Council by the end of 2019. SEATTLE, WASH., CODE §§ 14.09.110(C). But the Auditor has not completed the evaluation pending the resolution of the litigation described below. Memorandum from Lise Kaye, Analyst, to Councilmember Lewis re City of Seattle Auditing Practices, Attachment 2, (Feb. 3, 2020).

<sup>188</sup> *Yim v. City of Seattle*, 451 P.3d 675, 694 (Wash. 2019), *cert. denied*, 140 S. Ct. 2675 (2020).

<sup>189</sup> SEATTLE, WASH., CODE § 14.08.050(A)(4).

<sup>190</sup> *Id.* at §§ 14.08.050(A)(1)(a).

The landlord must also note the date and time when it receives a completed rental application and screen applications in chronological order.<sup>191</sup>

Together, the first-in-time and fair chance ordinances place Seattle at the cutting edge of policymaking seeking to sever the connection between homelessness and mass incarceration.

#### IV. LANDLORD LEGAL CHALLENGES

Landlords filed lawsuits alleging that both the first-in-time and the fair chance ordinances were unconstitutional shortly after each was enacted. The challenge to the first-in-time measure was resolved in favor of the city by the Washington Supreme Court and review was denied by the United States Supreme Court. The challenge to the fair chance provision was resolved in favor of the city as well by the U.S. District Court for the Western District of Washington and the landlord plaintiffs have filed an appeal in the Ninth Circuit Court of Appeals.<sup>192</sup> Shortly after the state high court rejected the first-in-time challenge, *The Wall Street Journal* published an editorial by the plaintiffs' counsel denouncing both the ordinances and the court under the headline, "Seattle and the State Supreme Court Wage War on Property Rights: Landlords are forced to rent to the first person who walks in—even if he has a criminal record."<sup>193</sup> The landlords claim both laws interfere with their "constitutionally protected right to rent their property to whom they choose, at a price they choose, subject to reasonable anti-discrimination measures."<sup>194</sup>

The landlords in the two suits accept the constraints of traditional anti-discrimination law and even the stated purposes of the two ordinances—to

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<sup>191</sup> *Id.* at §14.08.050(A)(2). The ordinance requires that the city Auditor conduct an evaluation of the ordinance after eighteen months, specifically considering "an analysis of the impact on discrimination based on a protected class," and submit it to the City Council so it could consider if the program "should be maintained, amended, or repeated." *Id.* at §14.08.050(D). The Auditor contracted for such a study, but it is largely based on interviews of landlords and tenants and contains no findings concerning the ordinance's impact on protected classes. See Kyle Crowder, *Seattle Rental Housing Study: Final Report*, U. of Wash. Center for Stud. in Demography and Ecology, (June 2018), at 26, <https://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/UWSRHSFinal.pdf> (surveying landlords found that a large majority believed the measures place an undue burden on them and may reduce housing access for low-income renters).

<sup>192</sup> Notice of Appeal, *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash. July. 14, 2021). The appeal has been fully briefed and is set for argument May 17, 2022.

<sup>193</sup> Ethan Blevins, *Seattle and the State Supreme Court Wage War on Property Rights*, WALL ST. J., Jan. 31, 2020, <https://www.wsj.com/articles/seattle-and-the-state-supreme-court-wage-war-on-property-rights-11580514036> [<https://perma.cc/5LW4-AQZX>].

<sup>194</sup> Complaint at ¶ 1, *Yim v. City of Seattle*, No. 17-2-05595-6 (Sup. Ct. Wash. King Cty. May 1, 2018); see *Yim v. City of Seattle*, 451 P.3d 675, 680 (Wash. 2019), *cert. denied*, 140 S. Ct. 2675 (2020).

prevent implicit bias in tenant selection and to give formerly incarcerated people a fair chance to secure housing. But the landlords argue that the laws go too far in constraining their right to control entry onto their property and imposing onerous regulations on all landlords, even those who do not discriminate based on either race or criminal history. These rules, they contend, shift the burden of the reentry problems created by mass incarceration away from government and onto private property owners. Moreover, while the laws curtail their rights as property owners, the landlords allege further that the novel means of eliminating bias adopted in the ordinances also infringe on their rights of free speech. They maintain that the fair chance ordinance “bans an important conversation between landlord and prospective tenant that begins like this: Have you ever committed a crime?”<sup>195</sup>

The landlords filed the actions challenging both the fair chance and the first-in-time ordinances in King County, Washington Superior Court.<sup>196</sup> The first-named plaintiffs in both actions are a husband and wife who live with their three children in a building covered by the ordinances. Chong and Marilyn Yim own both a duplex and triplex unit in Seattle and live in the triplex.<sup>197</sup> The complaint in the fair chance challenge alleges that “[t]he Yims share a yard with their renters, and the Yim children are occasionally at home alone when their renters are home. The Yims “treasure their right to ensure compatibility and safety for themselves and their tenants.”<sup>198</sup> The plaintiffs in the fair chance challenge also include the Rental Housing Association of Washington, a membership association that “provides screening services for its landlord members.”<sup>199</sup> In both actions, the plaintiffs are represented by the Pacific Legal Foundation, which describes itself as “a nonprofit legal organizations that defends Americans’ liberties when threatened by government overreach and abuse,” with specific legal expertise concerning “[t]he right to acquire and use property without undue government interference.”<sup>200</sup>

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<sup>195</sup> Plaintiffs’ Motion for Summary Judgment at 1, *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash. Sept. 28, 2018).

<sup>196</sup> Complaint, *Yim v. City of Seattle*, No. 18-2-11073-4 (Sup. Ct. Wash. King Cty. May 1, 2018) (challenging fair chance ordinance); see *Yim v. City of Seattle*, 451 P.3d 675, 681 (Wash. 2019) (challenging first-in-time ordinance).

<sup>197</sup> Complaint at ¶ 31, *Yim v. City of Seattle*, No. 18-2-11073-4 (Sup. Ct. Wash. King Cty. May 1, 2018).

<sup>198</sup> *Id.* at ¶ 32.

<sup>199</sup> *Id.* at ¶¶ 8, 39.

<sup>200</sup> Pacific Legal Foundation, *About Pacific Legal Foundation and What We Fight For*, <https://pacificlegal.org/about/> [<https://perma.cc/5YNF-D8SG>].

### A. *The Challenge to the First-in-Time Ordinance*

The challenge to the first-in-time provision alleged that the ordinance took landlords' property without just compensation, violated landlords' right to substantive due process, and infringed on landlords' right to free speech, all under the Washington State Constitution.<sup>201</sup> While a state trial court ruled in favor of the plaintiffs, the Washington Supreme Court, on direct review, reversed and upheld the law on November 14, 2019.<sup>202</sup>

The trial court struck down the first-in-time ordinance on all three grounds advanced by the plaintiffs.<sup>203</sup> First, finding that "an owner's right to sell a property interest to whom he or she chooses is a fundamental attribute of property," the court similarly concluded that "[c]hoosing a tenant is a fundamental attribute of property ownership."<sup>204</sup> Because the ordinance effectively took that property and "handed" it to the tenants, the Court held it effected a taking for private use and was thus unconstitutional.<sup>205</sup>

Second, the trial court held that the ordinance deprived the plaintiffs of substantive due process. While it was aimed at achieving a legitimate public purpose, the court found that the ordinance did not employ "means reasonably necessary to achieving that purpose."<sup>206</sup> The court concluded that the ordinance was "an unreasonable means of pursuing anti-discrimination because of its sweeping overbreadth."<sup>207</sup> "The principle that government can eliminate ordinary discretion because of the possibility that some people may have unconscious biases has no limiting principle," the court explained, and would thus "expand the police power beyond reasonable bounds."<sup>208</sup> For those reasons, the court held that the ordinance violated the due process clause.

Finally, the trial court held that the ordinance infringed plaintiffs' freedom of speech. "The [first-in-time] rule not only constrains the means by which landlords communicate," the court found, "it also controls the content of that communication."<sup>209</sup> "It forbids valuable speech activities like case-by-case negotiation and tells landlords how to communicate their [rental] criteria."<sup>210</sup> Again employing a form of overbreadth analysis, the court found

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<sup>201</sup> Complaint, *Yim v. City of Seattle*, No. 17-2-05595-6 (Sup. Ct. Wash. King Cty. Mar. 9, 2017).

<sup>202</sup> *Yim v. City of Seattle*, 451 P.3d 675, 681 (Wash. 2019).

<sup>203</sup> *Yim v. City of Seattle*, No. 17-2-05595-6, 2018 WL 10140201 (Sup. Ct. Wash. King Cty. March 28, 2018).

<sup>204</sup> *Id.* at \*4.

<sup>205</sup> *Id.* at \*4.

<sup>206</sup> *Id.* at \*5-6.

<sup>207</sup> *Id.* at \*6.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at \*7.

<sup>210</sup> *Id.* at \*10.

that the ordinance “restricts far more speech than is necessary to achieve its purposes in stopping discrimination.”<sup>211</sup> The ordinance “imposes sweeping advertising restrictions on all Seattle landlords, restricting their speech without any individualized suspicion of disparate treatment,” the court found.<sup>212</sup> The court thus struck the ordinance down on free expression grounds as well.

The state Supreme Court reversed on all counts and upheld the first-in-time ordinance. First, the court disposed of the takings challenge. It concluded that the plaintiffs did not argue that the ordinance constituted a *per se* taking, and it did not constitute such a taking because it did not cause landlords “to suffer any permanent physical invasion of their properties” and did not deprive landlords of “*any* economically beneficial uses of their properties.”<sup>213</sup> Because the plaintiffs also failed to argue the ordinance constituted a regulatory taking, the court dismissed the claim.<sup>214</sup>

Second, the state Supreme Court dismissed the substantive due process claim. Rejecting the plaintiffs’ contention that the ordinance was subject to heightened scrutiny “because it regulates a fundamental attribute of property ownership,” the court concluded that rational basis review was appropriate, following the law under the U.S. Constitution and overruling prior state law precedents.<sup>215</sup> The court then found that the legitimate purpose of the first-in-time rule was “to mitigate the impact of implicit bias in tenancy decisions.”<sup>216</sup> It concluded that the rule was rationally related to that purpose:

A rational person could believe that implicit bias will be mitigated by requiring landlords to offer tenancy to the first qualified applicant, rather than giving landlords discretion to reject an otherwise-qualified applicant based on a “gut check.” . . . It is precisely in such gut-check decisions where implicit bias is most likely to have influence because bias is “often unintentional, institutional, or unconscious.”<sup>217</sup>

The court also noted that the first-in-time requirements were “consistent with industry-recommended best practices.”<sup>218</sup> While acknowledging that the ordinance might “prove ineffective or unwise as a matter of policy,” the court held that plaintiffs had not shown that it had *no*

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Yim*, 451 P.3d at 690 (Wash. 2019).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 691.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

rational basis and thus had not demonstrated that the ordinance deprived them of substantive due process.<sup>219</sup>

Finally, the court rejected the free speech claim. Finding that the ordinance “requires only that landlords disclose factual information about their own rental criteria,” the court first concluded it was subject to “deferential scrutiny.”<sup>220</sup> The court then found that the city had shown that the problem of implicit bias in the rental housing market “is (at least) potentially real” and that the rule did not unduly burden protected speech.<sup>221</sup> Because the rule was not “wholly disconnected” from the “City’s interest in ensuring that the same rental criteria are applied to all applicants rather than subjecting some applicants to more demanding criteria due to the influence of implicit bias,” the court concluded it did not interfere with free speech.<sup>222</sup>

The plaintiffs petitioned the U.S. Supreme Court for review, but only of the state court’s takings holding. The petition was supported by conservative legal organizations, including the Cato Institute, the Reason Foundation, and the Center for Constitutional Jurisprudence.<sup>223</sup> The Cato Institute and Reason Foundation argued that the Court should grant *certiorari* in order to “protect the ‘fundamental attributes’ of ownership from state overreach,” in order “to ensure that a regulation that ‘goes too far’ cannot go national.”<sup>224</sup> But the Supreme Court denied review in 2020, leaving the first-in-time rule in place as a possible model for other cities.<sup>225</sup>

### *B. The Challenge to the Fair Chance Ordinance*

In the challenge to the fair chance ordinance, the landlords allege that the fair chance ordinance “does not allow a residential landlord to base a rental decision upon personal safety, safety of other tenants, or revulsion due to convictions for sex offenses, crimes against children, or even hate crimes.”<sup>226</sup> The landlords charge that the ordinance violates their right to free speech and deprives them of property without due process under both the state and U.S. Constitutions.<sup>227</sup> The U.S. District Court for the Western

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<sup>219</sup> *Id.* at 692.

<sup>220</sup> *Id.* at 693.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Brief for Cato Institute and Reason Foundation as Amicus Curiae Supporting Petitioner and Brief for Center for Constitutional Jurisprudence as Amicus Curiae Supporting Petitioner, *Yim v. City of Seattle*, 140 S. Ct. 2675 (2020) (No. 19-1136).

<sup>224</sup> Brief for Cato Institute and Reason Foundation as Amicus Curiae Supporting Petitioner at 20, *Yim v. City of Seattle*, 140 S. Ct. 2675 (2020) (No. 19-1136).

<sup>225</sup> *Yim v. City of Seattle*, *cert. denied*, 140 S. Ct. 2675 (2020).

<sup>226</sup> Complaint at ¶ 22, *Yim v. City of Seattle*, No. 18-2-11073-4 (Sup. Ct. Wash. King Cty. May 1, 2018).

<sup>227</sup> *Id.* at ¶ 6.



District of Washington upheld the ordinance on July 6, 2021.<sup>228</sup> Just days later, the landlords filed an appeal in the Ninth Circuit Court of Appeals.<sup>229</sup>

While acknowledging that the ordinance has the “laudable goal” of assisting “individuals in reintegrating into society after release from incarceration,” the complaint alleges its “chosen means to achieve the goals are unnecessary, unreasonable, and impose an undue burden on private landlords’ right to select their tenants” and thus violate landlords’ right to substantive due process.<sup>230</sup> The landlords assert a “constitutionally protected right to choose whom they will house.”<sup>231</sup> The landlords acknowledge that “[they] commonly screen an applicant’s criminal history.”<sup>232</sup> They argue that is necessary because “landlords must protect their tenants against foreseeable criminal acts of third parties.”<sup>233</sup> In fact, the landlords cite a Washington Supreme Court decision suggesting that if a landlord can be held liable for certain actions of its tenants, “[i]t would seem only reasonable that the landlord should at the same time enjoy the right to exclude persons who may foreseeably cause such injury.”<sup>234</sup> In addition, the landlords cite a negligence action then pending in Illinois brought by the family of a tenant raped and murdered by a neighboring tenant, alleging that the landlord was negligent because it did not perform a criminal background check.<sup>235</sup> Turning the recidivism argument on its head, the landlords argue that the probability of reoffending, used by the city to justify aiding released prisoners to find a home, actually justifies screening and exclusion because “[t]he best predictor of future behavior is past behavior.”<sup>236</sup> The landlords argue that the ordinance prevents precisely the type of “case-by-case consideration of criminal

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<sup>228</sup> Order, *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash. July 6, 2021).

<sup>229</sup> Notice of Appeal, *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash. July. 14, 2021).

<sup>230</sup> Complaint at ¶ 55, *Yim v. City of Seattle*, No. 2:18-cv-00736 (W.D. Wash. 2018).

<sup>231</sup> *Id.* at ¶ 30.

<sup>232</sup> *Id.* at ¶ 2.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* (quoting *City of Bremerton v. Widell*, 51 P.3d 733, 739 (2002)).

<sup>235</sup> *Id.* at n. 1 (citing Cate Cuaguiran, *Family of Woman Murdered in Schaumburg Apartment Files Lawsuit*, EYEWITNESS NEWS, Aug. 2, 2017, <http://abc7chicago.com/family-of-woman-murdered-in-schaumburg-apartment-files-lawsuit/2267952/>). Landlords in other cities echoed these fears. In Oakland, real estate attorney Brent Kernan expects legal challenges concerning “whether [criminal history questions] are appropriate questions that the owner has a right to ask. I mean they face liabilities and all sorts of consequences if they get the wrong person in and bad things happen.” Leslie Brinkley, *Oakland Bans Criminal Background Checks for Housing Applications*, ABC 7 NEWS, Jan. 22, 2020, <https://abc7news.com/5871655/> [<https://perma.cc/L748-PU3Q>].

<sup>236</sup> Brief for National Apartment Association as Amicus Curiae Supporting Plaintiffs at 15, *Yim v. City of Seattle*, No. 2:18-cv-00736 (W.D. Wash. Nov. 20, 2018).

convictions” that the HUD Guidance and less restrictive fair chance ordinances require.<sup>237</sup>

The landlords bolster their due process argument by pointing to the intimate and extended nature of many rental arrangements—the “often lengthy and interpersonal landlord-tenant relationships.”<sup>238</sup> The Yims’ sharing of a yard with their tenants is a case in point. “Renting out property is not a one-time, arms-length exchange ... it involves a lengthy, ongoing relationship,” the landlords’ counsel wrote in *The Seattle Times*.<sup>239</sup>

The ordinance also infringes on free speech, the complaint alleges, because it prohibits individuals and organizations “from accessing and sharing truthful information about housing applicants.”<sup>240</sup> Moreover, the ordinance itself addresses a form of discrimination because it “forbids anyone from inquiring after criminal background for the purpose of vetting housing applicants, but it does not forbid such inquiries for other purposes.”<sup>241</sup> The law is thus not a neutral restraint, but “targets speech based on content, speaker identity, and purpose,” requiring heightened scrutiny.<sup>242</sup>

The case was removed to the U.S. District Court for the Western District of Washington, where the parties filed cross-motions for summary judgment.<sup>243</sup> In their moving papers, the landlords claim that “No other jurisdiction has passed a . . . rule like Seattle’s.”<sup>244</sup> They argue that the ordinance infringes on their “fundamental right to select their tenants” and is “unduly oppressive” and they label it a “gag rule.”<sup>245</sup> A variety of national, state and local advocacy groups filed amicus briefs on both sides. Briefs in support of the City and the ordinance came from the ACLU of Washington, the Korematsu Center for Law and Equality, the National Housing Law Project, the Sargent Shriver National Center on Poverty Law, Pioneer Human Services, and the Tenants Union of Washington.<sup>246</sup> Supporting the plaintiffs

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<sup>237</sup> Complaint at ¶ 56, *Yim v. City of Seattle*, No. 18-2-11073-4 (Sup. Ct. Wash. King Cty. May 1, 2018).

<sup>238</sup> *Id.* at ¶ 30.

<sup>239</sup> Blevins, *Landlord Rights Trammelled*, *supra* note 181.

<sup>240</sup> Complaint at ¶ 51, *Yim v. City of Seattle*, No. 18-2-11073-4 (Sup. Ct. Wash. King Cty. May 1, 2018).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Cross-motions for summary judgment, *Yim v. City of Seattle*, No. 2:18-cv-00736 (W.D. Wash. May 7, 2020).

<sup>244</sup> Plaintiffs’ Memorandum in Support of Motion for Summary Judgment at 3, *Yim v. City of Seattle*, Case No. 2:18-cv-00736 (W.D. Wash. 2018).

<sup>245</sup> *Id.* at 1, 17.

<sup>246</sup> Briefs of Amicus ACLU of Washington, the Korematsu Center for Law and Equality, the National Housing Law Project, the Sargent Shriver National Center on Poverty Law, Pioneer Human Services, and the Tenants Union of Washington in Support of Defendant, *Yim v. City of Seattle*, No. 2:18-cv-00736 (W.D. Wash. 2018).

are the National Apartment Association and the National Consumer Reporting Association.<sup>247</sup>

After the conclusion of briefing on the motion, the City asked the District Court to certify certain questions concerning the state substantive due process claim to the Washington State Supreme Court. Specifically, the state high court was asked what standard applies to substantive due process claims under the Washington State Constitution, whether the standard applies to claims arising out of land use regulations, and what standard should apply to the fair chance housing ordinance.<sup>248</sup> The Washington State Supreme Court ruled on November 14, 2019, the same day it handed down its decision in the first-in-time case, that the landlords' due process claims are subject to rational basis review under the state constitution, the restrictions on the use of property must be "rationally related to a legitimate state interest."<sup>249</sup> The Court adopted the same standard as applied under the U.S. Constitution and found that that standard applied to land use regulations.

After the Washington Supreme Court returned answers to the certified questions to the federal district court, the parties filed supplemental briefs addressing the due process claim. The U.S. District Court for the Western District of Washington decided the case on cross-motions for summary judgement in favor of the City on July 6, 2021.

The court found for the City on all counts. Regarding the substantive due process claim, the court held that it only needed to "determine whether the Ordinance could advance any legitimate government purpose."<sup>250</sup> It found that the "City's *actual* reasons for enacting the statute are legitimate" and "the Ordinance directly advances these legitimate purposes."<sup>251</sup> The court agreed with the City's contention that the ordinance advances the purposes of "reduc[ing] barriers to housing faced by people with criminal records and . . . lessen[ing] the use of criminal history as a proxy to discriminate against people of color disproportionately represented in the criminal justice system."<sup>252</sup>

The court also rejected the plaintiffs' free speech claim. The plaintiffs challenged only the ordinance provision that "prohibits 'any person' from 'inquiring about . . . a prospective occupant, a tenant, or a member of their household[s]' . . . arrest record, conviction record, or criminal history."<sup>253</sup>

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<sup>247</sup> Briefs of Amicus National Apartment Association and the National Consumer Reporting Association in Support of Plaintiffs, *Yim v. City of Seattle*, Case No. 2:18-cv-00736 (W.D. Wash. 2018).

<sup>248</sup> *Yim v. City of Seattle*, 451 P.3d 651, 694 (Wash. 2019).

<sup>249</sup> *Id.* at 698.

<sup>250</sup> Order, *Yim v. City of Seattle*, No. 2:18-cv-00736-JCC (W.D. Wash. 2021), at 5.

<sup>251</sup> *Id.* at 6.

<sup>252</sup> *Id.* at 15.

<sup>253</sup> *Id.* at 6.

The court classified the prohibited inquiry as commercial speech and thus concluded that the provision is subject to intermediate scrutiny.<sup>254</sup> The plaintiffs argued to the contrary, contending that the many prohibited inquiries were not commercial speech as they were posed to the Rental Housing Association or other vendors and thus the speech was not part of the underlying rental transaction.<sup>255</sup> But the court found that the background check speech is “quintessential commercial speech” as at its core it consists of the landlord asking ““Can I purchase a background report for this particular applicant?””<sup>256</sup> The court then found that the government’s interest in regulating the commercial speech is substantial (the City’s interest is in reducing barriers to housing for people with criminal records and combatting racial discrimination) and the provision directly advances the City’s interest.<sup>257</sup>

Under the intermediate scrutiny standard, the court concluded that the City only needs to show and has shown that “a prospective occupant’s criminal record is one of several factors that contributes to a landlord’s decision to refuse to rent to him.”<sup>258</sup> Further, the City was “not required to show that landlords reject applicants based on criminal history ‘frequently.’”<sup>259</sup> The court found that the City provided sufficient empirical and anecdotal evidence showing that some Seattle landlords rejected potential tenants because of their criminal records.<sup>260</sup> For example, the City cited a study that found that “67% of property managers surveyed ‘indicated that they inquire about criminal history on rental applications.’”<sup>261</sup> The court held that the inquiry provision and the ordinance as a whole are reasonable vehicles through which to accomplish the City’s objectives and do not substantially burden speech.<sup>262</sup>

While the Seattle challenge was pending, both St. Paul and Minneapolis adopted fair chance ordinances.<sup>263</sup> Landlords promptly challenged both in federal court, and the federal district court for the District of Minnesota issued a preliminary injunction blocking enforcement of the St. Paul ordinance in April 2021.<sup>264</sup> In the other Twin City, however, the District Court denied a motion for a preliminary injunction to block the Minneapolis

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<sup>254</sup> *Id.* at 9.

<sup>255</sup> *Id.* at 13.

<sup>256</sup> *Id.* at 14.

<sup>257</sup> *Id.* at 14–17.

<sup>258</sup> *Id.* at 18–19.

<sup>259</sup> *Id.* at 19.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 20.

<sup>262</sup> *Id.* at 23.

<sup>263</sup> ST. PAUL, MINN., ORDINANCES § 193.

<sup>264</sup> Memorandum and Order, *Lamplighter Village Apartments LLP et al. v. City of St. Paul*, No. 21:413 (D. Minn. 2021).

ordinance in November 2020 and the Eight Circuit affirmed in March 2022.<sup>265</sup>

The St. Paul ordinance, like many of the earlier ordinances, places limitations on landlord use of specified types of criminal history in rental application screening.<sup>266</sup> The ordinance prohibits landlords from disqualifying applicants with arrests or charges that did not result in conviction, who are participating in or have completed a diversion or deferral of judgment program, with convictions that have been vacated or expunged, and with convictions for misdemeanors older than three years or felonies older than seven years.<sup>267</sup> In the litigation, the landlords allege that the ordinance violates the takings clause, due process clause and free speech provision of the State and federal constitutions and is an unconstitutional impairment of contracts.<sup>268</sup>

The landlords' preliminary injunction motion was based only on the takings clause and substantive due process claims.<sup>269</sup> The Court found plaintiffs were likely to succeed on the merits on both claims. Plaintiffs argued that the ordinance constituted a permanent physical taking. The plaintiffs alleged that the ordinance mandates that owners rent to tenants whom they would otherwise reject based on concerns regarding potential default, property damage, or safety of tenants and other individuals on the property. Moreover, plaintiffs argued that "the ordinance's creation of tenants' right to renew their leases in perpetuity, absent narrow just-cause circumstances, constitutes a permanent physical invasion of their property."<sup>270</sup> The Court agreed, echoing the reasoning of the Seattle landlords, that the ordinance "singles out private landlords 'to address a perceived, though vaguely identified, societal problem' related to housing needs."<sup>271</sup> The Court also found that the landlords were likely to prevail on a regulatory taking theory, reasoning that the ordinance imposes "a heavy cost for owners" and forces them "to bear society's burden related to housing needs."<sup>272</sup>

The Minnesota District Court also found the landlords were likely to prevail on the merits of their substantive due process claim. The Court

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<sup>265</sup> 301, 712, 2103 and 3151 LLC et al. v. City of Minneapolis, No. 20-1904 (D. Minn. November 6, 2020); 301, 712, 2103 and 3151 LLC et al. v. City of Minneapolis, No. 20-3493 (8th Cir. Mar. 14, 2022).

<sup>266</sup> ST. PAUL, MINN., ORDINANCES § 193.04(b)(1)).

<sup>267</sup> *Id.*

<sup>268</sup> Complaint, ¶¶ 160-241, *Lamplighter Village Apartments LLP et al. v. City of St. Paul*, No. 21:413 (D. Minn.).

<sup>269</sup> Memorandum and Order at 4, *Lamplighter Village Apartments LLP et al. v. City of St. Paul*, No. 21:413 (D. Minn. 2021).

<sup>270</sup> *Id.* at 6.

<sup>271</sup> *Id.* at 7 (quoting Plaintiffs' Supplemental Memorandum at 16).

<sup>272</sup> *Id.* at 8.

reasoned that “the right to exclude others from one’s property is fundamental” and thus “the ordinance must pass strict scrutiny.”<sup>273</sup> The ordinance failed that test, the Court concluded, because the City did not find that criminal records “impede[] St. Paul residents from securing housing that they could otherwise afford.”<sup>274</sup> In fact, the Court found, the ordinance likely could not survive even rational basis scrutiny because the City did not find that “the ordinance will accomplish the City’s enunciated objectives” and cited “racial disparities” that are “addressed by the Fair Housing Act.”<sup>275</sup>

The challenge to the Minneapolis ordinance resulted in the opposite result, but largely because of the more limited provisions of the law.<sup>276</sup> In that case, the landlords stated similar Takings Clause and Fourteenth Amendment Due Process Clause claims under both the U.S. and Minnesota Constitutions.<sup>277</sup> The district court denied a motion for a preliminary injunction in November 2020.<sup>278</sup> The landlords appealed and the Eighth Circuit affirmed the district court’s decision in March 2022.<sup>279</sup>

But both the trial and appellate courts’ rulings on the Minneapolis ordinance were based on a feature of the law not shared by the Seattle or St. Paul ordinances—it provides landlords with “two alternatives . . . to use when screening potential tenants.”<sup>280</sup> The first alternative parallels the St. Paul ordinance, barring landlords from considering certain types of criminal history. But the Minneapolis ordinance also gives landlords the option of conducting individualized assessment of applicants, permitting them to reject applicants based on criminal history if the landlords accept and consider all supplemental evidence applicants provide to explain the criminal history.<sup>281</sup> The Eighth Court held that, because of the individualized assessment option, the ordinance is a restriction on landlords’ use of their property, not a physical taking, and it is not a regulatory taking as the landlords did not offer any evidence of economic harm.<sup>282</sup> Additionally, the Court held, the ordinance

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<sup>273</sup> *Id.* at 9.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 9–10. The City of St. Paul repealed the ordinance in June 2021 and the case was dismissed in September 2021. Order, *Lamplighter Village Apartments LLP et al. v. City of St. Paul* (D. Minn. Sept. 8, 2021). The City repealed the ordinance in light of the District Court’s Order. Councilmembers plan to draft a scaled-back version of the ordinance depending on the outcome of the challenge to the Minneapolis ordinance. See Katie Galioto, *After losing in court, St. Paul poised to repeal tenant protection: Council plans to repeal, rewrite protections that federal judge ruled unconstitutional*, STAR TRIBUNE, May 28, 2021.

<sup>276</sup> 301, 712, 2103 and 3151 LLC *et al.*, No. 20-3493, at \*2.

<sup>277</sup> *Id.* at 2-3.

<sup>278</sup> 301, 712, 2103 and 3151 LLC *et al.*, No. 20-1904.

<sup>279</sup> 301, 712, 2103 and 3151 LLC *et al.*, No. 20-3493.

<sup>280</sup> 301, 712, 2103 and 3151 LLC *et al.*, No. 20-1904, at \*2.

<sup>281</sup> *Id.* at 2-3.

<sup>282</sup> 301, 712, 2103 and 3151 LLC *et al.*, No. 20-3493, at \*7-8.

does not infringe on landlords' right to exclude others because it permits them to do so as long as they follow the individualized tenant-screening procedures.<sup>283</sup> The Eight Circuit suggested that it might have enjoined the ordinance had it not contained the individualized screening option because "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking" and "the right to exclude is 'one of the most fundamental elements of property ownership.'"<sup>284</sup>

The sharply contrasting holdings of the federal courts, together with the spread of fair chance ordinances across the country, suggests that a legal challenge to one of those ordinances may eventually be heard in the United States Supreme Court. Paradoxically, in cases challenging an ordinance focused on the rental of property, the landlords' argument that the laws deprive them of property without substantive due process is likely to fail under the permissive standard applicable under both the U.S. and state constitutions, while the free expression claim may be more problematic under the Supreme Court's increasingly restrictive jurisprudence.<sup>285</sup>

The Minnesota and Seattle lawsuits reveal how the ordinances bring into direct conflict two contending theories of rights: the right of ex-offenders to fair treatment in the rental housing market versus the right of property owners to untrammelled freedom to acquire information and decide whether to rent housing to ex-offenders. "By forcing landlords to accept tenants regardless of a criminal past, the city simply barter[s] one injustice for another," the plaintiffs' lawyer in the Seattle lawsuit wrote in *The Seattle Times*.<sup>286</sup> The Seattle fair chance ordinance recognizes people with a criminal history as a protected class, expanding the reach of fair housing guarantees. The landlords view that protection as an unreasonable anti-discrimination measure infringing on constitutional free speech and property rights.

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<sup>283</sup> *Id.*, at 10.

<sup>284</sup> *Id.* at 7, 9.

<sup>285</sup> The landlords rely primarily on the Court's 2011 decision in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011), holding that a Vermont law preventing pharmacists from selling doctor's prescribing records to pharmaceutical companies violated the First Amendment. See generally Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Robert Post and Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2015). The City counters that the ordinance is no different than a prohibition of employment discrimination: "The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." City's Opposition and Cross-Motion at 9–10, *SeattleYim v. City of Seattle*, Case No. 2:18-cv-00736 (W.D. Wash. 2018) (quoting *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 62 (2006)). Moreover, the City argues, its authority to regulate landlord-tenant relations—"commercial transactions"—"justified its concomitant power to regulate speech that is 'linked inextricably' to those transactions." *Id.* at 11–12.

<sup>286</sup> Blevins, *Landlord Rights Trammelled*, *supra* note 181.

The landlords argue it is arbitrary for Seattle to shift the burden of mass incarceration—a problem that government itself had created—onto private parties. “The goal behind said Ordinance is to soften the perceived disparate impact that discriminatory policing and prosecution practices—including the City’s own policing and prosecution practices—have had on minority segments of the community with regard to obtaining housing,” the National Consumer Reporting Association pointed out in its amicus brief.<sup>287</sup> But “[t]he ordinance attempts to accomplish this goal by depriving” landlords of “access to, and information contained in, public criminal court records.”<sup>288</sup> Mass incarceration and its disparate racial impact are a “societal wrong,” landlords argue, and the city cannot place the burden of remedy solely “on the shoulders of property owners.”<sup>289</sup>

In challenging the protection of ex-offenders from discrimination in the rental housing market, the landlords’ free market arguments also perversely advocate the expansion of government support. Arguing that the fair chance ordinance is not rationally related to its stated objective, the landlords contend that “*assisted public housing* is the only viable option for many recently incarcerated individuals—particularly in Seattle where private rental properties are very expensive.”<sup>290</sup> Whereas the ordinances aim to protect ex-offenders from homelessness by affording them a fair chance to find affordable private housing, the landlords argue that government should directly support people with criminal records rather than interfere with rights of property and speech.

#### **V. CITIES SHOULD ADOPT THE SEATTLE MODEL WITH A BROADER EXEMPTION AND AS ONE ELEMENT OF A MULTI-PRONG APPROACH**

Seattle has taken the lead among governments at all levels in addressing the intersecting problems of homelessness and mass incarceration and their disproportionate impact on people of color. Other cities should adopt the Seattle model with three caveats. First, the ordinances should be amended to recognize the intimate nature of some housing arrangements and to blunt potential legal attacks by widening the exemption for small property

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<sup>287</sup> Brief of Amicus National Consumer Reporting Association in Support of Plaintiffs at 7, *Yim v. City of Seattle*, No. 2: 18-cv-00736 (W.D. Wash. 2018).

<sup>288</sup> *Id.* An industry lobbyist made the same point: “The state wants to put on the landlord the remedy of fixing this problem that they caused... it’s frustrating... because we want the government to do its job and the government doesn’t seem to want to do its job. It wants to force me to do its job. Reosti, Tenant Screening and Fair Housing, *supra* note 57, at 44.

<sup>289</sup> Brief of Amicus National Consumer Reporting Association in Support of Plaintiffs at 7, *Yim v. City of Seattle*, No. 2: 18-cv-00736 (W.D. Wash. 2018).

<sup>290</sup> Complaint ¶ 59, *Yim v. City of Seattle*, No. 2:18-cv-00736 (W.D. Wash. 2018) (emphasis in original).



owners living on the premises to parallel the exemption in the FHA. Second, adoption of the ordinances must be coupled with heightened and affirmative fair housing enforcement to counter the possibility that barring landlords from acquiring information about applicants' criminal history will lead to increased discrimination against people of color as landlords use race as a proxy for prior incarceration. Third, as the *Yim* plaintiffs point out, the problem of ex-offender homelessness will remain intractable without additional measures aimed not simply at regulating the housing market, but at increasing the supply of low-income housing, including transitional housing for formerly incarcerated people.

*A. Broaden the Exemption for Small Landlords Who Live on the Property*

Both advocates for formerly incarcerated people and advocates for landlords recognize that housing can be “intimate” and not an “arms-length exchange.”<sup>291</sup> The Yims allege that they “treasure their right to ensure compatibility” between themselves and their tenants.<sup>292</sup> Dating back to the passage of Title II of the 1964 Civil Rights Act barring discrimination in “any place of public accommodation,”<sup>293</sup> critics have deployed the gendered trope of “Mrs. Murphy’s Boarding House,” the female landlord renting rooms in her own home.<sup>294</sup> The image is both a powerful tool for undermining anti-discrimination efforts, as evidenced in the choice of plaintiffs in the *Yim* litigation, and an accurate representation of the reality that there are strong privacy and autonomy concerns at stake in regulating the occupancy of private homes. Striking a slightly different balance than Seattle’s, cities should expand the exemption for small landlords contained in the Seattle ordinances to parallel that in the FHA.

The Seattle fair chance ordinance contains two narrow exceptions for single family homes when the owner occupies part of the home and for accessory units when the owner resides on the same lot.<sup>295</sup> The first-in-time ordinance contains only the first exception.<sup>296</sup> The first-named plaintiffs in the two legal challenges, Chong and Marilyn Yim, fall just outside those narrow exemptions, living in a three-unit building and sharing common areas,

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<sup>291</sup> Thrope interview, *supra* note 116; Blevins, *Seattle and the State Supreme Court*, *supra* note 193.

<sup>292</sup> *Complaint* ¶ 32, *Yim v. City of Seattle*, No. 2:18-cv-00736 (W.D. Wash. 2018).

<sup>293</sup> 42 U.S.C. § 2000(a).

<sup>294</sup> The mythical Mrs. Murphy was first described by Senator George Aiken of Vermont when he urged Congress to “integrate the Waldorf and other large hotels, but permit the ‘Mrs. Murphys,’ who run small rooming houses all over the country, to rent their rooms to those they choose.” See ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* at 51 (1990).

<sup>295</sup> SEATTLE, WASH., CODE § 14.09.115(C)–(D).

<sup>296</sup> *Id.* § 14.08.190(A).

such as the yard, with their tenants. Seattle's exemptions are narrower than those contained in the federal FHA, which encompasses the Yims as it exempts dwellings containing four or fewer units if the owner lives in one of the units.<sup>297</sup> Cities should adopt an exemption parallel to that in the FHA.

A slightly broader exemption might blunt landlord opposition. It would also deprive ideologically-driven entities like the Pacific Legal Foundation of sympathetic plaintiffs—"mom-and-pop landlords," as their counsel called them—like the Yims.<sup>298</sup> A broader exemption might also make it less likely that small landlords, those most likely to take their property off the market because it is a secondary source of income, would frustrate the purpose of the laws by contracting the supply of housing. Finally, small landlords are less likely to follow standard operating procedures in selecting tenants and are less likely to have written or even conscious rental criteria. Thus, the ordinances impose more of a burden on small landlords than on their large competitors.

Admittedly, expanding the exemption for small landlords could have the unintended consequence of sanctioning their discrimination against formerly incarcerated people. Placed outside the reach of first-in-time requirements, those landlords would also avoid confronting the implicit biases that may lead them to exclude applicants of color. But that trade-off is prudent, at least until cities gain further experience with the fair chance measures and all landlords have time to adjust their practices to comply with the law.

### *B. Ensure Robust, Affirmative Fair Housing Enforcement*

It is conceivable that the fair chance housing legislation could have even more profound unintended consequences—that race will become a proxy for criminal history, as landlords seek to evade the restrictions on exclusion of former offenders. While it is well established that "prior criminal history has become a proxy for race,"<sup>299</sup> the fair chance ordinances threaten to invert that equation. If that happens, the ordinances could prove

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<sup>297</sup> 42 U.S.C. § 3603(b)(2). It should be noted, however, that the exemption does not extend to the prohibition of discriminatory advertising contained in section 3604(c). Moreover, there have been calls to eliminate the FHA's exemption. *See generally* James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.C.L. L. REV. 605 (1999).

<sup>298</sup> Blevins, *Landlord Rights Trammelled*, *supra* note 181.

<sup>299</sup> Harcourt, "Risk as a Proxy," at 237. Harcourt points out that race was expressly used as a factor in assessing risk in parole decisions up until the 1960s. *Id.* at 238–39. *See also* KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (Harv. Univ. Press, 2019).

counterproductive, adversely affecting home-seekers of color given the racial disproportionality of incarceration.

This problem has been extensively studied in relation to the ban the box in employment ordinances. Empirical research suggests that the laws may deepen discrimination against people of color as employers simply assume they have a criminal record in the absence of information on application forms. A consistent finding in the econometric literature is of statistical discrimination—in this context, employers faced with imperfect information when making decisions will infer risk factors, specifically criminal history, from the race of applicants. A 2016 study using fictitious online applications that varied both the race and the criminal history of the job applicants provides evidence of this dynamic. Before ban the box laws went into effect in New Jersey and New York City, white applicants were 7 percent more likely to be called back than were Black applicants; after the laws took effect, white applicants were 45 percent more likely to be called back.<sup>300</sup> A later study compared employment of African American and Hispanic men in jurisdictions covered by ban the box laws with those in non-covered jurisdictions before and after the laws went into effect and found that young, low-skilled African American men were 3.4 percent less likely to be employed after the laws went into effect and Hispanic men 2.3 percent less likely.<sup>301</sup> Most studies of ban the box laws find similar negative effects<sup>302</sup> although there is some contrary evidence concerning public employment.<sup>303</sup>

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<sup>300</sup> Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, in L. & ECON. RSCH. PAPER SERIES, U. OF MICH L. SCH. 2016 (Paper No. 16-012), at 4.

<sup>301</sup> Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of ‘Ban the Box’: Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 321, 321–374, (2017).

<sup>302</sup> See Ashley Hirashima, *Ban the Box: The Effects of Criminal Background Information on Labor Market Outcomes* (U. Haw. Manoa, Dept. Econ., Working Paper No. 201606, 2016) (finding that a ban-the-box policy resulted in negative effects on labor market outcomes for individuals); Osborne Jackson & Bo Zhao, *The Effect of Changing Employers’ Access to Criminal Histories on Ex-Offenders’ Labor Market Outcomes: Evidence from 2010-2012 Massachusetts CORI Reform* (Fed. Res. Bank Bos., Working Papers No. 16-30), <https://www.bostonfed.org/publications/research-department-working-paper/2016/the-effect-of-changing-employers-access-to-criminal-histories-on-ex-offenders-labor-market-outcomes.aspx> [<https://perma.cc/45EV-7QMJ>] (describing how the implementation of a ban-the-box policy resulted in lower employment rate of individuals with a criminal record); Evan K. Rose, *Does Banning the Box Help Ex-Offenders Get Jobs? Evaluating the Effects of a Prominent Example*, 39 J. LAB. ECON. 79, 111 (2021) (reporting that the implementation of a ban-the-box measure in Seattle did not positively impact the employment rates of individuals with criminal records).

<sup>303</sup> Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 ECON. INQUIRY 425, 442 (2020) (finding that ban the box policies increased the chance of obtaining employment for applicants of color with criminal history by 30 percent).

The analysis of the ban the box laws suggests that unintended consequences may likewise follow from the housing measures. Far less empirical research has focused on the fair chance housing ordinances. But an initial study provides some promising evidence. Conducted by sociologist Anna Reosti, whose research contributed to advocacy on behalf of the Seattle measures, a 2018 study evaluated the city's first-in-time and fair chance housing ordinances.<sup>304</sup> Fictitious applications, some disclosing criminal history and prior evictions and others making no such disclosures, were sent to 1,800 landlords in five metropolitan areas, with name used as a proxy for race.<sup>305</sup> Reosti examined whether there was a statistically significant difference in landlord reply rates to emails that did *not* disclose a conviction.<sup>306</sup> Surprisingly, she found that there was a statistically significant difference in reply rates by race in only one category: among male testers in Seattle. And even more surprisingly, she found that the rate of response for Black male testers was 143% of that of white male testers in that category.<sup>307</sup> The results suggest housing initiatives "might not trigger the kinds of unintended consequences that studies in the employment setting have revealed," Reosti concludes.<sup>308</sup> But she also acknowledges the limits of her study's examination of landlords' initial responses to inquiries and not their ultimate rental decisions, as well as the fact that the study was conducted before enforcement of Seattle's fair chance ordinance began. She also allows that public attention associated with the reforms may explain the surprising results as landlords may have been particularly sensitive to perceived racial discrimination.<sup>309</sup>

Further grounds for caution about these preliminary empirical findings are contained in Reosti's own survey research. Her interviews suggest that in addition to the risk of prompting statistical discrimination, the fair chance ordinances' requirement of individualized assessment rather than application of categorical rules may allow greater operation of implicit bias. As one rental housing industry lobbyist explained, "since the Fair Housing Act we've been hammering into our members' heads: there is no gut-judgment call, there are ascertainable standards, right?"<sup>310</sup> But the fair chance legislation compels a departure from such clear, exclusionary standards. The lobbyist imagined a hypothetical situation, where a tenants' rights advocate says to a landlord who seeks to review criminal records:

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<sup>304</sup> Reosti, *Tenant Screening and Fair Housing*, *supra* note 57, at 1, 7–8.

<sup>305</sup> *Id.* at iii–iv, 3, 101, 142.

<sup>306</sup> *Id.* at 97.

<sup>307</sup> *Id.* at 113.

<sup>308</sup> *Id.*, 122.

<sup>309</sup> *Id.* at 121, 133.

<sup>310</sup> *Id.* at 24.

[W]e also want you to, you know if there's a letter from a social worker, and yadda yadda yadda, well then I want you to take a risk.' And I'm like, great, but . . . what's to say that my landlord is making a judgment call from the gut—how do we know that isn't a prejudicial judgment call?<sup>311</sup>

The very individualized consideration that is the aim of fair chance ordinances, the lobbyist claimed, places landlords “into a fair housing paradox.”<sup>312</sup>

Advocates for formerly incarcerated people recognize that fair chance and first-in-time provisions are not alone sufficient to address systemic racism.<sup>313</sup> For that reason, fair chance housing measures should not only be coupled with first-in-time rules as in Seattle, but also with vigorous enforcement of fair housing laws. Seattle's City Council recognized that imperative when it adopted the fair chance housing measure. The measure not only followed the first-in-time rule—establishing an objective standard for landlords' choice among qualified tenants—it also mandates “regular fair housing testing” and a “Fair Housing Home Program” involving training of landlords and the issuance of a certificate to those that complete the program.<sup>314</sup> Such robust and proactive enforcement of fair housing laws is needed so fair chance laws do not lead to unintended, adverse, and discriminatory consequences.

### *C. Increase the Supply of Low-Income Housing*

When the Seattle City Council approved the fair chance ordinance, on August 14, 2017, sponsors of the measure explained that the city was in “a homelessness state of emergency.”<sup>315</sup> The experience of Adrian Laster illustrates the limits of prison reentry policy that curbs landlord discrimination without expanding transitional and low-income housing. When Laster was released from prison, he lived on the streets, and then found

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<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> As Dorsey Nunn of All of Us or None, a movement to restore rights to formerly incarcerated people, says about ban the box in employment, “Ban the Box is not the problem; implicit bias and racism in hiring practices are the problems . . . No policy can completely fix America's or Americans' deeply ingrained, fundamental racism.” Christina Stacy, *Policy Debates: How Can We Improve Ban the Box Policies?*, URBAN INST., <https://www.urban.org/debates/how-can-we-improve-ban-box-policies> [https://perma.cc/W33B-WZ67].

<sup>314</sup> Seattle, Wash., Ordinance 125393, § 1, A (2017).

<sup>315</sup> *Seattle City Council Committee Approves Fair Chance Housing Legislation*, SEATTLE MEDIUM, Aug. 9, 2017, <https://seattlemedium.com/seattle-city-council-committee-approves-fair-chance-housing-legislation/>, [https://perma.cc/93UX-UK3L]; City of Seattle, Human Service Department, *Homeless State of Emergency Implementation Plan 6* (Feb. 1, 2016)..

shelter in a city-approved homeless encampment, Othello Village. Built on a plot of land in the south of Seattle, on Martin Luther King Junior Way, Othello Village provides small wooden huts and tents for people who are experiencing homelessness. Laster lived at the encampment while waiting for a Section 8 voucher, and he stayed there when he could not secure an affordable housing unit and after his voucher expired. “It doesn’t make sense to get a voucher and not get a place,” Laster said. “They could’ve put me somewhere.”<sup>316</sup>

Laster’s experience—his inability to find a rental and use a Section 8 voucher—reflects the crisis in the city’s housing market, which extends beyond the impact of discrimination against ex-offenders. In a 2017 Seattle low-income housing lottery, more than 2,000 people applied for 109 units.<sup>317</sup> A city-mandated report on the effectiveness of the first-in-time ordinance completed by a University of Washington team in 2018 found that tenants cited cost as the biggest barrier to obtaining and maintaining stable housing.<sup>318</sup> Tenant focus group discussions highlighted different elements of the “affordability crisis”—neighborhood gentrification, the steep rise in rents, scarcity in affordable housing stock, and the added burden of application fees.<sup>319</sup> The research indicated the new ordinances could actually worsen the affordability crises. In interviews, landlords suggested the measures may cause them to shift to “provision of more expensive housing or short-term rentals (*e.g.*, through Airbnb).”<sup>320</sup> The study found that some landlords and property managers had “plans to raise their credit and income related rental criteria or stop publicly advertising vacancies in order to circumvent Seattle’s ‘First-in-Time’ and ‘Ban-the-Box’ laws and maintain

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<sup>316</sup> Kelsey Hamlin, *Seattle Could Be First in the Nation to Stop Rental Criminal History Discrimination*, S. SEATTLE EMERALD, August 10, 2017, <https://southseattleemerald.com/2017/08/10/seattle-could-be-first-in-the-nation-to-stop-rental-criminal-history-discrimination/>, [https://perma.cc/7LQ3-MM6R]; Aaronl2015, *Othello Village Tent City Opens*, LOW INCOME HOUS. INST., Mar. 8, 2016, <https://lihi.org/2016/03/0f8/othello-village-tent-city-opens/>, [https://perma.cc/H2KW-2L7K]; Sean Keeley, *Othello Village Tiny Homes Are Now Open for Homeless Residents*, CURBED SEATTLE, Mar. 10, 2016, <https://seattle.curbed.com/2016/3/10/11193736/othello-village-tiny-homes-are-now-open-for-homeless-residents> [https://perma.cc/67A9-KX4D].

<sup>317</sup> Danny Westneat, *Seattle’s Teeny Response to Tiny Houses for the Homeless*, SEATTLE TIMES, Feb. 14, 2017, <https://www.seattletimes.com/seattle-news/politics/seattles-teeny-response-to-tiny-houses-for-the-homeless/>, [https://perma.cc/Z6HE-RNZH]; Kelsey Hamlin, *Othello Residents Concerned With Seattle’s Shift Away from Transitional Housing*, SOUTH SEATTLE EMERALD, June 28, 2017, <https://southseattleemerald.com/2017/06/28/othello-residents-concerned-with-seattles-shift-away-from-transitional-housing/> [https://perma.cc/YU9U-5HVS]; Seattle Housing Authority, *Housing Choice Voucher Waitlist*, <https://www.seattlehousing.org/waitlist>, [https://perma.cc/7UHW-AMCR].

<sup>318</sup> Crowder, *Seattle Rental Housing Study*, *supra* note 191, at 1, 5.

<sup>319</sup> *Id.* at 5-6.

<sup>320</sup> *Id.* at 11-12.

the ‘quality’ of their application pools.”<sup>321</sup> These factors make clear that the fair chance ordinances may give only formal protection to people with a criminal history. More action is needed.

It is critical that fair chance and first-in-time measures are paired with government policies that increase the supply of low-income housing and wrap-around services for reentering people. While a full description of these needed policies is beyond the scope of this article,<sup>322</sup> city and state governments should increase investment in transitional and supportive housing and create incentives for private housing developers to create low-income housing.<sup>323</sup> Further, cities and states should fund additional rental assistance and better target limited federal funds to supportive housing. State policymakers should allocate more federal Low Income Housing Tax Credit and National Housing Trust Fund dollars for construction and rehabilitation of supportive housing.<sup>324</sup> Finally, more localities should adopt and expand the geographic scope of mandatory inclusionary housing ordinances.<sup>325</sup> In sum, eliminating discrimination alone will have little impact if formerly incarcerated people cannot afford rental units or face other challenges that make obtaining and retaining stable housing difficult.

## CONCLUSION

Among the final arguments made in Congress on behalf of the FHA was a metaphorical one—that access to housing was like escape from prison, a “ghetto-prison.”<sup>326</sup> The ghetto incarcerated Black people it was said; but a right to open housing—“a better home”—would afford entry to a life of

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<sup>321</sup> *Id.* at 21-22, 40-41.

<sup>322</sup> For a more comprehensive description of state and local policies that will expand affordable rental housing, *see generally* INGRID GOULD ELLEN, JEFFREY LUBELL, AND MARK W. WILLIS, LINCOLN INST. LAND POL’Y, *THROUGH THE ROOF: WHAT COMMUNITIES CAN DO ABOUT THE HIGH COST OF RENTAL HOUSING IN AMERICA* (2021), at 25-46.

<sup>323</sup> Reentry and Housing Coalition, *Housing Options for Reentry*, <http://www.reentryandhousing.org/private-housing#supportive>, [https://perma.cc/DYU8-EJED].

<sup>324</sup> EHREN DOHLER, PEGGY BAILEY, DOUGLAS RICE, AND HANNAH KATCH, CTR. ON BUDGET AND POL’Y PRIORITIES, *SUPPORTIVE HOUSING HELPS VULNERABLE PEOPLE LIVE AND THRIVE IN THE COMMUNITY*, May 31, 2016, <https://www.cbpp.org/research/housing/supportive-housing-helps-vulnerable-people-live-and-thrive-in-the-community>, [https://perma.cc/HC7G-7ZYD].

<sup>325</sup> Mandatory inclusionary housing policies require developers to set aside a fraction of their new or renovated units as affordable. *See* Abigail Savitch-Lew, *Everything You Need to Know about Mandatory Inclusionary Housing but Were Afraid to Ask*, CITYLIMITS, Nov. 17, 2016, <https://citylimits.org/2016/11/17/everything-you-need-to-know-about-mandatory-inclusionary-housing-but-were-afraid-to-ask/>, [https://perma.cc/X8XD-NQ2X].

<sup>326</sup> Statement of Rep. William McCulloch, Hearings Before the Committee on Rules, House of Representatives, 91<sup>st</sup> Cong., 2d Sess. Pt. 2, p. 87 (April 4, 5, 8 and 9, 1969).

dignity and opportunity.<sup>327</sup> Nothing less than “a writ of habeas corpus for a whole people” could be envisioned in the anti-discrimination legislation:

On passage of the bill, Congress would thereby decree that society has no right, no authority to imprison a man in a ghetto, because of his color. A door would be opened. The prisoner would be free to leave, yes, free to flee the ghetto. Of course, the bill would not buy for the prisoner a fine home in the suburbs. But it would offer the prisoner the hope that if he tried to climb the economic ladder, society would not forever be stamping on his hands. If that could be done, it would eliminate the posts and cross-beams of despair on which the ghetto-prison is built.<sup>328</sup>

Grim irony lies in the fact that the FHA did not contemplate reentry of formerly incarcerated people. On the contrary, it appeared inconceivable that ex-offenders, though disproportionately people of color, would enjoy the protections of the legislation. Today, the problem of homelessness caused by discrimination against people with a criminal history still falls outside the express purview of federal civil rights law. Yet, as this article demonstrates, pernicious bias in the housing market—the exclusion of former offenders from rental housing—is a racially disparate harm.

In breaking the cycle of homelessness and mass incarceration, local governments have proven to be incubators of civil rights innovation. Local fair chance housing ordinances stand at the cutting edge of criminal justice and housing reform, promoting prisoner reentry by striking at homelessness, recidivism, and systemic racism. The Seattle legislation represents a particularly promising model in recognizing people with a criminal history as a class protected from housing discrimination and attacking implicit bias through a first-in-time requirement. The efficacy of the policy remains to be tested through rigorous empirical analysis. As the Washington State Supreme Court noted in upholding Seattle’s first-in-time rule, “There is room for substantial debate about whether such an experiment is likely to succeed.”<sup>329</sup> As cities proceed with such experimentation, this article has suggested, fair chance housing legislation should be paired with heightened enforcement of anti-discrimination laws to prevent the use of race as a proxy for criminal history and with measures to increase the supply of private and public low-income housing, while also including an exemption for certain rental properties parallel to that in the FHA. Absent fair chance housing protections, owners of rental property will remain free to exclude people with

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Yim*, 451 P.3d at 694 (Wash. 2019).



criminal records, inhibiting the reentry of prisoners into society and rendering the costs of their homelessness solely a public responsibility.

