Criminal Legal Records: An Impediment to Housing Choice

By Britny J. McKenzie and Evan Dash

June, 2023
About the Fair Housing Justice Center

The Fair Housing Justice Center (FHJC), a regional civil rights organization based in New York City, is dedicated to eliminating housing discrimination, promoting open, accessible, and inclusive communities, and strengthening the enforcement of fair housing laws.

ACKNOWLEDGMENTS

The authors are responsible for the content of this policy paper. The Fair Housing Justice Center (FHJC) publishes policy papers to stimulate discussion and encourage meaningful action to address vital fair housing issues.
Criminal Legal Records: An Impediment to Housing Choice

According to the Brennan Center for Justice, over 2.3 million New Yorkers have a criminal record.¹ Individuals across New York State and the nation have experienced discrimination in the rental market during a housing crisis, resulting in widespread housing instability. Denying access to people with arrest and conviction records poses a stumbling block to successful re-entry into their communities. It creates a vicious cycle of homelessness, heightens family instability, and increases the chance of recidivism. Stable housing is integral to a holistic approach to re-entry; all daily necessities for personal well-being, including health, hygiene, food storage, and sleep, require access to a reliable home. Over 10 million children in the United States have parents who were imprisoned.² If the current barriers to housing persist, formerly incarcerated people and their families will continue to face housing insecurity and homelessness, thus reinforcing the vicious cycle of instability. Current laws and lack of robust protections against criminal legal history discrimination harm families by impeding housing access.

According to the Fortune Society, a New York City-based re-entry service provider and advocacy organization, "a tenant's prior arrests or criminal convictions do not negatively impact their likelihood to pay rent or ability to be a good neighbor or decrease the safety of the building or the community at large."³

Previously incarcerated people have served their sentences. Why should they continue to face barriers because of their past? Everyone deserves a fair chance at housing, including those with a history of criminal legal system interaction.

Federal, New York State, and New York City laws contain few limitations regarding housing provider's use of criminal records in applicant screenings. As a result, people with criminal records face substantial discriminatory barriers to finding housing. Currently pending legislation in New York State (S3251/A4959) and City (Int. 0632-2023) aims to eliminate discrimination based on criminal legal system involvement.

Intersection of Race and the Criminal Legal System

The United States has the most extensive carceral system in the world, encompassing federal, state, local facilities, and tribal centers. National data show that the United States incarcerates people at significant rates: annually, 600,000 people enter prison, and 10 million spend time in jail.⁴

The racism embedded in the U.S. criminal legal system is well-documented and undeniable. Following the Emancipation Proclamation, white racists exploited a loophole in the 13th Amendment, which essentially legalized the enslavement of a person convicted of a crime. As a result, southern legislators hastened to enact laws, such as the Black Codes, that targeted Black individuals and placed them back into a legalized labor force through imprisonment. Ultimately, historic legislation and penal codes were enacted, thus intertwining race and criminality.

¹ The Brennan Center for Justice, “The Clean Slate Act Can Build a More Prosperous New York”
² EVERY DOOR CLOSED: FACTS ABOUT PARENTS WITH CRIMINAL RECORDS
⁴ Mass Incarceration: The Whole Pie 2022
Today, although only fifteen percent of New York State residents are Black, they comprise 43% of the jail population and 48% of the prison population. Black and Latino people are also more likely to experience harsher punishments and sentences compared to white individuals. This long history of societal racism has caused race and the criminal legal system to become inextricably woven together: this consistent entanglement must be addressed by legislators and policymakers now.

Federal Protections Against Discrimination

The federal Fair Housing Act prohibits discrimination based on race and national origin. Ensuring that racially marginalized groups have fair access to adequate housing is one step towards achieving racial equity and enforcing fair housing laws. The U.S. Department of Housing and Urban Development (HUD) provides extensive guidance regarding criminal background checks in real estate transactions and tenant screenings. Notably, HUD makes clear that discriminatory effects of a neutral policy can result in a disparate impact on people with protected characteristics. Systemic racism is ingrained in all stages of the criminal legal system, and racial disparities are present from policing to sentencing all the way to reentry. The policies and practices of the judicial system involve adverse treatment based on protected characteristics, which is evident in outcomes such as the high rates of homelessness seen in formerly incarcerated people who identify as women, Black and/or Latino. Therefore, blanket bans and discriminatory policies based on criminal legal history are likely to violate the Fair Housing Act.

HUD guidelines affirm the idea that criminal history does not predict tenant success. A study of housing outcomes also found that the behavior of tenants with a criminal record was no different from tenants without a criminal history. No empirical evidence exists to justify barring these individuals from housing prospects. It is harmful for communities to rely on stereotypes that reinforce destructive narratives. Efforts to reform the local criminal legal system do not lead to increased crimes. Following the announcement of HUD’s action plan to remove unnecessary barriers to housing for people with criminal records, Secretary Marcia L. Fudge stated “...research shows that providing safe and affordable housing and supportive services so that people succeed during reentry makes our communities stronger and safer...” The action plan includes reforming HUD regulations that govern public housing agencies and HUD-subsidized housing providers to prevent unnecessary denials of housing assistance to people with criminal history records.

Fair housing laws were enacted to ensure that all people have access to housing without discrimination based on protected characteristics and to address unjust and arbitrary treatment. When housing providers deny an applicant based on criminal legal involvement, it creates

---

5. The Vera Institute of Justice, “Incarceration Trends in New York”
6. “Demographic Differences in Sentencing”
7. Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions
8. Visualizing the racial disparities in mass incarceration
9. Formerly incarcerated people have very high rates of homelessness, especially women and people of color
11. Tenant Screening with Criminal Background Checks: Predictions And Perceptions Are Not Causality
12. We Can Reduce Jail Populations and Keep Communities Safe (April 5, 2023)
13. HUD Outlines its Action Plan to Remove Unnecessary Barriers to Housing for People with Criminal Records
inconsistent access for people of color. To exclude prospective tenants with criminal histories from the market denies them a fair prospect at housing.

**Recent Developments Across the States**

In the last decade, some states, cities, and localities have enacted successful fair chance laws that prevent discrimination based on criminal legal system history. Federal housing officials paved the pathway in 2016 by asserting that "private landlords who have blanket bans on renting to people with criminal records are violating the Fair Housing Act and can be sued and face penalties for discrimination." As examples, Richmond, Seattle, Cook County (Chicago), Portland, and New Jersey, have recognized the need for protection. Below are some of the actions taken across the nation:

- In December 2016, Richmond passed a fair chance housing ordinance that prohibited any existing or new affordable housing development from denying an applicant based on criminal history.  

- In August 2017, Seattle became the first city to "prevent landlords from unfairly denying housing applications based on criminal history." Seattle City Council member Kshama Sawant stated, "there is an overwhelming amount of data, not only from Seattle but nationwide, that shows that the obstacle to finding housing is one of the key barriers to reducing recidivism."

- In April 2019, Cook County, Illinois, which includes Chicago, enacted the Just Housing Amendment. This amendment "prohibits housing discrimination based on an individual's covered criminal history and requires landlords considering an individual's covered criminal history to perform an individualized assessment of an otherwise qualified individual's criminal conviction history prior to denying them any application for housing."

- In March 2020, Portland passed the “FAIR Ordinance.” The ordinance outlines seven criteria for landlords to use when checking criminal records for applications. The ordinance additionally requires landlords to provide written notice of the denial.

- In June 2021, New Jersey enacted the Fair Chance in Housing Act, which ensures that housing providers cannot ask for an applicant's criminal record before making a conditional offer. The reasons for enacting this policy included the "tragically high 36-month recidivism rate over 30%."

---

15 [Fair Chance Access to Affordable Housing Ordinance](Fair Chance Access to Affordable Housing Ordinance)
16 [Just Housing Amendment to the Human Rights Ordinance | Cook County](Just Housing Amendment to the Human Rights Ordinance | Cook County)
17 [Portland landlord-tenant law](Portland landlord-tenant law)
18 [NJ Legislature (state.nj.us)](NJ Legislature (state.nj.us))
New York State Protections Against Discrimination

While New York takes great pride in being a diverse and progressive state, many New Yorkers can attest to its major housing crisis, growing homeless population, and history of unjust policies and practices. Housing discrimination protections in New York State exist only to safeguard individuals with an "Arrest Record resolved in [their] favor, an adjournment in contemplation of dismissal, a sealed conviction record, or a youthful offender adjudication." In state-funded housing, two federal blanket bans exist: "(1) Conviction for methamphetamine production in the home and (2) being a lifetime registrant on a state or federal sex offender database."

The New York State Human Rights Law exempts the following: (1) pending or resolved arrest, (2) convictions committed before 18 years old, (3) misdemeanor convictions over one year old, (4) felony convictions five years old, (5) convictions resulting in incarceration/parole supervision, from which you were released more than 1 year ago, (6) convictions that did not involve physical violence or danger to persons or property, or did not affect the health, safety, and welfare of others, (7) convictions for which an individual has received a Certificate of Good Conduct or Certificate of Relief from Disabilities that is permanent and covers housing, (8) Youthful offender adjudications, (9) convictions for violations sealed pursuant to Section 160.55 of New York State Criminal Procedure Law, (10) convictions sealed pursuant to Section 160.58 or 160.59 of New York State Criminal Procedure Law, and (11) convictions that were excused by pardon, overturned on appeal, or vacated. These existing protections are not enough to protect the thousands of other people with convictions who have successfully served their sentences.

Senator Gustavo Rivera and Assemblymember Kenny Burgos introduced bills S6895A/A7053A which require public housing providers to not discriminate against or evict any individual due to prior incarceration. This bill successfully passed both houses and was signed into law on December 23, 2022. However, New Yorkers in the private market are still not covered.

On January 30, 2023, Senator Julia Salazar and Assemblymember Michelle Solages introduced the “Housing for an Equitable Reentry and Opportunity” Act, also known as the HERO Act (S3251/A4959). The HERO Act would prohibit housing discrimination based on criminal legal system involvement, defined broadly to include conviction, arrest, charge, citation, participation in a diversion program, and a record of an offense that has been sealed, expunged, vacated, or pardoned, and youthful offender adjudications or juvenile delinquency determinations.

---

19 [At the root of NYC's housing crisis, a decades-long problem of supply not meeting demand](https://www.nydailynews.com/nydailynews/article/10008726)
21 [Governor Hochul Signs Legislative Package to Combat Housing Discrimination](https://www.governor.ny.gov/news/governor-hochul-signs-legislative-package-combat-housing-discrimination)
22 [NYSDHR Fair Housing Guide 2021](https://www.humanrights.ny.gov/fair-housing)
25 [Senate Bill S6895A/A7053A (nysenate.gov)](https://www.nysenate.gov/bills/s6895a)
26 [Senate Bill S3251](https://www.nysenate.gov/bills/s3251)
New York City Protections Against Discrimination

In New York City, there are few protections for people with criminal legal system involvement in housing. In response to a federal lawsuit filed by the Legal Aid Society, based on testing by the Fair Housing Justice Center, in May 2022, New York City enacted changes to its policy regarding criminal background checks in city-funded housing developments.27 Previously, NYC policy required all developers participating in its subsidy and loan programs to run criminal background checks on applicants. With few rules in place for applying such background checks, some buildings enforced arbitrary, extreme, and discriminatory criminal record admission policies, such as rejecting any applicants for housing who had an offense in the past ten years. One applicant, Ms. L. Smith, was denied an apartment in a city-funded development because of a ten-year-old felony, despite her exemplary post-conviction record of employment and community volunteer work. Her lawsuit alleged that these policies constituted unlawful discrimination and had a disparate impact on Black and Latino applicants. Consequently, New York City made policy changes prohibiting its Housing Preservation and Development and Housing Development Cooperation-funded housing providers from rejecting applicants due to felony records older than five years or misdemeanor convictions older than one year.28 This change only occurred as a result of time-constraining, costly litigation.

Advocates and legislators are pushing for the passage of 0632, a bill that would ban the use of criminal background checks and inquiries into arrest or conviction records.29 The legislation was mentioned in the Mayor’s 2022 housing blueprint, in which the administration indicates it will “work with partners in the City Council to pass local legislation creating new anti-discrimination protections for New Yorkers with criminal justice histories.” Additionally, New York City has acknowledged this effort to pass fair chance legislation in its fair housing analysis progress report released in March 2023.30

Countless individuals and families await the enactment of this bill, as there are currently no city protections against this egregious discrimination.

Proposed Solutions

New Yorkers and their families need equitable access to housing. We cannot have racial justice without fair housing justice. Fair chance policies will allow for greater protections and access for all. Recidivism and homelessness are significant crises that need to be addressed. A staggering "80% of New York City residents with a conviction are Black and Latinx."31 Fair housing investigations regularly reveal that the denial of housing based on conviction records is often a proxy for denying people based on race and national origin. Researchers and advocates have regularly stated that local communities should consider alternative options besides incarceration to address safety concerns. Claims that criminal legal system reforms jeopardize community safety disregard research and pointlessly endanger the lives of those with criminal legal histories.

---

27 Opening Acts: June 2, 2021 - Fair Housing Justice Center
28 marketing-handbook-8-21.pdf (nyc.gov)
29 https://www.fairchancehousing.org/
30 Housing Our Neighbors: A blueprint for housing and homelessness. Pg 54
31 FAQs — Fair Chance for Housing (fairchancehousing.org)
and their families. A person’s criminal legal history is not a valid indicator of whether they will be a good tenant. Additionally, research demonstrates that housing instability increases the risk of criminal legal involvement, while open access to housing choice reduces recidivism.

Without access to a home, how can one truly become a well and fully functional person? How can families impacted by the legal system achieve stability if they cannot settle into a home?

There is a multi-pronged approach to addressing the barrier of housing discrimination against people who have interacted with the criminal legal system. The Fair Housing Justice Center recommends the following steps that advocates, housing developers and providers, policymakers, and decision-makers can take to create a more equitable housing market for New Yorkers with criminal records:

- Pass state bill S3251/A4959 the “Housing for an Equitable Reentry and Opportunity” Act and City Int. 0632 the “Fair Chance for Housing” Act
- Pass state bill S.7551-A/A.1029-C the “Clean Slate” Act
- Increase enforcement of fair housing laws relating to criminal legal system involvement
- Build a record of case law and settlement agreements
- Fund qualified fair housing organizations and experienced groups to uncover discrimination based on criminal record
- Increase public awareness through education campaigns
- Identify housing providers who will commit to housing people returning from incarceration and influence their peers and networks to follow suit
- Inform and educate those impacted by the carceral system and the public

### Conclusion

Criminal records pose lifetime barriers, especially in the search for housing, where background checks are prevalent, and landlords have nearly unfettered discretion. New York State and New York City lack policy solutions to support people obtaining a fair chance at housing. Other states and cities are implementing policies and laws to eliminate discrimination based on criminal records. Housing provides the foundation for people to maintain employment, care for their families, and contribute to communities. Our communities and economy are safer and healthier when we ensure everyone can access housing. Passing NYS bill S3251/A4959 and NYC Int. 0632-2023 legislation will allow for greater enforcement of the federal guidelines against a blanket ban on people with a history of criminal legal system interaction. What is New York waiting for?

---

32 [We Can Reduce Jail Populations and Keep Communities Safe (April 5, 2023)](https://example.com)
33 [The Effect of Housing Circumstances on Recidivism: Evidence From a Sample of People on Probation in San Francisco - PubMed (nih.gov)](https://example.com)
About the Authors

Britny J. McKenzie, MSW, serves as the FHJC’s Policy Manager. Britny is responsible for the development and execution of policy-related activities, programs, research, and communications that advance the FHJC’s mission and vision. She joined the FHJC in 2019 after working on advancing racial equity on Long Island in education and housing at ERASE Racism. Britny has a Master’s in Social Work from the Silberman School of Social Work at Hunter College, specializing in community organizing, planning and development, public policy, and aging. Britny holds an undergraduate degree in Psychology with a minor in sociology from Molloy University. She is deeply passionate about the impact of social injustice in areas such as housing, education, and healthcare.

Evan Dash serves as part of the FHJC’s Investigative Coordinator team. Evan conducts research and leads and structures housing discrimination investigations. Before joining the FHJC in 2022, he spent two years at the Center for Urban Studies at the University at Buffalo, where he was a project assistant focusing on Geographic Information Systems analyses of underdeveloped and segregated communities. Evan has also worked as a fair housing tester at Housing Opportunities Made Equal. He holds a Master of Urban Planning degree from the University at Buffalo and a bachelor’s degree from the State University of New York at Geneseo, where he majored in geography and minored in urban studies and political science.