Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies

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Table of Contents

Cases

Statutes

Other Authorities

Beverly G. Burke, Elton C. Smith, & Laurence J. O'Toole Jr., *Selection of Public Housing Tenants: On the Feasibility of Using an Objective Screening Procedure*, Journal of Applied Social Psychology (1986) 29

Community Training and Resource Center and City Wide Task Force on Housing Court *Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel* (1993) 13

Corinne Carey, *No Second Chance: People With Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545 (2005) 30

Erik Eckholm, *A Sight All Too Familiar in Poor Neighborhoods*, New York Times, February 18, 2010 ..... …13

EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (1982), Sept. 7, 1990 28

EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987) 28

EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987). 24, 27

Jeffrey S. Gutman, ed., *Federal Practice Manual for Legal Aid Attorney* (2006) 17

Maurice Emsellem and Kerry O'Brien, *Criminal Background Checks: A Growing Problem for All Union Members, Not Just Those With a Criminal Record*, National Employment Law Project, 2006 12

Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 Housing Pol'y Debate, 461 (2003) 13

Jessica S. Henry, *Criminal History on a "Need to Know" Basis: Employment Policies that Eliminate the Criminal History on Employment* Applications, Justice Policy Journal, Vol. 5, No. 2 (Fall 2008) ….21

Rudy Kleysteuber, *Tenant-screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344 (2007) 13

Megan C. Kurlychek, Criminology and Public Policy, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*?, Vol. 5 No. 3 (2006) 31

Daniel K. Malone, *Accessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, Psychiatric Services, Vol. 60, No. 2 (2009) 30

Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MIJRL 181 (2009) 12

Lynn Peterson, *Not All Criminal Records Checks are Created Equal*, March 2, 2005 12

Ely Portillo, *Jury Finds Housing Authority Negligent,* Charlotte Observer, February 10, 2010 30

I. Overview

This guide addresses whether the use of criminal or eviction records by landlords and tenant screening companies constitutes a form of unlawful discrimination under federal and Washington state fair housing laws, and specifically how a *disparate impact* case could be made under these laws.[1] What follows is a practice manual—laying out the foundation for a disparate impact claim —with the aim of providing the fair housing practitioner with a set of basic tools necessary to make this claim. The focus is primarily on the Fair Housing Act (also known as Title VIII of the Civil Rights Act), as amended, 42 U.S.C. 3601. Included is some basic guidance under the Washington Law Against Discrimination, RCW 49.60. We wrote the guide for attorneys, but it may be useful to other advocates.

A. Introduction

1. The Tenant Screening Process

"Tenant screening" is the process by which landlords accept, process and review rental applications to determine whether to offer a residential property to an applicant for rent. Landlords commonly screen tenants by charging the applicant a fee to obtain a report about the applicant's background (which often includes credit information, check of sex offender registries, an eviction report and criminal history).[2] While landlords can obtain this information themselves, they increasingly employ the services of "tenant screening" companies to obtain this information and produce reports for them.

Some of the reports generated by tenant screening companies include only the data itself, (e.g., the criminal record or eviction court file) while others also provide "scores," "approvals," or "recommendations," based upon the data obtained. *See Evans v. UDR Inc.*, 644 F.Supp. 2d 675, 677 (E.D.N.C. 2009) (tenant screener recommended denial of application based on applicant's 2002 arrest and conviction). Landlords often have their own policies to deny applications based on a criminal or eviction record, regardless of such a recommendation. *Id.* at 678 n.6.

While the reporting and use of criminal and eviction history as part of the tenant screening process is commonplace today, this practice may be unlawful under fair housing law because of its disparate impact on certain protected classes. When criminal records are used as part of the tenant screening process, the disparate impact predominately affects African Americans and Latinos/Latinas. Eviction records may also have a disparate impact on women.

2. Criminal Records

[1] This Guide does not address specific tenant screening issues that arise in the subsidized housing context. The National Housing Law Project has a reentry resource center on its website, http://nhlp.org/resourcecenter?tid=86, that provides helpful materials. *See* Catherine Bishop, *An Affordable Home on Reentry, Federally Assisted Housing and Previously Incarcerated Individuals*, National Housing Law Project (2008).

[2] The Fair Credit Reporting Act (FRCA) regulates consumer reporting agencies such as tenant screening companies. *See* 15 U.S.C §§ 1681-1681x. The National Consumer Law Center's reference book, *Fair Credit Reporting*, provides an in depth discussion regarding a tenant's rights under FRCA, including the right to a copy of the tenant screening report, disputing information in the report and the permissible uses of the report. Your state may also have its own version of FRCA with different protections or your state's residential landlord tenant law may have additional requirements. *See* RCW 19.182; RCW 59.18.257.

Both landlords and tenant screening companies obtain criminal records from a myriad of sources.[3] A traditional criminal background search can be conducted in person at individual courthouses across the country. The more than 10,000 county, state, and federal courts in the United States each maintain court records.[4] However, each of these court systems has its own method for keeping and updating criminal records, and methodologies differ greatly between jurisdictions.[5] While many records are available online from official court record repositories, not all court systems offer this service. *See* n. 4. Courthouse or court system-based searches, even when done online, are costly, time intensive, or both. For this reason, landlords often turn to unofficial on-line databases to access these records, some of which purport to provide results "instantly" or "within minutes." Some of these databases originate from legitimate government agencies that update their files frequently, while others are less credible reproductions of other databases containing stale or static information.[6]

3. Criminal Records and Discrimination

The disparate impact of criminal records based tenant screening on certain protected classes is almost incontrovertible. Rebecca Oyama, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MIJRL 181, 203-207 (2009). People of certain races and ethnicities are disproportionately represented in the criminal justice system. *See Farrakhan v. Gregoire*, 590 F.3d 989, 1010 (9th Cir. 2010), *vacated on other grounds*, 623 F.3d 990 (9th Cir. 2010) ("[T]he significant racial disparities in arrest rates are not fully warranted by race or ethnic differences in illegal behavior."); Jenifer Warren, *One in 100: Behind Bars in America 2008*, Pew Center on the States (African American men are incarcerated at a rate more than six times that of white men). Over twenty years ago the EEOC recognized that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population." EEOC Policy Statement on the Issue of Conviction Records (1987).[7] Based on these statistics and guidance, blanket policies denying housing to individuals with criminal records have a disparate impact on these protected classes.

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[3] There are four different kinds of records that may all be referred to as "criminal records": arrest records (law enforcement records of arrests), criminal court records (local, state, or federal records), corrections records (prison records), and state criminal repository records (statewide records including arrest records, criminal court records, and correction records). *See* Lynn Peterson, *Not All Criminal Records Checks are Created Equal*, March 2, 2005, (http://www.virtualchase.com/articles/archive/criminal_checks.html).

[4] *See Inside Criminal Background Checks: Sources, Availability, and Quality; A White Paper About the Types of Criminal Court Records Used for Applicant and Employee Screening*, ADP, 2007 at 3-4. (http://www.adpselect-info.com/client/pdf/insideCriminalBackgroundChecks.pdf).

[5] In Washington, landlords and tenant screening companies seeking to obtain criminal or eviction records may use public sources, such as an on-line name search in the Superior Court Management Information System (SCOMIS), a computer database of state superior court records. The SCOMIS system was created with the intent for all superior courts to "[p]romote and facilitate electronic access to the public of judicial information." RCW 2.68.050. However, non-conviction records (e.g., arrest records) can only be disseminated if "the record disseminated states the disposition of such charge to the extent dispositions have been made at the time of the request for the information." (subject to certain exceptions). RCW 10.97.040.

[6] Databases are inconsistently updated, consequently errors in criminal records retrieval are frequently noted. *Inside Criminal Background Checks*, *supra* n.4 at 5; Maurice Emsellem and Kerry O'Brien, *Criminal Background Checks: A Growing Problem for All Union Members, Not Just Those With a Criminal Record*, National Employment Law Project, 2006 (citing a 1997 study that found that one in twenty "name based" background checks produced a criminal background for those that did not actually have one. (http://www.nelp.org/page/-/SCLP/union%203-pager_122106_150337.pdf).

[7] The EEOC also has provided guidance on arrest records. *See* n. 42.

4. Eviction Records

Tenant screening companies and landlords sometimes use court databases to obtain a tenant's eviction history.[8] These records may be deceptive and reliance on them problematic, because even if the tenant was the winning party in the action or a settlement was reached, the report may say nothing about these critical details.[9] For example, On-Site.com, a national tenant-screening company, indicates whether the prospective tenant has an eviction lawsuit or landlord collection "filed." *See* http://www.on-site.com/private_owners_report_1., This information is filed under "evictions" regardless of the outcome of the case.

Even in the rare case where the tenant screening company provides information about the outcome of the case, the landlord will often deny housing based simply upon the tenant's involvement in an unlawful detainer.[10] As stated by one tenant lawyer, "[M]any landlords refuse to rent to tenants named in a housing court case, regardless of its outcome." *See* Jay Romano, *What Every Tenant Ought to Know*, New York Times, October 22, 2006. An "eviction" notation in a tenant screening report may result in a lower score or recommendation from a tenant screening company and frequently results in a negative determination by the landlord, through an elevated deposit, co-signor requirement or a denial of housing altogether.

Tenant screening reports have been likened to blacklists. *White v. First American Registry, Inc*., 2007 WL 703926 at *1 (S.D. N.Y. 2007). "Risk averse landlords are all too willing to use defendants' product as a blacklist, refusing to rent to anyone whose name appears on it…defendants have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless individuals." *Id*.; *U.D. Registry, Inc. v. State of California*, 34 Cal.App. 4th 107, 114; 40 Cal.Rptr.2d 228 (Cal. App. Div. 1995) (discussing legislative justification for amendment to California statute to further limit the reporting of unlawful detainer actions, which provided that "inappropriate inclusion of information about unlawful detainer actions results in 'tenant blacklisting' and imposes an unfair and unnecessary hardship on tenants seeking rental housing"); *See* Rudy Kleysteuber, *Tenant-screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344, 1349, 1361-3 (2007).

5. Eviction Records and Discrimination

Studies from across the country indicate that women and people of color are evicted at rates that far outpace their representation in society. *See* Kleysteuber at 1353 (citing Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 Housing Pol'y Debate, 461, 467-68 (2003). In studies conducted in New York City, Philadelphia, and Oakland, people of color made up over 70% of tenants involved in unlawful detainer actions. *Id*.; *See* Community Training and Resource Center and City Wide Task Force on Housing Court, *Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel* (57.5% of tenants in housing court were African American and 29.7% were Latinos) (1993) (http://housingcourtanswers.org/images/stories/pdf/donaldson.pdf). In studies that consider gender, female-headed households are shown to be disproportionately impacted. Hartman at 467-468; Erik Eckholm, *A Sight All Too Familiar in Poor Neighborhoods*, New York Times,

[8] In Washington, landlords and tenant screening companies can obtain "eviction" records through SCOMIS. *See* n. 5.

[9] Another issue altogether is that tenant screening companies often produce reports based upon inaccurate information (e.g., based upon another individual with the same name). Tenant screening companies are subject to liability under the Fair Credit Reporting Act for reporting inaccurate or outdated information to landlords. But such restrictions do not apply regarding reporting true (even if limited) information. *See* n. 2.

[10] We use the term "unlawful detainer action" here to cover all types of residential eviction actions.

February 18, 2010 ("Women from largely black neighborhoods in Milwaukee constitute 13 percent of the city's population, but 40 percent of those evicted). It follows that women and people of color are disproportionately impacted by the "eviction" history reported by tenant screening companies and used by landlords to screen tenants. While there are currently no published studies specific to Washington, or many other states, regarding the race or gender of those involved in eviction actions, the "disparate impact" section in this guide provides possible methodologies for obtaining the data necessary to make this claim.[11]

B. Tenant Screening and Discrimination Claims Under the Fair Housing Act

Disparate impact theory originated in employment discrimination cases and has since been applied to other fields of law, including fair housing.[12] Disparate impact theory holds that a standard or practice is presumptively illegal if it has a disproportionate negative impact on members of legally protected groups even though the challenged practice does not refer to characteristics of the group. Discrimination exists even though the resulting adverse impact upon members of the group was not intentional. The remainder of this guide will examine the basic legal steps necessary to make a disparate impact claim under the federal Fair Housing Act and Washington Law Against Discrimination.

1. Fair Housing Act Overview

a) Introduction

The Fair Housing Act (FHA), Title VIII of the Civil Rights Act of 1968, was enacted to "provide, within constitutional limitations, for fair housing throughout the United States" and specifically to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." 42 U.S.C. § 3601; *Llanos v. Estate of Coehlo*, 24 F.Supp.2d 1052, 1056 (E.D.Cal) (1998); *see also U.S. v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). "Impermissible characteristics" under the FHA include race, color, religion, sex, disability, familial status, or national origin. 42 U.S.C. § 3604.

The FHA allows any "aggrieved person" to sue, which includes any person who "claims to have been injured by a discriminatory housing practice," or any person who "believes that such person will be injured by a discriminatory housing practice that is about to occur."[13] 42 U.S.C. § 3602(i)(1),(2).

As discussed below, a disparate impact claim may be brought against either a tenant screening company for the service it provides to landlords in connection with the housing process or against a landlord for denying housing to prospective tenants based on the information the tenant screening company provided or the landlord's own admission policy.

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[11] This demographic data is not kept in the SCOMIS system making it difficult to collect this type of information. Graduate students at the University of Washington, Bothell recently conducted research regarding race and eviction, showing a positive correlation between race and eviction based on census data, but that study has not yet been published. For a copy of the unpublished study, contact Merf.Ehman@ColumbiaLegal.org.

[12] *See Griggs v. Duke Power Co*, 401 U.S. 424 (1971); 42 U.S.C. § 2000e-2(k) (Congress codified the use of disparate impact analysis to prove discrimination claims in Title VII cases).

[13] Relevant provisions of the FHA make it unlawful to: refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person; discriminate against someone in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith; make, print, or publish any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3604(a), (b),(c).

b) FHA's Applicability to Tenant Screening Companies

Tenant screening companies have yet to appear as defendants in a Fair Housing Act case, but such companies do fall within the ambit of the Act.[14] Conduct prohibited by the FHA is broadly categorized as "discriminatory housing practices." 42 U.S.C. § 3602(f). Federal courts have routinely acknowledged that the FHA should be liberally construed to effectuate Congress' clear intent that achievement of fair housing throughout the country be considered the highest priority. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 211-212; *Resident Advisory Board v. Rizzo*, 425 F.Supp. 987, 1018 (E.D.Pa.1976) *modified,* 564 F.2d 126 (3d Cir.1977), *cert. denied,* 435 U.S. 908 (1978). All entities that engage in discriminatory practices incident to the private refusal to rent or otherwise make housing available may be civilly liable for violation of the FHA. *See* 93 AMJUR POF 3d 415 § 17.

There are solid reasons why the FHA should be interpreted to apply to tenant screening companies. First, courts have broadly defined who is subject to the law. "[C]ourts have broadly held that the activities of neighbors, management companies, realtors, and financiers which go beyond the initial purchase or rental of a dwelling are prohibited by the Fair Housing Act." *Schroeder v. De Bartolo*, 879 F.Supp. 173, 177 (D.P.R. 1995); *See Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994) ("[C]ongress intended § 3604 to reach a broad range of activities that have the effect of denying housing to a member of a protected class."); *Sofarelli v. Pinellas County,* 931 F.2d 718, 722 (11th Cir. 1991) (home owner's claim against neighbor was within scope of the Act). Courts have also extended the FHA's provisions to lending companies, newspapers, brochures, and telecommunication devices.[15]

Second, activities covered by the law are broadly defined—under the FHA, it is unlawful to discriminate in the "provision of services in connection with housing." 42 U.S.C. 3604(b). Courts have validated this broad reach in the area of rental housing. Recently, the Ninth Circuit extended the FHA's reach to a website offering roommate screening services. *Fair Housing Council of San Fernando Valley v. Roommates.Com*, LLC, 521 F.3d 1157 (9th Cir. 2008) (en banc) (remanding to district court as to whether website's actions violate the FHA). The company's practices included limiting the listings available to subscribers based on "discriminatory criteria" such as gender, sexual orientation, and the presence of children. *Id*. at 1167. The court recognized that other circuits have similarly held that it is "unlawful for housing intermediaries to 'screen' prospective housing applicants based on race, even if the preferences

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[14] Tenant-screening companies and credit reporting agencies conducting tenant screening have appeared as defendants in cases brought under the Fair Credit Reporting Act. *See, e.g. Dennis v. BEH-1, LLC.,* 520 F.3d 1066, 1069 (9th Cir. 2008) (credit report inaccurate where it listed tenant as having a "civil judgment" when unlawful detainer action was dismissed); *Wilson v. Rental Research Servs., Inc*. 165 F.3d 642 (8th Cir. 1999), *vacated,* 191 F.3d 91, *on rehear'g, rev'd by an equally divided court,* 206 F.3d 810 (8th Cir.2003) (en banc); *Cisneros v. U.D. Registry, Inc*., 46 Cal. Rptr. 2d 233 (Ct. App. 1995); *Shoendorf v. U.D. Registry, Inc*., 118 Cal. Rptr. 2d 313 (Ct. App. 2002); *Marino v. UDR*, No. CV-05-2268, 2006 WL 1687026. Tenant-screening companies have also appeared as plaintiffs in cases regarding access to records. *See U.D. Registry Inc. v. Mun. Court*, 57 Cal.Rptr.2d 788 (Ct. App. 1996); *U.D. Registry, Inc. v. Superior Court*, 46 Cal.Rptr.2d 363 (Ct. App. 1995).

[15] *See Taylor v. Accredited Home Lenders, Inc*., 580 F. Supp.2d 1062, 1068-69 (S.D. Cal. 2008) (homeowners sufficiently alleged that home lending company's financing rate policy had discriminatory impact); *Steptoe v. Savings of America*, 800 F.Supp. 1542, 1546-47 (N.D. Ohio 1992) (plaintiffs made out prima facie case against bank who ordered appraisal for mortgage loan that had discriminatory effect); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1357 (6th Cir. 1995), *cert. denied,* 516 U.S. 1140 (1996) (FHA applies to discrimination in the provision of property insurance); *Ragin v. New York Times Co.,* 923 F.2d 995, 999-1000 (2nd Cir. 1991) (applying FHA to newspapers); *Saunders v. Gen. Servs. Corp.,* 659 F.Supp. 1042, 1057-59 (E.D.Va.1987) (applying FHA to brochures).

arise with landlords." *Id.* at n. 21 *(citing Jeanty v. McKey & Poague, Inc.,* 496 F.2d 1119, 1120-21 (7th Cir. 1974).

When tenant screening companies determine what information they will provide to landlords regarding criminal and eviction records, this "screening" is a service in connection with housing that is a prohibited act under the FHA. It is a service analogous to the provision of property insurance, a practice covered by the Act. *See Lindsey v. Allstate Ins. Co*., 34 F.Supp.2d 636, 638 (W.D. Tenn. 1999) ("Although this section of the FHA does not explicitly indicate that the statute was intended to govern the practices of property insurers, the provision of property insurance can be reasonably interpreted as the 'provision of services or facilities in connection' with the sale or rental of a dwelling").[16] As stated by the court in *N.A.A.C.P v. American Family*, "Risk discrimination is not race discrimination. Yet efforts to differentiate more fully among risks may produce classifications that could be generated by discrimination." *N.A.A.C.P. v. American Family*, 978 F.2d at 290.

c) FHA Exemptions Are Inapplicable to Tenant Screening

Tenant screening companies are not similar to any of the entities granted specific exemptions in the FHA.[17] These exemptions are narrowly construed. *See City of Edmonds v. Washington State Bldg. Code Council,* 18 F.3d 802, 804 (9th Cir. 1994), *judgment aff'd*, 514 U.S. 725 ("exemptions must be read narrowly"); *U.S. v. Lorantffy Care Center*, 999 F. Supp. 1037, 1044 (N.D. Ohio 1998) (court must construe exemptions to the FHA narrowly). Generally, if exemptions are specified in a statute, courts may not imply additional exemptions unless there is a clear legislative intent to the contrary. *Imperial Merchant Services, Inc. v. Hunt*, 47 Cal. 469-70, 212 P.3d 736 (2009); *Adams v. King County*, 164 Wash.2d 640, 650, 192 P.3d 891 (2008).

d) Prohibited Acts - "Otherwise Make Unavailable"

The FHA makes it unlawful to "otherwise make unavailable or deny" housing based on protected characteristics. 42 U.S.C. § 3604(a).[18] While this phrase does not reach every act that might affect the availability of housing, courts have acknowledged that "otherwise make unavailable" might extend to "other actors who, though not owners or agents, are in a position directly to deny a member of a protected group housing rights."[19] *Nationwide*, 52 F.3d 1351 at 1360.

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[16] *See Ojo v. Farmers Group, Inc.,* 565 F.3d 1175, 1180 (9th Cir. 2009) (FHA's ban on racial discrimination extends to the underwriting of homeowners' property insurance under the "provision of services in connection with housing"). *Nationwide Mut. Ins. Co.*, 52 F.3d at 1357 (business of property insurance is governed by the FHA); *N.A.A.C.P v. Amercan Family Mut. Ins. Co.*, 978 F.2d 287, 301 (7th Cir.1992) (FHA applies to "discriminatory denials of insurance, and discriminatory pricing, that effectively preclude ownership of housing because of the race of the applicant"); *Nat'l Fair Housing Alliance, Inc. v. Prudential Ins. Co. of Am.,* 208 F.Supp.2d 46, 57 (D.D.C.2002) ("The application of the FHA to homeowners insurance is fully consistent with the statute's purpose in eliminating discrimination resulting in segregated housing and lack of equal housing opportunities.").

[17] Entities exempted from FHA regulation are: 1) single family homeowners (unless they own more than three homes at one time); 2) multiple-family homeowners who reside in the residence as long as no more than four families live there; 3) religious organizations; 4) private clubs and 5) senior citizen housing (subject to some limitations). 42 U.S.C. § 3603(b); 42 U.S.C. § 3607(a), (b).

[18] *See* n. 13 for other prohibited acts. Claims under the FHA for the other prohibited acts are straightforward, so are not covered here.

[19] *But see Jersey Heights Neighborhood Assn. v. Glendening,* 174 F.3d 180, 192 (4th Cir.1999) (state's decision in selecting location for new highway through predominately African American neighborhood did not "otherwise make [housing] unavailable"); *Clifton Terrace Assoc., Ltd. v. United Technologies Corp.,* 929 F.2d 714, 719 (D.C.Cir.1991) (private elevator company's refusal to service buildings in predominantly AfricanAmerican neighborhood did not "otherwise make [housing] unavailable" where it is not "sole source" of elevator repair

One court recognized that the practice of "tenant screening" may negatively affect the availability of rental housing to protected classes. *See Inland Mediation Board v. City of Pomona*, 158 F.Supp.2d 1120, 1145-46 (C.D.Cal. 2001). In *Inland*, a landlord association maintained a list that included former tenants who had been evicted from the property or were considered "problem" or "undesirable" tenants. *Id*. at 1145-46. The association dubbed it the "wish well" list as landlords should wish these tenants well, but not rent to them. *Id*. At one point, the landlord association director stated, "It's not my fault that at the time the majority of the problems were caused by African Americans." *Id.* The court held that the plaintiffs (a fair housing group and African American property manager) raised a triable issue of fact under the FHA as to whether this list was a "code or other device" used to reject potential renters in the tenant screening process.[20] *Id*. Based on this analysis, tenant screening companies and landlords should be liable under the FHA when their tenant screening practices making housing unavailable to certain protected classes.

2. Standing under the FHA

The Supreme Court has long held that claims brought under the FHA are judged under a very liberal standing requirement.[21] The "sole requirement for standing to sue [under the FHA] is the Article III minimum of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered a 'distinct and palpable' injury." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). A plaintiff need not prove that she was the target of discrimination. To the contrary, any person "harmed by discrimination, whether or not the target of the discrimination, can sue to recover for his or her own injury."[22] *San Pedro Hotel v. City of Los Angeles,* 159 F.3d 470, 475 (9th Cir.1998) (citing to *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 212, (1972)); *See also*, *Halet v. Wend Investment Co.,* 672 F.2d 1305, 13008-09 (9th Cir. 1982) (finding white person had standing to bring case of disparate impact to racial groups under the FHA). As declared by the court in *Trafficante*, "[t]he person on the landlords blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community.'" 409 U.S. 205 at 211 (citing 114 Cong.Rec. 2706).

An association may have standing under the FHA if: "(1) at least one member has standing, in his own right, to present a claim asserted by the association; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires that the members participate individually in the suit." *NAACP*, 635 F.Supp.2d at 1102 (citing *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, (1977)).

3. FHA Statute of Limitations

An individual claim brought as a civil action in federal district or state court must be filed within 2 years after the occurrence or the termination of an alleged discriminatory housing practice. 42 U.S.C. §

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services in community); *Burrell v. City of Kankakee,* 815 F.2d 1127, 1130-31 (7th Cir.1987) (plaintiffs' claims not cognizable under FHA where plaintiffs failed to produce sufficient evidence that defendants' conduct directly affects the availability of housing to people of color).

[20] A HUD regulation that interprets Section 3604(a), prohibits "employing codes or other devices to segregate or reject applicants." 24 C.F.R. § 100.70 (d)(2).

[21] For an in depth discussion of standing issues, *See Federal Practice Manual for Legal Aid Attorney, ed.* Jeffrey S. Gutman (2006).

[22] Standing exists even where no housing has actually been denied to persons protected under the Act. *See Smith v. Stechel,* 510 F.2d 1162, 1164 (9th Cir. 1975) (FHA applicable to property mangers fired for renting to people of color).

3613(a)(1)(A).[23] The computation of the 2-year period does not include any time during which an administrative proceeding related to a discriminatory housing practice was pending. U.S.C. § 3613(a)(1)(B). Generally, for these types of claims the statute of limitations would start at the time a landlord made the decision to deny housing to the applicant. Establishing the time frame for a claim against a tenant screening company could be more complicated. The discriminatory action could be when the tenant became aware of the tenant screening companies rating, when the tenant screener produced the information to the landlord or when the landlord made the decision based on tenant screener's information. Note too, that the U.S. Supreme Court endorsed applying the continuing violation doctrine to housing discrimination claims.[24] *See Havens Reality Corp.,* 455 U.S. 363 at 380-81 (a "continuing violation" of the Fair Housing Act should be treated differently from a discrete act of discrimination for statute of limitation purposes).

Complaints initiated through HUD must be filed within one year after the alleged discriminatory practice occurred. 42 U.S.C. § 3610.

There is no specific statute of limitations for § 3614(a) "pattern or practice" or "issue of public importance" claims. *See*, *e.g*., *U.S. v. City of Parma*, *Ohio*, 494 F. Supp. 1049, 1094 n.63 (N.D. Ohio 1980), *judgment aff'd*, 661 F.2d 562, 573 (6th Cir. 1981); *U.S. v. Yonkers Bd. Of Educ*., 624 F. Supp. 1276, 1374 n.72 (S.D. N.Y. 1985), *judgment aff'd*, 837 F.2d 1181 (2d Cir. 1987).

4. Enforcement

The Fair Housing Act provides three general enforcement methods: (1) filing a civil suit in federal district court, or a state or local court of general jurisdiction; (2) filing a written complaint with HUD; or (3) intervention of the U.S. Attorney General where there is reasonable cause to believe that a) any person or group of persons is engaged in a "pattern or practice" of resistance to the full enjoyment of rights embodied in the FHA, or b) where any group of persons has been denied rights under the FHA and such a denial "raises an issue of general public importance." 42 U.S.C. § 3610(a); §3612(a); §3613(a), (e); and §3614(a).

While this guide is written with the goal of assisting with a disparate impact claim under the first method of enforcement, the other two methods should be considered as additional or alternative advocacy strategies. Although HUD has not issued guidance stating that criminal records based tenant screening may have a disparate impact, fair housing enforcement agencies could still find disparate impact discrimination. The administrative option could be a less expensive and faster way to assist a client denied housing or be a useful enforcement mechanism for an unrepresented person.[25]

The proliferation of the use of criminal records checks in tenant screening may make this a good case for state-led enforcement. State regulators or attorneys general could show a "pattern or practice" of discrimination or focus on a case that "raises an issue of public importance." While there is no statutory

[23] "Discrimination claims [in WA] must be brought within three years to satisfy the statute of limitations." *Antonius v. King County*, 153 Wash.2d 256, 261-62, 103 P.3d 729 (2004).

[24] "The continuing violation doctrine permits a plaintiff to sue for all discriminatory acts that occurred during the limitations period, even if the policy or other event giving rise to the discrimination occurred outside the limitations period. A plaintiff must show that a pattern or practice of discrimination creates an ongoing violation." *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 701 (9th Cir. 2009)

[25] Advocates working on these issue have found meeting with local and state civil rights enforcement agencies helpful to understand how each agency will process these types of complaints and whether the agency has received such complaints. Advocates have also provided training to enforcement agencies on these issues. For a power point presentation on this topic contact merf.ehman@columbialegal.org. Some agencies are more familiar with these issues in the employment context and that can be a helpful way to frame the fair housing issues.

definition or legislative history to explain what is required for the "pattern or practice" method of enforcement, it was modeled after other civil rights laws, and Title VII case law provides some guidance. Under Title VII, to prove the existence of a pattern or practice of discrimination, the government must "establish by a preponderance of the evidence that racial discrimination was the [defendant's] standard operating procedure[,] the regular-rather than the unusual practice" and must prove more than "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336 (1977). Fair Housing Act cases have employed the same or similar standard. *See, e.g.*, *U.S. v. West Peachtree Tenth Corp*., 437 F.2d 221, 227 (5th Cir. 1971); *U.S. v. Matusoff Rental Co*., 494 F. Supp. 2d 740, 747 (S.D. Ohio 2007). Importantly for the tenant screening claim, it does not appear that willful or intentional discrimination must be shown. *See, e.g*., *U.S. v. Security Management Co., Inc*., 96 F.3d 260, 269 (7th Cir. 1996). The claim can be brought against an individual or "group of persons." Thus, it may be possible for the U.S. Attorney General to sue either a group of landlords or a group of tenant screening companies engaged in the pattern or practice of using criminal records to deny housing. Similarly, there is no legislative history to explain what is required under the "issue of general public importance" method, but instruction can be taken from similar enforcement provisions in other civil rights statutes.[26]

II. The Prima Facie Disparate Impact Case

A plaintiff can make a Fair Housing Act discrimination claim under either a theory of disparate treatment or disparate impact.[27] *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. &Urban. Dev.*, 56 F.3d 1243 (10th Cir. 1995) ("Discrimination may occur either by disparate treatment or disparate impact."). The elements of the prima facie disparate impact case include: (1) an outwardly neutral policy, procedure, or practice, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.[28] *Pfaff v. U.S. Dept't of Housing & Urban Dev*., 88 F.3d 739, 745 (9th Cir. 1996); *Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d. 690 (9th Cir. 2009) (finding of intentional discrimination is not required to establish a prima facie case of disparate impact). *Yonkers Bd. Of Educ*., 624 F. Supp. at 1374 n.72. ("[T]he consensus is that a plaintiff need prove only discriminatory impact, and need not show that the decision complained of was made with discriminatory intent."). The burden then shifts to the defendant to rebut by supplying a nondiscriminatory reason for its actions. *Comm. Concerning Commy. Improvement,* 583 F.3d at 711. Other circuits analyze disparate

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[26] For an overview of "pattern or practice" or "issue of public importance claims" S*ee*, Robert Schwemm, *Housing Discrimination Law and Litigation* § 26:2-10 (2009).

[27] The Washington plaintiff making a disparate impact claim based on tenant screening policies under the FHA may make an analogous claim under the Washington Law Against Discrimination (WLAD), RCW 49.60. A plaintiff's discrimination claim under WLAD is to be interpreted in the same manner the FHA. *Weyer v. Twentieth Century Fox Film Corp*., 198 F.3d 1104, 1118 (9th Cir. 2000); *Kees v. Wallenstein*, 161 F.3d 1196, 1199 (9th Cir. 1998). The Washington State Supreme Court has expressly recognized that claims under WLAD may be brought under the "disparate impact" theory. *Oliver v. Pac. Nw. Bell Tel. Co., Inc*., 106 Wn.2d 675, 680 (1986) (applying the Title VII disparate impact analysis to a WLAD employment discrimination claim); *See also*, *Mendoza v. Rivera-Chavez*, 88 Wash.App. 261, 267, 945 P.2d 232 (1997), *aff'd*, *Mendoza v. Rivera-Chavez*, 140 Wash.2d 659, 999 P.2d 29 (Wash. 2000).

[28] *See Betsey v. Turtle Creek Associates*, 736 F.2d 983, 985 (4th Cir. 1984) ("landlord's housing practice may be found unlawful under Title VIII either because it was motivated by a racially discriminatory purpose or because it is shown to have a disproportionate adverse impact on minorities."); *Metro. Hous. Dev. Corp.* 558 F.2d 1283 at 1290 (violation of Fair Housing Act made by "showing of discriminatory effect without a showing of discriminatory intent"); *U.S. v. Pelzer Realty Co*., 484 F.2d 438, 443 (5th Cir. 1973) (defendants actions violate Fair Housing Act because his words had discriminatory effect even if he had no intent to discriminate).; *cf. Smith v. City of Jackson*, 544 U.S. 228 (2005) (permitting disparate impact claim in age discrimination case, but often cited by defendants for its statement, in dicta, that a statute must contain specific "effects" language to allow disparate impact claims).

impact cases using this burden shifting analysis (similar to Title VII cases) or a multipronged test.[29] In the tenant screening context, a disparate impact case could be shown through the significant discriminatory effects that flow from rental decisions. *See Halet,* 672 F.2d at 1311 ("Significant discriminatory effects flowing from rental decisions may be sufficient to demonstrate a violation of the Fair Housing Act.").

A. Neutral Policy, Procedure, or Practice

The first step in the prima facie disparate impact case is to identify the neutral policy, procedure, or practice that has the disproportionate impact. The neutral policy, procedure, or practice must be *facially neutral*.[30]

1. Tenant Screening Companies

A tenant screening company that submits a lower or negative "score," "approval," or "recommendation," upon discovery of any criminal or eviction record against a prospective tenant presents an example of a facially neutral policy or practice that could have a discriminatory impact. For example, according to On-Site.com's sample tenant screening report, it provides a pass/fail indication, overall individual score and a recommendation for each prospective tenant. *See* sample report at http://www.on-site.com/private_owners_report_1. The score is based in part, on whether or not the tenant has "more than one misdemeanor conviction" or "any felony convictions" or an "eviction lawsuit or landlord collection filed." *Id.* In 2006, of the 50,000 background checks On-Site.com ran on Manhattan tenants, 41 percent of applicants garnered a rating of either "reject" or "maybe." Teri Karush Rogers, *Only the Strong Survive*, N.Y. Times, Nov. 26, 2006.

If a tenant screening company draws no inferences based on the presence of the criminal record or eviction history, the claimant may still argue that the unlawful practice is the neutral "practice" of reporting criminal record or eviction history data. However, this is a more difficult claim to make than where the agency actually determines a rating. A claim for disparate impact where no rating is determined could be made whether the tenant screening company reports complete records (including details about the type and outcome of the arrest or conviction) or limited records (without indicating anything beyond that an arrest or conviction was found) since, in either case, the disparate impact upon African Americans or Latinos, is still present. A similar claim could be made for eviction history where complete records (including outcome of the case) are provided, because the disparate impact upon women

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[29] Burden shifting type analysis: *See, e.g. Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir.1998); *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. &Urban. Dev.*, 56 F.3d 1243 (10th Cir. 1995); *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 269 n. 20 (1st Cir. 1993); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3rd Cir. 1977); *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir.1974);. Multi-pronged test: *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (*Arlington Heights II*) (created four factor test: "(1) the strength of the plaintiff's showing of discriminatory effect; (2) whether there is some (though not much is required) evidence of discriminatory intent; (3) the defendant's interest in taking the action; and (4) whether the plaintiff seeks to compel affirmative conduct or to restrain interference with individual property owners."); *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982) (adopted *Arlington Heights II* test); *Arthur v. City of Toledo*, 782 F.2d 565, 574-75 (6th Cir. 1986) (adopted all but the second factor of *Arlington Heights II* test).

[30] Under Washington law, this means that it must include objective, nondiscretionary features. *Oliver v. Pac. NW. Bell Tel. Co., Inc*., 106 Wn.2d 675, 680 (1986) (holding that where company applied an employment policy on a subjective case-by-case basis, the policy was not "facially neutral"). Be aware that a tenant screening company may argue that this is its practice.

and people of color in evictions is still present. Where the tenant screening company provided complete and accurate criminal or eviction information and took no other action, the tenant screening company may have a business justification defense to a disparate impact claim. A full discussion of available defenses, including business justification, appears later in this guide.

2. Landlords

A rental admission policy that automatically excludes applicants based upon their previous criminal record (e.g. "No Felons" or "Clean Record") or eviction record is "facially neutral," since it makes no distinction based on race, national origin, or other protected status. *See Gregory v Litton Systems, Inc.* 316 F Supp 401, 403 (D.C. Cal. 1970) *mod on other grounds*, 472 F2d 631 (9th Cir. 1972) (denial of employment to applicants with arrest records racially neutral on its face). Some jurisdictions already prohibit the use of this type of "neutral" criminal records screening policy in pre-employment enquiries because of the potential disparate impact on protected classes.[31]

Many landlords will not have explicit written policies, but will have a "practice" of automatically denying housing to applicants who have criminal or eviction records. Proving such a "practice," could require a more burdensome evidentiary showing than where a written policy exists. As discussed in this guide, disparate impact theory has been applied to the "practice" of pre-screening applicants based on criminal records in the employment context.

B. Disparate Impact

Demonstrating disparate impact is a challenging aspect of these types of discrimination cases. Most commonly, a disparate impact claim is demonstrated by statistics.[32] *U.S. v. Wood, Wire & Metal Lathers Int'l Union,* 471 F.2d 408, 414 n. 11 (2d Cir.) *cert. denied,* 412 U.S. 939, (1973); *Oliver v. Pac. Nw. Bell Tel. Co., Inc*., 106 Wn.2d 675, 682 (1986) ("The primary means of proving a substantial disproportionate impact on a protected class is through the use of statistical evidence."). The plaintiff may demonstrate discriminatory impact either by demonstrating that the decision has "greater adverse impact" or has a segregative effect on members of a protected group than for persons outside that group. *See Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Com'n,* 508 F.3d 366, 378 (6th Cir. 2007); *Hallmark Developers, Inc. v. Fulton County, GA*., 466 F.3d 1276, 1286 (11th Cir. 2006); *Fair Housing in Huntington Committee Inc. v. Town of Huntington, N.Y.* 316 F.3d 357, 366 (2d Cir.

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[31] *See* WAC 162-12-140 (3)(b),(d); RCW 9.96A.010, .020(2). Some cities include "ex-offender status" as a protected class in municipal codes. *See* Madison Mun. Code § 39.0; Dane County Code Ch. 31.02; Appleton Mun. Code § 8-26, 8-30; Urbana Mun. Code Ch. 12 Art. III, Div. 1, § 12-37 and 12-64; *compare* Boston Mun. Code, Ch. XII § 9.1. On April 24, 2009, the City of Seattle issued its new Personnel Rule 10.3 regarding criminal background checks. It announced that "[i]t is the City's policy that the use of applicant criminal conviction information will be based on consideration of the relationship between past felony convictions and the potential risk to the City and its employees, residents, and customers." City of Seattle, Personnel Rule10.3.3. Other cities have implemented "Ban the Box" policies in their hiring procedures. This prohibits or advises against the practice of using criminal arrests or convictions in certain pre-employment inquiries due to the disparate impact on certain racial and ethnic groups and potential misuse of this information. Jessica S. Henry, *Criminal History on a "Need to Know" Basis: Employment Policies that Eliminate the Criminal History on Employment* Applications, Justice Policy Journal, Vol. 5, No. 2 (Fall 2008); *See* Status of Ex-Offender Reentry Efforts in Cities, U.S. Conference of Mayors (2009) at http://www.usmayors.org/pressreleases/uploads/REENTRYREPORT09.pdf. Advocating for these types of policies can be a useful approach to systemic change for clients with criminal records.

[32] For an in depth discussion of these issues, *see generally*, Paetzold and Willborn, *The Statistics of Discrimination, Using Statistical Evidence in Discrimination Cases* § 8.04 (1996).

2003); *Wallace v. Chicago Housing Authority*, 321 F. Supp. 2d 968, 973-74 (N.D. Ill. 2004) (citing *Arlington Heights,* 558 F.2d at 1290).

"[N]o single test controls in measuring disparate impact" cases. *Langlois v. Abington Hous. Auth.,* 207 F.3d 43, 50 (1st Cir. 2000) (citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 995-96 n. 3 (1988)). But, certain guidelines have developed regarding statistics in disparate impact cases. First, it may be inappropriate to rely on absolute numbers rather than on proportional statistics; second, statistics based on the general population should bear a proven relationship to the actual applicant flow, and finally, "the appropriate inquiry is into the impact on the total group to which a policy or decision applies." *Hallmark,* 466 F.3d at 1286. A plaintiff may demonstrate disparate impact through "disproportional representation" where "the percentage of minority representation in the affected group is compared against that minority's representation in the general population." *Id*. Or "disproportionate adverse impact" may be shown where "the minority group's percentage representation in the affected group is compared against the majority group's representation in the affected group." *Id*. In either method, "the starting point is always the subset of the population that is affected by the disputed decision." *Id*.

1. The Statistical Sample

One of the first questions to address before bringing a disparate impact case is from where to draw the statistical sample (i.e., the relevant population to consider). Courts are by no means consistent on this matter. In some cases, courts find that the narrowest population should be considered. *See, e.g. Betsey*, 736 F.2d at 987-88 (narrowest population, the affected building, was the proper population to consider); *Mountain Side Mobile Estates P'ship,* 56 F.3d at 1253 ("[T]he appropriate comparables must focus on the local housing market and local family statistics. The farther removed from local statistics the plaintiff's venture, the weaker their evidence becomes."). In other cases, the court looked to the broadest population. *See, e.g. Griggs*, 401 U.S. at 430 (using all of North Carolina to draw statistics regarding high school diploma requirement in employment discrimination case); *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977) (relying on the population nationwide in upholding that height and weight requirements had disparate impact on women in employment discrimination case). For tenant screening, disparate impact could be alleged in a specific housing project or in the community as a whole, so the appropriate statistical sample could be from a specific project, the local region, statewide, or nationwide. The facts of your cases and availability of data will influence what statistical sample you use. A best practice is to analyze statistical information for all the groups and be prepared to defend the data set you choose as the appropriate one. The use of a statistical consultant can be critical when making this decision.

2. Disproportionality

The next key question to address is how much "disproportionality" must be shown. As an initial matter, in the employment and age discrimination contexts, the Ninth Circuit has warned district courts not to base a disparate impact finding on a comparative statistical sample that is too small. *See Stout v. Potter,* 276 F.3d 1118, 1123 (9th Cir. 2002) (sample involving six female applicants in a pool of thirty eight applicants is likely too small to produce statistically significant results.); *Shut v. Santas Crop Protection Corp.,* 944 F.2d 1431, 1433 (9th Cir.1991) (sample of twenty one former salesman "exceedingly" small), *cert. denied,* 503 U.S. 937 (1992). As far as the "disparity" is concerned, in the age discrimination context, the "significance" or "substantiality" of numerical disparities has been judged on a case-by-case basis. *See Rose,* 902 F.2d at 1424. Courts have yet to adopt the "four-fifths" rule in fair housing cases that the EEOC uses in the employment context. *See* 29 C.F.R § 1607.4(D) (a selection practice is considered to have a disparate impact if it has a "selection rate for any race, sex, or ethnic group which is less than four-fifths [or eighty percent] of the rate of the group with the highest rate").
Some housing cases have focused on the "representation rate" in the "rejected" (or affected) class. *See, e.g. Huntington Branch NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1998) (zoning

decision negatively impacting 24% of area's African Americans compared to 7% of all area families created a "substantial adverse impact on minorities"); ***Betsey v. Turtle Creek Associates***, 736 F.2d 983, 988 (4th Cir. 1984) (disparate impact where "74.9 percent of the non-whites were given eviction notices while only 26.4 percent of whites received such notices"); *Taylor,* 580 F.Supp.2d at 1068-69 (data demonstrating that 32.4% of high cost loans were made to African Americans in Birmingham compared to 8.7% to whites sufficient for alleging disparate impact); ***Bronson v. Crestwood Lake Section 1 Holding Corp***., 724 F.Supp. 148, 154 (S.D. N.Y. 1989) (policy of rejecting Section 8 vouchers would have disparate effect of disqualifying 6.06% of the households of color but only .25% of white households in the applicant pool). If using this approach, remember to recognize that the proportion of people of color and whites in the population of "rejected" persons depends upon the proportion of African Americans, Latinos/Latinas and whites in the population overall.[33]

3. Actual Discriminatory Effect

The plaintiff must go beyond providing statistical disparities and actually show the causal connection between the facially neutral policy and the discriminatory effect. *Tsombanidis*, 352 F.3d at 575 ("When establishing that a challenged practice has a significantly adverse or disproportionate impact on a protected group, a plaintiff must prove the practice 'actually or predictably results in ... discrimination.'" (quoting *Hack v. President & Fellows of Yale Coll.,* 237 F.3d 81, 90 (2d Cir.2000)); *Pfaff v. HUD*, 88 F.3d 739, 745-46 (9th Cir. 1996) ("discriminatory effect describes conduct that actually or predictably resulted in discrimination"…); *City of Black Jack*, 508 F.2d at 1184 ("[T]he plaintiff need prove no more than that the conduct of the defendant actually or predictably results in discrimination; in other words, that it has a discriminatory effect"); *Episcopal Church in Utah v. West Valley City*, 119 F.Supp. 2d. 1215, 1220 (D. Utah 2000) (disparate impact claim failed where no showing made that ordinance disproportionately impacted people with disabilities living as a group as opposed to other types of group living). A plaintiff may prove causation by offering "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the [alleged harm] because of their membership in a protected group." *See Rose v. Wells Fargo & Co.,* 902 F.2d 1417, 1424 (9th Cir. 1990) (applying disparate impact theory to Age Discrimination in Employment Act claim).

In the tenant screening context, actual discriminatory effect might be shown by demonstrating that a housing provider's policy regarding criminal or eviction records results or would result in under-representation of people of color or women in the housing. In other words, the plaintiff needs to statistically show that the policy results in or predictably could result in the housing provider denying the applications of a disproportionate number of members of a protected class as compared to those in an unprotected group because certain protected classes have higher arrest, conviction or eviction rates.

a. Criminal Records

Fortunately, various forms of criminal justice statistics are already available to the potential plaintiff seeking to make a disparate impact claim based upon the use of criminal records in tenant screening policies. The question becomes which statistics to harness and whether or not they will be enough. No case has indicated whether a plaintiff must use arrest, conviction or incarceration data to demonstrate that a particular protected class is disproportionately represented in the criminal justice system, but most

[33] Courts in FHA cases have sometimes used or alluded to use of a "standard deviation" (how much variation there is from the average) analysis to evaluate the significance of statistical disparities. *See Williams v. 5300 Columbia Pike Corp*., 891 F. Supp. 1169, 1179 (E.D. Va 1995) (citing *Hazelwood School District v. United States*, 433 U.S. 299, 311 n. 17 (1977)).

plaintiffs in employment cases have used arrest or conviction data.[34] *See Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1294-95 (8th Cir. 1975) (court cited statistics that African Americans are convicted at a 2 – 3 times greater rate); *Gregory*, 316 F.Supp. at 403, aff'd, 472 F.2d 631 (9th Cir. 1972) (court referred to national arrest statistics demonstrating that African Americans subject to a disproportionately high percentage of arrests); EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987) (http://www.eeoc.gov/policy/docs/convict2.html) [hereinafter Guidance on Use of Statistics].

However, a plaintiff could also use incarceration data to show that a policy related to criminal records has a disproportional impact on protected classes – particularly if arrest or conviction data is unavailable. The U.S. Department of Justice (DOJ) maintains demographic statistics based upon incarceration rates that show that African Americans and Hispanics are disproportionately represented in the corrections system.[35] One DOJ study indicates that on a national level, African Americans (39%) and Hispanics (18%) make up a majority of those who served prison time between 1974 and 2001. Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population*, *1974-2001*, U.S. Dept. of Justice, Bureau of Justice Statistics at 5 (August 2003) (http://bjs.ojp.usdoj.gov/content/pub/pdf/piusp01.pdf). According to that same report, in 2001, nearly 17% of adult black males had served time in prison, a number 6 times that of white males (2.6%), and nearly 8% of adult Hispanic males had served time.[36] *Id*. Moreover, based on 2001 incarceration rates, the chances of going to prison was 32.2% among black males, 17.2% among Hispanic males, and 5.9% among white males. *Id*. at 8.

Washington State corrections statistics similarly demonstrate that African Americans are disproportionately represented in the corrections system. Washington State's Census population estimate was 6,549,224 in 2008, and of that number 84.3% are White and 3.7% are African American. U.S. Census Quick Facts, Washington State, 2008, http://quickfacts.census.gov/qfd/states/53000.html. The Washington State Department of Corrections (DOC) collects data on the race of all offenders admitted to its facilities. Of the 27,547 offenders admitted to DOC prisons in Fiscal Year 2008, 24.1% were African American, a rate 6.5 times the proportion of the state population represented by African Americans. *Facility Reporter, Offender Characteristics, Population Movement and Custody*, Table 3D, State of Washington, Dept. of Corrections, Planning and Research Section. (Washington State 2000-2009). Between 2000 and 2009, African Americans were admitted to DOC facilities at an average rate of six times the admission rate of the general population. *Id*., Table 3C, 2000-2009.

Currently, statistics regarding the number of African Americans and Latinos/Latinas actually excluded from housing based on the use of criminal records policies as compared to the general population are not available, but are not necessary to make a disparate impact claim. Statistics *are* available to demonstrate that African Americans and Latinos/Latinas are far more likely to rent housing (as opposed to owning it) than are whites (and are therefore more likely to be subject to tenant screening reports) and can be used to bolster the disparate impact demonstrated by the criminal justice statistics above. African Americans in Washington are nearly 70% more likely to rent apartments than to own their own home, and they are 93% more likely to rent than whites.[37] *See* U.S. Census Bureau 2000, *Tenure by Race of Householder* (in Washington State), Census 2000 Summary File 3 (SF 3), Tables H11 and H12.

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[34] The FBI provides national and state arrest data, including racial information, on its website at http://www.fbi.gov/ucr/cius2009/arrests/index.html.

[35] http://bjs.ojp.usdoj.gov/index.cfm?ty=gsearc.

[36] Note that if these statistics were used to demonstrate disparate impact of tenant screening policies on a national level, the plaintiff should also provide statistics regarding the percentage of Blacks and Hispanics as compared to the percentage of whites living in the country during these years.

[37] To find information for your state, go to the 2000 Census SF3 page (http://factfinder.census.gov/servlet/DatasetMainPageServlet?_ds_name=DEC_2000_SF3_U&_program=DEC&_la

b. Eviction Records

Unfortunately, eviction data related to protected classes is not as readily available as data related to criminal records. For this reason, it is ***imperative*** that you seek the assistance of a statistician ***before*** embarking on gathering and using eviction data to build a housing discrimination case. You will want to ensure that your methodology is sound and that the results you obtain will be statistically valid. Undertaking a data gathering process without consulting an expert in advance may well result in a waste of valuable time, effort and money.

The following are suggestions for some possible methods of obtaining the data you might need if no study has been conducted in your area. One method is to observe unlawful detainer cases over a period of time in a particular county, city, or state, and then record the demographic information of the defendants. A second method is to administer a survey to unlawful detainer defendants outside of the courtroom. The data obtained from either type of sampling could then be used to show a disparate impact on the protected group as compared to the population as a whole. A drawback to both methodologies is that the tenant defendants in many unlawful detainer cases do not appear in court.[38]

Another method is to undertake a spatial analysis of your geographic area. First, obtain eviction data from your state court and then use GIS software to map those addresses with census tract information about selected protected classes. This analysis could show a possible correlation between protected class and likelihood of eviction.[39] When undertaking any of the above data gathering, keep in mind defendants' possible challenges to its significance and meaning. Again, you should consult with a statistician or other expert when attempting to gather or analyze this data.[40]

You could also try to rely on census data in your area. Some courts have permitted plaintiffs to rely on census data to prove a disparate impact claim. For example, plaintiffs' statistical evidence that a mortgage company made a greater percentage of its loans in majority black census tracts than other subprime lenders, and made an even more disproportionately large number of loans in neighborhoods that were over 90 percent black was sufficient to establish a prima facie showing of disparate impact. *National Fair Housing Alliance, Inc.*, 208 F.Supp. 2d at 61 (2002) (plaintiffs put forth sufficient data from most recent U.S. census to support their disparate impact claim); *Hargraves v. Capital City Mortg. Corp*., 140 F.Supp.2d 7, 21 (D.D.C. 2000); *Bronson*, 724 F.Supp. at 155 (allowing 1980 census data to be used to determine approximate racial makeup of residents in 1989 when it was the most recent compilation available and current estimates confirmed the data).

Census data was successfully used in an administrative disparate impact case to establish a prima facie case of familial status discrimination. *See Sec.v. Richard D. Carlson*, HUDALJ 08-91-0077-1 (1995); *overturned on other grounds, Carlson v. HUD*, WL 156704 at *1 (8th Cir. 1996) (overturning ALJ

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ng=en). On the right-hand side, under "Select from the following," there is a link to "enter a table number." Click on this link, and a box will pop up. You can now enter the table of interest - H11 or H12 - and click "Go." Under "Select a Geographic Type" select 'State'. The page will refresh, and you can then select your state from the list. Click the "Add" button just below the list of states. Then click "Show Result."

[38] According to 2007 information obtained from the WA Administrative Office of the Courts, nearly 43% of the residential unlawful detainer cases resulted in a default judgment against the defendant for failure to appear.

[39] This methodology was used in a study undertaken in King County, WA. *See* n. 5.

[40] If you plan to litigate this issue, but do not already have the data for your area, obtaining the data and using an appropriate expert can be expensive and time consuming. There are steps you can take to reduce costs including working with local universities, partnering with other nonprofit advocacy agencies, and seeking grant funding for the research. Before undertaking a disparate impact case based on an eviction record, it is important to do an analysis to determine potential costs and the ability to obtain the necessary data.

decision because landlord did not actually enforce his neutral policy of renting to three or less people as he rented to families of four). The charging party introduced 1990 census data showing that the average family with children in the area (Sioux Falls) was excluded by respondents' occupancy policy of limiting rentals to three people. *Id.* Using national data, the charging party demonstrated that 58.8% of families with minor children in Sioux Falls would be prevented from living in respondent's units because of the policy, whereas only 3.6% of households without minor children would be prevented. *Id.*

Be aware that defendants may point to one decision that found census data insufficient to establish a disparate impact claim. *2922 Sherman Ave. Tenants' Ass'n v. Dist. of Columbia*, 444 F.3d 673, 680 (D.C.Cir.2006). In that case, an expert testified that the buildings affected by the policy at issue were located, on average, in census block groups whose percentage of Latino/Latina residents was 4.1 times the percentage of Latinos/Latinas in the District as a whole. According to the court, "the tenants provided no evidence that the *specific buildings* at issue were disproportionately Latino/Latina. Instead, their statistical expert merely described the ethnic composition of the neighborhoods, leaving it to the jury to infer the ethnic composition of the buildings from the ethnic composition of their respective neighborhoods." *Id.* at 681. (Emphasis added).

To avoid *Sherman Avenue* pitfalls, the potential plaintiff would make the strongest case by first providing a statistical showing of the actual percentage of the protected group (e.g., African Americans, Latinos/Latinas, or women) who have been involved in unlawful detainer actions in the relevant area as compared to the majority population. She would then demonstrate the actual percentage of the protected group living in the area as compared to the general population, and would be prepared to present and defend that data through use of an expert.

4. Segregative Effect

A disparate impact case can be demonstrated by showing a *segregative effect* as an alternative to a showing a disproportionate impact. *See Metropolitan Housing Development Corp.*, 558 F.2d at 1290-91, (when a decision "perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups"); *Huntington Branch*, 844 F.2d at 938 (discrimination claims based on segregative effect "advances the principal purpose of Title VIII to promote 'open integrated residential housing patterns''); *Wallace*, 321 F. Supp. 2d at 974 ("Conduct that 'perpetuates segregation and thereby prevents interracial association ... will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.'"(quoting *Arlington Heights*, 558 F.2d at 1290)).

Litigating a segregative effect case requires a different statistical strategy from that used in a disproportionate impact case. The plaintiff would need to produce data demonstrating it was more common for landlords to exclude applicants who have criminal or eviction records in neighborhood X than in neighborhood Y, and that neighborhood Y has a significantly higher proportion of residents who are members of a protected class. The plaintiff would then show that the practice (in Neighborhood X) of excluding applicants who have criminal or eviction records tends to preserve or promote segregation by making it more difficult (on a collective level) for members of protected classes to access the housing market in Neighborhood X than Neighborhood Y.

Little guidance exists as to the statistical or other evidentiary requirements for a "segregative effect" claim under the FHA. One court held that the plaintiff must show: 1) an "indicia of segregation" as a localized concentration of groups within the municipality; 2) comparisons of the racial composition of the areas inside and outside the area at issue; 3) a showing that people of color have been excluded from the area; and 4) historical practices of segregation where effects still linger. *Housing Investors v. City of*

Clanton, 68 F. Supp. 2d 1287, 1298 (M.D. Ala. 1999) (citing *Huntington v. Huntington Branch NAACP,* 488 U.S. 15 (1988). A statistical showing that the population of the affected area has a higher percentage of whites than people of color is likely insufficient if it does not show anything more than the expected white to people of color proportion. *Id.* However, if a large majority of African American or Latino/Latina tenants is clustered in a certain area more than others, this can be "highly probative of [an FHA] violation." *U.S. v. Mitchell*, 580 F.2d 789, 791 (C.A. Tex. 1978*) superseded by statute as stated in U.S. v. City of Jackson*, 359 F.3d 727 (5th Cir. 2004).

C. Possible Defenses for Tenant Screening Companies and Landlords

Housing providers have successfully raised defenses to FHA disparate impact case based on insufficient statistical evidence and business justification. The majority of case law is related to criminal records is in the employment context.

1. Insufficient Statistical Evidence

Defendants may challenge the statistical basis of a plaintiff's prima facie case, and avoid providing any other defense. *Gamble*, 104 F.3d at 306 (plaintiff failed to establish a prima facie case because he presented no statistics demonstrating landlord's practices had disproportionate impact on protected classes). A defendant can raise this defense by presenting statistics that are more current, accurate, or specific to the region or applicant pool than the statistics plaintiff presented. *See* Guidance on Use of Statistics ("[i]f the employer can present more narrow regional or local data on conviction rates for all crimes showing that Blacks and Hispanics are not convicted at disproportionately higher rates, then a no cause determination would be proper"). A defendant can also argue that the statistics themselves are inadequate or incomplete. *EEOC v. Carolina Freight Carriers*, 723 F. Supp. 734, 751 (S.D. Fla. 1989) (EEOC failed to provide adequate statistics for relevant labor market to prove that trucking company's exclusion of drivers with convictions for theft crimes had an adverse impact on Hispanics at a particular job site); *c.f. Reynolds v. Sheet Metal Workers Local* 102, 498 F. Supp. 952, 963, 22 EPD P 30, 39 (D.C. 1980), *aff'd.,* 702 F.2d 221 (D.C. Cir. 1981) (plaintiff's statistics showing employer's requirements disproportionately excluded African Americans were not irrelevant, as argued by defendants, but no prima facie case of disparate impact established until after examination of all elements of hiring process).

2. Business Justification Defense

There is no clear agreement among the circuits for the business justification defense standard in FHA cases. [41] In the Ninth Circuit, once the plaintiff establishes a prima facie disparate impact claim, the burden shifts to the defendant to advance a "compelling business necessity." *See Pfaff v. U.S. Dept. of Housing &Urban Dev*., 88 F.3d 739, 747 (9th Cir. 1996). ("appropriate standard of rebuttal in disparate

[41] The Tenth Circuit has declined to require that defendants provide a "compelling need or necessity" defense and while "mere insubstantial justifications" are not sufficient, a "compelling need or necessity" is too high a bar because such a degree of scrutiny would be almost impossible to satisfy. *Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254-55 ("manifest relationship" test applies in Title VII disparate impact cases). The Eighth Circuit requires that the defendant demonstrate a "manifest relationship" to "legitimate non-discriminatory policy objectives" and is "necessary" to attain those objectives. *Charleston Housing Auth. v. U.S. Dept. of Agriculture*, 419 F.3d 729, 741 (8th Cir. 2005). The Third Circuit does not use the "business necessity" test and looks at the criteria for a defendant's policy on a "case-by-case basis." *Resident Advisory Board v. Rizzo*, 564 F.2d 126 at 148-9. The Fourth Circuit uses the "legitimate nondiscriminatory reason" test where defendants must prove a "business necessity sufficiently compelling to justify the challenged practice." *Betsey*, 736 F.2d at 988. The Sixth Circuit requires defendants to articulate a "legitimate business reason" for the challenged decision. *Graoch Associates # 33*, 508 F.3d at 374. The Second Circuit requires a legitimate, bona fide interest and that no alternative would serve that interest with less discriminatory effect. *Salute*, 136 F.3d at 302.

impact cases normally requires a compelling business necessity"); *See Oliver v. Pacific Northwest Bell Telephone Co., Inc.,* 106 Wn.2d 675, 679; 724 P.2d 1003 (1986) (defendant must demonstrate that challenged practice is justified by "business necessity" or has a "manifest relationship to the position in question"). Defendants face a heavier burden of rebuttal in cases involving disparate impact, which is more difficult to establish than disparate treatment. *Pfaff*, 88 F.3d at 747 n.3.

In the employment context, the Eighth Circuit examined whether an employer's policy that barred employment of all people with criminal records was justified by business necessity. *Green,* 523 F.2d at 1293 . The employer asserted that the policy was necessary because of "1) fear of cargo theft, 2) handling company funds, 3) bonding qualifications, 4) possible impeachment of an employee as a witness, 5) possible liability for hiring persons with known violent tendencies, 6) employment disruption caused by recidivism, and 7) alleged lack of moral character of persons with convictions" *Id*. at 1298. The court rejected these reasons because they were not validated by any statistical evidence and the employer did not demonstrate that a "less restrictive alternative with a lesser racial impact would not serve as well." *Id.* In examining other cases, the court found instructive an inquiry into whether "consideration is given to the nature and seriousness of the crime in relation to the job sought [and] the time elapsing since the conviction, the degree of the felon's rehabilitation, and the circumstances under which the crime was committed." *Id*. at 1297. The EEOC promulgated a policy codifying these factors as the "business necessity" standard for the consideration of convictions by an employer.[42] EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987) [hereinafter Policy Guidance on Convictions].

After the EEOC's promulgation of the Policy Guidance on Convictions, case law regarding employment policies on criminal records was scant until the decision in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3rd Cir. 2007). The court found that the EEOC Policy Guidance on Convictions was not entitled to great deference because it did not substantively analyze the statue. *Id.* at 244. If a policy can "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not" then the policy is consistent with business necessity.[43] *Id.* The employer must show that its discriminatory hiring policy "accurately-but not perfectly-ascertains an applicant's ability to perform successfully the job in question."[44] *Id*. at 242.

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[42] In 1990, the EEOC issued guidance on arrest records as well. *See Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, Sept. 7, 1990 (hereinafter Guidance on Arrests). Under the Guidance on Arrests, the employer must consider the "job-relatedness" of the arrest (the relationship of the charges to the position sought) and the likelihood that the applicant actually committed the conduct alleged in the charges. As stated by the Guidance on Arrests, "It is the conduct, not the arrest or conviction per se, which the employer may consider in relation to the position sought." *Id*. Case law took a similar approach to the use of arrest records in employment inquiries. *See Schware v. Board of Bar Examiners,* 353 U.S. 232, 241 (1957) ("An arrest shows nothing more than someone probably suspected the person apprehended of an offense."); *Watkins v. City of Chicago*, 73 F. Supp.2d. 944, 949 (N.D. Ill. 1999) ("policy of refusing to hire persons who have been arrested but not convicted has been generally disapproved in view of its proven adverse racial impact"); *Gregory v Litton Systems, Inc.* 316 F. Supp. at 402-03 (no business necessity exists to exclude worker based on arrest record because employer had neither examined the particular circumstances surrounding the arrests nor considered the relationship of the charges made against him to the position); *Dozier v. Chupka*, 395 F. Supp. 836, 850 (D.C. Ohio 1975) (individual's arrest record must be related to job performance).

[43] *El* points out that the Supreme Court departed from the *Griggs* interpretation of business necessity in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 109 S.Ct. 2115 (1989). In *Wards Cove* the Court held that the challenged practice did not need to be "essential" or "indispensable" to comply with Title VII and shifted the burden of proof to the employee. *Id*. at 659. Congress then superseded the holding in *Wards Cove* by codifying the *Griggs* standard for business necessity. 42 U.S.C. § 2000e-3(k) (1991).

[44] Notably, the policy at issue in SEPTA was not a "flat ban" but created distinctions between some convictions for which it mandated a lifetime ban and others for which it mandated a seven-year ban. While the court upheld the policy based on SEPTA's expert testimony that the policy accurately screened out applicants too likely to commit

The business justification defense could be a difficult barrier for plaintiffs to overcome. Courts may be sympathetic to a housing provider's concerns about safety and recidivism related to an applicant with a criminal record, i.e. a tenant could harm neighbors or cannot pay rent if he is in jail. Overcoming the business justification defense is not insurmountable, as pointed out in the next section. Careful consideration of your client's facts, including the type and seriousness of crime committed, whether the tenant engaged in the conduct alleged in the unlawful detainer action and the length of time since the offense or eviction filing, and preparing possible alternative screening practices is essential.

a) Business Justification Defense for Eviction Records

To defeat a disparate impact claim, a tenant screening company could argue that it is in the business of offering objective information, such as eviction records, to landlords for screening purposes. Tenant screeners may claim that eviction records provide some indication of that tenant's past behavior that may indicate whether a tenant will meet rental obligations in the future. A landlord may argue that he has a business interest in renting to tenants who can meet all rental requirements and an eviction history is indicative of failing to meet these requirements in the past. Hence, the landlord will argue that he reasonably screens tenants using eviction histories to avoid problem tenants.

The underlying assumption of these assertions is that using "eviction" history in tenant screening is somehow predictive of the person's future behavior. Although these arguments may be intuitively persuasive, there are weaknesses to these contentions. The Guidance on Arrests and relevant case law can be useful in tenant screening cases where a landlord or tenant screener relies on eviction records and there is no information regarding any actual misconduct by the tenant. *See supra* n. 42. An advocate should argue that merely having an eviction record should not disqualify a tenant for housing. The screener or landlord must examine the tenant's actual conduct before rejecting the applicant. *Id*. A complete ban on all housing applicants with an eviction record would be akin to employer policies banning all applicants with arrest records. Courts found such policies discriminatory as they had a disparate impact on people of color. *Id*. Consequently, any correlation that might be drawn between an eviction filing and the tenant's ability to meet her tenant obligations grows weaker if the data used cannot show whether the tenant actually met her tenant obligations, the case was dismissed or reached a favorable settlement with the landlord. Moreover, no academically reliable correlation has yet been drawn between previous involvement in an unlawful detainer action and a future problematic tenancy. It is unlikely a landlord or tenant screening company will be able to provide much if any research to support this policy.[45] Thus, the plaintiff can argue that the practice of reporting just the eviction filing or denying housing based such filing, does not have a legitimate business justification.[46]

b) Business Justification Defense for Criminal Records

Policies against renting to individuals with criminal histories are based on the concern that such individuals are more likely than others to commit crimes on the property than those without such

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acts of violence against paratransit passengers, it made clear that the plaintiff's decision not to hire an expert to rebut SEPTA's experts on the issue of business necessity, nor even to depose SEPTA's experts, was fatal to its claim opposing summary judgment. *El,* 479 at 247. If plaintiff had taken such action, *El* "would have been a different case." *Id.*

[45] For one relevant study, S*ee Burke, Smith, & O'Toole, Selection of Public Housing Tenants: On the Feasibility of Using an Objective Screening Procedure*, Journal of Applied Social Psychology (1986).

[46] For cases where there the eviction may indicate a previous inability to comply with lease terms, there is little justification to treat all eviction filings as a negative mark. The crises that lead to the eviction may have passed - such as loss of job, family illness, or exacerbation of a disability.

backgrounds.[47] *See*, *e.g.*, *Evans,* F.Supp.2d 644 at 683. This policy is rooted in concerns for the safety of other residents of the apartment complex and their property.[48]

As with eviction records, while arguments as to the business justification for using criminal records to screen tenants based upon a "future threat" to persons or property may be intuitively persuasive, empirical proof is lacking. An academically reliable correlation has yet to be drawn between a previous conviction or other involvement in the criminal justice system and a future problematic tenancy and it is unlikely the landlord will be able to provide much if any evidence to support this policy. *See* Corinne Carey, *No Second Chance: People With Criminal Records Denied Access to Public Housing*, 36 U. Tol. L. Rev. 545, 563 (2005) ("Curiously, there has been relatively little discussion among federal or local housing officials as to what, in fact, predicts a good tenant, much less the predictive value of a criminal record."). According to a criminal justice expert, "[p]eople had always just gone with the assumption that having a criminal record makes someone a bad tenant, and that has never been empirically demonstrated." *Id.* at 563-65. In fact, a recent research study found that the previous criminal history of its residents was not indicative of success in meeting tenant obligations. Daniel K. Malone, *Accessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, Psychiatric Services, Vol. 60, No. 2 (2009). The study suggests that policies and practices that deny housing to individuals with criminal records may be "unnecessarily restrictive" as there is no clear empirical basis for them. *Id*. Hence, potential recidivism based on criminal history is not a "good proxy" for determining the ability of an applicant to meet tenant obligations. *Id.* at 228. In the employment context a "common sense" approach to applicant screening is unacceptable; there must be "some level of empirical proof that challenged hiring criteria accurately predicted job performance." *El*, 479 F.3d at 240. The same standard should apply in tenant screening cases.

Advocates should be prepared to rebut a housing provider's assertion that a criminal record ban may "accurately-but not perfectly-ascertains an applicant's ability to perform successfully" the obligations of tenancy. *See Id.* at 242. The advocate should present work history, evidence of rehabilitation, or expert

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[47] One of the risks landlords may seek to avoid by using a policy barring criminal convictions is their own liability for negligence should a tenant commit a future crime. Traditionally, landlords were not liable for the criminal acts of third parties, but may be liable if the act was foreseeable. *See* 43 A.L.R.5th 207. Landlords could be liable only if they do not follow their own screening guidelines or fail to take other precautions to protect tenants. *See* Ely Portillo, *Jury Finds Housing Authority Negligent,* Charlotte Observer, February 10, 2010, at http://www.charlotteobserver.com/2010/02/10/1236243/jury-finds-housing-authority-negligent.html (jury award against PHA for $132,000 for violating its own rules by conducting a statewide rather than national criminal background check on a tenant who later murdered another tenant); Hong Tran*, The Crimes That Bind: The Intersection of Subsidized Housing and Criminal Law,* Clearinghouse Review Journal of Law and Policy (Jan. – Feb. 2008) at 541, ("Landlords commonly cite concerns over potential legal liability if they rent to individuals with a criminal history: however, such concerns are more rooted in stereotyping than real threats." But noting *Kline v. 1500 Massachusetts Ave. Corp*., 439 F.2d 477, 480-81 (D.C. Cir. 1970) (landlord liable for injuries to tenant as a result of criminal acts by third party where he did not take reasonable steps to protect tenants from criminal activity) and *Griffin v. West RS Inc*., 97 Wash. App. 557, 567-68, 984 P.2d 1070, 1075 (1999) (landlord has duty to take reasonable steps to protect tenant from foreseeable criminal acts of third parties on the premises), *rev'd* on other grounds, Wn 143.dd 81, 18 P.3d 558 (2001)).

[48] To justify their "business necessity" arguments, the landlord or tenant screening company may first attempt to rest on language in the FHA providing that a dwelling can be refused on the basis that an individual would constitute a "direct threat to the health and safety of other individuals or whose tenancy would result in substantial physical damage to the property of others," 42 U.S.C. § 3604(f)(9); 24 C.F.R. § 100.202(d). This argument misinterprets the regulation. This provision applies specifically to discrimination based on disability, not discrimination based on other protected status. *See Roe v. Sugar River Mills Associates*, 820 F.Supp.636, 639-40 (D.N.H.1993) (citing to legislative history of the amendments and finding that the "[d]efendants [must] demonstrate that no 'reasonable accommodation' will eliminate or acceptably minimize the risk.").

testimony related to specific safety concerns. In addition, for older criminal histories, advocates could assert that over time the likelihood of a person committing another crime approximates the risk of someone who has never committed a crime. *See* Megan C. Kurlychek, Criminology and Public Policy, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*?, Vol. 5 No. 3, 483, 499 (2006) (over a 6 or 7 year period, the risk of criminal activity for a person with a prior criminal history and a person with none becomes similar); Sentencing Project, State Recidivism Study (2010) at http://sentencingproject.org/doc/publications/inc_StateRecidivismFinalPaginated.pdf (recidivism rates by state).

In sum, like Title VII, Title VIII should operate to ensure that housing applicants receive the consideration they are due and are not screened out by arbitrary policies or practices. *See El*, 479 F.3d at 239-40 (3rd Cir. 2007) ("employer must present real evidence that the challenged criteria 'measure[s] the person for the job and not the person in the abstract.'"(quoting *Dothard,* 433 U.S. at 332, 97 S.Ct. 2720)). As articulated in one case, "the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII…as one commentator has observed, 'the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot.'" *Rizzo*, 564 F.2d at 148 (quoting Elliot M. Mincberg, *Applying the Title VII Prima Facie Case to Title VIII Litigation,* 11 Harv. C.R. - C.L.L.Rev. 128 (1976)).

D. Burden Shifting Back to Plaintiff

If a screening company or landlord can successfully rebut the presumption of discrimination under a business necessity or other defense, the burden shifts back to the plaintiff as to whether the proffered reason for screening out or denying housing is pretextual. *See Harris,* 183 F.3d at 1051 ("Assuming the defendant can successfully rebut the presumption of [intentional housing] discrimination, the burden shifts back to the plaintiff to raise a genuine factual question as to whether the proffered reason is pretextual"); *Moua v. City of Chico*, 324 F.Supp.2d 1132, 1142 (E.D. Cal 2004) (burden shifts back to the plaintiffs to at least raise a genuine factual question as to whether this reason is pretextual). Showing pretext can be difficult to execute in disparate impact cases, as discriminatory motive is typically not part of the claim. But, few if any disparate impact cases under the FHA have required that plaintiffs do so. The Sixth Circuit required the plaintiff to show pretext or "demonstrate that there exists an alternative [housing] practice that would achieve the same business ends with a less discriminatory impact."[49] *Graoch*, 508 F.3d at 374. This methodology is analogous to the showing available at this stage in disparate impact claims under Title VII, where plaintiffs must show that an "alternative employment practice" serves the employers goals as effectively as the challenged practice and that the alternative results in less of a disparate impact than the challenged practice. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Watson v. Fort Worth Bank*, 487 U.S. 977, 997-98 (1988) ("when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must 'show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.'" Quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 525) (1975)).

Suggestions for "alternative housing practices" that would be equally effective in addressing housing providers' concerns without creating a disparate impact could include eliminating the use of criminal and

[49] To evaluate the plaintiff's demonstration of pretext or an alternative practice, the court examined the strength of the plaintiff's showing of discriminatory effect against the strength of the defendant's interest in taking the challenged action. *Id.*(citing *Arthur*, 782 F.2d at 575).

eviction records altogether because they have not shown to be an effective tool to predict future positive tenancies, or, more realistically, requiring that landlords conduct an individualized assessment of the eviction or criminal record of the prospective tenant, as is required in the employment context. If the landlord did use such a case-by-case analysis, it would likely be the rare case where the eviction or criminal record would lead to a reliable determination that the prospective tenant would be at "high risk" for future problems in his or tenancy, over and above tenants without a criminal or eviction record. Landlords could also take the "ban the box" approach used by many cities. *See Major U.S. Cities Adopt New Hiring Policies Removing Unfair Barriers to Employment of People with Criminal Records*, Second Chance Labor Project (2008) at http://www.nelp.org/page/-/SCLP/citypolicies.cfm.htm; n.31 *supra*. Under this approach, employers "remove the box" by not asking about criminal records until the final stages of the hiring process. This approach would avoid the discriminatory impact of a permanent ban on those with criminal or eviction histories by looking at all the other housing criteria before considering an eviction or criminal history.

II. Conclusion

This guide is intended to encourage advocates to use disparate impact claims under the FHA to stop landlords and tenant screeners from using criminal or evictions records as a reason to deny housing to tenants in protected classes. This is an emerging area of law. Careful consideration of the case law in your circuit or state on these issues is important before filing a court case. We encourage advocates to use these theories as effective tools for enforcing tenants' rights to be free of racial or gender-based housing discrimination.