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

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I. Overview

Since we published this guide in 2010 much has changed. There was a real chance that the Supreme Court would eliminate disparate impact as actionable under the Fair Housing Act, but the theory remains. The EEOC has issued new guidance on the use of criminal records in employment, but there has been a backlash against these cases in federal court. There has also been renewed energy and commitment to ending racial inequities at all levels in our society. The recent murders and terrorist attacks on Black men and women, as well as historically Black churches, call us to action to end structural racism. Along with explicit racism, there has been court recognition that implicit bias and unconscious prejudice exists and has harmful impacts on our society. This guide is one tool to assist the civil rights and fair housing practitioner in ending housing practices that have a discriminatory effect on protected classes.

This guide specifically 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 with the aim of providing the fair housing practitioner with a set of basic tools necessary to assert this claim.[2] 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.

The difficulty in bringing a disparate impact case should not be underestimated by practitioners. There are many hurdles that a plaintiff must overcome to succeed on these claims such as obtaining appropriate statics, hiring a qualified expert and overcoming some court's hostility to these types of claims.[3] However, the disparate impact theory is still an important and necessary means to address structural and institutional discrimination.

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[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] This guide does not cover additional claims that could be made under the Fair Credit Reporting Act (FCRA). FCRA regulates consumer reporting agencies such as some tenant screening companies. There are many problems that can arise with criminal records and background checks. *See* Persis S. Yu and Sharon M. Dietrich, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses,* National Consumer Law Center (April 11, 2012), http://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf; 15 U.S.C. §§ 1681–1681x. However, succeeding on a claim under the FCRA regarding inaccurate reporting of eviction information can be challenging. *Taylor v. Screening Reports, Inc*., No. 13C02886, 2015 WL 405824, at *4 (N.D. Ill July 2, 2015). (complaint did not adequately allege that filed eviction case connected to an unrelated foreclosure against another party was misleading even though tenant did not live at the premises at the time of eviction). 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.

[3] *See* Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 Harv. C.R.-C.L. L. Rev. 197, 207 (2014) (in employment disparate impact cases courts are now demanding higher burden of proof that makes it significantly more difficult for plaintiffs to succeed).

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.[4] Landlords commonly screen tenants by charging the applicant a fee to obtain a report about the applicant's background. This report often includes credit information, check of sex offender registries, an eviction report and criminal history.[5] 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.[6]

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.[7] Landlords often have their own policies to deny applications based on a criminal or eviction record, regardless of such a recommendation.[8]

While the reporting and use of criminal and eviction history as a basis for rejecting rental applicants is common today, this practice may be unlawful under fair housing law because of its disparate impact on certain protected classes,[9] particularly African American men and Latino men.[10] Criminal and eviction records may also have a disparate impact on women.[11]

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[4] *See* Eric Dunn, Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 Seattle J. for Soc. Just. 319, 327–38 (2010) (providing an overview of the tenant screening process and discussing the problems caused by modern tenant screening practices such as errors and misleading information in tenant screening reports and unfair admission practices by landlords).

[5] Washington passed the Fair Tenant Screening Act, effective June 7, 2012. The Act requires landlords to give written notice to prospective tenants about the type of information to be accessed to conduct the screening; what criteria may result in denial of an application; and, if a consumer report is used, the name and address of the reporting agency. The tenant has the right to obtain a copy of the report if the application is denied, as well as a right to dispute the adverse action. If a landlord takes adverse action, it must notify the prospective tenant the reasons for the adverse action. Wash. Rev. Code § 59.18.257 (requirements of the screening notice); Wash. Rev. Code § 19.182.110 (notice required in the event of adverse action); Wash. Rev. Code § 59.18.030 (defines tenant screening).

[6] *See e.g.*, David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 Law & Soc. Inquiry 5, 11 (2008); *Tenant Screening Agencies in the Twin Cities: An Overview of Screening Practices and Their Impact on Renters,* HousingLink, 9–10 (2004), http://www.housinglink.org/Files/Tenant_Screening.pdf; David J. D'Urso, *Tenant Screening Agencies: Implications for Landlords and Tenants,* 26 Real Est. L.J. 44 (1997).

[7] *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).

[8] *Id.* at 678.

[9] Rebecca Oyama, *Do Not (Re)enter: The Rise of Criminal Background Tenant Screening As A Violation of the Fair Housing Act*, 15 Mich. J. Race & L. 181, 212 (2009)

[10] *Id.* at 203–207 (citing studies that show that racial discrimination in the criminal justice system contributes to the higher rates of convictions for people of color); *see Farrakhan v. Gregoire*, 590 F.3d 989, 1010, *on reh'g en banc,* 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 (Feb. 2008), http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one in 100.pdf (African American men are incarcerated at a rate more than six times that of white men).

[11] *See* George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. Rev. 1746, 1766, 1774 (2012); Mathew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 Am. J. of Sociology 88, 120 (2012) (women from black neighborhoods are "evicted through the court system at alarmingly high rates").

2. Criminal Records

Both landlords and tenant screening companies obtain criminal records[12] from a myriad of sources.[13] The more than 10,000 county, state, and federal courts in the United States each maintain court records.[14] However, each of these court systems has its own method for keeping and updating criminal records, and methodologies differ greatly between jurisdictions.[15] While many records are available online from official court record repositories, not all court systems offer this service. 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 "instant" reports or information "in less than a minute."[16] 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.[17] Many times background checks are simply incorrect.[18]

3. Criminal Records and Discrimination

The probable disparate impact on certain protected classes of policies banning applicants from housing based on criminal records is almost incontrovertible.[19] People of certain races and ethnicities are disproportionately represented in the criminal justice system.[20] Over twenty years

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[12] The rejection or disqualification of applicants with a criminal conviction from housing opportunities reflects the informal collateral consequences imposed outside of the courtroom which significantly affect the lives of those individuals. Wanye A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1106 (2013).

[13] 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 that may include arrest records, criminal court records, and corrections records). *See* Lynn Peterson, *Not All Criminal Records Checks are Created Equal*, The Virtual Chase (Mar. 2, 2005), http://www.virtualchase.com/articles/archive/criminal_checks.html.

[14] *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*, Automatic Data Processing, 3–4 (2007), http://www.adpselect-info.com/client/pdf/insideCriminalBackgroundChecks.pdf.

[15] 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." Wash. Rev. Code § 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). Wash. Rev. Code § 10.97.040.

[16] RenTec, *Screening Report Details,* http://www.rentecdirect.com/details/tenant_screening.php (last visited Feb. 11, 2014); YouCheckCredit.com, *Online Tenant Screening & Background Check*, http://www.youcheckcredit.com/ (last visited Feb. 11, 2014); TenantScreeningUSA, *Welcome Landlords!,* http://tenantscreeningusa.com/landlord-tenant-screening/ (last visited Feb. 11, 2014).

[17] Databases are inconsistently updated, consequently errors in criminal records retrieval are frequently noted. *Inside Criminal Background Checks*, *supra* note 12 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 (Dec. 2006), http://www.nelp.org/page/-/SCLP/union 3-pager_122106_150337.pdf (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).

[18] *See* Yu and Dietrich, *Broken Records, supra* at 1, n. 2 ("evidence indicates that professional background screening companies routinely make mistakes with grave consequences for job seekers.").

[19] *See* Oyama, *supra* at 2, n.9..

[20] *See Farrakhan v. Gregoire,* 590 F.3d 989, 1010 (9th Cir. 2010), *vacated on other grounds,* 623 F.3d 990 (9th Cir.

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."[21] As a result, blanket policies denying housing to individuals with criminal records have a disparate impact on these protected classes.

4. Eviction Records

Tenant screening companies and landlords sometimes use court databases to obtain a tenant's eviction history.[22] 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.[23]

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.[24] As stated by one tenant lawyer, "[M]any landlords refuse to rent to tenants named in a housing court case, regardless of its outcome."[25] 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 an outright denial of housing.[26] Tenant

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2010) ("[T]he significant racial disparities in arrest rates are not fully warranted by race or ethnic differences in illegal behavior."); Task Force on Race in the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System* 10 (2011) at http://www.law.washington.edu/About/RaceTaskForce/preliminary_report_race_criminal_justice_030111.pdf ("racial and ethnic disproportionalities exist at many different stages of the criminal justice system, including at arrest, charging, conviction, and imprisonment."); Warren, *supra* at 2, n.10. (African American men are incarcerated at a rate more than six times that of white men); *see* The Sentencing Project, *Reducing Racial Disparities In the Criminal Justice System: A Manual for Practitioners and Policymakers* at 1-3 (2008); Thomas Fitzgerald, *Obama to Call for Criminal Justice Reform at NAACP in Philadelphia*, Philadelphia Inquirer, July 14, 2015 ("Mandatory minimums have disproportionately affected Blacks and Latinos, and there is a developing bipartisan consensus to reform sentencing guidelines and to smooth out disparities in punishment.").

[21] The U.S. Equal Employment Opportunity Commission, *EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended,* 42 U.S.C. § 2000 *et seq.* (1982) (Feb. 4, 1987), http://www.eeoc.gov/policy/docs/convict1.html. The EEOC issued guidance in 1987 concerning the use of conviction records and in 1990 for consideration of arrest records. In 2012, the EEOC updated this guidance. *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The 2012 guidance consolidates the 1987 and 1990 guidance, updates the research and discusses disparate treatment and disparate impact analysis for employer criminal record policies under Title VII with an in depth analysis and specific examples.

[22] In Washington, landlords and tenant screening companies can obtain "eviction" records through SCOMIS. *See supra* n. 15.

[23] 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 supra* at 1, n.2.

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

[25] *See* Jay Romano, *What Every Tenant Ought to Know*, N. Y. Times, Oct. 22, 2006.

[26] Dunn and Grabchuk at 358. In 2010, New York City passed the Tenant Fair Chance Act that requires landlords, property managers and brokers to disclose the screening company they use, so that tenants can order their files from these groups.

screening reports have been likened to blacklists.[27] "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."[28]

5. Eviction Records and Discrimination

Studies from across the country indicate that women[29] and people of color are evicted at rates that far outpace their representation in society.[30] In studies conducted in New York City, Philadelphia, and Oakland, people of color made up over 70% of tenants involved in unlawful detainer actions.[31] As a result, 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 statewide studies, 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.[32]

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

Disparate impact theory originated in employment discrimination cases and has been applied to fair housing law.[33] Eleven federal courts of appeals that addressed this issue recognized

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[27] The New York State Bar Association has developed a pamphlet entitled "The Use of Tenant Reports and Blacklisting" which describes how tenant screening reports and credit information affects a tenant's chances of renting a dwelling. Although it references New York law, it is a useful guide to the process generally. *See* http://www.nysba.org/AM/Template.cfm?Section=LegalEASE_Informational_Pamphlets&ContentID=46338&Template=/CM/ContentDisplay.cfm.

[28] *White v. First Am. Registry, Inc.*, 04 CIV. 1611 (LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007); *see also U.D. Registry, Inc. v. State of California*, 34 Cal. App. 4th 107, 114, 40 Cal. Rptr. 2d 228 (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).

[29] Black women and Latinas are at great risk of housing discrimination. Lipsitz at n. 11 ("Similarly, government policies that provide subsidies to homeowners--who are often white, male, and middle class--but fail to fund adequately low- income housing so dearly needed by communities, and especially women of color, are part of a pattern that sustains segregation and exposes black women and Latinas to greater risks of housing discrimination, redlining, foreclosure, eviction, serial displacement, and homelessness.").

[30] *See* Desmond, *supra* at p.2, n.11*;* Kleysteuber, at 1353 (*citing* Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 Housing Pol'y Debate, 461, 467-68 (2003)).

[31] *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, February 18, 2010 ("Women from largely black neighborhoods in Milwaukee constitute 13 percent of the city's population, but 40 percent of those evicted).

[32] 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 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.

[33] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (U.S.N.C. 1971); 42 U.S.C. § 2000e-

disparate impact as a valid legal claim under the Act, but the circuit courts formulated several different legal tests.[34] Recently, HUD issued a final rule formalizing its long standing recognition of disparate impact as a prohibited form of discrimination under the Act and setting a national standard for analyzing these types of claims.[35] Previously, there was serious concern that the U.S. Supreme Court might overturn this precedent.[36] The Court was set to hear oral argument on December 4, 2014 regarding whether disparate impact claims are cognizable under the Fair Housing Act, but much to the relief of some fair housing advocates, the parties settled the case.[37] Advocates were concerned when the Court granted *certiorari* to another fairing housing case, but in a surprising 5-4 decision, the court affirmed the cognizability of disparate impact claims under the Fair Housing Act.[38]

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.[39] Discrimination exists even though the resulting adverse impact upon members of the group was not intentional.[40] The remainder of this guide will examine the basic legal steps necessary to make a disparate impact claim under the federal Fair Housing Act.

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."[41] "Impermissible

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2(k) (Congress codified the use of disparate impact analysis to prove discrimination claims in Title VII cases).

[34] The appeals courts have used several different tests for evaluating disparate impact. Oyama *supra* at p.2, n.9. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 24 C.F.R. Part 100 (February 13, 2013), Summary at p. 10.

[35] The HUD rule sets out a three-step burden shifting analysis. 24 C.F.R. § 100.500. A recent law review article provides an in-depth discussion of this rule and its implications for future court decisions. Michael G. Allen, Jamie L. Crook, John P. Relman, *Assessing HUD's Disparate Impact Rule: A Practitioner's Perspective*, 49 Harv. C.R.-C.L. L. Rev. 155 (2014).

[36] Nikole Hannah-Jones, *How the Supreme Court Could Scuttle Critical Fair Housing Rule,* ProPublicola, February 8, 2013.

[37] *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3rd. Cir. 2011), *cert. granted,* 133 S.Ct. 2824 (U.S. June 12, 2013) (Docket No. 11-1159), http://www.supremecourt.gov/qp/11-01507qp.pdf. The Court was previously set to decide this same legal issue, but the parties agreed to dismiss the case. *Magner v. Gallager*, 619 F.3d 823 (8th Cir. 2010), *dismissed* 132 S.Ct. 1306 (U.S. February 14, 2012) (docket 10-1032); Lyle Denniston, *Fair housing case dismissed*, SCOTUSBLOG (Feb. 10, 2012, 2:27 PM), http://www.scotusblog.com/2012/02/fair-housing-case-dismissed/.

[38] *Texas Dep't. of Hous. and Cmty. Affairs v. Inclusive Communities Project Inc.*, 135 S.Ct. 2507 (June 25, 2015) (FHA "aims to ensure that those priorities [of the housing authority's] can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.").

[39] Oyama at 204, *supra* at p.2, n.9.

[40] *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) ("Effect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme.").

[41] 42 U.S.C. § 3601; *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1056 (E.D. Cal. 1998); *see also United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

characteristics" under the FHA include race, color, religion, sex, disability, familial status, or national origin.[42]

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."[43]

As discussed below, a disparate impact claim may be brought against either (1) a tenant screening company for the service it provides to landlords in connection with the housing process, or (2) 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.

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.[44] Conduct prohibited by the FHA is broadly categorized as "discriminatory housing practices."[45] 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.[46] 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 Act.[47]

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

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[42] 42 U.S.C. § 3604.

[43] 42 U.S.C. § 3602(i)(1),(2).

[44] 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), *reh'g en banc granted, opinion vacated,* 191 F.3d 911 (8th Cir. 1999), and *on reh'g en banc,* 206 F.3d 810 (8th Cir. 2000); *Cisneros v. U.D. Registry, Inc*., 46 Cal. Rptr. 2d 233 (Ct. App. 1995); *Schoendorf v. U.D. Registry, Inc.*, 97 Cal. App. 4th 227, 118 Cal. Rptr. 2d 313 (2002); *Marino v. UDR*, CIV A. 05-2268, 2006 WL 1687026 (E.D. Pa. June 14, 2006). Tenant-screening companies have also appeared as plaintiffs in cases regarding access to records. *See U.D. Registry, Inc. v. Mun. Court*, 50 Cal. App. 4th 671, 57 Cal. Rptr. 2d 788 (1996); *U.D. Registry, Inc. v. Superior Court*, 39 Cal. App. 4th 1241, 46 Cal. Rptr. 2d 363 (1995). In April, 2013, the WA ACLU filed a class action complaint against a tenant screening service for violating the Washington Fair Credit Act. Complaint available at http://aclu-wa.org/cases/wilson-v-rentgrow.

[45] 42 U.S.C. § 3602(f).

[46] *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 211-212, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972); *Resident Advisory Bd. v. Rizzo,* 425 F. Supp. 987, 1018 (E.D. Pa. 1976), *modified,* 503 F. Supp. 383 (E.D. Pa. 1980)*, and modified,* 564 F.2d 126 (3d Cir. 1977); *cert. denied,* 435 U.S. 908 (1978).

[47] 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); *see Proof of Housing Discrimination Against a Prospective Tenant on Account of Race or National Origin,* 93 Am. Jur. Proof of Facts 3d 415 § 17.

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."[48] Courts have also extended the Act's provisions to lending companies, newspapers, brochures, and telecommunication devices.[49]

Second, activities covered by the Act are broadly defined. The Act prohibits discrimination in the "provision of services in connection with housing."[50] 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.[51] 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.[52] 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 arise with landlords."[53] When tenant screening companies recommend that landlords take a particular action regarding an applicant, this "screening" is a service in connection with housing that is a prohibited act under the Act. It is a service analogous to the provision of property insurance, a practice covered by the Act.[54] Although "risk discrimination" may not be race discrimination, "efforts to differentiate more fully among risks may produce classifications that could be generated by discrimination."[55]

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[48] *Schroeder v. De Bertolo*, 879 F. Supp. 173, 177 (D.P.R. 1995); *see Michigan Prot. & Advocacy Serv., 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 Cnty.,* 931 F.2d 718, 722 (11th Cir. 1991) (home owner's claim against neighbor was within scope of the Act).

[49] *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. Sav. of Am.*, 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 (2d 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).

[50] 42 U.S.C. § 3604(b).

[51] *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (en banc) (remanding to district court as to whether website's actions violate the FHA).

[52] *Id.* at 1167.

[53] *Id. (citing Jeanty v. McKey & Poague, Inc.,* 496 F.2d 1119, 1120-21 (7th Cir. 1974).

[54] *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"). *See Ojo v. Farmers Grp., 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. v. Cisneros*, 52 F.3d 1351, 1357 (6th Cir. 1995) (business of property insurance is governed by the FHA); *N.A.A.C.P. v. Am. 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 Hous. 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."); *but see Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urban Dev.,* No. 13-00966, 2014WL 5802283 (D.D.C. November 7, 2014) (insurance companies succeeded in arguing that HUD exceeded its rule making authority in promulgating disparate impact rules). This case is most likely less important given the ruling in *Inclusive Communities* even though the Court did not rule specifically on the validity of HUD's regulations.

[55] *N.A.A.C.P.*, 978 F.2d at 290.

c) FHA Exemptions Are Inapplicable to Tenant Screening

Tenant screening companies are not specifically exempted from the Act nor are they similar to any of the entities granted exemptions.[56] These exemptions are narrowly construed.[57] Generally, if exemptions are specified in a statute, courts may not imply additional exemptions unless there is a clear legislative intent to the contrary.[58]

d) Prohibited Acts: "Otherwise Make Unavailable"

The FHA makes it unlawful to "otherwise make unavailable or deny" housing based on protected characteristics.[59] 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."[60]

One court recognized that the practice of "tenant screening" may negatively affect the availability of rental housing to protected classes.[61] 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.[62] The association dubbed it the "wish well" list as landlords should wish these tenants well, but not rent to them.[63] 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."[64] 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.[65] Based on this analysis, tenant screening companies and landlords should be liable under the FHA when their tenant screening practices make housing unavailable to certain protected classes.

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[56] 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).

[57] *See City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 804 (9th Cir. 1994), *aff'd sub nom. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed. 2d 801 (1995) ("exemptions must be read narrowly"); *United States v. Lorantffy Care Ctr.*, 999 F. Supp. 1037, 1044 (N.D. Ohio 1998) (court must construe exemptions to the FHA narrowly).

[58] *Imperial Merch. Servs., Inc. v. Hunt*, 47 Cal. 4th 381, 212 P.3d 736 (2009); *Adams v. King Cnty.*, 164 Wash. 2d 640, 650, 192 P.3d 891 (2008).

[59] 42 U.S.C. § 3604(a).

[60] *Nationwide Mut. Ins. Co.*, 52 F.3d at 1360; *but see Jersey Heights Neighborhood Ass'n 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 Associates, Ltd. v. United Technologies Corp.*, 929 F.2d 714, 719 (D.C. Cir. 1991) (private elevator company's refusal to service buildings in predominantly African American neighborhood did not "otherwise make [housing] unavailable" where it is not "sole source" of elevator repair 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).

[61] *See Inland Mediation Bd. v. City of Pomona*, 158 F. Supp. 2d 1120, 1145-46 (C.D. Cal. 2001).

[62] *Id.* at 1145-1146.

[63] *Id.*

[64] *Id.*

[65] *Id.* 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).

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.[66] 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."[67] 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."[68] Standing may exist even where no housing has actually been denied to persons protected under the Act.[69]

As declared by the court in *Trafficante*, "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community.'"[70]

An association may have standing under the Act 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."[71]

3. FHA Statute of Limitations

An individual claim brought as a civil action in federal district or state court must be filed within two years after the occurrence or the termination of an alleged discriminatory housing practice.[72] The computation of the two-year period does not include any time during which an administrative proceeding related to a discriminatory housing practice was pending.[73] 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 period 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 company's rating, when the tenant screener produced the information to the landlord, or when the landlord made the decision based on a tenant screener's information. Note too, that the U.S. Supreme Court endorsed applying the continuing violation doctrine to housing discrimination claims.[74]

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[66] For an in depth discussion of standing issues, *see* The Shriver Center, *Federal Practice Manual for Legal Aid Attorneys,* ed. Jeffrey S. Gutman (2006).
[67] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982).
[68] *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 475 (9th Cir. 1998) (*citing Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972)); *see also*, *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982) (finding white person had standing to bring case of disparate impact to racial groups under the FHA).
[69] *See Smith v. Stechel*, 510 F.2d 1162, 1164 (9th Cir. 1975) (FHA applicable to property managers fired for renting to people of color.)
[70] *Trafficante*, 409 U.S. at 211 (*citing* 114 Cong.Rec. 2706).
[71] *Nat'l Ass'n for Advancement of Colored People v. Ameriquest Mortgage Co.*, 635 F. Supp. 2d 1096, 1102 (C.D. Cal. 2009) (*citing Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (U.S.N.C. 1977)).
[72] 42 U.S.C. § 3613(a)(1)(A) ("Discrimination claims [in WA] must be brought within three years to satisfy the statute of limitations." *Antonius v. King Cnty.*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004).
[73] U.S.C. § 3613(a)(1)(A),(B).
[74] "The continuing violation doctrine permits a plaintiff to sue for all discriminatory acts that occurred during the

Complaints initiated through HUD must be filed within one year after the alleged discriminatory practice occurred.[75] There is no specific statute of limitations for § 3614(a) "pattern or practice" or "issue of public importance" claims.[76]

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."[77]

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.[78]

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."[79] While there is no statutory 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."[80] Fair Housing Act cases have employed the same or similar

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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); *see Havens Realty Corp.*, 455 U.S. 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).

[75] 42 U.S.C. § 3610.

[76] *See*, *e.g*., *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1094 n.63 (N.D. Ohio 1980) *aff'd,* 661 F.2d 562 (6th Cir. 1981); *United States 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).

[77] 42 U.S.C. § 3610(a); § 3612(a); § 3613(a), (e); and § 3614(a).

[78] 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 PowerPoint 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.

[79] *Id.*

[80] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

standard.[81] Significantly, for the tenant screening claim, it does not appear that willful or intentional discrimination must be shown.[82] 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.[83]

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.[84] The elements of the *prima facie* disparate impact claim 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.[85] A showing of intentional discrimination is not required.[86] The burden then shifts to the defendant to rebut by supplying a "substantial, legitimate, nondiscriminatory"

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[81] *See, e.g.*, *United States v. W. Peachtree Tenth Corp.*, 437 F.2d 221, 227 (5th Cir. 1971); *United States v. Matusoff Rental Co.*, 494 F. Supp. 2d 740, 747 (S.D. Ohio 2007).

[82] *See, e.g.*, *United States v. Sec. Mgmt. Co., Inc.*, 96 F.3d 260, 269 (7th Cir. 1996).

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

[84] *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011) ("The FHA can be violated by either intentional discrimination or if a practice has a disparate impact on a protected class."); *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997). 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), Wash. Rev. Code § 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). 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, 724 P.2d 1003 (1986) (applying the Title VII disparate impact analysis to a WLAD employment discrimination claim); *see also*, *Mendoza v. Rivera-Chavez,* 88 Wn. App. 261, 267, 945 P.2d 232 (1997), *aff'd, Mendoza v. Rivera-Chavez,* 140 Wn.2d 659, 999 P.2d 29 (Wash. 2000).

[85] *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 (9th Cir. 1996), *quoting Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986) (disparate impact requires plaintiff to show (1) "outwardly neutral … practices, and (2) "significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices.") (*citing Spaulding v. Univ. of Washington*, 740 F.2d 686, 705 (9th Cir. 1984), *overruled by Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987)); *see* 24 C.F.R. § 100.500(a), (b) ("a practice has a discriminatory effect where it actually or predictably results in disparate impact" on a protected group.).

[86] *Comm. Concerning Cmty. Improvement*, 583 F.3d 690 (finding of intentional discrimination is not required to establish a prima facie case of disparate impact). *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1374 n.72 (S.D.N.Y. 1985) *aff'd,* 837 F.2d 1181 (2d Cir. 1987). ("[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."); *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. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977) (violation of Fair Housing Act made by "showing of discriminatory effect without a showing of discriminatory intent*"); United States v. Pelzer Realty Co., Inc.*, 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, Miss.*, 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (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).

justification for its actions.[87] In the tenant screening context, a disparate impact case could be shown through the significant discriminatory effects that flow from rental decisions.[88] Prior to the HUD regulation, other circuits analyzed disparate impact cases using this burden shifting analysis (similar to Title VII cases) or a multipronged test.[89] Recently, a federal appeals court adopted the burden shifting approach set out in the HUD regulation.[90] This ruling is significant as there has been much controversy over the validity of these regulations.[91]

The Supreme Court in *Inclusive Communities,* reiterated this standard. To state a claim for disparate impact, Plaintiffs must first "allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection" between the disparity and the defendant's policy.[92] Mere conclusory allegations will not suffice – there must be some factual allegations demonstrating specific support for the claim.[93] Next, defendants need to "state and explain the valid interest served by their policies" and "prove [each policy] is necessary to achieve a valid interest."[94] The Court remanded the case to the district court to apply these standards.[95]

There will most likely be continued debate as to the interpretation of the disparate impact standard under this ruling. One specific issue that raises concern is the Court's statements about constitutional issues that could arise if liability were imposed solely on a showing of statistical

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[87] 24 C.F.R. § 100.500(b), (c); *Comm. Concerning Cmty. Improvement*, 583 F.3d at 711.

[88] *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.").

[89] 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 for Dist. of Arecibo*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977); *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir. 1974). Multi- pronged test: *Metro. Hous. Dev. Corp. v. Vill. 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, N. C.*, 682 F.2d 1055 (4th Cir. 1982) (adopted Arlington Heights II test); *Arthur v. City of Toledo, Ohio*, 782 F.2d 565, 574-75 (6th Cir. 1986) (adopted all but the second factor of *Arlington Heights II* test); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, CIV.A. 06-7185, 2011 WL 4915524 (E.D. La. Oct. 17, 2011) (adopted *Arlington Heights II* test).

[90] *Inclusive Communities Project, Inc. v. Texas Dep't. of Hous. & Cmty. Affairs*, 747 F.3d 275, 282 (5th Cir. March 24, 2014) (recognizing the various tests applied in different circuits and applying the test set out in the HUD regulations at 24 C.F.R. § 100.500 because that standard is in accordance with disparate impact principle and precedent). However, the court did not analyze the degree of deference that should be accorded the HUD regulations. *See* 43 May Real Est. L. Rep. 2 (May 2014) (Ruling in *Inclusive Communities* leaves open fundamental questions about disparate impact including what deference a court should give HUD regulations).

[91] *See* n.54.

[92] Florence Wagman Roisman, Poverty & Race, *The Power of the Supreme Court's Decision in The Fair Housing Act Case, TDHCA v. ICP,* (July/August 2015) *citing Texas Dep', of Hous.*, 135 S.Ct. 2507 at 2523, athttp://www.prrac.org/pdf/JulyAugust2015PRRACRoisman.pdf; *Ward v. Wells Fargo Bank, N.A.*, 12-CV-1626, 2014 WL 1491757, 9 (D.C. Apr. 17, 2014) (dismissing complaint that does not "identify any specific support for a conclusion that any of the other specific acts alleged had a disparate impact on African-Americans"). *But see Wallace v. Magnolia Family Servs.*, Civ.A. 13-4703, 2013 WL 6198277, at *4 (E.D. La. Nov. 27, 2013) (complaint sufficiently plead disparate impact claim where it identified a neutral policy that excluded employees with criminal records, plaintiff is an African-American with a criminal record and the policy has a disparate impact on African-American males because that group is more likely to have a criminal record than whites).

[93] Roisman at n. 92.

[94] *Id.*

[95] *Id.*

disparity.

> But disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, e.g., if such liability were imposed based solely on a showing of a statistical disparity.[96]

Justice Kennedy stated concern that the plaintiffs in *Inclusive Communities* put forth a "novel theory of liability" that is simply a dispute about how a housing authority should allocate tax credits rather than an action that has an impermissible discriminatory impact.[97] He stressed that there should be a "robust causality requirement" whereby plaintiff's should point to a "defendant's policy or practice causing the disparity."[98]

An important positive aspect of this case is the Court's recognition that "disparate impact liability under the FHA plays an important role in uncovering discriminatory intent: it permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[99] Research on implicit bias could help courts or other decision makers understand that people and entities can make decisions or create policies that have a discriminatory result without having a discriminatory intent.[100]

In the criminal records and housing context, there is one case pending in New York that alleges disparate impact discrimination based upon a landlord's refusal to rent to applicants with a criminal record.[101] The lawsuit alleges that "regardless of the nature of the conviction, the amount of time that has lapsed since the conviction, evidence of rehabilitation, or any other factor related to whether a specific person poses any threat to safety." John Relman, who represents the tenants, states that this type of policy creates "a racial caste system" and "drives this population back to prison."[102] This case is currently in the discovery phase.

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 discriminatory effect. The neutral policy, procedure, or practice must be *facially neutral*.[103]

1. Tenant Screening Companies

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[96] *Inclusive Communities,*135 S.Ct. 2507 at 2512.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Inclusive Communities,* 135 S.Ct. 2507, Brief of Sociologists, Social Psychologists, and Legal Scholars as Amici Curiae Supporting Respondent at 4 ("While most Americans now agree that racial and ethnic discrimination is wrong, this consensus has not translated into decision-making that reflects those values."), http://prrac.org/pdf/EJS-WCLP-LSNC-et_al_amicus_brief.pdf*; State v. Saintcalle*, 178 Wash.2d 34, 48 (2013) ("To put it simply, good people often discriminate, and they often discriminate without being aware of it.").
[101] Mireya Navarro, *Lawsuit Says Rental Complex in Queens Excludes Ex-offenders*, New York Times, Oct. 30, 2014.
[102] *Id.*
[103] Under Washington law, this means that it must include objective, nondiscretionary features. *Oliver v. Pac. Nw. Bell Tel. Co., Inc.*, 106 Wash. 2d 675, 680, 724 P.2d 1003 (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.

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.[104] 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."[105] Another national screener provides a "rental decision based on your custom decision [*sic*] criteria for the credit score and select attributes."[106] These types of facially neutral decision making practices could have a discriminatory effect on certain protected groups.

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 ("no eviction history") is "facially neutral," since it makes no distinction based on race, national origin, or other protected statuses.[107]

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. Others will ban people with criminal histories who have specific types of crimes. Both of these seemingly neutral practices could have a discriminatory effect on protected classes. Proving such a "practice" could require a more burdensome evidentiary showing than where a written policy exists. Disparate impact theory has been applied to the "practice" of pre-screening applicants based on criminal records in the employment context, so this type of neutral practice could be the basis of a claim.[108]

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.[109] Unfortunately, only three jurisdictions, Newark and San Francisco, have this type of law

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[104] *See* http://www.on-site.com/online-leasing/qualify-and-screen/. Last visited 9/24/2013.
[105] *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.
[106] *Experian,* http://www.experian.com/screening-services/tenant-screening.html. Last visited 9/24/13.
[107] *See Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified,* 472 F.2d 631 (9th Cir. 1972) (denial of employment to applicants with arrest records racially neutral on its face). For example of neutral policies that could have a discriminatory in the public and subsidized housing context, *see* Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing,* Shriver Center (February 2015), http://povertylaw.org/sites/default/files/images//publications/WDMD-final.pdf.
[108] *See infra* at n.188.
[109] *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records*, National Employment Law Project (July 2014) http://nelp.org/content/uploads/2015/03/Bantheboxcurrent.pdf?nocdn=1; 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); 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. Many of these local laws apply to all applicants and not just to those in protected classes.

in the housing context.[110] Regrettably, advocates report that Newark's law has not been enforced.[111] The San Francisco law is enforceable, but only applies to City funded housing (which is a great step forward). Oregon recently amended its landlord/tenant law to restrict a landlord's consideration of an applicant's eviction, criminal or arrest records.[112] Yet, even without legislation, some housing providers and housing authorities are changing their criminal record tenant screening policies to avoid unintentionally discriminating against protected classes and to encourage reentry.[113] Advocates have had success in changing their housing authority's admission policies to be less restrictive regarding criminal records.[114] For example, New Orleans advocates urged the housing authority to adopt a background check policies that help eliminate barriers for persons with a criminal history seeking employment or housing.[115] In Seattle, the PHA significantly changed its Section 8 criminal records screening policy for most convictions by limiting the "look back" period to one year.[116] This type of advocacy can sometimes be more effective and efficient than filing a disparate impact claim. Deplorably, these housing authorities are the exception to the rule. Many if not most housing authorities across the nation have admission policies that create significant barriers to housing for people with criminal histories.[117]

B. Disparate Impact

Demonstrating disparate impact is a challenging aspect of these types of discrimination cases.

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[110] Newark Ordinance #12-1630 (Sept. 19, 2012); San Francisco File No. 131192. http://www.nelp.org/content/uploads/2015/03/San_Francisco_Fair_Chance_Ordinance_2014.pdf. San Francisco's ordinance applies only to City funded housing providers. Private landlords successfully lobbied for exclusion from the ordinance. Recently, Seattle's Mayor included this type ordinance in a slate of recommendations related to affordable housing. Seattle Housing Affordability and Livability Agenda, Final Advisory Committee Recommendations, at 6,8, 33, http://murray.seattle.gov/wp-content/uploads/2015/07/HALA_ActionPlan_2015.pdf; Kristen Capps, *How a Seattle Plan to End Single-Family Zoning Could Change Affordable Housing,* The Atlantic City Lab, July 13, 2015, http://www.citylab.com/housing/2015/07/how-a-seattle-plan-to-end-single-family-zoning-could-change-affordable-housing/398420/ ("The proposal recommends a "ban-the-box" approach to housing to ensure that people with criminal histories still have access to fair, stable, affordable housing.").

[111] Conversation with Scott M. Welfel, Skadden Fellow/Staff Attorney, New Jersey Institute for Social Justice (March 2014).

[112] ORS § 90.303. A landlord cannot consider an eviction record if it was dismissed or the judgment is more than five years old. Additionally, the landlord cannot consider an arrest that did not result in a conviction (with some exceptions). The landlord may consider a criminal conviction related to a drug related crime, a crime against a person, a sex offense, a crime involving financial fraud or any other crime that would "adversely affect" the property of the landlord or tenant or "the health safety or right to peaceful enjoyment of the premises of residents, the landlord or the landlord's agent."

[113] *See* Legal Action Center, *Safe at Home: A Reference Guide for Public Housing Officials on the Federal Housing Laws Regarding Admission and Eviction Standards for People with Criminal Records* (Fall 2004). http://lac.org/doc_library/lac/publications/Safe@Home.pdf.

[114] *See* Bruce Reilly, *Communities, Evictions & Criminal Convictions* (April 2013) at *http://ficpmovement.wordpress.com/2013/04/18/new-report-on-public-housing-communities-evictions-and-criminal-convictions/*.

[115] http://www.louisianaweekly.com/hano-adopts-new-criminal-background-policy/; http://www.hano.org/business/criminal_background.aspx. This advocacy is ongoing and there have been successes and set backs. (http://www.naacpldf.org/news/ldf-files-comments-criminal-background-policy-proposed-housing-authority-new-orleans) (proposed policy overly restrictive and may disproportionately impact African Americans and Latinos).

[116] http://www.csh.org/wp-content/uploads/2012/09/CSH-PHA-Profile-Seattle.pdf (Seattle Housing Authority passed less stringent screening criteria in its Housing Choice Voucher Program)

[117] Tran-Leung at n. 107.

Most commonly, a disparate impact claim is demonstrated by statistics.[118] The plaintiff may demonstrate discriminatory impact through statistics 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.[119]

"[N]o single test controls in measuring disparate impact."[120] However, 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 pool; and finally, "the appropriate inquiry is into the impact on the total group to which a policy or decision applies."[121] 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."[122] Disparate impact may also 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."[123] In either method, "the starting point is always the subset of the population that is affected by the disputed decision."[124]

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.[125] In other cases, the court looked to the broadest population.[126]

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[118] *United States. v. Wood, Wire & Metal Lathers Int'l Union,* 471 F.2d 408, 414 n. 11 (2d Cir. 1973) *cert. denied,* 412 U.S. 939 (1973) ("Statistics may establish a *prima facie* case of discrimination."); *Oliver*, 106 Wash. 2d, 682("The primary means of proving a substantial disproportionate impact on a protected class is through the use of statistical evidence."). 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).

[119] *See Graoch Associates # 33, L.P. v. Louisville/Jefferson Cnty. Metro Human Relations Comm'n*, 508 F.3d 366, 378 (6th Cir. 2007) (disparate impact plaintiff must use statistics to demonstrate that a discriminatory effect either results in a greater adverse impact on one racial group over another or perpetuates segregation) ; *Hallmark Developers, Inc. v. Fulton Cnty., Ga*., 466 F.3d 1276, 1286 (11th Cir. 2006) ("A plaintiff can demonstrate a discriminatory effect in two ways: it can demonstrate that the decision has a segregative effect or that it makes housing options significantly more restrictive for members of a protected group than for persons outside that group.), aff'd 778 F.3d 463 (4th Cir. 2015); *Fair Hous. In Huntington Comm. Inc. v. Town of Huntington, N.Y*, 366 (2d Cir. 2003) (plaintiff must demonstrate that an outwardly neutral policy has significantly adverse or disproportionate impact on minorities, or perpetuates segregation").

[120] *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, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988)).

[121] *Hallmark Developers, Inc.*, 466 F.3d at 1286.

[122] *Id.* (quoting *Hous. Investors, Inc. v. City of Clanton, Ala.*, 68 F. Supp. 2d 1287, 1299 (M.D. Ala. 1999)

[123] *Id.*

[124] *Id.*

[125] *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.").

[126] *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, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (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 well-trained and experienced statistical consultant can be critical when making this decision because the defendants will try to disparage your data and methods and could win on summary judgment based on these contentions.[127]

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 context, the Ninth Circuit has warned district courts not to base a disparate impact finding on a comparative statistical sample that is too small.[128] However, a small sample size can still be used to prove a disparity if a small group or organization is involved and the disparity is fairly large[129] Moreover, if the parties dispute the significance of a small sample size, "the district judge may accept some of the statistical inferences and reject others based upon his perception of the oral and documentary evidence placed before him."[130]

As far as the "disparity" is concerned, the "significance" or "substantiality" of numerical disparities has been judged on a case-by-case basis.[131] Courts have yet to adopt the "four-fifths" rule in fair housing cases that the EEOC uses in the employment context.[132] Some housing cases have focused on the "representation rate" in the "rejected" (or affected) class.[133] When 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,

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[127] *E.E.O.C. v. Freeman*, 961 F. Supp. 2d 783, 796-97 (D. Md. 2013) (in a disparate impact case based on employer's criminal record screening policies, the court granted summary judgment to defendants based on their contention that the conclusions reached by the EEOC's experts were based on "unreliable data" and were "rife with analytical errors"),
[128] *See Stout v. Potter,* 276 F.3d 1118, 1123 (9th Cir. 2002) (discrepancy too small to prove a disparity where sample involved six female applicants in a pool of thirty eight applicants and 33% of women and 41% of men made it through initial screening stage for promotion); *Shutt v. Sandoz Crop Prot. Corp.*, 944 F.2d 1431, 1433 (9th Cir. 1991) (sample of twenty one former salesman "exceedingly" small), *cert. denied,* 503 U.S. 937 (1992).
[129] *See Arizona v. City of Cottonwood*, WL 2976162 *8 (2012) (plaintiffs established a prima facie disparate impact case where in a testing pool of 100 where the passing rate was 20% for women and 79% for men).
[130] *Id. quoting Contreras v. City of Los Angeles,* 656 F.2d 1267, 1273 (9th Cir. 1981).
[131] *See Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (age discrimination cases).
[132] *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").
[133] *See, e.g., Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988); *aff'd in part sub nom. Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988) (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*, 736 F.2d, 988 (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).

and Whites in the population overall.[134]

In recent disparate impact case under the Act, plaintiffs established a prima facie case using 2000 Census data to demonstrate that a redevelopment project would negatively affect African Americans and Latinos more than Whites—eight times more and eleven times more respectively.[135] Moreover, only 21% of African American and Latina households would be able to afford the new redeveloped housing as compared to 79% of Whites.[136] The court found the disproportionality evidenced by this data sufficient for surviving summary judgment.[137]

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.[138]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."[139]

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 over-representation of people of color or women applicants in those applicants rejected on this basis. 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

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 they will be enough. No case has indicated whether a plaintiff must use arrest, conviction or incarceration data to

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[134] 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 Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977)).
[135] *Mt. Holly Gardens Citizens in Action, Inc.*, 658 F.3d at 382.
[136] *Id.*
[137] *Id.*at 382-83. (District Court erred when it looked at the absolute number of African–American and Hispanic residents affected by the redevelopment plan rather than examining whether these groups were *disproportionately* affected.)
[138]*Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) ("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)); *City of Black Jack, Missouri*, 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"); *Corp. of Episcopal Church in Utah v. W. 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).
[139] *See Rose*, 902 F.2d at 1424 (applying disparate impact theory to Age Discrimination in Employment Act claim).

demonstrate that a particular protected class is disproportionately represented in the criminal justice system, but most plaintiffs in employment cases have used arrest or conviction data.[140]

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 Federal Bureau of Prisons maintains demographic statistics based upon incarceration rates that show that African Americans are disproportionately represented in the corrections system.[141] An older 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.[142] 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.[143] 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.[144]

Washington State corrections statistics similarly demonstrate that African Americans are disproportionately represented in the corrections system. Washington State's 2012 estimated Census population was 6,897,012, and of that number 81.6% are white, 11.7% Hispanic or Latino, 1.8% Native American and 3.9% are African American.[145] The Washington State Department of Corrections (DOC) collects data on the race of all offenders admitted to its facilities.[146] Of the 17,930 prisoners as of June 2013, 18.5% were African American, a rate almost six times the proportion of the state population represented by African Americans.[147] For Native Americans the incarceration rate was more than double at 4.1%.[148] The disproportionality of Hispanics is more difficult to ascertain as some data track certain ethnicities as white – making it unclear whether the 12.2% incarceration rate is an accurate representation of that group's disproportionality.[149]

b. Eviction Records

Unfortunately, eviction data related to protected classes is not as readily available as information related to criminal records. For this reason, it is ***imperative*** that you seek the assistance of a

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[140] *See Green v. Missouri Pac. R. 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 (court referred to national arrest statistics demonstrating that African Americans subject to a disproportionately high percentage of arrests); EEOC Guidance at 3, n. 21 (citing statistics related to race, arrest and incarceration).

[141] Federal Bureau of Prisons, Statistics, http://www.bop.gov/about/statistics/statistics_inmate_race.jsp; http://www.ojp.usdoj.gov; Marc Mauer, *Race to Incarcerate* (2d ed. 2006).

[142] 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).

[143] 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.

[144] *Id*. at 8. According to the U.S. Bureau of Justice Statistics, the prison population dropped in 2012 for the third consecutive year by a rate of 1.7%. http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4737; *See* Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime,* N.Y. Times July 25, 2013.

[145] U.S. Census Quick Facts, Washington State, 2010, http://quickfacts.census.gov/qfd/states/53000.html.

[146] WA DOC Fact Card, June 30, 2013 http://www.doc.wa.gov/aboutdoc/docs/msFactCard_010.pdf

[147] *Id.*

[148] *Id.*

[149] *See* Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, Sentencing Project (July 2007).

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.[150]

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.[151] 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.[152]

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.[153] 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.[154]

Census data was successfully used in an administrative disparate impact case to establish a prima facie case of familial status discrimination.[155] The charging party introduced 1990

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[150] 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.
[151] This methodology was used in a study undertaken in King County, WA. *See* n. 32.
[152] 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.
[153] *Boykin v. Gray*, 895 F. Supp. 2d 199, 213-14 (D.D.C. 2012) (census data sufficient to survive motion to dismiss, but court skeptical of plaintiff's chances for success); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7, 21 (D.D.C. 2000), *on reconsideration in part,* 147 F. Supp. 2d 1 (D.D.C. 2001); *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).
[154] *Nat'l Fair Hous. Alliance, Inc.*, 208 F. Supp. 2d at 61 (plaintiffs put forth sufficient data from most recent U.S. census to support their disparate impact claim).
[155] *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 decision because landlord did not actually enforce his neutral policy of renting to three or less people as he rented to families of four).

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 from occupying the premises.[156]

Be aware that defendants may point to one decision that found census data insufficient to establish a disparate impact claim.[157] In *Sherman*, 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."[158] 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 showing a disproportionate impact.[159] 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.

Limited 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

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[156] *Id.*

[157] *2922 Sherman Ave. Tenants' Ass'n v. D.C.*, 444 F.3d 673, 680 (D.C. Cir. 2006).

[158] *Id.* at 681. (Emphasis added).

[159] *See Metro. Hous. Dev. 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, N.A.A.C.P.*, 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 v. Chicago Hous. Auth.*, 321 F. Supp. 2d 968, 974 (N.D. Ill. 2004) ("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 Metro. Hous. Dev. Corp.*, 558 F.2d at 1290)).

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.[160] 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.[161] 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."[162]

C. Possible Defenses for Tenant Screening Companies and Landlords

1. Insufficient Statistical Evidence

Defendants may challenge the statistical basis of a plaintiff's prima facie case, and avoid providing any other defense.[163] A defendant can also argue that the statistics themselves are inadequate or incomplete.[164] A defendant may rebut the plaintiff's statistical allegations by presenting statistics that are more current, accurate, or specific to the region or applicant pool than the statistics plaintiff presented.[165]

2. Business Justification Defense

Historically, there has been no clear agreement among the circuits for the business justification defense standard in FHA cases.[166] 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

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[160] *Hous. Investors, Inc.*, 68 F. Supp. 2d 1298 (*citing Town of Huntington, N.Y. v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 109 S. Ct. 276, 102 L. Ed. 2d 180 (1988)).
[161] *Id.*
[162] *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978), *superseded by statute as stated in United States v. City of Jackson, Miss.*, 359 F.3d 727 (5th Cir. 2004) (statute relates to damages issues).
[163] *Freeman,* 961 F. Supp. 2d at 796-97; *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).
[164] *See supra* n.103; *E.E.O.C. v. Carolina Freight Carriers Corp.*, 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).
[165] *Shidaker v. Tisch*, 833 F.2d 627, 633 (7th Cir. 1986) ("Defendants may rebut a statistical prima facie showing of disparate impact with statistical evidence of their own that is 'more refined, accurate and valid'") (*quoting Movement for Opportunity & Equal. v. Gen. Motors Corp.*, 622 F.2d 1235, 1245 (7th Cir. 1980)).
[166] 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 Hous. Auth. v. U.S. Dep't of Agric.*, 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 Bd.*, 564 F.2d 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, L.P.*, 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.

necessity."[167] Recently, HUD issued its own disparate impact rule, defining business necessity as a practice that is necessary to achieve a substantial, legitimate and nondiscriminatory interest and cannot be served by another practice having a less discriminatory impact.[168] Further, the justification must be supported by evidence that is not speculative or hypothetical. [169] If a defendant meets its burden, then the plaintiff may still prevail if the business necessity supporting the challenged practice could be met by a different practice that has a less discriminatory effect.[170]

In the employment context, the business justification defense has been used to defend the practice of not hiring applicants with a criminal record.[171] In *Green* the employer asserted that the policy was necessary based on

> 1) a 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.[172]

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."[173] In reviewing 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."[174]

Case law regarding employment policies on criminal records was scant until the decision in *El v. Southeastern Pennsylvania Transportation Authority*.[175] The court found that the EEOC Policy Guidance on Convictions was not entitled to great deference because it did not substantively analyze the statue.[176] The court held that 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.[177] The employer must show that it's discriminatory hiring policy "accurately-but not perfectly-ascertains an applicant's ability to perform successfully the

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[167] *See Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 747 (9th Cir. 1996) ("appropriate standard of rebuttal in disparate impact cases normally requires a compelling business necessity"); *see Oliver*, 106 Wn.2d at 675 (defendant must demonstrate that challenged practice is justified by "business necessity" or has a "manifest relationship to the position in question").
[168] 24 CFR 100 subpart G (2013).
[169] *Id.*
[170] *Id.*
[171] *Green*, 523 F.2d at 1293.
[172] *Id.* at 1298.
[173] *Id.*
[174] *Id.* at 1297.
[175] *El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007).
[176] *Id.* at 244. The EEOC has since updated its policy. *See supra* n.21.
[177] *Id.* In its analysis, the *El* court points out that the Supreme Court departed from the *Griggs* interpretation of business necessity in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (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).

job in question."[178]

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 criminal 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 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 EEOC Guidance and relevant case law can be a useful tool 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.[179]

An advocate could argue that merely having an eviction record should not disqualify a tenant for housing. A complete ban on all housing applicants with an eviction record would be akin to employer policies banning all applicants with arrest records. The EEOC Guidance states that only the underlying conduct related to an arrest, and not the arrest record itself, could be disqualifying because the "fact of an arrest does not establish that criminal conduct has occurred."[180] Similarly, courts have not permitted employer bans on arrests under this same reasoning.[181]

Like arrests, an eviction filing alone does not demonstrate that the tenant failed to fulfill her obligations. Hence, housing providers and tenant screeners should not draw a correlation between an eviction filing and the tenant's ability to meet her tenant responsibilities unless the record indicates whether the underlying conduct occurred. Moreover, no academically reliable correlation has yet been drawn between previous involvement in an unlawful detainer action and

[178] *Id*. at 242. 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 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 F.3d at 247. If plaintiff had taken such action, *El* "would have been a different case." *Id.*

[179] *See supra* n.21, n. 44.

[180] EEOC Guidance at 12, n. 21.

[181] *Id*. at n. 140.

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 type of policy.[182] Thus, the plaintiff can argue that the practice of reporting just the eviction filing or denying housing based upon such filing, does not have a legitimate business justification.[183]

b) Business Justification Defense for Criminal Records

Policies against renting to individuals with criminal histories are mainly based on the concern that such individuals are more likely than others to commit crimes on the property than those without such backgrounds.[184] This policy is rooted in concerns for the safety of other residents of the apartment complex and their property as well as potential liability for the criminal acts of third parties.[185]

i. Potential Landlord Liability for Criminal Acts of Third Parties

Historically, a landlord had no duty to protect tenants from injuries caused by the criminal acts of third parties.[186] However, this principle began to change as the nature of landlord-tenant

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[182] 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).

[183] For cases where 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.

[184] *See*, *e.g.*, *Evans,* F.Supp.2d 644 at 683.

[185] 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 Assoc.*, 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.").

[186] Corey Mostafa, *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability for Third-Party Criminal Acts Against Tenants*, 54 UCLA L. Rev. 971, 974-75 (2007); William Stoebuck and John Weaver, Wash. Prac., Real Estate: Property Law and Transactions, Vol. 17, § 6.36 (2d ed.) (WA landlord was traditionally not liable to a tenant for injuries due to defective conditions on the premises); *see Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 199 n.3, 943 P.2d 286 (1997) (no duty to protect persons from criminal acts of third persons unless a special relationship exists). Unlike landlords, employers have historically been liable for negligent hiring. Employers may be liable for injuries caused by their employee if they knew or should have known that the employee was unfit for the position at the time of hiring and "retaining the employee was a proximate cause of the plaintiff's injuries." *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306-07, 151 P.3d 201 (2006); *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252, 868 P.2d 882 (1994); *see Liability. of employer, other than carrier, for a personal assault upon customer, patron, or other invitee*, 34 A.L.R.2d 372, 390 (1954), s. 9 Negligence: Selection or Retention of Employee ("An employer who knew or should have known of his employee's propensities and criminal record before commission of an intentional tort by employee upon a customer who came to employer's place of business would be liable for damages to such customer."). Courts evaluate negligent hiring claims by examining the steps an employer took when hiring the employee such as interviews, reference checks and background checks. *Id.* (*citing Scott v. Blanchet High School*, 50 Wn.App. 37, 747 P.2d 1124, 1112 (1987) (employer not negligent in hiring where it interviewed applicant twice and checked references)). The type of inquiry required depends on the nature of the position. *La Lone v. Smith*, 39 Wn.2d 167, 172, 234 P.2d 893 (1951) ("What precautions must be taken depend upon the situation. One may normally assume that another who offers to perform simple work is competent. If, however, the work is likely to subject third persons to

relationship evolved from simply leasing a piece of land to renting a dwelling unit with complicated infrastructures such as heating, lighting, plumbing and other mechanical systems that could only be maintained by the landlord.[187] By the 1970s, many states, including Washington, were requiring landlords to adequately maintain these systems and keep the rental premises fit for human habitation.[188] These changes made some courts more receptive to a tenant's claim for injuries caused by the criminal acts of third parties when the criminal acts were facilitated by a landlord's failure to properly maintain the property.[189] A few courts also began to find that landlords might have a duty to protect tenants from foreseeable criminal acts that occurred in an area over which he had exclusive control.[190]

In the cases that have analyzed this issue, courts relied on different factors such as whether the landlord knew or should have known the applicant was dangerous; the foreseeability of the attack; or whether the landlord followed its own screening policies. For example, one court found no duty at all for a landlord to engage in background screening to protect tenants.[191] That same court considered whether a landowner could be liable for injuries to occupants when he allowed a person he knew or should have known had dangerous propensities to occupy the property.[192] The court determined that there was no liability for the landowner because it was not the occupant's mere presence on the property that caused the harm, but the person's unforeseeable act.[193]
Imposing liability for the possible future criminal acts of applicants with a criminal history could have negative social impacts. It could:

> induce landlords to decline housing to those with a criminal record in the absence of

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serious risk of great harm, there is a special duty of investigation."); 1 Restatement 464, Agency § 213.

[187] *City of Bremerton v. Widell*, 146 Wn. 2d 561, 571, 51 P.3d 733 (2002) (common law rule that a landlord has no duty to protect tenants has been eroded in the modern era); Mostafa, *supra* n.186, at 975.

[188] *Widell*, 146 Wn.2d at 571-72; *Foisy v. Wyman*, 83 Wn.2d 22, 28, 515 P.2d 160 (1973) ("in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability"); Wash. Rev. Code § 59.18.060 (1973) (landlord must maintain building's structural components and common areas and make repairs).

[189] *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 481 (D.C. Cir. 1970); *Trentacost v. Brussel*, 82 N.J. 214, 412 A.2d 436, 440 (1980); 17 Wash. Prac., Real Estate: Property Law § 6.36.

[190] *See Rosenbaum v. Sec. Pac. Corp.*, 43 Cal. App. 4th 1084, 1090, 50 Cal. Rptr. 2d 917 (1996) ("landlord's duty to take reasonable steps to secure common areas of the premises against foreseeable criminal acts of third parties has become well established in California"); *Kline*, 439 F.2d at 481("The landlord is no insurer of his tenants' safety, but he certainly is no bystander. And where, as here, the landlord has notice of repeated criminal assaults and robberies, has notice that these crimes occurred in the portion of the premises exclusively within his control, has every reason to expect like crimes to happen again, and has the exclusive power to take preventive action, it does not seem unfair to place upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants.").

[191] *See Robicheaux v. Roy*, 352 So. 2d 766, 768 (La. Ct. App. 1977), *writ denied,* 354 So. 2d 207 (La. 1978) (court determined that a landlord owed no duty under state law to protect the tenant from harm by conducting background investigations on prospective tenants).

[192] *Dore v. Cunningham*, 376 So. 2d 360, 362 (La. Ct. App. 1979).

[193] *Dore*, 376 So. 2d at 362; *Stephens v. Greensboro Properties, Ltd., L.P.*, 247 Ga. App. 670, 544 S.E.2d 464 (2001), *overruled by TGM Ashley Lakes, Inc. v. Jennings*, 264 Ga. App. 456, 590 S.E.2d 807 (2003). A North Carolina jury found the Charlotte Housing Authority (CHA) liable for the murder of a tenant by another tenant where the CHA failed to conduct a national background check on the murderer when its policies required it to do so before renting to him. *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). A more thorough analysis is available on these liability questions in Merf Ehman and Anna Reosti, Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball, 2015 N.Y.U. J. LEGIS. PUB. POL'Y QUORUM 1.

> evidence of an actual threat to cotenants or individual tenants. That would only export the 'problem' somewhere else. The resulting unstable living conditions or homelessness may increase the chances of recidivism to the detriment of public safety.[194]

In responding to these concerns, whether in litigation or in helping housing providers develop policies, the best approach may be to carefully craft policies that address the actual risk of harm to tenants or employees without inadvertently screening out qualified tenants. The EEOC Guidance could be helpful in developing these policies. A policy based on those principles could include an individualized assessment of the tenant to determine whether their particular criminal history was directly related to the applicant's ability to meet tenant obligations.[195]

ii. Future Risk of Harm by Tenant with a Criminal History

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.[196] 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 assertion.[197] 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."[198] In fact, a recent research study found that the previous criminal history of its residents was not indicative of success in meeting tenant obligations.[199] 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.[200] Hence, potential recidivism based on criminal history is not necessarily a "good proxy" for determining the ability of an applicant to meet tenant obligations.[201] In the employment context a "common sense" approach to applicant screening is unacceptable; there must be "some level of empirical proof that

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[194] Ehman, *supra* n. 193 at 26, *citing Davenport v. D.M. Rental Props., Inc*., 718 S.E.2d 188, 191 (N.C. Ct. App. 2011) (citing *Anderson v. 124 Green St., LLC,* 2011 WL 341709, at *5, (Mass. Super. Jan. 18, 2011), *aff'd*, 974 N.E.2d 1167 (2012)).

[195] *See supra* n. 107 (providing examples of PHA policies). Local government ordinances can provide helpful models for developing policies. San Francisco passed a law limiting the use of criminal records in housing decision that applies to housing providers subsidized by the city. *See* https://sfgov.legistar.com/LegislationDetail.aspx?ID=1532673&GUID=992EEEE0-1602-4FB8-92C7-78D127400B0D&Options=&Search. In Seattle, WA, legislators took a different approach to a business justification for refusing to hire someone based on a criminal history. Seattle Ordinance No. 124201; http://www.seattle.gov/civilrights/criminalrecords.htm. The standard is a subjective one based upon an employer's good faith belief as to whether a criminal history would negatively impact the business, but also requires the employer to consider numerous factors including the seriousness of the conviction and rehabilitation. *Id.*

[196] Ehman, n.193 at 16-21.

[197] *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.").

[198] *Id.* at 563-65.

[199] 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).

[200] *Id.*

[201] *Id.* at 228.

challenged hiring criteria accurately predicted job performance."[202] 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-ascertain an applicant's ability to perform successfully" the obligations of tenancy.[203] The advocate should request from the landlord evidence and information used to determine how it concluded that a specific crime would impact an applicant's ability to be a good tenant. 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.[204] There are also some studies demonstrating that stable housing reduces recidivism.[205]

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 criminal history policies or practices.[206] As articulated in one employment 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.'"[207]

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.[208] Showing pretext can be difficult to execute in disparate impact cases, as discriminatory motive is typically not part of the

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[202] *El*, 479 F.3d at 240.
[203] *See Id.* at 242
[204] *See* Megan C. Kurlychek, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*?, Criminology and Public Policy, 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); The Sentencing Project, State Recidivism Study (2010) at http://sentencingproject.org/doc/publications/inc_StateRecidivismFinalPaginated.pdf(recidivism rates by state).
[205] *See* Melissa Ford Shah, Callie Black, Barbara Felver, *Achieving Successful Community Re-Entry upon Release from Prison* (July 2013), http://www.dshs.wa.gov/pdf/ms/rda/research/11/193.pdf (Homeless ex-offenders who received housing assistance and transitioned to permanent housing had *lower* rates of criminal recidivism and *higher* rates of employment, Medicaid coverage, and substance abuse treatment compared to other homeless ex-offenders.); Julie M. Somers, Stefanie N. Rezansoff, et al., *Housing First Reduces Re-offending among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial* (September 4, 2013) at http://www.dshs.wa.gov/pdf/ms/rda/research/11/193.pdf
[206] *See El*, 479 F.3d at 239-40 ("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)).
[207] *Resident Advisory Bd.*, 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)).
[208] *See Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999) ("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).

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."[209] 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 employer's goals as effectively as the challenged practice and that the alternative results in less of a disparate impact than the challenged practice.[210] HUD adopted a similar standard in its new disparate impact regulations.[211]

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 eviction records altogether because they have not shown to be an effective tool to predict future positive tenancies[212], 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 her tenancy, over and above tenants without a criminal or eviction record. Landlords could also take the "ban the box" approach used by many cities.[213] 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.

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[209] *Graoch Associates # 33, L.P.*, 508 F.3d at 374. (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).

[210] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Watson*, 487 U.S., 997-98 ("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 Albemarle Paper Co. v. Moody*, 422 U.S. 405, 525, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (U.S.N.C. 1975)).

[211] *Supra* n. 35 .

[212] *Ehman* at n.193.

[213] *See* n.109.

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. I hope to encourage advocates to use these theories as effective tools for enforcing tenants' rights to be free of racial or gender-based housing discrimination and to dismantle the racist sturctures that are supported by these policies.