Discriminatory Policing and Fair Housing

2015 HUD National Fair Housing Training and Policy Conference

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Understanding the Root Cause of Ferguson and Baltimore

- Cracking the surface reveals deep ties to fair housing
- Fair housing lies at the center
- Frontier: Where criminal justice and fair housing issues meet
Challenging Criminal Records Bans Under the Fair Housing Act
Incarceration & Parole Statistics

- By 2014:
  - 2.3 million people under state or federal detention
- 1970 to 2007:
  - Number of people in prison increased sevenfold

National Re-entry Statistics

- Each year, over 680,000 prisoners are released from prisons
  - Roughly 95% of inmates will eventually be released

(Carson & Sobel, “Prisoners in 2011”; Pager, “The Mark of a Criminal Record”)
National Re-entry Statistics (cont.)

- 30% of the U.S. adult population has a criminal record
  - Including arrests and convictions
- Housing preferences for applicants with no criminal record would exclude huge fraction of the population

(Hughes & Wilson, “Reentry Trends in the U.S.”)
Re-entry population is disproportionately African-American men (incarceration rate almost 7x that of white men)

- US population: 13% African-American, 17% Hispanic
- Prison and jail populations: 37% African-American, 22% Hispanic
- Chance of going to prison: 1 in 3 for African-American men, 1 in 6 for Hispanic men, 1 in 17 for white men

“African Americans are not significantly more likely to use or sell prohibited drugs than whites, but they are made criminals at drastically higher rates for precisely the same conduct. In fact, studies suggest that white professionals may be the most likely of any group to have engaged in illegal drug activity in their lifetime, yet they are the least likely to be made criminals.”

— Michelle Alexander, The New Jim Crow
Housing & Recidivism

- Stable housing can reduce recidivism rates
  - 30% of all released prisoners are re-arrested in the first few months of release
  - 67.5% of prisoners released are re-arrested within 3 years (increase from 62.5% in 1983)
  - Each time one moves after release from prison increases chance of re-arrest by 25%

Access to Criminal Records

- Increased access to electronic criminal records post-9/11 → increased tenant screening
  - By 2003, 94% of criminal records maintained by state criminal history repositories were automated
  - Increased use of criminal background checks by tenant screening agencies, not just landlords
80% of members of National Multi-Housing Council (organization of large apartment companies) report screening prospective tenants for criminal histories.
Retroactive Application of the 2014 Drug Guidelines Amendment

- More than 46,000 additional federal prisoners are expected to become eligible for early release over the next few years

- 75% of the prisoners eligible to apply for early release are African-American or Hispanic

(2014 U.S. Sentencing Commission, Office of Research and Data)
The New Jim Crow

- Second-class citizenship for those re-entering society:
  - No right to vote
  - No benefits
  - Job bans
  - Housing bans
Proving Discrimination Under the Fair Housing Act
Two Theories of Liability

- **Disparate Treatment**
  - Requires proof of intent

- **Disparate Impact**
  - Focuses on effect of neutral policy or practice
The Legal Standard for Establishing Disparate Impact: “Burden-Shifting”

- **Step 1**: Plaintiff demonstrates neutral rule or practice has adverse disproportionate impact on protected group.

- **Step 2**: Burden shifts to defendant to prove its actions further “legitimate non-discriminatory goal.”

- **Step 3**: Plaintiff must show less discriminatory alternative that serves defendant’s interest equally well.
Challenging Criminal Records Bans

- Intentionally discriminatory if used to perpetuate desired racial balance or exclude people of color.
- Absent intent, criminal records bans operate as facially neutral policies that have adverse, disproportionate impact on people of color.
Less Discriminatory Alternative

- Rethink how landlords select potential tenants
  - Move from a blanket ban to an individualized review
  - Focus on requirements of tenancy
  - Examine mitigating factors
    - Nature of offense (minor)
    - Time of offense (long ago)
    - Tenant requirements (ability to pay)
Less Discriminatory Alternative (cont.)

- Individualized assessments: less discriminatory while still effectively protecting public safety
  - Allow housing providers to carefully review all potential tenants
  - Permit prospective tenants who have criminal records but who pose no threat to the community to obtain housing
EEOC guidelines on use of criminal records (1987)

“[A]n employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity.”

Determining business necessity requires the employer to consider: “(1) The nature and gravity of the offense or offenses; (2) The time that has passed since the conviction and/or completion of the sentence; and (3) The nature of the job held or sought.”

Nothing similar produced by HUD
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

THE FORTUNE SOCIETY, INC.
29-76 Northern Blvd
Long Island City, NY 11101

Plaintiff,

v.

SANDCASTLE TOWERS HOUSING
DEVELOPMENT FUND CORP.
1463A Flatbush Ave.
Brooklyn, NY 11210

SARASOTA GOLD LLC
1407-48th Street
Brooklyn, NY 11219

and

WEISSMAN REALTY GROUP LLC
45 Broadway, 12th Floor
New York, NY 10006

Defendants.

Civil Action No. 1:14-cv-6410
COMPLAINT
JURY DEMAND

NATURE OF THE ACTION

Fortune Society

- Non-profit dedicated to the successful re-entry of formerly incarcerated individuals in New York City

- Serves 5,000 clients every year, offering housing, education, employment, health, and case management programs
Fortune Society (cont.)

- Provides temporary and permanent housing for formerly incarcerated individuals
  - Operates two transitional and permanent housing facilities in West Harlem – The Fortune Academy and Castle Gardens
  - Places clients in private rental housing throughout New York City
  - Leases these apartments and pays the rent itself
  - Criminal records bans diminish supply of affordable housing where Fortune can place clients
  - The bans also frustrate Fortune’s mission by restricting available beds in transitional facilities
Sandcastle Towers

- Four-building apartment complex with over 900 affordable rental units in Far Rockaway, Queens
  - Safe, racially diverse neighborhood
  - Readily accessible to public transportation
Sandcastle Towers (cont.)

- Maintains and enforces a policy prohibiting anyone with a criminal record from renting or living in an apartment at Sandcastle Towers.

- Refused to rent to The Fortune Society because its clients are formerly incarcerated individuals.
Disparate Impact of Sandcastle’s Policy

- Taking into account minimum income requirement, records ban has adverse impact on people of color in NYC
  - 12.2% of African-American men and 18% of Hispanic men who live in the City satisfy Sandcastle’s income threshold but are nonetheless disqualified from living there because of the criminal records ban
  - This is in contrast to only 4.1% of white men who live in the City and satisfy the income requirement but are disqualified by the ban
Otherwise qualified African-American men are three times as likely as white men to be disqualified by Sandcastle’s blanket ban.

Otherwise qualified Latino men are nearly four and one-half times as likely to be disqualified.
Less Discriminatory Alternatives for Sandcastle

- Individualized consideration:
  - Public safety can be protected by assessing the nature of an individual’s conviction, the amount of time since the conviction or release, and evidence of rehabilitation
  - Less discriminatory than blanket criminal records ban
Implication of blanket ban for Fortune’s clients:

- Stanley Richards, Fortune’s Senior Vice President, was released from prison over 20 years ago. He has since implemented supportive re-entry programs, and currently oversees Fortune’s Housing programs.
- The Honorable Walter Strauss served two prison sentences, but following his released, he received a bachelor’s and a law degree. He became a Manhattan Housing Court Judge.

Neither of these men would have been eligible for housing at Sandcastle
Intent Inferred from Sandcastle’s Policy

- The disparate impact of Sandcastle’s blanket ban is so large and foreseeable – and its overbreadth so unnecessary – that Sandcastle’s intent to discriminate against African Americans and Hispanics can be inferred.

- Sandcastle intentionally implemented the policy for the express purpose of decreasing the number of persons of color at their property.
Challenging Chronic Nuisance Ordinances
Chronic Nuisance Ordinances

- In recent years, dozens of cities have passed chronic nuisance ordinances
- Most of these ordinances share common features:
  - Police designate properties as “nuisances” if there are excessive 911 calls made within a certain time period, and they issue citations accordingly
  - Landlords face fines, property forfeiture, or even incarceration if they do not “abate the nuisance”
Chronic Nuisance Ordinances (cont.)

- **Alleged purpose:**
  - To assist police in addressing public nuisances

- **Results:**
  - Properties in heavily African-American and in transitional neighborhoods are disproportionately deemed “nuisances”
  - The vast majority of nuisance incidents involve domestic violence
  - Eviction is the preferred method of abating nuisance, and African-American women are disproportionately affected

Criminal record bans:
“African-American men locked up”

Public nuisance ordinances:
“African-American women locked out”
Structural Racism
Structural Racism

- **What:**
  - A practice that exploits historic discrimination and spatial segregation for private or political gain

- **Why:**
  - Profits and power can be extracted more easily from underserved communities made vulnerable by decades of historic discrimination and segregation
Structural Racism

- Harms:
  - Strips equity from minority/underserved communities
  - Creates new barriers to integration
  - Perpetuates segregation
Philadelphia

- Green dot = African American
- Yellow dot = Hispanic
- Red dot = Asian
- Blue dot = White
- Brown dot = All Others
- 1 dot = 1 person
Los Angeles, CA

- Green dot = African American
- Blue dot = White
- Brown dot = Hispanic
- Red dot = Asian
- Other dots = All Others
- 1 dot = 1 person
Washington, DC and MD Metropolitan Area

- = African American
- = White
- = Hispanic
- = Asian
- = All Others
1 dot = 1 person
New York City

• = African American  • = White
• = Hispanic  • = All Others
• = Asian  1 dot = 1 person
Early-Release Re-entry Population\(^1\)

| 75% African American or Hispanic |

U.S. Population

| 29% African American or Hispanic |

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\(^1\) Per the 2014 Drug Guidelines Amendment, an estimated 46,000 additional federal prisoners are expected to become eligible for early release over the next several years. See 2014 U.S. Sentencing Commission, Office of Research and Data.
Healing → Understanding Root Causes → Fair Housing