

TEXAS CRIMINAL BACKGROUND **SCREENING GUIDE FOR** **RENTAL HOUSING PROVIDERS**

APRIL 2018



This document is a publication of the Austin/Travis County Reentry Roundtable, a collaborative committed to promoting safe and healthy communities through effective reentry and reintegration of formerly incarcerated persons and individuals with criminal histories. Learn more at reentryroundtable.net.

TEXAS CRIMINAL BACKGROUND SCREENING GUIDE FOR RENTAL HOUSING PROVIDERS¹

The Austin/Travis County Reentry Roundtable (“Roundtable”) envisions a community that values and supports equity for formerly incarcerated persons and individuals with criminal histories. The Roundtable’s mission is to be a robust collaborative promoting safe and healthy communities through effective reentry and reintegration of formerly incarcerated persons and individuals with criminal histories. Bringing partners and stakeholders together, the Roundtable develops plans to bring system change that ensures the safety and well-being of all.

In 2016, the Roundtable released *Locked Out: Addressing Criminal History Barriers to Affordable Rental Housing in Austin & Travis County, Texas*,² which reviewed recent fair housing and criminal record screening guidance from the U.S. Department of Housing and Urban Development (“HUD”) and assessed the screening policies of publicly funded affordable housing projects in Austin through this lens. The information was compiled to help the community better understand current criminal history barriers in accessing affordable rental housing and to inform new policies, strategies, and resources to reduce such barriers. Since its release, the Roundtable has worked to implement the report’s recommendations, including convening a working group of local stakeholders from local and state government, area housing authorities, housing providers, and organizations representing both tenants and landlords to find solutions to promote housing access for persons with criminal backgrounds (see Appendix 1 for a list of working group members and others consulted throughout the process). The working group partnered with The University of Texas School of Law’s Entrepreneurship and Community Development Clinic to develop a template that provides landlords and property managers with clear standards for criminal background screening policies. This Guide represents the outcome of that work.

Introduction

This Guide is designed to provide instruction to landlords and property managers (collectively “housing providers”) on how best to comply with fair housing law and guidelines when implementing criminal background screenings for housing applicants. This Guide focuses on compliance with the federal Fair Housing Act and recent HUD guidance on the use of criminal records.³

Housing providers are permitted to run criminal background screenings on applicants;⁴ housing providers have an obligation, however, to ensure that any admissions and occupancy requirements they impose comply with all applicable civil rights requirements. Thus, housing providers should wait to undertake criminal background screening of applicants until after all other screening procedures are completed, such as credit checks and landlord references. So, too, housing providers that ban applicants based on arrests, as opposed to convictions, will be in

violation of HUD’s guidance⁵ and may be in violation of federal law.⁶ And housing providers that impose blanket prohibitions on housing applicants with any past convictions without further individualized review may also be in violation of federal law.⁷ Finally, housing providers should never consider any conviction that has been expunged (i.e., erased) when screening for criminal background.⁸

Disparate Treatment and Disparate Impact

Housing providers should institute written protocols that assure procedures and standards are applied consistently and that applicant decisions are based on accurate and pertinent information, because inconsistent application of standards or decisions can result in housing provider liability under federal civil rights laws.⁹ Housing providers who fail to implement admissions and occupancy policies that comply with the Fair Housing Act can be found liable under both a disparate treatment and a disparate impact standard.

An admissions or occupancy policy that uses criminal records as a pretext for intentional discrimination is a violation of the Fair Housing Act under a disparate treatment theory of liability.¹⁰ A disparate treatment claim is supported by evidence that the housing provider treated housing applicants differently based on a protected characteristic, including race, color, national origin, gender, familial status, disability, or religion. Disparate treatment claims can be proven by overt or direct evidence of discrimination or by indirect evidence, by establishing the following:¹¹ (i) the applicant is a member of a protected class; (ii) the applicant applied for housing; (iii) the housing provider rejected the applicant because of the applicant’s criminal record; and (iv) the housing provider offered housing to a similarly-situated applicant not of the applicant’s protected class, but with a comparable criminal record.

An admissions or occupancy policy that uses criminal records in a manner that causes an unjustified discriminatory effect on a protected class is a violation of the Fair Housing Act under

HB 1510: LANDLORD LIABILITY

HB 1510, which went into effect on January 1, 2016, and is codified at § 92.025 of the Texas Property Code, further encourages landlords to look beyond the mere fact of a criminal record when making leasing decisions.

Specifically, the legislation limits any perceived risk of “foreseeable” negligence liability that might arise if leasing property to an individual with a criminal record who later commits a criminal act at the property. Moreover, while not creating a new risk of liability, the statute also does not preclude the possibility if a landlord leases property to someone convicted of a Texas Code of Criminal Procedure Article 62.001 or Article 42A.054 offense.

Notwithstanding any new protection offered by HB 1510, landlords can always protect against possible legal liability by creating clear, written tenant screening policies and ensuring that all applicants are provided notice of those policies as required by § 92.3515 of the Texas Property Code.

a disparate impact theory of liability.¹² Disparate impact liability results when a rule that appears, on its face, to treat everyone equally, in fact has a disadvantageous effect on people with a protected characteristic. Discriminatory intent is not a requirement for disparate impact liability; as long as the policy or rule has a disproportionate adverse impact against an otherwise protected class of persons, a housing provider can be found liable.¹³ A disparate impact claim has a three-step shifting burden of proof that includes the following:¹⁴ (i) the applicant must prove there has been an adverse disparate impact from a policy towards a protected class, even if the policy appears neutral; (ii) the burden then shifts to the housing provider to prove the policy was necessary to achieve a substantial, legitimate, and nondiscriminatory interest; and (iii) the applicant can then show that the substantial, legitimate, and nondiscriminatory interest could have been served by a less discriminatory policy. Additionally, housing providers should not implement strict look-back periods without affording applicants an Individualized Further Review. A strict look-back period policy can subject a housing provider to a disparate impact claim because strict look-back periods can have the same practical effect as a discriminatory ban of finite duration.

Criminal Activity

In many cases, arrests do not result in criminal charges. In a recent study of the 75 largest counties in the United States, one-third of all felony arrests did not result in a conviction.¹⁵ The Supreme Court has recognized, “the mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”¹⁶ An arrest is not a reliable basis upon which to assess the potential risk to resident safety or property posed by a particular individual.¹⁷ A record of conviction, as opposed to an arrest, serves as sufficient evidence to prove that an individual engaged in criminal conduct.¹⁸ When considering a record of conviction, note that only charges for which a conviction actually was returned should be considered and not any other charges that may have been filed but did not result in conviction. Similarly, in Texas, deferred adjudication does not equate to a conviction. A deferred adjudication in Texas equates closely to a probationary period, where a judge postpones adjudication of guilt after the individual pleads guilty or nolo contendere. There is no formal conviction linked to a deferred adjudication and the housing provider should not consider deferred adjudication in the criminal background screening.¹⁹

A housing provider with a tailored policy or practice that excludes individuals with certain types of convictions must still prove that its policy is necessary to serve a substantial, legitimate, and nondiscriminatory interest.²⁰ The housing provider’s policy with regard to convictions must distinguish between criminal conduct that indicates a demonstrable risk to resident and property safety, and criminal conduct that does not.²¹ Moreover, providers must be mindful of the obligation to provide reasonable accommodation for certain applicants. For example, where a disqualifying criminal record may be directly linked to a covered disability, the housing provider may be legally obligated to provide an accommodation for the disability “by mitigating its effects (*i.e.*,

disregarding the conviction).”²² Mental illness and past drug abuse are two categories of qualifying disability that disproportionately impact individuals who have a history of criminal justice involvement and may require accommodation.²³

In creating a tenant screening policy and establishing any demonstrable risk attributable to a specific offense, a housing provider should be mindful of the often considerable length of time between an individual’s arrest and any resulting conviction. The more serious the alleged conduct, the more time typically required to complete any investigation and related legal proceedings. Moreover, following conviction, the individual may also serve a term of incarceration. The suggested look-back periods listed below take this additional time into account. Thus, for example, while a particular offense may trigger a 3-year look-back period calculated from the date of conviction, the conduct leading to the conviction may have occurred many years prior.

Reasonable Look-Back Periods as a First Line of Screening

Reasonable, specific look-back periods should be the first source of screening in determining whether a housing candidate with a criminal conviction may pose an unreasonable risk to other residents or to the property.²⁴ Housing providers should use reputable and consistent background screening companies. For most criminal activity, the focus of the criminal background screening is limited to activity that occurred during a “reasonable time” before the screening process takes place.²⁵ HUD expects that “reasonable time” be defined in the housing provider’s policy.²⁶ The reasonable time should be considered from the date of the conviction.

Where the suggested look-back period accounts for multiple offenses, for example, a 1-year look-back period for felony drug possession but only if two or more convictions are involved, the look-back period should be calculated from the date of the last conviction.

CALCULATING A LOOK-BACK PERIOD

Except for the two narrow categories of criminal conduct prohibited in federally funded housing, HUD has clarified that for all other past criminal activity, the focus of the inquiry is limited to activity that occurred during a “reasonable time” before the screening process takes place, and that the relevance of a criminal record diminishes with time.

It is recommended that look-back periods run from the date of conviction. Arrest records or other legal records not resulting in a conviction (such as deferred adjudication) should not be used.

If an applicant who has been released from incarceration has already met or exceeded the look-back period during his/her confinement, he/she should be considered to have met the look-back period.

Source: Tran-Leung, Marie Claire. [*When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing.*](#) Sargent Shriver National Center on Poverty Law, Feb. 2015.

If a housing applicant has a criminal conviction on his or her record and the date of the conviction falls outside of the enumerated look-back period, then the applicant should not be denied housing based on the criminal background screening. In no discretionary situation should the enumerated look-back period extend greater than seven (7) years.²⁷ Research indicates that at seven years past the offense date, the likelihood that a person with a prior criminal record will engage in future criminal conduct decreases to where it approximates the likelihood that a person with no criminal history will engage in criminal conduct.²⁸ However, different criminal convictions yield different likelihoods of recidivism. The following chart offers suggested look-back periods for different types of crimes based on best practices from other similar policies.²⁹

Suggested Look-Back Periods Based on Type of Crime and Conviction

| Type | Crime | Type of Conviction | *Suggested Look-Back Period from Date of Conviction |
|---|--|--------------------|---|
| Crimes Against Persons | Assault and Battery Offenses | Felonies | 3 years |
| | Domestic Violence Offenses | Felonies | 3 years |
| | | Misdemeanors | 3 years |
| | Use of a Firearm Against a Person Offenses | Felonies | 4 years |
| | Armed Robbery Offenses | Felonies | 4 years |
| | Robbery Offenses (no weapon involved) | Felonies | 3 years |
| | Intentional Homicide Offenses | Felonies | 4 years |
| | Manslaughter Offenses | Felonies | 4 years |
| | Kidnapping and Abduction Offenses | Felonies | 4 years |
| | Forcible Sex Offenses ³⁰ | Felonies | 4 years |
| Non-Forcible Sex Offenses ³¹ | Felonies | 3 years | |
| Stalking Offenses | Felonies | 3 years | |
| Crimes Against Property | Arson-Related Offenses | Felonies | 4 years |
| | Burglary/Breaking and Entering-Related Offenses | Felonies | 3 years |
| | Theft, Stolen Property, Fraud-Related Offenses | Felonies | 3 years (only if 2+ felonies) |
| | Destruction/Damage/Vandalism of Property Offenses | Felonies | 3 years (only if 2+ felonies) |
| Crimes Against Society | Drug Possession Offenses | Felonies | 1 year (only if 2+ felonies) |
| | Drug Manufacture, Distribution, or Possession with Intent to Distribute Offenses | Felonies | 3 years |
| | Driving Under the Influence-Related Offenses | Felonies | 1 year (only if 2+ convictions) |
| | Driving While Intoxicated-Related Offenses | Felonies | 1 year (only if 2+ convictions) |

The criminal background screening template utilizes a screening criteria grid linking the type of crime to a specified look-back period in order to determine whether an applicant's application should be accepted or, alternatively, subject to Individualized Further Review. If the applicant falls outside of the specified look-back period, then no Individualized Further Review is necessary and the applicant passes the criminal background screening for that specific category of offense. For example, if the relevant look-back period is four years and the date of the conviction is six years ago, then no Individualized Further Review is needed and the applicant passes the criminal background screening. On the other hand, if the relevant look-back period is four years and the date of the conviction was only three years from the date of the criminal background screening, then an Individualized Further Review is necessary.

Individualized Further Review ³²

A housing provider must show that its policy accurately distinguishes between criminal conduct that indicates a demonstrable risk to resident safety and property, and criminal conduct that does not.³³ A policy or practice that fails to take into account the nature and severity of the crime for which the applicant was convicted is unlikely to satisfy the second, legitimate, non-discriminatory justification prong under the Fair Housing Act's discriminatory impact test.³⁴

Individualized Further Review should only occur if the date of the conviction falls within the enumerated look-back period. The purpose of the Individualized Further Review is to limit a housing provider's exposure to a disparate impact claim. Thus, the Individualized Further Review does not serve to comprehend every applicant's entire background and situation, but it does serve to identify reasonable factors that qualify an applicant as someone who is not a demonstrable risk to resident and property safety. The factors³⁵ a housing provider considers in an Individualized

INDIVIDUALIZED FURTHER REVIEW: HOW & WHEN?

HUD's guidance suggests that Individualized Further Reviews may reduce the discriminatory disparate impact that comes with using broad blanket bans. Individualized Further Reviews should consider the following factors:

- age at time of offense,
- how long since offense was committed,
- community ties and support,
- references and supporting recommendations,
- rehabilitation efforts,
- further explanation of the offense, and
- requests for reasonable accommodation.

Individualized Further Reviews are subjective in nature and vulnerable to allegations of profiling or other improper considerations, it is therefore recommended that all screening policies and procedures be clear, written, and standardized.

Where an applicant presents with a criminal history that involves circumstances not considered by the policy, this Guide recommends performing an Individualized Further Review before making any decision to reject the application.

For any applicant listed on the Texas Sex Offender Registry, the individual should be granted an Individualized Further Review, regardless of the recommended look-back period.

Further Review should include: the applicant's age at time of offense, how long since the offense was committed, community ties and support, references and other supporting recommendations, rehabilitation efforts, further explanation of the offense, and requests for accommodation. The Individualized Further Review process should be set forth in specific, written detail. Examples of relevant supporting documentation include counseling records, probation and parole records, employment documentation, school and technical training records, documents evidencing work with social and nonprofit organizations, police reports, probable cause documents, charging documents, and letters from a criminal defense attorney.

The housing provider manager or owner should conduct the Individualized Further Review in a confidential setting. Additionally, the housing provider should keep the information shared by the applicant confidential. A good Individualized Further Review policy requires the housing provider to consider whether there were multiple convictions that stemmed from the same incident, or whether the multiple convictions stemmed from multiple incidences.

Notice to Applicants

The Texas Property Code requires that "at the time an applicant is provided with a rental application, the landlord shall make available to the applicant printed notice of the landlord's tenant selection criteria and the grounds for which the rental application may be denied."³⁶ It is recommended that housing providers also post their criminal background screening policy on a property's website to better facilitate the housing search process for potential applicants.

For an application denial based on criminal background, the applicant should be notified by standard notification letter and provided information identifying the specific conviction(s) forming the basis of the denial (i.e., cause number, conviction date, etc.). The letter should also include contact information for the screening company that performed the criminal record background check so the applicant can follow up to correct any possible inaccuracies in the record.

Conclusion

A housing provider that imposes a blanket prohibition on any person with any conviction record, no matter when the offense occurred, will be unable to prove that such a policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest.³⁷

A housing provider with a more tailored policy or practice that excludes individuals with certain types of convictions must still prove that its policy is necessary to serve a substantial, legitimate, nondiscriminatory interest by accurately distinguishing between a demonstrable risk to resident safety and/or property.³⁸

Appendix 1: Acknowledgements

The Austin/Travis County Reentry Roundtable thanks the members of its Criminal Background Work Group for their leadership and vision to move this project forward:

- Paul Cauduro, Director of Government Relations, Austin Apartment Association
- Helen Gaebler, Senior Research Attorney, The University of Texas School of Law (Roundtable Co-Chair)
- Juliana Gonzales, Executive Director, Austin Tenant’s Council
- Annette Price, Senior Roundtable Advocacy Fellow
- Bree Williams, Director of Community Housing, Ending Community Homelessness Coalition (Roundtable Planning Council Member and Housing Chair)

The Roundtable also thanks the members of the Stakeholder Advisory Group, for their guidance:

- Brooke Boston and Suzanne Hemphill, Texas Department of Housing and Community Affairs
- Kelly Crawford and Elvira Lathrop, Housing Authority of the City of Austin
- Patrick Howard and Naomi Ortiz-Tejero, Housing Authority of Travis County
- Cathy McLaugherty, Travis County Justice Planning
- Christy Moffett, Travis County Health and Human Services
- Ellis Morgan and David Potter, City of Austin Neighborhood Housing and Community Development Office
- Abby Tatkov, Ending Community Homelessness Coalition
- Cacki Young, Foundation Communities

Finally, the Roundtable acknowledges the following individuals and organizations for their significant contributions to this project:

- The Austin Apartment Association and its members for feedback on the draft guide.
- Keith Gibbons, Southeast Regional Account Executive at CoreLogic, for allowing the CoreLogic Safe Rent CrimSafe™ criteria to be utilized as an initial template.
- Marissa Latta, Texas Law ‘18, for her research on sex offense registries.
- Kelly Nichols, Woollard Nichols & Assoc., for project management and editing support.
- Professor Eliza Platts-Mills and law students Catherine Ellis, Texas Law ‘18, and Ryan Yergensen, Texas Law ‘18, The University of Texas School of Law’s Entrepreneurship and Community Development Clinic, for the initial drafting of the guide and template.

Appendix 2: Sex Offender Registrants & Recidivism

Texas first established a sex offender registry in 1991, with the express purpose of “alerting law enforcement to the presence of sex offenders.”³⁹ The law was limited in scope, applying only to a few offenses: indecency with a child, sexual assault, aggravated sexual assault, and incest. Moreover, only law enforcement officials could access registry information. Upon release from probation or parole, the registration terminated and registrants could seek an exemption from the duty to register.

Since 1991, Texas’ sex offender registration program has expanded considerably and today applies to any individual with a “reportable conviction or adjudication” after September 1, 1970. The impact from this ever-widening dragnet has been dramatic both in terms of numbers and consequences. By 2011, Texas had just over 64,000 registrants. Six years later, the number of registrants in Texas had risen by more than one-third to approximately 90,000. Nationally, an estimated 800,000 individuals are now listed on federal or state registries.

The fear of recidivism and risk to public safety is the primary justification for the severe limits imposed on registrants with regard to accessing housing and employment opportunities. But recidivism is a largely misunderstood concept and, especially in the case of sex offense registrants, significantly overstates the risk to public safety. In 2003, Justice Kennedy, writing in *Smith v. Doe*, 538 U.S. 84, stated that sex offender recidivism rates were “frightening and high...as high as 80 percent.” While this language has been widely cited in the intervening 15 years, adding to the public’s misperception of risk associated with this population, the available evidence shows a recidivism rate that is, in fact, much lower than for most other types of criminal conduct. Indeed, study after study has shown that recidivism rates for sex offense registrants hovers around 3.5% after three years, which is the typical length of time used for evaluating recidivism rates. Moreover, if one were to consider recidivism rates only for those registrants who are rearrested for a new sex offense (versus a technical violation of probation or for a new offense that is not a sex offense), that recidivism rate drops even lower.⁴⁰

For anyone whose offense(s) require registration, the reentry barriers are far more severe and long lasting than for other individuals living with a criminal record. This is true regardless of the nature of the offense. In Texas, as in many jurisdictions, sex offender registries fail to distinguish between conduct that may be more or less serious in terms of risks to public safety. Thus, for example, the same lifetime restrictions might apply to a conviction for sexting, indecent exposure for urinating in public, possessing child pornography, or ongoing sexual abuse of a child. The registry operates with a blunt force that does nothing to take into account the unique circumstances of an individual’s offense, background, prior history, or recidivism risk.

It is for these reasons that the Guide recommends that any applicant listed on a sex offender registry be provided an automatic individualized review. To do otherwise is to ignore the limited recidivism risk posed by the overwhelming majority of these individuals.

NOTES

- ¹ This Guide is not a comprehensive description of every legal and business issue that can arise under fair housing and other civil rights laws. All law, including regulatory guidance, is subject to change and, as a result, these materials are not designed to substitute for the advice of an attorney.
- ² *Locked Out* available at http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf.
- ³ The federal Fair Housing Act is at 42 U.S.C. § 3601, et seq. For a discussion of recent HUD guidance, see *Locked Out*, *supra* note 2, at 7. See also *Fair Housing and Reentry*, National Housing Law Project, <https://www.nhlp.org/initiatives/fair-housing-housing-for-people-with-disabilities/fair-housing-and-reentry/>.
- ⁴ See U.S. DEP'T OF HOUS. AND URBAN DEV., Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016) at 1, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.
- ⁵ See U.S. DEP'T OF HOUS. AND URBAN DEV., Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions (Nov. 2, 2015) (clarifying that arrest records may not be the basis for denying admissions), <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.
- ⁶ *Use of Criminal Records*, *supra* note 4, at 5 (stating that a housing provider that excludes applicants based on prior arrests cannot satisfy its burden of showing the policy is necessary to achieve a substantial, legitimate, and nondiscriminatory interest under the disparate effects test).
- ⁷ *Id.* at 8. See also *Fortune Society, Inc. v. Sandcastle Towers Housing Dev. Fund Corp. et al.*, No. 14 Civ. 6410 (E.D.N.Y. Oct. 18, 2016).
- ⁸ Federal guidelines exclude expunctions when computing criminal history. U.S. Sentencing Comm., Guidelines Manual, § 4a1.2 (Nov. 2016).
- ⁹ *Allen v. Muriello*, 217 F.3d 517 (7th Cir. 2000) (African American applicant given less opportunity to contest a record of erroneous criminal activity than two similarly situated white applicants established a prima facie case of discrimination under the Fair Housing Act.).
- ¹⁰ 42 U.S.C. § 3604. See also *Muriello*, 217 F.3d 517 (7th Cir. 2000).
- ¹¹ *Use of Criminal Records*, *supra* note 4, at 8.
- ¹² 42 U.S.C. § 3604. See also *Texas Dept. of Housing and Comm. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2549 (2015).
- ¹³ 24 U.S.C. § 100.500. See also *Use of Criminal Records*, *supra* note 4, at 5.
- ¹⁴ Robert G. Schwemm, Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. Legis. & Pub. Pol'y 685, 689 (2016). See also U.S. DEP'T OF HOUS. AND URBAN DEV., Implementation of the Fair Housing Act's Discriminatory Effects Standard (Feb. 15, 2013) at 2, <https://www.hud.gov/sites/documents/DISCRIMINATORYEFFECTRULE.PDF>.
- ¹⁵ Brian A. Reaves, Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE, *Felony Defendants in Large Urban Counties, 2009*, at 24, Table 21 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.
- ¹⁶ *Schware v. Bd of Bar Examiners*, 353 U.S. 232, 241 (1957). See also *U.S. v. Berry*, 553 F.3d 273, 282 (3rd Cir. 2009); *U.S. v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006).
- ¹⁷ *Use of Criminal Records*, *supra* note 4, at 5.
- ¹⁸ *Id.* at 6.
- ¹⁹ See Tex. Code of Crim. Proc. Art. 42A.101.
- ²⁰ 24 C.F.R. § 100.500.
- ²¹ *Use of Criminal Records*, *supra* note 4, at 6.
- ²² *Simmons v. T.M. Associates Management, Inc.*, No. 3:17-CV-00066 (W.D. Va. Feb. 14, 2018). The *Simmons* court denied motion to dismiss on the ground that plaintiff, who was arrested and convicted for conduct occurring as a direct result of mental illness, stated a claim under the Fair Housing Act based on housing provider's refusal to overlook the disability-related conviction during the background screening process.
- ²³ This Guide is narrowly focused on applications for admission to housing, but much of the information contained in the Guide applies equally to eviction or lease termination decisions that are based on criminal activity.
- ²⁴ See *Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975).
- ²⁵ Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Sargent Shriver National Center on Poverty Law (Feb. 2015) at 11, <http://povertylaw.org/wdmd>.
- ²⁶ *Id.* at 14.
- ²⁷ Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *Criminology and Pub. Pol'y* 483 (2006).
- ²⁸ *Id.*
- ²⁹ See Criminal Background Screening Procedures, Housing Authority of New Orleans (HANO) (March 29, 2016), http://www.hano.org/home/agency_plans/2016%20CRIMINAL%20BACKGROUND%20PROCEDURES%20-%20FINAL.pdf.
- ³⁰ See Appendix 2 for more detailed information.
- ³¹ *Id.*
- ³² See generally Ensuring Fair Housing for People with Criminal Records: A Conversation with HUD, 34:30, <http://povertylaw.org/clearinghouse/webcast/HUDfairhousing> (discussing categorical versus specific circumstances, including age at time of offense and age now).
- ³³ *Use of Criminal Records*, *supra* note 4, at 6.
- ³⁴ 24 C.F.R. § 100.500.
- ³⁵ Richard A. Webster, *HANO approves new criminal background check policy*, The Times Picayune, http://www.nola.com/politics/index.ssf/2016/03/hano_approves_new_criminal_bac.html. See also *Criminal Background Screening Procedures*, *supra* note 29.
- ³⁶ Texas Property Code § 92.3515 (Notice of Eligibility Requirements), law.onecle.com/texas/property/92.3515.html.
- ³⁷ *Supra* note 4, at 6. See also, *Green*, 523 F.2d at 1298; *Fortune Society*, No. 14 Civ. 6410 (E.D.N.Y. Oct. 18, 2016).
- ³⁸ *Supra* note 4, at 6.
- ³⁹ Texas House of Representatives Select Interim Committee on Sex Offender Statutes, 79th Legislature, 2004 Interim Report, http://www.house.state.tx.us/media/pdf/committees/reports/78interim/sex_offender.pdf.
- ⁴⁰ See generally, Roger Przybylski, *Recidivism of Adult Sexual Offenders*, U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (July 2015) (citing studies); Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, *Analyses of Social Issues and Public Policy*, Vol. 7, No. 1, pp. 1-25 (2007) (citing studies and finding, among other things, that "[a]lthough it is believed that sex offenders have the highest recidivism rates ... they are

among the least likely ... to be rearrested for new crimes.”). Consistent with these studies, the Texas Department of Public Safety has concluded that more than 90 percent of all Texas registrants are not considered to be at high risk for re-offending. *See* Eric Dexheimer, *Program to corral ballooning sex offender registry failing*, Austin American-Statesman (July 15, 2016), <https://www.mystatesman.com/news/state--regional/program-coral-ballooning-sex-offender-registry-failing/z4ltoUh7g2A8KSxI64vv5I/>.