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# Disparate Impact Lacks an Impact: The Need for Pay for Success Programs to House Formerly Incarcerated People

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# DISPARATE IMPACT LACKS AN IMPACT: THE NEED FOR PAY FOR SUCCESS PROGRAMS TO HOUSE FORMERLY INCARCERATED PEOPLE

*Eva Coruzzi Schneider\**

*“As a society, our decision to heap shame and contempt upon those who struggle and fail in a system designed to keep them locked up and locked out says far more about ourselves than it does about them.”\*\**

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\*\* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 69 (2010).

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### INTRODUCTION

The United States is home to less than five percent of the world’s total population, yet houses nearly twenty-five percent of the world’s prison population.<sup>1</sup> Almost one-third of Americans have a criminal record.<sup>2</sup> For the past twelve years, an average of 650,000 people have been released annually from federal and state prisons.<sup>3</sup> Over ninety-five percent of people

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1. See *The Prison Crisis*, ACLU, <https://www.aclu.org/prison-crisis> [<https://perma.cc/AE9U-346G>].

2. See U.S. DEP’T OF HOUS. & URB. 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 1 (Apr. 4, 2016), [hereinafter HUD GUIDANCE 2016] [https://portal.hud.gov/hudportal/documents/huddoc?id=HUD\\_OGCGuidAppFHASandCR.pdf](https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHASandCR.pdf) [<https://perma.cc/RM5C-WD98>].

3. See *id.* at 1.

currently incarcerated in state prisons will be released at some point in the future.<sup>4</sup> Where will they live?

This issue has especially impacted Black communities throughout the United States. Indeed, Black Americans are vastly overrepresented in the American prison system: 1 million of the 2.3 million people currently incarcerated are Black Americans.<sup>5</sup> Statistically, Black Americans make up 13.3 percent of the total population of the United States yet comprise 37.8 percent of the federal incarcerated population.<sup>6</sup> In other words, Black Americans are incarcerated at “nearly three times their proportion of the general population.”<sup>7</sup>

For many formerly incarcerated people, the pathway to reentering society is fraught with obstacles. One substantial barrier is obtaining access to safe, secure, and affordable housing—an integral step for successful reentry.<sup>8</sup> This is particularly true for formerly incarcerated people of color. Historically, the federal government supported state-sanctioned segregation and created stringent policies to keep formerly incarcerated people of color out of white neighborhoods and public housing.<sup>9</sup> However, under the Obama Administration, the federal government generated regulations and guidance under the Fair Housing Act (“FHA”) to combat housing discrimination that formerly incarcerated people face.

The FHA prohibits discrimination in housing based on “race, color, religion, sex, familial status, or national origin.”<sup>10</sup> In 2013, the Department of Housing and Urban Development (“HUD”) issued a regulation that

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4. Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS. (last revised Apr. 14, 2004), <http://www.bjs.gov/content/pub/pdf/reentry.pdf> [<https://perma.cc/JF3W-3NCV>]; HUD GUIDANCE 2016, *supra* note 2, at 1.

5. See *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/484F-TCNX>].

6. See *Inmate Statistics*, FED. BUREAU OF PRISONS (last updated Mar. 25, 2017), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [<https://perma.cc/936M-XCRJ>]; *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/00#headnote-js-a> [<https://perma.cc/7FAJ-R25U>].

7. See HUD GUIDANCE 2016, *supra* note 2, at 3.

8. See Jocelyn Fontaine & Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, WHAT WORKS COLLABORATIVE, URB. INST. 1 (Apr. 2012), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.pdf> [<https://perma.cc/JE23-8P5Z>].

9. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/XWZ6-J37S>] (explaining that the federal government in the 1950s only distributed funding to segregated housing projects); see also U.S. DEP’T OF HOUS. & URB. DEV., “ONE STRIKE AND YOU’RE OUT” POLICY IN PUBLIC HOUSING, GUIDING PRINCIPLES OF A ONE STRIKE POLICY 5 (Mar. 1996), [hereinafter HUD, ONE STRIKE AND YOU’RE OUT] in HUD Directive No. 96-16 (Apr. 12, 1996).

10. 42 U.S.C. § 3604(b).

formalized a three-part burden-shifting test<sup>11</sup> to prove disparate impact liability under the FHA.<sup>12</sup> Under this regulation, a practice has a discriminatory effect if it actually, or predictably, will result in a disparate impact on a protected group.<sup>13</sup> In 2015, the Supreme Court recognized the disparate impact liability theory based on its interpretation of the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*<sup>14</sup> However, the Court limited the application of disparate impact claims brought under the FHA by enacting certain “safeguards” that apply at the pleadings stage, making establishing a prima facie case more challenging.<sup>15</sup> Also in 2015, HUD issued guidance to Public Housing Authorities (“PHAs”) and owners of federally assisted housing, prohibiting the use of arrest records as a basis for denying admission, terminating assistance, or evicting tenants from federally subsidized housing.<sup>16</sup> In 2016, HUD issued further guidance to detail how the disparate impact test applied to formerly incarcerated people.<sup>17</sup> HUD recognized that having a criminal record is not a protected characteristic under the FHA, but that criminal record barriers to housing disproportionately affect racial and ethnic minorities.<sup>18</sup> According to this guidance, an individual who is discriminated against on the basis of her past criminal conviction may bring a disparate impact claim against a housing provider<sup>19</sup> if she can prove “that the [housing provider’s] policy results in a disparate impact on a group of persons because of their race or national origin.”<sup>20</sup> This guidance does not detail the limitations established by the Court in *Texas v. Inclusive*

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11. *See infra* Section I.E.

12. *See* 24 C.F.R. § 100.500.

13. *See id.* § 100.500(a).

14. 135 S. Ct. 2507, 2507 (2015).

15. *See infra* Section I.E.

16. *See* GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAS) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS 2 (Nov. 2, 2015), [hereinafter HUD GUIDANCE 2015] <http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-19.pdf> [<https://perma.cc/R7WP-7G3W>] (explaining that arrest records alone cannot be used as a basis for denying housing; PHAs have discretion to consider circumstances; HUD does not require “one strike” policies; PHAs must ensure that applicants’ and tenants’ due process rights are upheld; and that all policies must be in compliance with the FHA, Americans with Disabilities Act, the Civil Rights Act of 1964, and the Rehabilitation Act).

17. *See* HUD GUIDANCE 2016, *supra* note 2, at 3-4, 7.

18. *See id.* at 2.

19. The Fair Housing Act, in some circumstances, exempts owner-occupied buildings that have four or fewer units, single family housing that is rented or sold without a broker, and housing that is operated by private clubs and religious organizations that restrict occupancy to members only. *See Fair Housing—It’s Your Right*, DEP’T OF HOUS. & URB. DEV., [https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/FHLaws/yourrights](https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights) [<https://perma.cc/5DM3-GA5T>]; 42 U.S.C. §§ 3603(b), 3606, and 3607(a).

20. HUD GUIDANCE 2016, *supra* note 2, at 3; *see infra* Section I.E.

*Communities*.<sup>21</sup> As a result, the more plaintiff-friendly HUD guidance and regulations and the more defendant-friendly 2015 decision by the Court are in tension and may result in conflicting outcomes in the future.<sup>22</sup>

This Note argues that disparate impact litigation alone is insufficient to provide formerly incarcerated people access to safe, affordable, and stable housing. Even with the HUD regulations and guidance and the Court's recent recognition of the disparate impact theory under the FHA, the current litigation model is ineffective for four reasons. First, over the past forty years, plaintiffs have experienced limited success litigating disparate impact claims. Second, the more stringent pleading requirements (or "safeguards") outlined in *Texas v. Inclusive Communities* will only make it more challenging for plaintiffs to initiate successful disparate impact claims. Third, litigation is a slow, time-consuming, and expensive process that can impede disadvantaged individuals from bringing claims. Lastly, the most recent appointment on the Supreme Court, the single party dominance of the executive and legislative branches, and the appointment of Ben Carson as HUD Secretary<sup>23</sup> will likely undercut the efficacy of disparate impact litigation over the coming years. Ultimately, litigation alone is ill-equipped to accommodate the large volume of housing discrimination that occurs every year.

This Note examines two potential solutions to supplement the current disparate impact litigation regime. First, this Note explores giving formerly incarcerated people protected class status. Protected class status would allow plaintiffs to pursue FHA claims under the disparate treatment theory.<sup>24</sup> Plaintiffs would be able to challenge housing policies that facially discriminate against those who have criminal records.<sup>25</sup> However, several hurdles would have to be overcome to pursue this approach, and the recourse afforded—litigation—still falls short of a solution to the problem. At the

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21. Compare HUD GUIDANCE 2016, *supra* note 2, with *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

22. Outcomes for plaintiffs may differ depending on whether an administrative hearing is conducted versus federal litigation. See *infra* notes 154-56 and accompanying text. However, one could speculate that HUD, in the current conservative administration, will align their disparate impact policies in accordance with the Court's narrower interpretation. See *infra* notes 409-11 and accompanying text.

23. See Ben S. Carson, *Experimenting with Failed Socialism Again*, WASH. TIMES (July 23, 2015), <http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/> [https://perma.cc/CPU9-8APP] ("These government-engineered attempts to legislate racial equality create consequences that often make matters worse. There are reasonable ways to use housing policy to enhance the opportunities available to lower-income citizens, but based on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous.")

24. Unlike disparate impact, disparate treatment addresses policies and practices that facially discriminate against a protected class of individuals. See *infra* Section II.B.2.

25. See *infra* Section II.B.2.

outset, whether formerly incarcerated people meet the legal criteria for protected class status is debatable. Moreover, like disparate impact, disparate treatment is often hard to prove<sup>26</sup> and is still rooted in the litigation regime, thus subject to the aforementioned problems. This Note concludes that the feasibility of a protected class designation is questionable.

As a second solution, this Note explores the adoption of the Pay for Success (“PFS”) model in conjunction with the use of Social Impact Bonds (“SIBs”) to operate outside the litigation framework by funding housing programs for formerly incarcerated people. The PFS model is a private-public partnership for the achievement of a social good.<sup>27</sup> Under the PFS model, partnerships can be forged with non-profits or other service providers whose programs have been shown to achieve successful outcomes (“proven models” or “proven programs”) to expand the reach of their services to larger populations.<sup>28</sup> Thus, proven models can be scaled up to effectively provide safe, stable, and affordable housing to more formerly incarcerated people. This Note concludes that this solution, if implemented responsibly, is a more viable remedy that supplements the current litigation model and avoids the problems surrounding the disparate impact test.

Part I of this Note examines the history of mass incarceration and housing segregation in the United States that led to the current intersection of poverty, imprisonment, segregation, and homelessness. It describes the types of discrimination formerly incarcerated people face, reviews recent state action regarding criminal history screening, and explains the current FHA disparate impact litigation regime. Part II identifies the inadequacies of the current disparate impact litigation regime by analyzing the effect *Texas v. Inclusive Communities* will have, and discusses current disparate impact litigation cases at bar. It also explores the benefits and detriments of two potential solutions: (1) the creation of a protected class of formerly incarcerated persons and (2) the PFS model. Part III concludes that the PFS model is a unique solution that state and local governments should implement to help formerly incarcerated people secure safe, stable, and affordable housing. By expanding proven housing programs and allocating state funds based on the specific housing needs of formerly incarcerated persons, states can

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26. For example, housing providers, in an attempt to avoid disparate treatment liability, may adopt unwritten policies that treat those with criminal records differently, making explicit discrimination hard to prove. *See infra* Section II.B.2.

27. In the PFS model, the government (acting as a back-payor) contracts with one or more service providers (typically non-profits) to provide certain social services. Private investors provide the upfront capital to fund these services. The investor is only paid back (by the government) if outcomes are achieved. *See infra* Section II.C.

28. The process of expanding proven programs to reach a larger population is typically referred to as “scaling up.” Programs that undergo this expansion can be referred to as “scaling programs.” *See infra* Section II.C.

effectively reduce recidivism, lessen expenditures, and achieve positive social outcomes for the formerly incarcerated population and society at large.

### I. BACKGROUND

The United States imprisons more of its population than any other nation in the developed world.<sup>29</sup> The number of people incarcerated in the United States has increased dramatically in the past forty years. In 1980, roughly 500,000 people were incarcerated—today, that number has quadrupled to over 2.3 million.<sup>30</sup> However, the demographics of the prison population do not mirror the demographics of the American population.<sup>31</sup> Black Americans make up 37.8 percent of the federal prison population, but only 13.3 percent of the total U.S. population.<sup>32</sup> White Americans make up 58.7 percent of the federal prison population, yet comprise 77.1 percent of the total population.<sup>33</sup> Some studies reveal that this misrepresentation does not reflect actual disparities in illegal activity, but is instead a result of the disproportionate criminalization of communities of color.<sup>34</sup>

Scholars attribute much of the prison population increase to the “War on Drugs,” a policy which incarcerated many non-violent offenders,<sup>35</sup> and the over-policing of Black communities.<sup>36</sup> As scholars have noted, “[b]etween

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29. See Michelle Ye Hee Lee, *Yes, U.S. Locks People up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> [<https://perma.cc/596U-GKEL>].

30. NAACP, *supra* note 5; Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL’Y INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html> [<https://perma.cc/J5MJ-TA64>] (“The American criminal justice system holds more than 2.3 million people in 1,719 state prisons, 102 federal prisons, 942 juvenile correctional facilities, 3,283 local jails, and 79 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories.”).

31. NAACP, *supra* note 5; Wagner & Rabuy, *supra* note 30.

32. See FED. BUREAU OF PRISONS, *supra* note 6; U.S. CENSUS BUREAU, *supra* note 6.

33. See FED. BUREAU OF PRISONS, *supra* note 6; U.S. CENSUS BUREAU, *supra* note 6.

34. See Kate Linden Morris, Note, “*Within Constitutional Limitations: Challenging Criminal Background Checks by Public Housing Authorities Under the Fair Housing Act*,” 47 COLUM. HUM. RTS. L. REV. 158, 171 (2015) (“For example, research has shown that, although people of color are no more likely to use or sell illegal drugs than Whites, they are arrested at higher rates, and an analysis of federal sentencing data by the U.S. Sentencing Commission in 2010 revealed that once convicted, Black people are more likely to receive higher sentences than similarly situated White people for the same crimes.”) (internal citations omitted).

35. See generally Michael Tonry, *Racial Politics, Racial Disparities, and the War on Crime*, 40 CRIME & DELINQUENCY 475 (1994). *But see* JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017) (arguing that prosecutorial discretion is the true culprit of this forty year incarceration boom).

36. See, e.g., MARY PATTILLO ET AL., *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 2* (Mary Pattillo et al. eds. 2004) (“Although young minority men with little schooling had relatively high rates of incarceration, before the 1980s the penal system



1982 and 1999, drug sentences in federal and state prisons increased by 975 percent.”<sup>37</sup> Today, non-violent offenders make up the majority of the national prison population: 46.4 percent of incarcerated individuals are in federal prison due to non-violent drug offenses,<sup>38</sup> and roughly thirty-eight percent of those convicted are Black Americans.<sup>39</sup>

Yet, even prior to the war on drugs, Black Americans have historically been overrepresented in prisons.<sup>40</sup> The Thirteenth Amendment of the United States Constitution, which formally abolished slavery after the Civil War, contains language that some scholars refer to as a “convict exception.”<sup>41</sup> The Thirteenth Amendment provides, in relevant part, “[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”<sup>42</sup> Scholars argue that the original understanding of this clause recognized that slavery was constitutionally permitted “when the class of people to be enslaved were prison inmates.”<sup>43</sup>

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was not a dominant presence in disadvantaged neighborhoods. Criminal behavior, as officially recognized by the police, was much more unusual than poverty. The utter marginality of prisons and other carceral institutions shaped criminological and penological understanding of punishment.”).

37. Zach Newman, Note, “*Hands up, Don’t Shoot*”: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness, 43 HASTINGS CONST. L.Q. 117, 135 (2015) (citations omitted).

38. T.J. Raphael & Dana Roberson, *President Trump, Do You Support Rehabilitation or Incarceration for Nonviolent Drug Offenders?*, PRI (Mar. 1, 2017, 9:00 AM), <https://www.pri.org/stories/2017-03-01/president-trump-do-you-support-rehabilitation-or-incarceration-nonviolent-drug> [<https://perma.cc/G5Q4-4L68>].

39. FED. BUREAU OF PRISONS, *supra* note 6; Sam Taxy et al., *Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data*, DEP’T OF JUST. BUREAU OF JUST. STATS. 3 (Oct. 2015), <https://www.bjs.gov/content/pub/pdf/dofp12.pdf> [<https://perma.cc/C857-J8ZZ>] (“About three-quarters of drug offenders in federal prison were either non-Hispanic black or African American (39%) or Hispanic or Latino (37%); nearly a quarter (22%) were non-Hispanic white offenders. In addition, drug offenders in federal prison were overwhelmingly male (92%), about a quarter (24%) were noncitizens, and nearly 80% were age 30 or older.”).

40. See Robert Johnson et al., *The American Prison in Historical Perspective: Race, Gender, and Adjustment*, in PRISONS: TODAY AND TOMORROW 22, 23 (2nd ed. 2005) (citing T. SELLIN, *SLAVERY AND THE PENAL SYSTEM*, (1st ed. 1976)) (“Minorities, by contrast, have always formed a sizable portion of the prison population. In fact, ethnic and, after the Civil War, racial minorities have almost certainly been overrepresented in American prisons.”).

41. Taja-Nia Y. Henderson, *The Ironic Promise of the Thirteenth Amendment for Offender Anti-Discrimination Law*, 17 LEWIS & CLARK L. REV. 1141, 1180 (2013).

42. U.S. CONST. amend. XIII, § 1 (emphasis added).

43. Henderson, *supra* note 41, at 1180 (“The ‘ironic promise’ is that the constitutional provision explicitly granting states authority to coerce forced labor from convicts as punishment within its first section is the same amendment granting Congress the authority to limit other forms of subordination levied upon this same group in its second section.”).

After the Civil War, there was an uptick in incarceration rates of Black Americans in southern states due to the enactment of “Black Codes.”<sup>44</sup> Integral to these Black Codes were vagrancy laws, which allowed local municipalities to arrest and imprison newly freed Black Americans for minor infractions.<sup>45</sup> Once in prison, incarcerated persons were forced to provide free labor, a practice known as convict leasing.<sup>46</sup> Some scholars refer to this practice as “slavery by another name.”<sup>47</sup> Although Black Codes were abolished during the Reconstruction Era, Jim Crow laws quickly took hold in the late 1890s, mandating segregation in public places under the guise of separate but equal.<sup>48</sup>

Once Black Americans began to move north, local governments in northern states promulgated a host of racially discriminatory land use laws in an attempt to keep Black people out of their white neighborhoods.<sup>49</sup> Subsequently, the newly established Federal Housing Administration<sup>50</sup> engaged in discriminatory lending practices known as redlining.<sup>51</sup> Banks

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44. RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* 8-9 (1st ed. 2003) (explaining that these laws severely restricted the newfound freedoms of Black Americans such as the ability to own property, purchase and lease land, conduct business, and move freely in public places).

45. *See generally* DOUGLAS BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (1st ed. 2008).

46. *See id.* at 64-66; *see also* Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <http://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/57YF-4SND>] (“Over the decades, prison labor has expanded in scope and reach. Incarcerated workers, laboring within in-house operations or through convict-leasing partnerships with for-profit businesses, have been involved with mining, agriculture, and all manner of manufacturing from making military weapons to sewing garments for Victoria’s Secret . . . . In a sense, slavery never ended at Angola; it was reinvented.”).

47. *See, e.g.*, BLACKMON, *supra* note 45.

48. *See Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Board of Ed.*, 347 U.S. 483 (1954); David Pilgram, *What Was Jim Crow*, FERRIS ST. U. (2012), <http://www.ferris.edu/jimcrow/what.htm> [<https://perma.cc/65JR-92AT>].

49. Racial zoning was used as a means of legal de jure segregation. In 1917 the Supreme Court ruled that racial zoning was unconstitutional. *See Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917). However, this decision disallowed legal statutes, not private agreements. *See id.* The enforcement of racially restrictive covenants was not disallowed until 1948. *See Shelly v. Kraemer*, 334 U.S. 1 (1948). Yet, “[i]t was not until 1968 that the actual inclusion of racially-restrictive covenants into deeds was deemed illegal, although many such covenants can still be found within the language of deeds today.” *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts, 1948-1968: Unenforceable Restrictive Covenants*, FAIR HOUS. CTR. OF GREATER BOS., <http://www.bostonfairhousing.org/timeline/1948-1968-Unenforceable-Restrictive-Covenants.html> [<https://perma.cc/P2FN-BH2R>].

50. The Federal Housing Administration was created in 1934 by the National Housing Act of 1934. *See* 12 U.S.C. § 1701.

51. *See Fair Lending Regulations and Statutes*, Consumer Compliance Handbook, FED. RES., [https://www.federalreserve.gov/boarddocs/supmanual/cch/fair\\_lend\\_fhact.pdf](https://www.federalreserve.gov/boarddocs/supmanual/cch/fair_lend_fhact.pdf)

and financial institutions “refused loans to black families in white suburbs and even, in most cases, to black families in black neighborhoods—leading to the deterioration and ghettoization of those neighborhoods.”<sup>52</sup> Many whites living in cities and public housing bought and moved to homes in the suburbs using low-interest mortgages.<sup>53</sup> This concentrated Black Americans in inner cities, and helped to produce a downward income shift in the population residing in public housing after the 1940s.<sup>54</sup> Eventually redlining and a host of other discriminatory laws were challenged and repealed by federal legislation in the 1960s.<sup>55</sup>

In an effort to subdue the unrest and unaffordability of urban housing for people of color, in the 1960s Congress funded large public housing

[<https://perma.cc/3QY4-YBA9>] (“Redlining is the practice of denying a creditworthy applicant a loan for housing in a certain neighborhood even though the applicant may otherwise be eligible for the loan. The term refers to the presumed practice of mortgage lenders of drawing red lines around portions of a map to indicate areas or neighborhoods in which they do not want to make loans.”); Lorren Patterson, *The Impact of Disparate Impact: The Benefits Outweigh the Costs of Recognizing Disparate Impact Claims Under the Fair Housing Act*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 211, 216 (2016).

52. Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods—A Constitutional Insult*, RACE & SOC. PROB.S (2014), <http://www.epi.org/publication/the-racial-achievement-gap-segregated-schools-and-segregated-neighborhoods-a-constitutional-insult/> [<https://perma.cc/XX92-MQDW>].

53. See *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts, 1950s-1975: Impact of Rte 128 & Rte 495*, FAIR HOUS. CTR. OF GREATER BOS., <http://www.bostonfairhousing.org/timeline/1950s-1975-Suburbs.html> [<https://perma.cc/HA2M-QEKZ>] (explaining that from the 1950s through 1975, large highways were built that enabled white flight to suburban towns). From the 1970s through today, local municipalities utilized large-lot zoning, single-family housing, minimum multi-family zoning, and restrictions on age to concentrate wealth and effectively exclude people of color from moving to suburban areas. See *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts, 1970s-Present: Disparate Impact of Local Land Use Regulations*, FAIR HOUS. CTR. OF GREATER BOS., [http://www.bostonfairhousing.org/timeline/1970s-present-Local-Land\\_use-Regulations.html](http://www.bostonfairhousing.org/timeline/1970s-present-Local-Land_use-Regulations.html) [<https://perma.cc/8DE4-27TE>].

54. J.A. Stoloff, *A Brief History of Public Housing*, OFF. OF POL’Y DEV. & RES., DEP’T HOUS. & URB. DEV. 6, [http://reengageinc.org/research/brief\\_history\\_public\\_housing.pdf](http://reengageinc.org/research/brief_history_public_housing.pdf) (“Over time, advocates for the poor asked that preferences on waiting lists be given to the most disadvantaged applicants, in particular to the homeless and displaced. This, combined with income limits, ensured that public housing residents were drawn from the least well-off segments of society. Anyone who could afford to live elsewhere moved out of public housing, and whites had more opportunities than minorities to take advantage of government subsidies that promoted homeownership.”).

55. See generally *The Fair Housing Act of 1958*, 42 U.S.C. §§ 3501 *et seq.* (making the practice of redlining unlawful); *The Civil Rights Act of 1964*, 88 P.L. 352, 78 Stat. 241, 88 P.L. 352, 78 Stat. 241 (ending de jure segregation of public spaces). See also Stoloff, *supra* note 54, at 6 (explaining the Civil Rights Act of 1964 also ended segregation in public housing).

projects.<sup>56</sup> However, these projects served to reinforce already existing racial segregation patterns.<sup>57</sup> Residents of public housing, who were overwhelmingly Black,<sup>58</sup> were demonized and stereotyped, social inequities were ignored, and violence, inner-city decay, and crime became linked with public housing.<sup>59</sup> In response, Congress enacted a series of more stringent reforms that enabled PHAs to more easily screen out and evict tenants with criminal records.<sup>60</sup> The culmination of these policies resulted in HUD's 1996 "One Strike" guidelines, which encouraged PHAs to adopt screening criteria by tying funding to the implementation of these policies.<sup>61</sup> More often than not, these policies were in the form of blanket bans on those with criminal records without consideration of individualized circumstances.<sup>62</sup> Thus, those already facing legal discrimination in the private housing market due to their criminal records also faced stringent PHA screening policies, which effectively "locked out a population with nowhere else to live."<sup>63</sup>

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56. See Jeff R. Crump, *The End of Public Housing as We Know It: Public Housing Policy, Labor Regulation and the US City*, 27 INT'L J. URB. & REG'L RES. 177, 179-80 (2003).

57. See *id.* at 181 ("Ghetto boundaries were made visible by highways or other spatial barriers and the design of public housing set it apart from the urban fabric, making it easy to identify public housing residents and keep them within well-defined borders of 'the projects.'"); see also Rothstein, *supra* note 52 ("[I]t remains an open question whether it really was in [Black American's] best interests to be herded into segregated projects, where their poverty was concentrated and isolated from the American mainstream.").

58. See Stoloff, *supra* note 54, at 6 ("Ironically, while ending legal discrimination by no longer allowing racially segregated projects, the Civil Rights Act of 1964 contributed to the movement of whites out of projects when they became racially integrated.").

59. See Jesse Kropf, Note, *Keeping "Them" Out: Criminal Record Screening, Public Housing, and the Fight Against Racial Case*, 4 GEO J.L. & MOD. CRITICAL RACE PERSP. 75, 85 (2012) ("[O]pponents demonized public housing residents . . . Ignoring the staggering social inequalities facing urban minority communities, public housing thus became linked with inner-city decay and violence."); *id.* at 85 n.66 ("This corresponded to a general stigmatization of inner-city Blacks as welfare queens and gangbangers, which accompanied the War on Drugs.") (internal quotations and citations omitted).

60. See Kropf, *supra* note 59, at 85 n.68 ("The 1988 Anti-Drug Abuse Act granted PHAs the power to evict any tenant engaged in any criminal activity on or near the premises. In 1996, Congress passed the Housing Opportunity and Extension Act urging PHAs to exclude people based on their criminal records and allowing PHAs to deny applicants it believed to be abusing alcohol or drugs, regardless of any conviction.") (citations omitted).

61. See HUD, ONE STRIKE AND YOU'RE OUT, *supra* note 9; see also Kropf, *supra* note 59, at 86; Morris, *supra* note 34, at 164-66 (providing a summary of the Quality Housing and Work Responsibility Act ("QHWRA"), the final statutory amendments to the "One Strike" policy).

62. See Kropf, *supra* note 59, at 78.

63. *Id.* at 87.

### A. Incarceration, Segregation, and Poverty Today

*“Two hundred fifty years of slavery. Ninety years of Jim Crow. Sixty years of separate but equal. Thirty-five years of racist housing policy. Until we reckon with our compounding moral debts, America will never be whole.”*<sup>64</sup>

Today, the criminal justice system is defined by over-criminalization, over-punishment, and discriminatory policing and prosecuting.<sup>65</sup> As a result, federal prisons and state jails are filled beyond capacity, with people of color overrepresented.<sup>66</sup> Upon conviction, incarcerated persons are burdened with “collateral consequences”—indirect penalties imposed by state and federal statutes that disadvantage and deny them political, social, and economic rights and privileges that most Americans consider to be fundamental and intrinsic components of citizenship.<sup>67</sup> Consequently, these individuals are “shackled with the stigma of their prison record long after serving time behind bars,”<sup>68</sup> which makes housing and employment difficult to obtain.<sup>69</sup>

Also today, neighborhoods, towns, and cities remain deeply segregated.<sup>70</sup> Many neighborhoods with high concentrations of poverty are comprised predominately of people of color.<sup>71</sup> Some of these individuals are stuck in a cycle of poverty and recidivism: “[w]hen individuals are economically impoverished, they are more likely to not only offend, but also repeatedly offend, because poverty compounded with the imposed civil disabilities of a

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64. Coates, *supra* note 9.

65. See Newman, *supra* note 37, at 134.

66. See *supra* Part I.

67. See Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 267 (2009) (explaining that these penalties can affect parental rights; voting rights; jury service; employment; licensing; driver’s licenses and passports; educational grants, loans and work assistance; federal welfare benefits; and public housing); see also, Etienne C. Toussaint, *Incarceration to Incorporation: Economic Empowerment for Returning Citizens Through Social Impact Bonds*, 25 J. AFFORD. HOUS. & CMTY. DEV. L. 61, 64 (2016) (“Not only does America’s criminal justice system overwhelmingly target young Black men in low-income communities as the primary perpetrators of criminal activity, but it also routinely relegates them to second-class citizenship upon their release from prison.”).

68. Toussaint, *supra* note 67, at 64.

69. See Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/> [<https://perma.cc/F2RN-JE5W>] (“Our carceral state banishes American citizens to a gray wasteland far beyond the promises and protections the government grants its other citizens. Banishment continues long after one’s actual time behind bars has ended, making housing and employment hard to secure.”).

70. See Matthew Bloch et al., *Mapping Segregation*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/interactive/2015/07/08/us/census-race-map.html> [<https://perma.cc/3D3S-VUFC>].

71. See, e.g., *Poverty Data Tool*, N.Y.C. CTR. FOR ECON. OPPORTUNITY, <http://www.nyc.gov/html/ceo/html/poverty/lookup.shtml> [<https://perma.cc/LKH8-JDZM>].

criminal conviction further socially isolate and minimize their life options.”<sup>72</sup>

### B. The Importance of Reducing Recidivism

Reducing recidivism is an important goal of many municipalities for both social and economic reasons.<sup>73</sup> An average of roughly 650,000 people are released from federal and state prisons annually, and 11.4 million cycle in and out of local jails annually.<sup>74</sup> An estimated forty to fifty percent of people released from prison are re-incarcerated within three years of their release.<sup>75</sup> Recidivism, coupled with a growing incarceration rate has resulted in huge correctional expenses born by the states: in recent years, annual correctional expenses have surpassed fifty billion dollars.<sup>76</sup>

From a social perspective, reducing recidivism can create safer communities and promote long-term public safety goals.<sup>77</sup> Reducing recidivism helps both the communities in which formerly incarcerated people typically live in, and their family members who they often disproportionately rely on for support.<sup>78</sup> Programs to reduce recidivism can act as a means to confront and counteract racism and bring about social justice.<sup>79</sup> From an economic perspective, reducing the number of incarcerated people reduces the cost states and municipalities spend on

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72. See Alina Ball, Comment, *An Imperative Redefinition of “Community”*: Incorporating Reentry Lawyers to Increase The Efficacy of Community Economic Development Initiatives, 55 UCLA L. REV. 1883, 1883 (2008); see also Lyles-Chockley, *supra* note 67, at 263 n.29 (“[T]he exit and reentry of prison inmates is geographically concentrated in America’s poorest minority neighborhoods.”) (citing Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181, 184 (Marc Mauer & Meda Chesney-Lind eds., 2002)).

73. See Report: *17 States Reduce Recidivism, Save Billions by Reinvesting Wisely*, PRISON LEGAL NEWS (Jan. 13, 2015), <https://www.prisonlegalnews.org/news/2015/jan/13/report-17-states-reduce-recidivism-save-billions-reinvesting-wisely/> [<https://perma.cc/5F4T-YT9K>].

74. See HUD GUIDANCE 2016, *supra* note 2, at 1; Wagner & Rabuy, *supra* note 30.

75. See Fontaine & Biess, *supra* note 8, at 1.

76. See *id.* (“[A] handful of states spend more discretionary dollars on corrections than higher education.”) (internal citations omitted).

77. See *Recidivism Reduction Checklist—Executive and Legislative Policymakers*, CSG JUST. CTR., <https://csgjusticecenter.org/reentry/legislative-and-executive-policymakers/> [<https://perma.cc/57PA-3P7T>].

78. Fontaine & Biess, *supra* note 8, at 1; see also Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1196-97 (2006) (“Since ex-offenders are often important breadwinners, their innocent families and relatives also suffer . . . [o]n top of the significant expense of supporting an inmate, then, inmates’ families face a loss of income. Similarly, since poor communities of color receive a disproportionately high number of ex-offenders, these communities have even fewer resources for rehabilitation per ex-offender.”) (internal citations omitted).

79. See Lyles-Chockley, *supra* note 67, at 259.

corrections.<sup>80</sup> Many municipalities, aware of this cost savings, track recidivism rates by setting targets and implementing proven programs<sup>81</sup> to curb recidivism.<sup>82</sup>

Despite efforts currently undertaken by many states, the recidivism problem still persists.<sup>83</sup> Many state policies designed to reduce recidivism focus on helping formerly incarcerated people obtain jobs.<sup>84</sup> However, overcoming barriers to housing is arguably one of, if not the most important step in reducing recidivism and ending the cycle of poverty and homelessness.<sup>85</sup> Housing stability is the “lynchpin that holds the reintegration process together.”<sup>86</sup>

### C. The Intersection of Homelessness and Incarceration

Residential instability and homelessness are two of the greatest challenges formerly incarcerated people face that limit their chances of successful reentry.<sup>87</sup> Roughly one out of ten people who become incarcerated have experienced homelessness in their lifetime prior to prison, and one out of ten who leave prison will experience homelessness in the future.<sup>88</sup> Approximately twenty percent of single homeless adults have served time, and this number is even higher in urban areas.<sup>89</sup> For example, in New York

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80. See PRISON LEGAL NEWS, *supra* note 73.

81. For example, the N.Y.C. FUSE Initiative is one such program. See Adala et al., *infra* note 97 and accompanying text.

82. See, e.g., March Schabbes, *Criminal Justice Technical Report*, N.Y. DIV. OF CRIM. JUST. SERVS. 3 (Oct. 2013), [http://www.criminaljustice.ny.gov/crimnet/ojsa/resultsfirst/rf-technical\\_report\\_cba1\\_oct2013.pdf](http://www.criminaljustice.ny.gov/crimnet/ojsa/resultsfirst/rf-technical_report_cba1_oct2013.pdf) [<https://perma.cc/DZT2-F47X>].

83. See Toussaint, *supra* note 67, at 65.

84. See Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U.L. REV. 1429, 1458 (2014) (“Employment became a central focus of a loose ‘re-entry movement’ that joined activists and policymakers interested in helping prisoners re-integrate into their communities.”) (internal citations omitted).

85. See Fontaine & Biess, *supra* note 8, at 1, 5.

86. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 219 (2005) (quoting Katharine H. Bradley et al., *No Place Like Home: Housing and the Ex-Prisoner*, CMTY. RES. FOR JUST. (2001), [http://b3cdn.net/crjustice/a5b5d8fa98ed957505\\_hqm6b5qp2.pdf](http://b3cdn.net/crjustice/a5b5d8fa98ed957505_hqm6b5qp2.pdf) [<https://perma.cc/FRB8-LZ2H>]).

87. Faith E. Lutze et al., *Homelessness and Reentry: A Multistate Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV. 471, 472 (2014).

88. See Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, SHRIVER CTR. 2 (2015), <http://www.povertylaw.org/files/docs/WDMD-final.pdf> [<https://perma.cc/9U26-4W8F>] (citing Stephen Metraux et al., *Incarceration And Homelessness* 9-5 (2007), <https://www.huduser.gov/publications/pdf/p9.pdf> [<https://perma.cc/N58L-SX5F>]; Caterina Gouvis Roman & Jeremy Travis, *Taking Stock: Housing, Homelessness and Prisoner Reentry*, URB. INST. 7-8 (2004), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411096-Taking-Stock.PDF> [<https://perma.cc/EF9G-QDVT>]).

89. See Tran-Leung, *supra* note 88, at 2.

City about one-third of single adults in shelters have been recently released from local jails.<sup>90</sup> Access to safe and stable housing is critical to successful reentry, making one less likely to recidivate.<sup>91</sup> One study demonstrated that the chances of recidivism were doubled for those who lacked adequate housing.<sup>92</sup> Further, a comprehensive analysis of a Washington state program,<sup>93</sup> which aims to reduce recidivism by providing high-risk formerly incarcerated persons<sup>94</sup> with one year of housing support, proved to be successful: the rates of new offenses and recidivism were significantly reduced.<sup>95</sup> This study further recommended that subsidized housing for high risk formerly incarcerated persons be a “central part of coordinated responses to reentry.”<sup>96</sup> Similarly, New York City’s “FUSE” Initiative<sup>97</sup> has also achieved success in reducing recidivism of high-risk formerly incarcerated people by collaborating with ten non-profits and various City agencies to provide supportive housing.<sup>98</sup>

Access to stable housing provides formerly incarcerated people with a platform upon which they can begin to focus on reintegrating, whether that be finding a job, obtaining treatment for mental health or drug addiction,

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90. *See id.* (citing N.Y. State Bar Assoc. Special Comm. on Collateral Consequences of Criminal Proceedings, *Re-Entry and Reintegration: The Road to Public Safety* 219 (May 2006), <http://www.nysba.org/Workarea/Downloadasset.aspx?Id=26857> [<https://perma.cc/54JR-47SH>]) (explaining this figure is substantially higher if prisons are also included).

91. *See* Tran-Leung, *supra* note 88, at 2 (citing Julian M. Somers et al., *Housing First Reduces Re-Offending Among Formerly Homeless Adults with Mental Disorders: Results of a Randomized Controlled Trial*, PLOS ONE 1, 6-7 (Sept. 2013), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0072946> [<https://perma.cc/8QCX-5ZJQ>]); *see also* Michael G. Allen, et al., *Assessing HUD’s Disparate Impact Rule: A Practitioner’s Perspective*, 49 HARV. C.R.-C.L. L. REV. 155, 192 (2014) (“[A]n individual’s inability to find stable, affordable housing upon release from prison contributes dramatically to recidivism.”).

92. Tran-Leung, *supra* note 88, at 2 (citing Lornet Turnbull, *Few Rentals for Freed Felons*, SEATTLE TIMES (Nov. 29, 2010, 10:09 PM), [http://o.seattletimes.nwsources.com/html/localnews/2013552561\\_housing30m.html](http://o.seattletimes.nwsources.com/html/localnews/2013552561_housing30m.html) [<https://perma.cc/R5ZA-J7PC>]).

93. The program is called the “Reentry Housing Pilot Program (RHPP).” Lutze et al., *supra* note 87, at 471.

94. High-risk generally refers to individuals who have cycled in and out of jail or prison and in and out of homelessness multiple times in their lives.

95. *See* Lutze et al., *supra* note 87, at 471.

96. *Id.*

97. “Frequent Users Service Enhancement.” Angela A. Adala et al., *New York City FUSE II Evaluation Report*, COLUM. U. MAILMAN SCH. OF PUB. HEALTH i, [http://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final\\_Linked.pdf](http://www.csh.org/wp-content/uploads/2014/01/FUSE-Eval-Report-Final_Linked.pdf) [<https://perma.cc/C6C6-XB5Y>].

98. *See id.* (This is a “collaboration between the Corporation for Supportive Housing; The New York City Departments of Homeless Services, Correction, Health and Mental Hygiene, and Housing Preservation and Development; The New York City Housing Authority; and ten non-profit providers of housing and services. FUSE provided supportive housing to roughly 200 individuals who were frequently cycling in and out of jails and homeless shelters . . . supportive housing significantly improved their lives by reducing their cycling between public systems, their days spent in jail and shelter and their use of crisis health services.”).



rebuilding a social network, or reconnecting with their community and family.<sup>99</sup> Housing for formerly incarcerated people can serve a larger purpose beyond mere shelter: “it can also serve as the literal and figurative foundation for successful reentry and reintegration for released adults.”<sup>100</sup>

#### **D. Forms of Housing Discrimination Formerly Incarcerated People Face**

*“Providing an effective second chance for folks with criminal justice involvement starts with housing . . . You can’t rejoin a community without access to housing. And you can’t reconnect a family without a home in which to do so.”*<sup>101</sup>

Formerly incarcerated people ideally have five housing options when released from prison: private housing; federally subsidized housing; supportive housing; community correctional facilities or halfway houses; and homeless shelters.<sup>102</sup> Yet, formerly incarcerated people face barriers to accessing housing options “regardless of their level of self-sufficiency and employment prospects.”<sup>103</sup>

In the private housing market, formerly incarcerated people face an economic barrier: the inability to afford to buy or rent in the private housing market.<sup>104</sup> Formerly incarcerated people also face a discrimination barrier: landlords routinely conduct background checks and reject those with

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99. See Lutze et al., *supra* note 87, at 472-73.

100. Fontaine & Biess, *supra* note 8, at 3 (“Quite simply, individuals released from prisons and jails need to secure a place to sleep on their very first night out of the correctional institution. For many, they return to their communities having only temporary housing arrangements; therefore, their initial housing placement in the community is nothing more than a “landing spot” or temporary destination.”) (internal citations omitted). See also *id.* at 5 (“The provision of short- and long-term housing for individuals targeted to their level of need could be the key to successful reentry.”).

101. Statement by Tonya Robinson, Acting General Counsel, HUD. See Sargent Shriver National Center on Poverty Law, *Ensuring Fair Housing for People with Criminal Records: A Conversation with HUD*, Webinar & Presentation (Oct. 26, 2016), [hereinafter *A Conversation with HUD*] <https://www.youtube.com/watch?v=y4TiGgOky8> [<https://perma.cc/XUP6-FA4N>].

102. See Fontaine & Biess, *supra* note 8 at 5-6.

103. *Id.* at 5.

104. See NAT’L HOUS. L. PROJECT, *The Importance of Stable Housing for Formerly Incarcerated Individuals*, 40 HOUS. L. BULL. 60, 60 (2010), [https://www.nhlp.org/files/NHLP%20Bull%20Feb10\\_FINAL-1.pdf](https://www.nhlp.org/files/NHLP%20Bull%20Feb10_FINAL-1.pdf) [<https://perma.cc/D874-5BAG>] [hereinafter *NHLP BULLETIN*].

criminal histories,<sup>105</sup> further limiting their ability to obtain housing in the private market.<sup>106</sup>

Formerly incarcerated people have difficulty obtaining federally subsidized housing units due to long wait lists, lotteries, and overly restrictive criminal history policies.<sup>107</sup> The Sargent Shriver National Center on Poverty Law has identified four rationales for why these criminal history policies are overly restrictive: (1) “unreasonable lookback periods;”<sup>108</sup> (2) “use of arrests to prove criminal activity;”<sup>109</sup> (3) “overbroad categories of criminal activity;”<sup>110</sup> and (4) “underuse of mitigating circumstances.”<sup>111</sup> HUD, and even some states, have begun to regulate these policies in an attempt to mitigate their discriminatory effects.<sup>112</sup>

Formerly incarcerated people also face challenges in finding supportive housing. While supportive housing options exist,<sup>113</sup> these programs have

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105. Landlords have historically defined “criminal history” to include arrests where there was no conviction. In the past several years HUD has made clear this is not permissible, yet the practice still continues in many instances. *See generally* Tran-Leung, *supra* note 88 (explaining that landlords will reject people with criminal histories, regardless of the severity of the crime, mitigating circumstances, how long ago it occurred, or the positive behavior and rehabilitation exhibited years after the crime).

106. Fontaine & Biess, *supra* note 8, at 6-7.

107. *See id.*

108. Tran-Leung, *supra* note 88, at V (“Although HUD has suggested that five years is a reasonable lookback period for serious crimes, some PHAs are looking back seven, ten, and even twenty years for a wide variety of crimes . . . even where admissions policies set forth seemingly reasonable lookback periods, they are often inconsistent in terms of which of the following events triggers the denial: (i) when the applicant engaged in the criminal activity; (ii) when the applicant was arrested; (iii) when the applicant was convicted; or (iv) when the applicant was released from incarceration or other correctional supervision.”).

109. *Id.* at VI (“[I]nstead of determining whether criminal activity took place, many housing providers treat a criminal arrest the same as criminal activity, even if the applicant was never convicted of the underlying offense.”).

110. *Id.* at VIII-IX (Federal law allows PHAs to design policies that relate to “drug-related criminal activity, violent criminal activity, and criminal activity that pose a threat to the health, safety, and welfare of other residents.” However, PHAs commonly ban applicants with any past felony charges, including those charged with littering, shoplifting, or failure to pay a fine.).

111. *Id.* at X (Federal law requires PHAs to give consideration to mitigating circumstances, but some policies lack any reference to this requirement, and as a result “formerly incarcerated individuals knew about their local PHAs’ screening criteria, but they did not know that they could appeal the denial of their application.”).

112. *See infra* Section I.F.

113. *See* Fontaine & Biess, *supra* note 8, at 7-8 (“[S]upportive housing is an effective platform for individuals with histories of chronic residential instability, mental illness, and institutional cycling . . . studies on supportive housing seem to suggest that supportive housing can reduce service use among formerly incarcerated persons with extensive histories of homelessness and incarceration.”).

limited spots available,<sup>114</sup> and when new developments are proposed many communities react with “not in my backyard” (“NIMBY”) attitudes.<sup>115</sup> Such attitudes, and the resulting campaigns against proposed developments contribute to the lack of available services and housing stock for formerly incarcerated persons upon their release.<sup>116</sup>

Furthermore, there are not enough governmental services such as community correctional facilities or halfway houses available to recently released individuals, and most states do not implement housing plans for recently un-incarcerated persons.<sup>117</sup> The communities of recently released individuals are also ill-equipped; most communities generally have a shortage of affordable housing stock.<sup>118</sup> As a result, formerly incarcerated people may end up in unstable arrangements, or their families must bear the cost of housing them.<sup>119</sup>

Lastly, shelters are not a viable option for all formerly incarcerated people. For example, some individuals chose to remain on the streets rather than stay in a shelter due to stories they have heard or experiences they have had in dangerous and unsanitary shelters: “you hear a lot of terrible things about shelters, that shelters are dangerous places, that they’re full of drugs and drug dealers, that people will steal your shoes, and there’s bedbugs and body lice. And yeah, unfortunately a lot of those things are true.”<sup>120</sup> Additionally,

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114. For example, the Fortune Society in New York City has helped hundreds of formerly incarcerated people, and operates two facilities; however, they have limited space, offering sixty-two beds for emergency and transitional housing. See Terrance Ross, *Fortune Society Halfway House Marks 10 Yrs. Helping Ex-Inmates, Homeless in Harlem*, N.Y. Daily News (June 21, 2012, 2:47 PM), <http://www.nydailynews.com/new-york/manhattan/fortune-society-halfway-house-marks-10-yrs-helping-ex-inmates-homeless-harlem-article-1.1099476> [<https://perma.cc/9N54-9KB7>].

115. See Tran-Leung, *supra* note 88, at 8.

116. See *id.* at 6.

117. See Fontaine & Biess, *supra* note 8, at 7.

118. See *id.* at 8 (“[R]esearch has shown that released prisoners disproportionately return to a few, often clustered, neighborhoods with high social and economic disadvantage and low institutional investment. This is problematic because released prisoners who return to these disadvantaged neighborhoods have a higher risk of reoffending than those who do not return to such neighborhoods.”) (internal citations omitted).

119. See *id.* at 9 (“[R]esiding on one’s own instead of relying on family and friends for housing is related to lower recidivism rates among released prisoners in Illinois.”). *But c.f. id.* at 8 (“The location of the housing unit—particularly if it is in a neighborhood that differs from where the released prisoner was living before prison—may also afford adults the opportunity to separate themselves from the former social networks and opportunities that originally contributed to their criminal activity . . . those who return to a different neighborhood than the one where they were arrested are less likely to recidivate than those who return to their old neighborhood.”) (internal citations omitted).

120. Interview with David Pirtle, James Greene, & Kathy Sibert (Dec. 6, 2012), <http://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters> [<https://perma.cc/L3K8-BTRX>].

similar to supportive housing, many residents oppose the construction of shelters in their neighborhoods, thwarting the creation of newer, less crowded, and likely safer facilities.<sup>121</sup>

### E. HUD Guidance and the Fair Housing Act: The Litigation Regime

Due to the difficulties facing the formerly incarcerated—systemic racism, residential segregation, homelessness, and harsh federal policies—HUD has taken a more active role in addressing their needs. In the last several years, HUD has attempted to foster more fairness in the use of criminal records in housing decisions. In 2011, the then Secretary of HUD, Shaun Donovan, in a series of letters to PHA executive directors, indicated that second chances are important: formerly incarcerated people need support in “gain[ing] access to one of the most fundamental building blocks of a stable life—a place to live.”<sup>122</sup> Donovan highlighted that HUD only imposes mandatory housing bans for two categories of former offenders: (1) those convicted of manufacturing methamphetamine; and (2) registered sex offenders for life.<sup>123</sup> All other mandatory bans are temporary,<sup>124</sup> and denying housing is not mandatory in most cases.<sup>125</sup>

In 2013, HUD codified a three-part test to prove disparate impact and establish liability under the FHA.<sup>126</sup> The FHA bars discrimination against “any person in the terms, conditions, or privileges of sale or rental of a

121. See, e.g., Emma Whitford, *Outraged Queens Residents Shout Down Homeless Shelter Proposal at Packed Meeting*, GOTHAMIST (Sept. 1, 2016, 9:42 AM), [http://gothamist.com/2016/09/01/maspath\\_homeless\\_shelter.php](http://gothamist.com/2016/09/01/maspath_homeless_shelter.php) [<https://perma.cc/LHC4-5YW9>].

122. Letter from Shaun Donovan, Secretary, HUD, to Public Housing Authority Executive Directors (June 17, 2011), [hereinafter Donovan Letter 1] <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf> [<https://perma.cc/K7JB-ZAYS>]; Letter from Shaun Donovan, Secretary, HUD (Mar. 14, 2012), <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf> [hereinafter Donovan Letter 2] [<https://perma.cc/YLV4-5RTB>].

123. See Donovan Letter 1, *supra* note 122; 42 U.S.C. § 1437n(f)(1) (2012), 42 U.S.C. § 13663(a) (2015); 24 C.F.R. §§ 960.204, 982.553 (2012).

124. See 42 U.S.C. § 13661 (2012); see also 24 C.F.R. §§ 982.553, 960.204(a)(2)(i)-(ii) (2012); *Public Housing Occupancy Guidebook*, HUD 73 (June 2003), [hereinafter *Pub. Hous. Guidebook*] <https://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf> [<https://perma.cc/L6WP-7MHP>]; see also Tran-Leung, *supra* note 88, at 7 (The temporary drug-related eviction ban requires “PHAs and project owners [to] determine whether an applicant has ever been evicted from federally assisted housing for drug-related criminal activity. If such an eviction took place in the past three years, the applicant must be denied . . . . If, however, the eviction took place more than three years prior to the application, the PHA or project owner has the discretion to admit the applicant.”).

125. See 42 U.S.C. § 13661(c) (2012); 24 C.F.R. § 5.100 (2012); 24 CFR 982.553 (2012); *Pub. Hous. Guidebook*, *supra* note 124; see also Geiger, *supra* note 78, at 1204 (explaining that PHAs and project owners may reject applicants who have engaged in drug-related criminal activity or violent criminal activity, or “other criminal activity that would adversely affect the health, safety or right to peaceful enjoyment of the premises by other residents”).

126. See 24 C.F.R. § 100.500.

dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”<sup>127</sup> Under this regulation, “a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of [protected class status].”<sup>128</sup> In 2015, HUD issued guidance to PHAs and owners of federally assisted housing clarifying that arrest records alone could not be used as the basis for terminating assistance, evicting tenants, or denying admission to federally subsidized housing.<sup>129</sup>

That same year, the Supreme Court in *Texas v. Inclusive Communities* recognized the disparate impact theory and prescribed certain “safeguards”<sup>130</sup> based on its interpretation of the FHA.<sup>131</sup> In April 2016, soon after the Court’s decision, HUD further clarified FHA standards on the use of criminal histories.<sup>132</sup> This HUD guidance explained that due to the disproportionate number of people of color who have been involved in the criminal justice system, a housing provider with a policy that denies formerly incarcerated persons housing may be violating the FHA.<sup>133</sup> Specifically the guidance noted, “[w]hile having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another.”<sup>134</sup> The 2016 guidance details and clarifies the three-step process first established in 2013 for reviewing a claim of discriminatory effect, which must be evaluated on a case-by-case basis.<sup>135</sup>

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127. 42 U.S.C. § 3604(b).

128. 24 C.F.R. § 100.500(a).

129. See HUD GUIDANCE 2015, *supra* note 16 and accompanying text.

130. See *infra* notes 145-149 and accompanying text.

131. See Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.”).

132. See HUD GUIDANCE 2016, *supra* note 2.

133. See *id.* at 2. Importantly, this policy does not create new standards or requirements, but rather, clarifies how existing standards apply. See *id.*

134. *Id.* at 2; see *id.* at 8 (explaining that intentional discrimination, when a housing provider treats applicants with substantially similar criminal histories unequally based on a protected characteristic, is also prohibited).

135. See *id.* (explaining that there is one exception (§ 807(b)(4)) under the statute to liability for a disparate impact claim: housing providers can deny housing to those who have been convicted of manufacturing or distributing drugs).

The first step requires the plaintiff (or the “charging party” in a HUD administrative action)<sup>136</sup> prove that the criminal history policy has a disparate impact on a particular group due to their race or national origin.<sup>137</sup> The plaintiff can satisfy the burden of proof in step one by presenting evidence that shows the practice actually or predictably results in a disparate impact.<sup>138</sup> The plaintiff may use evidence such as housing applicant data, tenant files, census demographic data and localized criminal justice data.<sup>139</sup> If the plaintiff satisfies the burden of proof, the second step then shifts the burden to the housing provider to prove that the criminal history policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest—that the policy is justified.<sup>140</sup> The interest of the housing provider must be proven with evidence that is not hypothetical or speculative.<sup>141</sup> While protecting property and the safety of other residents is considered substantial and legitimate, “[b]ald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk than any other individual without such a record are not sufficient to satisfy this burden.”<sup>142</sup> If the housing provider meets this burden, the third step requires the plaintiff to prove that the interest of the policy could be achieved by a less discriminatory alternative.<sup>143</sup> A less discriminatory alternative often is one that involves an individualized assessment of the applicant beyond what is in the criminal record.<sup>144</sup>

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136. See 24 C.F.R. § 100.500 (explaining that plaintiffs may bring private actions against landlords in a federal proceeding (see 42 U.S.C. § 3613, 42 U.S.C. § 3614), or the charging party may bring an administrative action to be tried before HUD administrative law judges (see 42 U.S.C. § 3612)).

137. See HUD GUIDANCE 2016, *supra* note 2, at 3.

138. See *id.*

139. See *id.* at 3-4.

140. See *id.* at 4.

141. See *id.*

142. *Id.* at 5-6. A policy or practice of excluding individuals due to one or more prior arrests (without any conviction) or a policy that imposes a blanket prohibition on any person with any conviction record will fail this burden. Moreover, a policy that fails to take into account when the conviction occurred, the underlying conduct, the actions of the convicted person since, the nature and severity of the conviction, and the amount of time that has passed is also unlikely to satisfy this burden.

143. See *id.* at 7.

144. See *id.* at 7 (“Relevant individualized evidence might include: the facts or circumstances surrounding the criminal conduct; the age of the individual at the time of the conduct; evidence that the individual has maintained a good tenant history before and/or after the conviction or conduct; and evidence of rehabilitation efforts. By delaying consideration of criminal history until after an individual’s financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.”); see also *Tex. Dep’t of Hous. & Cmty Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2549 (2015) (Alito, J., dissenting) (These HUD regulations and “the Court’s pronouncements are so hazy, courts—

Importantly, in *Texas v. Inclusive Communities*, the Supreme Court limited the scope of a disparate impact claim “to protect potential defendants against abusive disparate-impact claims.”<sup>145</sup> First, while the Court held that plaintiffs can use statistics to illustrate the discriminatory effect, it established a robust causality requirement: liability is not found solely on the bases of “statistical disparity.”<sup>146</sup> There must be a causal connection between the challenged policy and the alleged disparities to prevent race-based considerations from being introduced into every housing decision.<sup>147</sup> Second, the justification for the policy provided by the defendant is “not contrary to the disparate-impact requirement, unless . . . artificial, arbitrary, and unnecessary.”<sup>148</sup> Third, any “remedial orders” issued by a court must “concentrate on the elimination of the offending practice” through “race-neutral means.”<sup>149</sup>

Overall, the *Texas v. Inclusive Communities* ruling is in tension with the HUD 2016 guidance and 2013 regulation. There are several key differences between the Supreme Court’s use of disparate impact and HUD’s. First, the limitations described above are absent from HUD’s 2013 regulation and 2016 guidance: the “robust causality requirement” established by the Supreme Court arguably creates a higher burden of proof for a plaintiff to meet in a private action, whereas HUD’s guidance provides greater discretion in investigating complaints.<sup>150</sup>

Second, the Supreme Court’s language in describing the housing provider’s justification differs from that in HUD’s 2013 regulation. HUD calls for the housing provider to furnish a “legally sufficient justification” that is “necessary to achieve one or more substantial, legitimate, nondiscriminatory interests,” which “could not be served by another practice

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lacking expertise in the field of housing policy—may inadvertently harm the very people that the FHA is meant to help . . . Congress did not intend to engage the federal courts in an endless exercise of second-guessing local programs.”) (internal citations and quotations omitted).

145. *Tex. v. Inclusive Cmtyts.*, 135 S. Ct. at 2524.

146. *Id.* at 2512.

147. *See id.* at 2524.

148. *Id.* (internal citations and quotations omitted); *see Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

149. *Tex. v. Inclusive Cmtyts.*, 135 S. Ct. at 2524 (“If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means.”) (internal citations omitted); *see also Fair Housing Act—Disparate Impact and Racial Equality—Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 129 HARV. L. REV. 321, 328 (2015) (“Justice Kennedy’s concern for facial neutrality evinces a commitment to understanding and deconstructing race as a social concept perpetuated by the law.”).

150. *Compare Tex. v. Inclusive Cmtyts.*, 135 S. Ct. 2507, with HUD GUIDANCE 2016, *supra* note 2, at 3 (“National statistics provide grounds for HUD to investigate complaints challenging criminal history policies.”).

that has a less discriminatory effect.”<sup>151</sup> The Court uses the term “valid interest” which may call for a lower standard of proof and could be more favorable to defendants.<sup>152</sup> The Court did not elaborate on this point, and whether the Court intended to lower the standard of proof is an open question for future litigation.<sup>153</sup>

These differences between the HUD 2013 regulation and 2016 guidance, and the *Texas v. Inclusive Communities* decision may lead to potentially conflicting outcomes in the future depending on the nature of the action. For example, in an administrative action, HUD will likely enjoy more discretion in determining whether a policy results in disparate impact liability<sup>154</sup>—assuming its 2016 guidance remains unchallenged.<sup>155</sup> In contrast, when a case is brought in the courts, the plaintiff will likely have more difficulty satisfying her burden due to the additional “safeguards” detailed in *Texas v. Inclusive Communities*.<sup>156</sup>

In response to the HUD guidance and *Texas v. Inclusive Communities* decision, several states have become significantly active in addressing criminal history screening policies.<sup>157</sup>

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151. 24 C.F.R. § 100.500(b).

152. See William E. Taibl, *Fair Housing Act and Disparate-Impact – Is There a Bit of a Silver Lining in the Dark Cloud of a Recent U.S. Supreme Court Decision?*, NAT’L L. R. (2015), <http://www.natlawreview.com/print/article/fair-housing-act-and-disparate-impact-there-bit-silver-lining-dark-cloud-recent-us-s> [https://perma.cc/K7MY-2AFZ]; see also Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1141 (2016) (“[T]he Court’s ‘valid interest’ language will doubtless cause confusion and disagreement.”). The HUD 2016 Guidance makes no mention of this subtle difference: It restates the language in 24 C.F.R. 100.500 and also cites to *Texas v. Inclusive Communities* for support. See HUD GUIDANCE 2016, *supra* note 2.

153. See Bagenstos, *supra* note 152, at 1141 (“Whether the opinion effects a meaningful weakening of the burden of justifying practices with a disparate impact will only become apparent with time.”).

154. HUD administrative judges will likely follow HUD regulations and guidance, absent from which are the limitations imposed by the Court. See Taibl, *supra* note 152; *Tex. v. Inclusive Cmty.*, 135 S. Ct. at 2549 (Alito, J., dissenting) (“The effect of these regulations, not surprisingly, is to confer enormous discretion on HUD—without actually solving the problem. What is a ‘substantial’ interest? Is there a difference between a ‘legitimate’ interest and a ‘nondiscriminatory’ interest? To what degree must an interest be met for a practice to be ‘necessary’? How are parties and courts to measure ‘discriminatory effect’?”).

155. New litigation brought in the courts may lead to a challenge of the recent 2016 guidance as overstepping constitutional limits by being overly broad when failing to mention the “safeguards” established in *Texas v. Inclusive Communities*, and thus being inconsistent with the Supreme Court’s interpretation of the FHA. See *infra* Section II.A.

156. See Amy M. Glassman & Shanellah Verna, *Disparate Impact One Year After Inclusive Communities*, 25 J. AFFORD. HOUS. & CMTY. DEV. L. 11, 12 (2016) (“Although there have been a range of disparate impact claims since ICP, our review of those cases suggests that the guidance of the ICP case is creating difficulty for many plaintiffs to make a prima facie showing of disparate impact.”).

157. See *infra* Section I.F.



### F. State Action to Address Discrimination in Criminal History Screening

Some states have taken the initiative to provide further guidance to housing managers and owners regarding the permissible use of criminal histories in housing policies. In April of 2016, New York State's Division of Housing and Community Renewal ("DHCR") issued a memorandum explaining and clarifying the new HUD guidance and how it applies to all housing companies, owners, managing agents, and site managers in the state.<sup>158</sup> This memorandum requires housing companies that screen for criminal histories to establish policies and standards by which an individualized assessment is conducted, weighing factors such as: "(a) seriousness of the crime, (b) the time elapsed since the offense, (c) the age of the applicant at the time of the crime, (d) evidence of the applicant's rehabilitation and (e) whether they are an actual danger to their neighbors."<sup>159</sup>

DHCR issued further requirements specific to state-funded housing providers. First, DHCR requires that these housing providers complete a worksheet when reviewing an applicant with a criminal history.<sup>160</sup> This worksheet contains a series of questions that address the individualized assessment factors described above.<sup>161</sup> The worksheet serves two purposes: (1) it creates a written record of the decision making process, allowing the housing provider to make consistent decisions and the applicant to understand the reasons for the decision;<sup>162</sup> and (2) it ensures housing providers consider all relevant factors when making their decision.<sup>163</sup> Second, DHCR issued accompanying guidance to this worksheet to assist state-funded housing providers.<sup>164</sup> This guidance outlined general policies for housing providers that detail how to conduct an individualized

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158. See MEMORANDUM RE: ACCESS TO REDUCING HOUSING BARRIERS FOR NEW YORKERS WITH CRIMINAL CONVICTIONS, DHCR, (Apr. 20, 2016), <http://www.nyshcr.org/AboutUs/Offices/HousingOperations/2016-B-04.pdf> [<https://perma.cc/ML6V-APGX>].

159. *Id.*

160. See WORKSHEET FOR APPLYING NEW YORK STATE'S ANTI-DISCRIMINATION POLICIES WHEN ASSESSING APPLICANTS FOR STATE-FUNDED HOUSING WHO HAVE CRIMINAL CONVICTIONS, DHCR (May 2016), [hereinafter NY CRIMINAL WORKSHEET] [http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC\\_Worksheet.pdf](http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Worksheet.pdf) [<https://perma.cc/F9C6-X4YU>].

161. *See id.*

162. This also creates a record of evidence that may assist plaintiffs in ensuing litigation, or unearth patterns of discrimination from particular housing providers.

163. See GUIDE FOR APPLYING NEW YORK STATE'S ANTI-DISCRIMINATION POLICIES WHEN ASSESSING APPLICANTS FOR STATE-FUNDED HOUSING WHO HAVE CRIMINAL CONVICTIONS, DHCR 2, (May 2016), [hereinafter DHCR 2016 GUIDE] [http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC\\_Guidance\\_Document.pdf](http://www.nyshcr.org/AboutUs/Offices/FairHousing/GPCC_Guidance_Document.pdf) [<https://perma.cc/4V24-MBMQ>].

164. *See id.*

assessment, specific requirements on how to maintain a record of all applications, and an explanation of how to complete the worksheet and appropriately consider the relevant factors.<sup>165</sup>

The Housing Authority of New Orleans (“HANO”) in March of 2016 amended its criminal background procedure, which used to ban housing assistance to individuals with criminal records.<sup>166</sup> HANO’s new policy applies to HANO-managed public housing sites, third-party managed public housing sites, and the Housing Choice Voucher Program (“HCVP”).<sup>167</sup> The policy explicitly states that “[t]here is absolutely no presumption that an applicant with a criminal conviction should be denied housing assistance. Before making a decision to admit or deny applicants with criminal convictions, they shall be given an individualized review based on accurate information, including notice and opportunity to be heard.”<sup>168</sup> HANO requires a two-step process that first assesses criminal convictions using what they call “the Grid” (categories of crimes and lookback periods that require further review); and second, conducts an individualized assessment of applications who require further review.<sup>169</sup>

The screening process determines if an applicant is deemed eligible, or if an applicant requires further review by referencing the Grid.<sup>170</sup> Then the further review is conducted by a three-person panel—two senior HANO officials and a resident representative—established by HANO and each manager.<sup>171</sup> The panel is to consider, at a minimum, the number of convictions, nature of convictions, time since release, rehabilitation, community ties and support, and employment history of the individual.<sup>172</sup> Importantly, applicants are notified in writing when further review is necessary, and have the opportunity to “dispute the accuracy of the

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165. *See id.* at 2-5.

166. *See* Richard Webster, *HANO Approves New Criminal Background Check Policy*, TIMES-PICAYUNE (Mar. 29, 2016), [http://www.nola.com/politics/index.ssf/2016/03/hano\\_approves\\_new\\_criminal\\_bac.html](http://www.nola.com/politics/index.ssf/2016/03/hano_approves_new_criminal_bac.html) [<https://perma.cc/8CEP-VAGG>].

167. *See* HANO CRIMINAL BACKGROUND SCREENING PROCEDURES 1 (Draft 2/5/2016), [hereinafter HANO PROCEDURES] [https://www.hano.org/home/agency\\_plans/CRIMINAL%20BACKGROUND%20PROCEDURES%20FOR%20POSTING%2002.05.16.pdf](https://www.hano.org/home/agency_plans/CRIMINAL%20BACKGROUND%20PROCEDURES%20FOR%20POSTING%2002.05.16.pdf) [<https://perma.cc/W7CL-36UX>].

168. *Id.*

169. *See id.*

170. *See id.* Technically, if a crime does not require further review, the applicant is deemed eligible. However, all crime categories listed on the Grid require further review, but some crimes are limited to a look-back period of three years from conviction and one year from release. *See* A Conversation with HUD, *supra* note 101, at slide 23; *see also* HANO PROCEDURES, *supra* note 167, at 2-3. However, these look-back periods are shorter than the standard five to seven year lookback period. *See* A Conversation with HUD, *supra* note 101.

171. HANO PROCEDURES, *supra* note 167, at 5 (“HANO will coordinate with community partners to develop and deliver the training [to panel members].”).

172. *See id.* at 6-8.

conviction information” before the review is undertaken.<sup>173</sup> If an applicant is denied, she is entitled to appeal the decision but not the process.<sup>174</sup> HANO and managers must keep a record of every decision made, and every six months HANO must publish a report on the further review process’ data and outcomes.<sup>175</sup>

These state actions to clarify criminal history housing procedures and enhance protections against discrimination for formerly incarcerated persons are meaningful steps. However, it is important to note that these DHCR and HANO procedures generally apply only to state-funded housing providers and programs, not private housing providers.<sup>176</sup>

## II. FRAMEWORKS FOR ADDRESSING HOUSING ISSUES FACED BY FORMERLY INCARCERATED PEOPLE

Section II.A discusses the current disparate impact litigation regime, and its inadequacies in addressing the issues formerly incarcerated individuals face regarding access to stable, safe, affordable housing. Section II.B explores the designation of protected class status for formerly incarcerated individuals. The Section ultimately concludes that this solution is still rooted in a litigation framework and is thus subject to the same problems. Moreover, the feasibility of such a designation is questionable. Section II.C examines the PFS model as a way to supplement the current disparate impact litigation regime. The Section concludes the PFS model is the most viable remedy for combatting the barriers formerly incarcerated people face in securing housing.

### A. The Disparate Impact Fix: The Current Model Does Not Adequately Address Problems Faced by Formerly Incarcerated People

Disparate impact litigation alone is incapable of securing housing for, and combatting the volume of housing discrimination against, formerly incarcerated people for several reasons. While disparate impact liability is, in theory, hugely beneficial for assisting formerly incarcerated people in challenging discrimination, it falls short in practice.<sup>177</sup> When *Texas v.*

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173. *Id.* at 6.

174. *See id.* at 7.

175. *See id.* at 8.

176. *See* NY CRIMINAL WORKSHEET, *supra* note 160; HANO PROCEDURES, *supra* note 167; *see also* NHLP BULLETIN, *supra* note 104, at 60 (“Private housing represents 97% of the total housing stock in the United States.”).

177. This is not to say that disparate impact, in general, is not an important tool; it is a very important “mechanism for fighting segregation by prohibiting housing practices that inadvertently have a disproportionate effect on minority populations and perpetuate residential segregation.” Cornelius J. Murray IV, *Promoting “Inclusive Communities:” A Modified Approach to Disparate Impact Under the Fair Housing Act*, 75 LA. L. REV. 213, 236 (2014).

*Inclusive Communities* was decided, advocates saw the decision as a victory.<sup>178</sup> At last, the Supreme Court recognized liability under the disparate impact theory.<sup>179</sup>

However, in the past forty years, plaintiffs have had limited success when litigating disparate impact claims under the FHA.<sup>180</sup> Some scholars argued that this lack of success was due to an unclear standard “as well as the theory’s use as a ‘Plan B’ to disparate treatment claims.”<sup>181</sup> Now, some scholars argue that the Court’s imposition of significant limitations on establishing such a prima facie case will pose significant barriers to the commencement of these private actions.<sup>182</sup> In fact, the first court to hear a case<sup>183</sup> under the *Texas v. Inclusive Communities* disparate impact framework granted the defendant’s motion for summary judgment because the plaintiff failed to meet the pleading requirements.<sup>184</sup> In the past year

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178. See, e.g., *Victory! Supreme Court Upholds Key Protections of Fair Housing Act*, LAMBDA LEGAL (June 2015), [http://www.lambdalegal.org/blog/20160625\\_victory-fha](http://www.lambdalegal.org/blog/20160625_victory-fha) [<https://perma.cc/JNX4-FB6N>].

179. See Patterson, *supra* note 51, at 213.

180. See Murray IV, *supra* note 177, at 216 n.20 (citing Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 393 (2013) (“What is abundantly clear when analyzing the FHA disparate impact case law over the past forty years is that the appellate courts have had little difficulty disposing of all manner of disparate impact claims under the FHA . . . plaintiffs have received positive decisions in less than 20%, or eighteen of the ninety-two FHA disparate impact claims considered on appeal.”)).

181. Murray IV, *supra* note 177, at 216 n.21, n.23 (citing Jennifer L. Peresie, *Toward A Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 774-75 (2009); Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Anti-Discrimination Law*, 42 WAKE FOREST L. REV. 1141, 1148-49 (2007); Seicshnaydre, *supra* note 180, at 393).

182. See S. Lamar Gardner, *#Blacklivesmatter, Disparate-Impact, and the Property Agenda*, 43 S.U. L. REV. 321, 325 (2016) (“[S]uch a strong causality requirement significantly reduces the number of persons who might be able to prevail under a disparate-impact housing discrimination claim. This high bar, in turn, has the potential to shut down many legitimate claims of housing discrimination in instances where the practices and policies of the defendant are engineered so as to be particularly difficult to directly and strongly connect to the discriminatory effect so produced.”); J. William Callison, *Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act*, 46 U. MEM. L. REV. 1039, 1051 (2016) (“[W]hile *Inclusive Communities* did not eliminate disparate impact as a cause of action under the FHA, it severely limited the scope of the theory and expanded the discretion of the policy-making defendant.”). See generally Glassman & Verna, *supra* note 156, at 16-24 (providing an overview of current cases since the IPC decision).

183. *City of Los Angeles v. Wells Fargo & Co*, No. 2:13-CV-09007, 2015 U.S. Dist. LEXIS 93451 (C.D. Cal. July 17, 2015).

184. See *id.* Plaintiff, Los Angeles, alleged that Wells Fargo engaged in patterns and practices such as redlining and reverse redlining which resulted in both intentional and disparate impact discrimination. See *id.* On summary judgment, the court ruled that Los Angeles failed to state a prima facie case due to a lack of quantitative evidence supporting the

since the *Texas v. Inclusive Communities* decision, several other disparate impact cases have also faced real challenges meeting these pleading requirements.<sup>185</sup>

*Fortune Society, Inc. v. Sandcastle Towers Housing Development Fund Corp.*<sup>186</sup> and *Alexander v. Edgewood Management Corp.*<sup>187</sup> are two cases at bar that are examining this framework as applied to formerly incarcerated persons. Thus far, both have survived the more stringent pleading requirements stage; however, both are only in the early stages of litigation.

In *Fortune Society v. Sandcastle*, Fortune Society challenged Sandcastle Towers' criminal history policy.<sup>188</sup> Fortune Society alleged the policy constitutes a blanket ban against those with felony records and thus violates the FHA under the disparate impact theory as it disproportionality affects people of color.<sup>189</sup> Sandcastle Towers insisted there was no blanket ban, citing a handful of approved applications of tenants with misdemeanors.<sup>190</sup> Additionally, they claimed there was no disparate impact as people of color comprised seventy percent of the building.<sup>191</sup> They further asserted that convicted criminals are not a protected class, and plaintiffs were "impermissibly seeking to challenge the criminal justice system and the alleged racial disparity therein indirectly by and through Defendants."<sup>192</sup>

The United States filed a statement of interest which asserts that "[i]t is blackletter law under both Title VII and the FHA that the absence of racial disparities in the final results of a multi-step process—at the bottom line—

disparate impact claims, and the city's failure to identify artificial, arbitrary, or unnecessary policies of Wells Fargo that produced the disparate impact. *See id.*

185. *See, e.g.,* Burbank Apartments Tenant Ass'n v. Kargman, 48 N.E. 3d 394 (Mass. 2016); *Ellis v. City of Minneapolis*, No. 14-CV-3045(SRN/SER), 2016 U.S. Dist. LEXIS 40750 (D. Minn. Mar. 28, 2016); *Azam v. City of Columbia Heights*, No. CV 14-1044 (JRT/BRT), 2016 WL 424966 (D. Minn. Feb. 3, 2016). *But see* Long Island Hous. Servs., Inc. v. Nassau Cty. Indus. Dev. Agency, No. 14-CV-3307, 2015 WL 7756122 (E.D.N.Y. Dec. 1, 2015); *R.I. Comm'n for Hum. Rts. v. Graul*, 120 F. Supp. 3d 110 (D.R.I. 2015).

186. 1:14-cv-6410 (E.D.N.Y.).

187. 1:15-cv-01140-RCL (D.D.C.).

188. 1:14-cv-6410.

189. *See* First Amended Complaint at 1-2, Dkt. No. 30, *Fortune Soc'y v. Sandcastle*; *see also* Transcript for Motion Hearing at 20:13-15, Dkt. No. 66, *Fortune Soc'y v. Sandcastle* ("But what the truth seeking function has produced is 35 emails that say in writing there is a blanket ban. They say no criminal background.").

190. *See* Answer at 11 ¶ 87, Dkt. No. 37, *Fortune Soc'y v. Sandcastle*; *see also*, United States of America's Statement of Interest at 3-4, Dkt. No. 102, *Fortune Soc'y v. Sandcastle* ("Plaintiff also analyzed the Sandcastle's accepted application files and found evidence of no more than six accepted tenants with non-traffic-related criminal convictions in the past decade.").

191. *See* United States of America's Statement of Interest, Dkt. No. 102 at 5, *Fortune Soc'y v. Sandcastle*.

192. Answer at 11 ¶ 81, Dkt. No. 37, *Fortune Soc'y v. Sandcastle*.

does not excuse discrimination at a particular step of the process.”<sup>193</sup> Sandcastle Tower’s reply accused the United States of lacking impartiality in their statement of interest, and alleged it resembles “an intervenor’s memorandum of law.”<sup>194</sup> Sandcastle Towers also asserted that the United States analysis is “only relevant should this court factually determine a blanket ban exists.”<sup>195</sup> Sandcastle filed a letter to request a pre-motion hearing regarding their anticipated motion to dismiss for lack of subject matter jurisdiction, arguing that the Fortune Society lacked standing.<sup>196</sup> No pre-motion hearing was granted.<sup>197</sup> Subsequently, the parties have submitted supplemental briefing on this issue.<sup>198</sup> Interestingly, Sandcastle’s recent reply briefs reassert that formerly incarcerated people are not a protected class, and that the Fortune Society lacks organizational standing.<sup>199</sup> The Fortune Society has requested oral arguments be heard on this issue.<sup>200</sup> In their opposition brief the Fortune Society argues, among other things, that it does have organizational standing, and even if defendant’s views of the facts were correct, they still would have standing because the defendant’s conduct injured them.<sup>201</sup> In its sur-reply, Fortune Society further asserts that

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193. United States of America’s Statement of Interest at 11-12, Dkt. No. 102, *Fortune Soc’y v. Sandcastle* (“Based on just such reasoning, a federal district court recently rejected an attempt to defend against an FHA disparate impact challenge to a criminal records policy based on the fact that the tenants at the complexes at issue were predominately (and, in one case, exclusively) African-American.”) (citing *Alexander v. Edgewood Mgmt. Corp.*, No. 1:15-cv-01140-RCL, 2016 WL 5957673, at \*3 (D.D.C. July 25, 2016)); see also *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 987-88 (4th Cir. 1984); *Connecticut v. Teal*, 457 U.S. 440, 456 (1982).

194. Brief in Response to the Submission of the United States of America at 1, Dkt. No. 106, *Fortune Soc’y v. Sandcastle*.

195. *Id.* at 2.

196. See Letter re: Pre-Motion Conference for Anticipated Motion to Dismiss, Dkt. No. 111, *Fortune Soc’y v. Sandcastle*.

197. See Order Denying Motion for Pre Motion Conference, Jan. 26, 2017, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410).

198. See Defendant’s Supplemental Brief in Support of Dismissal for Lack of Subject Matter Jurisdiction, Dkt. No. 115, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410); Plaintiff’s Brief in Opposition to Defendants’ Supplemental Brief in Support of Dismissal of the Action for Lack of Subject Matter Jurisdiction, Dkt. No. 116, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410); Defendant’s Reply Supplemental Brief in Further Support of Dismissal of the Action for Lack of Subject Matter Jurisdiction, Dkt. No. 119, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410).

199. See Defendant’s Reply Supplemental Brief in Further Support of Dismissal of the Action for Lack of Subject Matter Jurisdiction, Dkt. No. 119, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410); see Defendant’s Brief in Response to Plaintiff’s Sur-Reply Brief Submitted in Further Support of Dismissal of the Action for Lack of Subject Matter Jurisdiction at 1, Dkt. No. 125, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410).

200. See Plaintiff’s Brief in Opposition to Defendants’ Supplemental Brief in Support of Dismissal of the Action for Lack of Subject Matter Jurisdiction at 1, Dkt. No. 116, *Fortune Soc’y v. Sandcastle* (1:14-cv-6410).

201. See *id.* at 9-14, 19-25.

defendants mischaracterize FHA standing requirements.<sup>202</sup> The court has not ruled on this issue as of yet.<sup>203</sup>

*Alexander v. Edgewood* involves a challenge to Edgewood Management's and Community Preservation Development's criminal history policies under the disparate impact theory.<sup>204</sup> The defendants filed a motion to dismiss, and argued that their building is comprised of almost one hundred percent people of color and, thus, there is no statistical disparity and no disparate impact.<sup>205</sup> In denying the motion,<sup>206</sup> Judge Lamberth explained that "[i]n order to prevail in a discriminatory impact case under Title VII, plaintiffs, members of a discrete minority, are required to prove only that a given policy has a discriminatory impact on them as *individuals*."<sup>207</sup> Thus, Mr. Alexander had stated a prima facie case, and defendant's broad criminal history policy may violate HUD's 2016 guidance.<sup>208</sup> In their answer to the amended complaint, defendants asserted affirmative defenses, including that the plaintiff's application was denied for legitimate nondiscriminatory reasons, and that the guidelines the plaintiff seeks to enforce are beyond the legislative or constitutional authority of one or more governmental and promulgating entities.<sup>209</sup> Most recently, the defendants filed a motion to sever arguing joinder was improper.<sup>210</sup> The parties have agreed to stay discovery until this motion has been adjudicated.<sup>211</sup>

There is no way to accurately predict the outcomes of these cases or the ramifications these decisions may have on disparate impact litigation under the FHA for formerly incarcerated plaintiffs. However, several cases, including *Alexander v. Edgewood*, call into question the constitutionality of HUD's 2013 regulation and 2016 guidance.<sup>212</sup> In one case concerning the

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202. See Plaintiff's Sur-Reply in Opposition to Defendants' Supplemental Brief in Support of Dismissal of the Action for Lack of Subject Matter Jurisdiction at 7, Dkt. No. 122, *Fortune Soc'y v. Sandcastle* (1:14-cv-6410).

203. See *Fortune Soc'y v. Sandcastle* (1:14-cv-6410) docket.

204. See 1:15-cv-01140-RCL.

205. See East Capital Senior Rental LP's Motion to Dismiss, Dkt. No. 17-1 at 10, *Alexander v. Edgewood Management Co.* (D.D.C.) (1:15-cv-01140-RCL).

206. See Order, Dkt. No. 36, *Alexander v. Edgewood*.

207. Memorandum Opinion, Dkt. No. 35 at 5-6, *Alexander v. Edgewood*, (quoting *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 987 (4th Cir. 1984)) (emphasis added).

208. See *id.* at 8.

209. Answer to Amended Complaint, Dkt. No. 38 at 13, *Alexander v. Edgewood*; see also Defendants A&R Management Inc. & East Capitol Senior Rental LP's Answer to Amended Complaint, Dkt. No. 37, *Alexander v. Edgewood*.

210. See Defendants A&R Management's Motion to Sever, Dkt. No. 44, *Alexander v. Edgewood*; see also Reply in Support of Defendants A&R Management's Motion to Sever, Dkt. No. 51, *Alexander v. Edgewood*.

211. See Unopposed Motion to Stay Discovery, Dkt. No. 54, *Alexander v. Edgewood*.

212. See *supra* note 210; see also *Am. Ins. Ass'n v. U.S. Dep't of Hous. & Urb. Dev.*, 1:13-cv-966 (RJL), 2015 U.S. App. LEXIS 16894 (D.C. Cir. Sept. 23, 2015).

extension of liability to the pricing of homeowner insurance under HUD's 2013 regulation, plaintiffs argued that the disparate-impact rule extends beyond HUD's statutory authority under the FHA as interpreted by the Court in *Texas v. Inclusive Communities*.<sup>213</sup> With the single party control of the Presidency and Congress, the appointment of Justice Gorsuch to the Supreme Court (and possible other conservative appointments to come), and the appointment of Ben Carson as HUD Secretary, one may speculate that a constitutional challenge against these HUD regulations and guidance will result in an unfavorable outcome for fair-housing advocates.<sup>214</sup>

In addition to the limited historical success of disparate impact claims, the more stringent pleading requirements under *Texas v. Inclusive Communities* and the potential for HUD's 2013 regulation and 2016 guidance to be successfully challenged only increase the barriers and burdens surrounding litigation. This litigation model places an additional undue burden on disadvantaged individuals to bring claims in court.<sup>215</sup> A victim of such discrimination typically does not have enough resources to hire an expert who can develop the statistical analysis that is often necessary to establish a prima facie case of disparate impact.<sup>216</sup> As a result, many claims cannot survive the summary judgment stage and are dismissed.<sup>217</sup> Moreover, any success is case specific to the individual plaintiff and housing provider.<sup>218</sup>

Taking into account these barriers, burdens, and limitations, the current disparate impact litigation regime does not adequately combat the incredible

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213. See Amended Complaint for Declaratory and Injunctive Relief, Dkt. No. 57, at ¶¶ 6, 8, *Am. Ins. v. HUD*, 1:13-cv-00966 (RJL) (“The Disparate-Impact Rule also runs afoul of other limits announced in *Inclusive Communities*. For example, the Rule contemplates that a plaintiff may state a prima facie claim based on a statistical disparity alone, without showing that a policy or practice of the defendant actually caused the alleged disparity. See, e.g., 78 Fed. Reg. 11,460, 11,469. The Rule also purports to allow a disparate-impact plaintiff to prevail by showing simply that the defendant's stated interest in the policy or practice at issue could be served by another practice that has a less discriminatory effect, even if the policy or practice is valid and does not present an artificial, arbitrary, and unnecessary barrier. See *id.* at 11,482 (24 C.F.R. § 100.500(c)(3)).”).

214. See *infra* notes 409-11. If a case were to successfully challenge the current HUD regulations on a constitutional basis, given Carson's stated opinions about government agencies' “social engineering” practices, under his leadership it is unlikely that HUD would challenge such a ruling.

215. See Seicshnaydre, *supra* note 180, at 392.

216. See *id.*; see, e.g., Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257 (2011) (“It is today very rare for plaintiffs other than highly sophisticated and well-funded litigants, such as the U.S. Department of Justice, to prevail under Title VII on a disparate impact theory.”).

217. See *id.*

218. See HUD 2016 GUIDANCE, *supra* note 2, at 7.



volume of housing discrimination that occurs every single year.<sup>219</sup> The next two sections will propose potential remedies to this ineffective model.

### **B. The Equal Protection Fix: Making Formerly Incarcerated People a Protected Class**

Section II.B.1 examines arguments for granting protected class status to formerly incarcerated individuals. Section II.B.2 concludes such protected class status designation will still ultimately face similar problems as the disparate impact framework, for it is still rooted in the litigation regime. Moreover, the feasibility of this solution is questionable.

#### *1. The Case for Making Formerly Incarcerated People a Protected Class*

Formerly incarcerated people exhibit many of the characteristics deserving of a federally protected class as established by the Court in *United States v. Carolene Products Co.*<sup>220</sup> “immutability, political powerlessness, and a history of class-based discrimination.”<sup>221</sup> Even after serving their sentences, formerly incarcerated people continue to face collateral consequences that restrict their rights and freedoms beyond those restrictions ordinary citizens face.<sup>222</sup> A growing number of scholars support the idea that these collateral consequences “generated by structural inequality, social stigma, criminal and civil penalties, and improved information technology, combine to create ex-offenders’ second-class citizenship.”<sup>223</sup> One scholar, Ben Geiger, advocates that formerly incarcerated people should be a protected class because (1) “ex offender class” is created by government policies that do not allow alteration, and thus “ex-offender” status is immutable;<sup>224</sup> (2) “ex offenders” are discrete<sup>225</sup> and insular<sup>226</sup> minorities that

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219. *See id.* (quoting U.S. Dep’t of Hous. & Urb. Dev., *The State of Fair Housing: FY 2008 Annual Report on Fair Housing 2* (2009), <http://www.hud.gov/content/releases/fy2008annual-rpt.pdf> [<http://perma.cc/4GG4-XVBX>] (“Each year, tens of thousands of FHA complaints are filed, and these complaints represent ‘only a fraction of instances of housing discrimination’ that actually occur annually, which is estimated to be about 4,000,000.”)).

220. 304 U.S. 144, n.4 (1938).

221. Geiger, *supra* note 78, at 1207 (referring to *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, n.4 (1938)).

222. *See* Lyles-Chockley, *supra* note 67, at 267.

223. Geiger, *supra* note 78, at 1194.

224. *See id.* at 1219 (“Overall, only a fraction of states allow for some form of clearing of post-conviction records, and even those few states impose significant administrative and evidentiary hurdles to legally available remedies. Thus, having a criminal record qualifies as an unalterable classification for purposes of the suspectness inquiry.”).

225. *See id.* at 1226 (explaining formerly incarcerated people are distinct and easily identifiable with the advent of new and inexpensive technology).

226. *See id.* 1228 (explaining that when incarcerated they are incredibly insulated, and an argument that claims they are diffuse once released “should not remove them as candidates

lack access to political power;<sup>227</sup> and (3) there is a history of discrimination against “ex offenders.”<sup>228</sup>

However, the classification of formerly incarcerated people as a protected class can be challenged on at least two bases. First, as to the political process, the Fourteenth Amendment permits the disenfranchisement of formerly incarcerated people.<sup>229</sup> The Fourteenth Amendment provides, in relevant part, “[b]ut when the right to vote at any election . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation shall be reduced.”<sup>230</sup> However, some scholars argue that the plain text reading and legislative history of the Fourteenth Amendment suggest the framers did not intend that those who could be denied voting rights could also be denied civil rights.<sup>231</sup> As such, a reading of the Fourteenth Amendment that grants states the power to deprive other rights to formerly incarcerated people, such as certain collateral consequences, is overly broad.<sup>232</sup>

Second, critics assert that unlike immutable characteristics such as race, formerly incarcerated people are morally culpable and responsible for their status.<sup>233</sup> Analyzed in a vacuum, this statement may be true. However, scholars argue that “like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.”<sup>234</sup> This is at least in part attributable to a “racialized justice

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for heightened scrutiny” because the fears of the populous and legislators around their diffusion fuel legislative actions against them as a class).

227. *See id.* at 1191 (“Ex-offenders are not just marginalized, they are also a clear example of repeat losers in pluralist politics. Ex-offenders are often legally disenfranchised.”).

228. *Id.* at 1225 (although America never formerly adopted the “civil death” of English common law, formerly incarcerated people have always faced discrimination in this country).

229. *See id.*; *see also* Richardson v. Ramirez, 418 U.S. 24, 24 (1974) (holding that denying the right to vote to convicted felons who had completed their sentences and paroles did not deny equal protection).

230. U.S. CONST. amend. XIV (emphasis added).

231. Geiger, *supra* note 78, at 1237 (“To the contrary, the framers specifically designed the Fourteenth Amendment to guarantee Freedmen civil equality without extending political equality.”).

232. *See id.*

233. *See id.* at 1192.

234. Michelle Alexander, *The New Jim Crow: How the War on Drugs Gave Birth to a Permanent American Undercaste*, HUFFINGTON POST (Mar. 8, 2010), [http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow-how-the\\_b\\_490386.html](http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow-how-the_b_490386.html)

[<https://perma.cc/QFK6-R92W>]; *see also* Lyles-Chockley, *supra* note 67, at 269 (“Upon reentry into their communities, black ex-offenders are faced with a double stigma of having been incarcerated and of being black . . . . In general, offenders are assumed to be dangerous, aggressive, and unworthy of trust, and upon release are met with suspicion and hostility. Black offenders are additionally often assumed to be unintelligent, lazy, and dishonest. The misinterpretation of crime statistics exacerbates the stigma borne by black ex-offenders.”).

system that disadvantages and targets people of color.”<sup>235</sup> Thus, when one takes into account the history of mass incarceration,<sup>236</sup> the limits imposed by poverty,<sup>237</sup> the unfair targeting of people of color by law enforcement,<sup>238</sup> the lack of access to justice in the courts,<sup>239</sup> and the type and degree of the crimes and mere arrests that may put an individual in this category,<sup>240</sup> creating a protected class may help mitigate the dual barriers of discrimination offenders of color face.<sup>241</sup>

As it stands today, formerly incarcerated people are not considered a suspect class and thus, do not garner heightened judicial attention when they challenge discriminatory policies.<sup>242</sup> While unlikely,<sup>243</sup> if formerly incarcerated people were granted protected class status, Geiger argues, they would meet the criteria for heightened scrutiny<sup>244</sup> under the Equal Protection Clause of the Fourteenth Amendment.<sup>245</sup> Heightened scrutiny may be called for when “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>246</sup>

2. *Creating a Protected Class Will Not Adequately Address the Access to Housing and Housing Discrimination Problems Faced By Formerly Incarcerated People*

Creating a federally protected class is unlikely to provide greater antidiscrimination protection beyond what already exists under the disparate treatment and disparate impact theories. First, the Court has not recognized housing as a fundamental right. As it currently stands, a claim cannot be brought using the Equal Protection framework of the Due Process Clause. In terms of the future, it remains unlikely that courts will ever view housing

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235. Newman, *supra* note 37, at 135 n.81.

236. *See supra* Part I.

237. *See supra* Section I.A.

238. *See* Newman, *supra* note 37, at 134-35.

239. *See* Seicshnaydre, *supra* note 180, at 392.

240. *See supra* Section I.D.

241. *See* Jenny Bourne, *Black People Face Double Discrimination*, INST. OF RACE REL. (Oct. 27, 2003), <http://www.irr.org.uk/news/black-people-face-double-discrimination/> [<https://perma.cc/434C-ZSSZ>].

242. *See* Geiger, *supra* note 78, at 1191.

243. It is probably not a politically viable option for legislators to advocate for protected class status for formerly incarcerated people.

244. Heightened (or intermediate) scrutiny is used to review laws that classify on the basis of gender and other suspect-classes. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976). This standard of review requires that the government show the classification is substantially related to an important governmental justification. *See id.*

245. *See* U.S. CONST. amend. XIV; *see also* Geiger, *supra* note 78, at 1217.

246. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, n.4 (1938).

as a liberty interest rising to the level of a fundamental right.<sup>247</sup> It is equally unlikely that the federal courts would consider housing to be a “traditionally understood right.”<sup>248</sup> At the state level, New York is the only jurisdiction that provides a fundamental right to shelter.<sup>249</sup> Internationally, the United Nations considers the right to shelter a universal human right.<sup>250</sup> Nevertheless, the right to housing is still not protected under the United States Constitution.

However, states can create protected classes beyond those enumerated by the federal government. New York currently has more protected classes than what is required at the federal level, including protections based on age, marital status, military status, sexual orientation, and source of income, in some jurisdictions like New York City, Buffalo, and West Seneca, as well as Nassau, Westchester, and Suffolk counties.<sup>251</sup> If New York were to create a protected class for formerly incarcerated persons under the state’s Human Rights Law, many housing policies that facially discriminate on the basis of criminal history likely could be challenged under the disparate treatment framework.<sup>252</sup>

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247. See Geiger, *supra* note 78, at 1217. Collateral consequences, like housing barriers, are infringements which are “social or economic in nature, [thus] they violate no fundamental right for equal-protection purposes.” *Id.* Employment, a liberty interest that is protected by the due process clause, is not considered a fundamental right. Seeing as the courts have used an analogous framework for housing by adopting the Title VII disparate impact theory, it is unlikely they would give more protections under the due process clause to housing than to employment.

248. *Washington v. Glucksberg*, 521 U.S. 702 (1997) (explaining that traditional rights are those that are deeply rooted in the country’s history).

249. See N.Y. CONST. art. XVII, § 1 (“[T]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions.”). In *Callahan v. Carey*, a New York State Supreme Court Justice declared the City was required to provide shelter for homeless men. Clearly this right to shelter extends to the homeless, but it is not clear this right would extend to formerly incarcerated people (unless they too were homeless). See *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. 1979).

250. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978), at art. 11; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, at art. 27; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, at art. 5; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, at art. 14; American Declaration of the Rights and Duties of Man, OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948), at art. XI.

251. See N.Y.S. Human Rights Law § 292; *Fair Housing FAQ’s*, DHCR, <http://www.nyshcr.org/AboutUs/Offices/FairHousing/FEHOfaqs.htm#whoisprotected> [<https://perma.cc/FV83-RCLY>].

252. A case of disparate treatment under the FHA “refers to housing practices that intentionally treat similarly situated persons differently. In other words, a practice qualifies as disparate treatment if it applies rules to a protected set of people that are different from the rules that it applies to others.” *Murray IV*, *supra* note 177, at n.40.

There are both benefits and drawbacks to this approach. The benefit is that victims of discrimination based on their criminal histories could make two claims as opposed to one claim, which may increase their chances of success. However, the creation of a protected class could lead to perverse effects whereby housing providers participate in unwritten practices—in an attempt to avoid disparate treatment liability—that exclude people of color because they are statistically more likely to be criminals.<sup>253</sup> Historically, it has been incredibly difficult to prove explicit discriminatory intent in such instances.<sup>254</sup> These plaintiffs would then be in the same or a worse position as before, and would have to bring a disparate impact claim to challenge this practice. Additionally, the disparate treatment framework, like the disparate impact framework, is still rooted in the litigation regime. As such, similar issues discussed earlier would still apply.<sup>255</sup>

### C. The Local Fix: The Case for Pay for Success Implementation in States and Municipalities

The Pay-For-Success (“PFS”) model, in conjunction with the use of social impact bonds (“SIBs”),<sup>256</sup> can be used as a tool to provide much needed

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253. See Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, U. MICH. L. & ECON. RES. PAPER NO. 16-012 (2016) (finding that “ban the box” legislation enacted to prevent employers from reviewing criminal histories at the initial stages of the interview process has resulted in more discrimination against people of color. Employers have begun to refuse to hire people of color because it is statistically more likely they have a criminal record. Instead of eliminating barriers, this legislation might be responsible, in some cases, for making discrimination against people of color and formerly incarcerated people worse).

254. See John F. Stanton, *The Fair Housing Act and Insurance: An Update and the Question of Disability Discrimination*, 31 HOFSTRA L. REV. 141, 171 n.165 (2002) (citing *United States v. Real Est. Dev. Corp.*, 347 F. Supp. 776, 783 (N.D. Miss. 1972) (“The Court recognizes that ‘most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro Race.’”)); *Fowler v. Borough of Westville*, 97 F. Supp. 2d 602, 612 (D.N.J. 2000) (“[I]t is unusual that a [FHA defendant] will openly reveal that he or she acted on the basis of discriminatory intent.”) (quoting *Horizon Hous. Dev. Serv., Inc. v. Twp. of Upper Southampton*, 804 F. Supp. 683, 696 (E.D. Pa. 1992)).

255. See *supra* Section II.A.

256. See *Frequently Asked Questions: Pay for Success/Social Impact Bonds*, NONPROFIT FIN. FUND 1, [hereinafter PFS FAQ] <http://www.payforsuccess.org/learn-out-loud/pfs-faq/> [<https://perma.cc/NJ3Y-BXGZ>]. The difference between PFS and SIBs is that PFS “refer[s] to outcomes-oriented contracts” whereas SIBs “refer to specific financing arrangements with upfront funding provided by private investors.” *Id.* Other forms of financing arrangements can also be used, such as outcomes-oriented performance loans and performance based contracts. See *id.*; see also Benjamin R. Cox, *Financing Homelessness Prevention Programs with Social Impact Bonds*, 31 REV. BANKING & FIN. L. 959, 964 (2012) (“In typical government-funded social programs, risk of economic loss from unsuccessful programs lies with government; in a pure PFS arrangement, that risk is shifted to the service-providing nonprofit organization (‘NPO’). The benefit of the SIB in conjunction with a PFS contract is that risk of loss is transferred to the private sector and away from financially fragile NPOs.”);

housing options for formerly incarcerated people. PFS projects are “multi-stakeholder partnerships that typically involve the public, private and nonprofit sectors.”<sup>257</sup> In PFS projects, a back-end payor (often the government, a foundation, insurance provider, or hospital) contracts with one or multiple service providers and agrees to pay for outcomes (as opposed to amount of work done).<sup>258</sup> SIBs help provide initial funding for PFS programs. Private investors, both commercial and philanthropic, provide the program with the upfront capital needed to fund the service, and the back-end payor only repays these investors when the contractually agreed upon outcomes come to fruition.<sup>259</sup> Thus, tax payers’ dollars are only spent to pay back investors on programs that generate positive outcomes.<sup>260</sup> This way of funding social services is “ultimately aimed at reducing the costs associated with meeting critical needs by addressing problems early and effectively.”<sup>261</sup>

Private investment in these programs is a form of “impact investing”<sup>262</sup>—providing investors with both a financial and social return.<sup>263</sup> Importantly, private investors have a growing interest in impact investing.<sup>264</sup> According to one study, “6 in 10 wealthy individuals feel that they can have some influence on society by how they invest, and 45 percent agree that how they invest is a way to express their social, political and environmental values.”<sup>265</sup> Also, forty-six percent would be willing to accept a lower return from their investment if the impact is great and positive, and forty-four percent would

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Max Liang et al., *An Overview of Social Impact Bonds*, 13 J. INT’L BUS. & L. 267 (2014) (discussing whether it is accurate to call SIBs bonds).

257. *Pay for Success 101*, NONPROFIT FIN. FUND [hereinafter PFS 101], <http://www.payforsuccess.org/learn/basics/> [<https://perma.cc/D6JD-CR68>]; see also *Invest in What Works: Pay for Success*, RESULTS FOR AM., (Aug. 18, 2015), <http://results4america.org/policy-hub/invest-works-fact-sheet-social-impact-bonds/> [<https://perma.cc/GL6Z-Q8LW>].

258. See PFS 101, *supra* note 257.

259. See PFS FAQ, *supra* note 256, at 1.

260. See *id.*

261. *Id.* at 3.

262. Jennifer Miller Oertel et al., *Proving That They Are Doing Good: What Attorneys and Other Advisers Need to Know About Program Assessment*, 59 WAYNE L. REV. 693, 701 (2013) (“[I]mpact investing”—has evolved over centuries, when public and private sector groups began investing in emerging market enterprises to fight poverty.”).

263. See PFS FAQ, *supra* note 256, at 5.

264. See *id.*

265. Tracy Palandjian & Jane Hughes, *The Social Impact Bond Market: Three Scenarios for the Future*, STAN. SOC. INNOVATION REV. (Dec. 19, 2013), [https://ssir.org/articles/entry/the\\_social\\_impact\\_bond\\_market\\_three\\_scenarios\\_for\\_the\\_future](https://ssir.org/articles/entry/the_social_impact_bond_market_three_scenarios_for_the_future) [<https://perma.cc/73XP-EG87>].

even be willing to take on a higher risk.<sup>266</sup> Large financial institutions such as Goldman Sachs support and promote this kind of impact investing.<sup>267</sup>

The PFS model is unique. The first project was launched in the United Kingdom in 2010.<sup>268</sup> The United States soon followed with the first project launched in New York in 2012.<sup>269</sup> Over thirty states in the U.S. have begun to explore the PFS model and several have launched projects addressing a wide range of issues, from homelessness to recidivism to early childhood education.<sup>270</sup>

### 1. *The Structure of Pay for Success*

A PFS project typically involves the following actors: (1) a government contracting authority; (2) social service provider(s); (3) private investors; (4) an intermediary; and (5) an independent evaluator.<sup>271</sup> The government engages in a pay for success contract whereby it agrees to pay back investors, plus some agreed upon return, if it receives independent evidence that the agreed upon targets and goals have been met by a certain date.<sup>272</sup> The social service provider agrees to this contract and works to achieve the target goals within the specified time frame.<sup>273</sup> The private investor finances the program (usually through SIBs) and agrees to only be repaid if targets are achieved.<sup>274</sup> The intermediary borrows the money from the private investors, distributes the money (through SIB loans) to the social service providers, and monitors and provides general oversight regarding the flow of funds to providers, investors, and the contracting government authority.<sup>275</sup> The independent

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266. *See id.*

267. *Macroeconomic Insights Social Impact Bonds*, GOLDMAN SACHS (Oct. 2014), <http://www.goldmansachs.com/our-thinking/pages/social-impact-bonds.html> [https://perma.cc/2Q3R-548R].

268. *See* Rebeca Leventhal, *Effecting Progress: Using Social Impact Bonds to Finance Social Services*, 9 N.Y.U. J.L. & BUS. 511, 516 (2013); Liang et al., *supra* note 256, at 269 (SIBs were used to fund a recidivism project at Peterborough Prison: “as of June 2013, preliminary results showed that the Peterborough bond has been successful in reducing the re-conviction rate by 23% relative to the comparison group.”).

269. *See* PFS 101, *supra* note 257; Leventhal, *supra* note 268, at 515.

270. *See* PFS FAQ, *supra* note 256, at 2 (“In 2015, new projects are expected to launch in California, Ohio, South Carolina, Illinois, Michigan, Colorado, New York, Massachusetts, and Connecticut. The UK has 16 projects underway and projects have launched or are developing in Canada, Australia, Mexico, Brazil, and India, among other countries.”); *see also* *Pay for Success U.S. Activity*, NONPROFIT FIN. FUND, <http://www.payforsuccess.org/pay-success-deals-united-states> [https://perma.cc/Q29S-QLRL].

271. *See* Deborah Burand, *Globalizing Social Finance: How Social Impact Bonds and Social Impact Performance Guarantees can Scale Development*, 9 N.Y.U. J.L. & BUS. 447, 452-53 (2013).

272. *See id.* at 452.

273. *See id.* at 453.

274. *See id.*

275. *See id.*

evaluator assesses and determines whether the targets have been met by the prescribed time in accordance with the contract.<sup>276</sup> If these targets have been met, the investors are repaid, and if they are not met, the investors are not repaid.<sup>277</sup>

## 2. *The Benefits of Pay for Success*

Scholars have identified eight benefits of the PFS model. First, the PFS model enhances each program's potential to deliver the best possible services to the communities it serves by focusing stakeholders on the same primary social objective and outcome, whether that be reducing recidivism, increasing educational opportunities, providing jobs, or another goal.<sup>278</sup> This approach is a departure from the traditional funding model (such as grants) that focuses on outputs or services delivered, as opposed to outcomes or results.<sup>279</sup> PFS models may help facilitate "a larger movement to create a more performance-based social sector."<sup>280</sup>

Second, this model "facilitate[s] spending on upfront prevention, reducing the need for downstream remediation expenditures."<sup>281</sup> Government spending is typically constrained by the limitations of the budgeting process. Most spending is typically done on "crisis-driven services" to generate results that can come to fruition within the fiscal year.<sup>282</sup> However, by allowing the government to transfer the risk of a prevention program to private investors and away from taxpayers, the government can "support prevention without the fear that they will pay the cost and not reap the reward."<sup>283</sup> Thus, the government and taxpayers pay for results only, and

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276. *See id.*

277. *See* PFS FAQ, *supra* note 256, at 5 ("If a PFS project does not achieve its intended outcomes, government doesn't spend any money. If a project is successful, however, investors are repaid principal and modest rates of return relative to the risk of financing social outcomes. The return a government pays is, in essence, a premium for not bearing the upfront full cost- and risk- of achieving positive social outcomes. The alternative to paying this interest 'premium' is risking all of government's funding upfront on projects that may or may not work.").

278. *See* PFS FAQ, *supra* note 256, at 3; *see also* Liang et al., *supra* note 256, at 272 ("This financial incentive gives investors a reason to take more of an interest in how effectively a program is run and which interventions are used. They will require that quality controls be implemented and that service providers are chosen based on their program model, supervision, and management team rather than their political ties.").

279. Leventhal, *supra* note 268, at 528.

280. *Id.*

281. *Id.* at 523; *see also* Cox, *supra* note 256, at 968 ("The SIB structure redirects money from safety-net programs to more effective early-intervention programs.").

282. Leventhal, *supra* note 268, at 523.

283. *Id.* at 525; *see also id.* at 524 n.33.



serious problems that require more long-term solutions can actually be addressed.<sup>284</sup>

Third, the PFS model allows for, and even encourages, innovation.<sup>285</sup> PFS programs can operate as “pilot programs” and allow the government to partner with riskier projects that can yield a higher reward, all at the investors’ expense, not at the tax-payers’.<sup>286</sup> If a program is successful, the government has the option to adopt that program and expand it to benefit a larger population.<sup>287</sup> This innovation can facilitate collaboration across organizations. If service providers were funded together, as opposed to independently on similar goals, such collaboration could yield positive outcomes for multifaceted problems.<sup>288</sup>

Fourth, the PFS model can create more accountability<sup>289</sup> and transparency and lead to superior programs in general.<sup>290</sup> Data collection is integral since the programs are based upon outcomes and results. Governments will be encouraged to “improve their data collection processes by integrating data systems” which will lead to an increased understanding of “how underserved populations interact with government systems.”<sup>291</sup> Put another way, the data collected by these social service providers and used to assess the success of the program, can also be used by the government to understand more

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284. See PFS FAQ, *supra* note 256, at 1.

285. See Liang et al., *supra* note 256, at 273; see also John K. Roman, et al., *Five Steps to Pay for Success: Implementing Pay for Success Projects in the Juvenile and Criminal Justice Systems*, URB. INST. 14 (June 2014) (“The focus on developing and using evidence-based social programs may also spur innovation in the social sector as programs compete and are adopted based on the strength of their evidence and track records of success.”).

286. See Hanna Azemati et al., *Social Impact Bonds: Lessons Learned so Far*, 9 CMTY. INV. REV. ISSUE 27 (2013) (“[T]he interventions being tested in most of the initial SIB projects are riskier, more innovative, and offer more potential learning benefits than we had anticipated.”). On the other hand, PFS can be used to scale up proven programs. See Liang et al., *supra* note 256, at 273.

287. See Kristina Costa & Sonal Shah, *Government’s Role in Pay for Success*, 9 CMTY. INV. REV. ISSUE 91 (2013) (“For government agencies at all levels, PFS mechanisms create opportunities for the public sector to reward “what works” or expand access to evidence based preventive social interventions without requiring taxpayers to shoulder all of the financial risk upfront.”).

288. See Leventhal, *supra* note 268, at 528 (“If instead both the mental health provider and the shelter provider were funded together to achieve an outcome, they would have to acknowledge the multi-faceted nature of the problem and work closely together to address the underlying challenges.”); see also Cox, *supra* note 256, at 969 (“Outcome contracting through an intermediary allows “organizations . . . to join forces with other organizations to provide a tailored service that answer[s] the needs of their clients most effectively.”).

289. See Oertel et al., *supra* note 262, at 696 (“With everyone from individuals to governments and foundations calling for increased accountability, it is not surprising that donors are looking for objective means to assure that the funds they have given have achieved the intended outcomes.”).

290. See Leventhal, *supra* note 268, at 526.

291. *Id.*

thoroughly the extent and intensity of social problems. Through greater data collection and analysis, governments will be able to create services that are more attuned to community and societal needs.<sup>292</sup>

Fifth, PFS has the ability to unlock “new service delivery potentials.”<sup>293</sup> Because outcomes are contracted for, programs can be adapted “on the fly” to achieve the targets.<sup>294</sup> Social service providers—and other parties<sup>295</sup>—will be driven to discover more cost-effective ways of achieving the targeted outcomes.<sup>296</sup> This does not just benefit the stakeholders in the PFS program, but also benefits philanthropists. Because of the model’s focus on outcomes, it will reduce expenses generated by ineffective programming, thus allowing philanthropists to be more judicious and fund innovation.<sup>297</sup>

Sixth, the PFS model enables a stable, multiyear revenue stream to service providers.<sup>298</sup> The financial burden to provide the upfront funds is not born by the government or non-profit service providers.<sup>299</sup> Typically, many non-profits struggle with funding and resources, and as a result must devote substantial amounts of time and energy to finding financing as opposed to devoting their time to the social services they offer.<sup>300</sup> By having upfront costs taken care of, non-profit service providers have the opportunity to

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292. See Justin Milner & Matthew Eldridge, *From Evidence to Outcomes: Using Evidence to Inform Pay for Success Project Design*, URB. INST. 8 (May 2016), <http://pfs.urban.org/library/content/evidence-outcomes-using-evidence-inform-pay-success-project-design> [<https://perma.cc/Z85A-KRCG>] (“Using evidence to make public welfare decisions improves government effectiveness and drives better outcomes for society. Pay for success can be on the front line of that change, helping improve the use and availability of evidence by making stakeholders consumers and generators of evidence.”).

293. Cox, *supra* note 256, at 969.

294. *Id.*; PFS FAQ, *supra* note 256, at 3 (explaining service providers can “course correct” as needed to achieve the target goals).

295. See Liang et al., *supra* note 256, at 272 (“[I]nherent within the model is a strong incentive for all parties to pursue performance and cost efficiency in achieving the program goals.”).

296. Emily Bolton & Louise Savell, *Towards a New Social Economy: Blended Value Creation Through Social Impact Bonds*, SOC. FIN. 3 (Mar. 2010), <http://www.socialfinance.org.uk/wp-content/uploads/2014/07/Towards-A-New-Social-Economy-web.pdf> [<https://perma.cc/P9RP-9DUW>].

297. See Leventhal, *supra* note 268, at 525.

298. See *id.* at 527.

299. See PFS FAQ, *supra* note 256, at 1 (explaining that “Private investors—commercial and philanthropic—provide the upfront capital needed” through SIBs).

300. See Leventhal, *supra* note 268, at 527; see also Cox, *supra* note 256, at 970 (“Admittedly, SIB structures are not a panacea for every social problem, but—where viable—they present many advantages over traditional grant and appropriation financing.”).

“think strategically about robust scaling efforts and to focus their energy on providing excellent services.”<sup>301</sup>

Seventh, the PFS model expands access to a market previously unavailable to non-profits.<sup>302</sup> Traditionally service providers rely on foundation assets provided by philanthropists.<sup>303</sup> That pool of money is roughly seven hundred billion dollars.<sup>304</sup> The PFS model creates an asset that investors can invest in.<sup>305</sup> The amount of money then available to finance these programs is dramatically increased: “there are some \$200 trillion of financial assets; creating a pipeline from social outcomes to these \$200 trillion forms a pathway to a new world where social entrepreneurs can get the capital they need to scale critical services and where people in need have access to services they require.”<sup>306</sup>

Eighth, this model also benefits investors in two ways: (1) investors can gain a financial return while achieving a social impact—investors make money by utilizing their portfolio for a greater social benefit; and (2) investors now have access to new assets that are not connected to other investments, thereby spreading their risk. Since returns are linked to social outcomes, not traditional investment benchmarks, investors can diversify their risk in their portfolios by social impact investing, “rather than compound any one set of risks.”<sup>307</sup>

### 3. *The Risks of Pay for Success*

The PFS model it is not without risks. Risks stem from the fact that PFS utilizes SIBs that are “a complicated, multi-party and cross-sector financial instrument, which is still in its infancy stage today.”<sup>308</sup> Scholar Deborah Burand has grouped the risks of the PFS model into the following categories:

301. Leventhal, *supra* note 268, at 528; *see also* Cox, *supra* note 256, at 970 (“Multi-year contracts allow service providers to do more service providing and less time consuming fundraising.”).

302. *See* Leventhal, *supra* note 268, at 529 (“By monetizing social outcomes, Social Impact Bonds create an asset that investors can invest in, expanding the pot of money available beyond philanthropy and government grants to true investment capital.”).

303. *See id.* at 528; *see also* Toussaint, *supra* note 67, at 78 (explaining that, alternative funding is “especially important during an era of government austerity at both the state and local levels”).

304. *See* Leventhal, *supra* note 268, at 529.

305. *See id.*

306. *See id.*; *see also* Sir Ronald Cohen & William A. Sahlman, *Social Impact Investing Will Be the New Venture Capital*, HBR BLOG NETWORK (Jan. 17, 2013), [http://blogs.hbr.org/cs/2013/01/social\\_impact\\_investing\\_will\\_b.html](http://blogs.hbr.org/cs/2013/01/social_impact_investing_will_b.html) [<https://perma.cc/6FEH-MF5Q>].

307. *See* Leventhal, *supra* note 268, at 527, 527 n.44.

308. *See* Liang et al., *supra* note 256, at 273.

(1) intervention model risk; (2) execution risk; (3) intermediary risk; (4) political risk; (5) financial risk; and (6) reputational risk.<sup>309</sup>

Intervention model risk is the possibility that the outcomes expected are not produced.<sup>310</sup> One way to mitigate this risk is to rely on proven models.<sup>311</sup> However, this may make funding harder to obtain for smaller fledgling non-profits with new and untested ideas.<sup>312</sup> One way to reduce intervention model risk is to ensure that appropriate metrics are: (1) used to provide feedback on the progress of the program; and (2) are correlated strongly with the expected financial benefit of the program.<sup>313</sup>

Execution risk is created by performance challenges that are specific to the structure of a given model.<sup>314</sup> First, social providers that have been selected for programs may “prove to be weak or otherwise unable to scale the intervention as expected.”<sup>315</sup> Second, a badly executed program can “wreak havoc on the very populations that the SIB is meant to serve.”<sup>316</sup> Third, there is a risk that social service providers may take “inappropriate actions” such as withholding information that shows a program may not reach its targets or, at worst, falsifying information to meet the targets.<sup>317</sup> However, there are several ways the government can mitigate these risks.<sup>318</sup> For example, the government can require due diligence to mitigate this

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309. See Burand, *supra* note 271, at 467.

310. See *id.* at 468.

311. See *id.*

312. See Rick Cohen, *Eight Sobering Thoughts for Social Impact Bond Supporters*, NONPROFIT Q. (June 12, 2014), <https://nonprofitquarterly.org/2014/06/12/eight-sobering-thoughts-for-social-impact-bond-supporters/> [<https://perma.cc/LH6T-EXPP>].

313. Liang et al., *supra* note 256, at 274.

314. See Burand, *supra* note 271, at 469.

315. *Id.*

316. *Id.* at 469 (explaining that if players give up on the programs when and if they do not reach their targets prematurely, this runs a “shut down” risk whereby those social services once provided on a smaller scale are no longer operational).

317. *Id.* at 470 (“For example, a social service provider participating in a SIB aimed at reducing the number of children residing in foster care might start returning children to dangerous family situations without sufficient regard for the children’s safety. Or a social service provider participating in a SIB aimed at prisoner recidivism might interfere with legal processes to ensure that reconviction rates are delayed or inappropriately frustrated during periods when SIB reconviction targets are to be measured.”); see also PFS FAQ, *supra* note 256, at 7 (discussing skimming dangers: programs may be biased in their selection of program participants—those who are more statistically likely to achieve the positive outcomes needed to achieve targets so investors are repaid. This can disadvantage groups who are in the most need of these kind of social programs in the first place.).

318. See Burand, *supra* note 271, at 472 (Investors can also help to mitigate these risks “1) before an investment, through their decisions about whether to invest in a particular SIB (including due diligence as to the SIB intermediary, the likely social service providers, and their potential fellow SIB investors) and 2) once invested, through the influence they exert on the governance of the SIB intermediary.”).

risk.<sup>319</sup> The government can also include certain contractual provisions that allow it to terminate or replace social service providers who act inappropriately.<sup>320</sup> The government can also support independent watchdog organizations, distinct from the independent evaluator, that ensure the protection of vulnerable populations by providing independent oversight of PFS programs.<sup>321</sup>

Intermediary risk is the risk that the intermediary will not perform its obligations and thus thwart the financial and social goals of the program.<sup>322</sup> Since this is such a new model, intermediaries that lack experience may fail to manage the project well.<sup>323</sup> Additionally, if their role as intermediary is not their primary job, they also may not have the time necessary to adequately manage a project.<sup>324</sup> One way to mitigate this risk would be to develop best practices for intermediaries.<sup>325</sup>

Political risk refers to “both the capacity and the will of the host government to undertake its obligations.”<sup>326</sup> Government entrenchment can result in an unwillingness to participate in PFS programs.<sup>327</sup> Also, since government officials change, new administrations may not adhere to former obligations.<sup>328</sup> Further, if a government has limited experience, this political risk is exacerbated.<sup>329</sup> For example, some programs may be priced too highly, and an inexperienced government may not recognize this.<sup>330</sup> Thus, government commitment<sup>331</sup> and executive leadership within government are often critically important to a program’s success.<sup>332</sup> Additionally, some

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319. Presumably this due diligence would be undertaken by the government before the contract is entered into in order to assess the staff training, codes of conduct, financial incentive schemes, and reputation of social service provider. *See id.* at 471.

320. *See id.*

321. *See id.* at 471-72.

322. *See id.* at 472.

323. *See id.*

324. *See id.*

325. *See id.* at 473 (“Drawing on such practices should also help reduce the risk of SIB intermediary failure. Similarly, as more organizations gain experience in SIB intermediation, there may be opportunities for weak SIB intermediaries to be eased out and new SIB intermediaries to be recruited.”).

326. *Id.*

327. *See id.* at 475.

328. *See id.* For example, some states may require special legislation to allow for PFS contracting. If one administration makes this promise and is then replaced with another administration that does not look favorably on the PFS model, this legislation may not be enacted.

329. *See id.* at 473.

330. *See id.* at 474.

331. *See Cox, supra* note 256, at 979 (“The problem of multi-year contracting is solved by pledging the government’s full faith and credit to multi-year commitments.”).

332. *See Burand, supra* note 271, at 475.

programs may require the adoption of legislation to ensure the government is bound to a long term PFS contract.<sup>333</sup>

Financial risks are largely born by the investors.<sup>334</sup> First, the investor's money is often locked up in the model for years: "investors must be willing to tolerate high liquidity risk since the duration of a bond is anywhere from 3 to 10 years with no early termination."<sup>335</sup> Transaction and monitoring costs in the early stages of PFS models may be incredibly high.<sup>336</sup> Once these PFS contracts become more standardized, the transaction costs will likely lower at least moderately.<sup>337</sup> Moreover, there are some risk-mitigation methods that can "be applied to the social impact bond structure, such as reserve funds, first-loss provisions, and other credit enhancing methods."<sup>338</sup> Also the government can explore tax solutions to encourage investors to participate in this type of financing.<sup>339</sup>

Reputational risks affect all players; however, service providers bear the brunt of this risk if targets are not met.<sup>340</sup> The reputational risk also extends to PFS programs in general. If some programs prove to be unsuccessful due to any of the aforementioned risks, governments may shy away from using this model to address other societal problems.<sup>341</sup>

There are also several general concerns with the PFS model. First, because it is still a new innovation in the United States, it is difficult to predict whether this model will become more popular or if it will stagnate.<sup>342</sup> Second, there is a risk that if PFS programs become more mainstream, they

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333. See Cox, *supra* note 256, at 979 ("Typical appropriations statutes are often unable to commit the government to either multi-year or contingent contracts, while a PFS/SIB contract requires both . . . Congress should . . . pass an appropriations statute that authorizes long-term contracts and allows for future redirection of any unused funds, for another closely related high priority purpose.") (internal citations and quotations omitted); see also Burand, *supra* note 271 at 476 ("Several states in the United States are contemplating or have enacted legislation intended to advance the issuance of SIBs or SIB-like financial instruments. One of the first states to enact such legislation was Massachusetts.").

334. See Burand, *supra* note 271, at 478.

335. Liang et al., *supra* note 256, at 274.

336. See Toussaint, *supra* note 67, at 79 ("SIBs are very complex transactions with high transaction costs, requiring significant legal and financial expertise, institutional expertise, and detailed negotiation among key stakeholders.").

337. See Burand, *supra* note 271, at 479; see also, Toussaint, *supra* note 67, at 80 (explaining that negotiating these contracts require high levels of sophistication and thus may inhibit smaller non-profits from participating).

338. Liang et al., *supra* note 256, at 274. See generally Burand, *supra* note 271 (providing an in depth examination of these methods).

339. See Cox, *supra* note 256, at 981-82 ("Because the government already realizes significant savings upon successful completion of a SIB-funded program, legislators should consider exempting investor SIB earnings from capital gains taxation.").

340. See Burand, *supra* note 271, at 480.

341. See *id.*

342. See Palandjian & Hughes, *supra* note 265.

will cannibalize funding from non-profits who do not participate.<sup>343</sup> Third, not all social goods are easily quantifiable. This model may be limited to only those programs that can be easily measured and monetized, creating the unintended effect of ignoring some of the more challenging social ills.<sup>344</sup> Additionally, there is a risk that the programs funded will rely on oversimplified models that “obscure the true scope of the costs, benefits, and savings to local communities.”<sup>345</sup> Fourth, monetizing social progress may lead to favoring local incrementalism in lieu of broad based reform.<sup>346</sup> Fifth, others argue that PFS models risk privatizing the public sector, and instead we should “consider a simpler solution—public investments in schools, jobs, social programs and innovate criminal justice.”<sup>347</sup>

#### 4. *Federal and State Support for Pay for Success*

The 2016 federal budget invests seventy million dollars in the Social Innovation Fund (“SIF”), housed under the Corporation for National and Community Service (“CNCS”), and proposes twenty percent be available for PFS projects.<sup>348</sup> Importantly, the Senate Appropriations Committee submitted a draft of the 2017 budget to the Senate floor that defunds SIF.<sup>349</sup> Conversely, the House Appropriations Committee submitted a budget that provides fifty million dollars to SIF with a twenty percent set aside for pay for success.<sup>350</sup> In April 2016, CNCS announced twenty-five SIB PFS competition sub-awards, and over the summer, announced three more grantees.<sup>351</sup>

343. See PFS FAQ, *supra* note 256, at 4.

344. See V. Kasturi Rangan & Lisa A. Chase, *The Payoff of Pay-for-Success*, STAN. SOC. INNOVATION REV., (2015), [https://ssir.org/up\\_for\\_debate/article/the\\_payoff\\_of\\_pay\\_for\\_success](https://ssir.org/up_for_debate/article/the_payoff_of_pay_for_success) [<https://perma.cc/S2QQ-GKCY>] (“Most important, in the rush to quantify costs and benefits, we fear that there could be a retraction from those social issues where the outcomes are hard to pin down and successful interventions hard to identify, but which are the very issues demanding society’s attention and resources.”).

345. Toussaint, *supra* note 67, at 81.

346. See *id.* at 81.

347. See Donald Cohen & Jennifer Zelnick, *What We Learned from the Failure of Rikers Island Social Impact Bond*, NONPROFIT Q. (Aug. 7, 2015), <https://nonprofitquarterly.org/2015/08/07/what-we-learned-from-the-failure-of-the-rikers-island-social-impact-bond/> [<https://perma.cc/U2MU-9PE2>].

348. See CONGRESSIONAL BUDGET JUSTIFICATION—FISCAL YEAR 2016, CNCS 6, 45, 94-95 (appendix 1) (2016), [http://www.nationalservice.gov/sites/default/files/page/cnsc\\_2016\\_CBJ\\_Final.pdf](http://www.nationalservice.gov/sites/default/files/page/cnsc_2016_CBJ_Final.pdf) [<https://perma.cc/X43Q-BBUL>].

349. See Nicole Truhe, *State of Play: Pay for Success and Evidence-Based Policy*, NEWPROFIT (July 2016), <http://www.newprofit.org/state-of-play-pay-for-success-and-evidence-based-policy-junejuly-2016/> [<https://perma.cc/R4CN-JHGB>].

350. See *id.*

351. See *id.*

During fiscal year 2014/2015, Congress authorized the Department of Justice (“DOJ”) to provide funds to implement Permanent Supportive Housing for those cycling in and out of the criminal justice system and homeless services.<sup>352</sup> HUD and DOJ awarded a total of \$8.7 million in grants to different entities that focus on using the PFS model to address homelessness and reduce recidivism.<sup>353</sup>

In addition to these budgetary measures, Congress appears to be in favor of aspects of the PFS model. In March 2016, Congress passed the Evidence-Based Policymaking Commission Act, which established a commission to develop practices that will ensure evidence and outcomes are used to decide federal policy and budget proposals.<sup>354</sup> The commission is tasked with exploring how to use federal data sources in a more useful way for analysis and research, how to connect data sets, examine infrastructure necessary to make data more accessible to researchers, provide recommendations as to how to evaluate program designs, and how to protect security and privacy.<sup>355</sup>

In June 2016, the House introduced and passed the Social Impact Partnerships to Pay for Results Act.<sup>356</sup> The Senate version has been introduced and referred to the Committee on Finance.<sup>357</sup> Both versions of this Act would “direct federal resources to states and local communities to support innovative Pay for Success feasibility studies, evaluations, and end payment structures.”<sup>358</sup>

Over thirty states have embarked on some exploration of PFS programs.<sup>359</sup> Several states have set aside funding in their budgets for PFS programs,<sup>360</sup> a number of states enacted or introduced legislation to fund PFS

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352. *See id.*

353. *See id.* (“The seven grantees are: Corporation for Supportive Housing, Third Sector Capital Partners, United Way of Anchorage, Rhode Island Coalition for the Homeless, University of Utah, American Institutes of Research, and Ending Community Homelessness Coalition.”).

354. *See id.*; *see also* Public Law No: 114-140.

355. *See* Public Law No: 114-140.

356. *See* H.R. 5170; Truhe, *supra* note 349; CONG. RES. SERV., SUMMARY: H.R. 5170, [hereinafter CRS SUMMARY] <https://www.congress.gov/bill/114th-congress/house-bill/5170> [[https://perma.cc/9SXX\\_JDN2](https://perma.cc/9SXX_JDN2)] (explaining that this is a reworked version of the “Social Impact Partnership Act” (H.R. 1336/S. 1089) which was introduced in both houses earlier).

357. *See* Truhe, *supra* note 349 (“The Senate is now considering whether to take up the new House version of the bill, which includes a one-year reauthorization of TANF and a pay for or funding offset, or to try and move their bill in which case they still need to find a way to fund the bill and a legislative vehicle to move the bill forward.”); CRS SUMMARY, *supra* note 356.

358. Truhe, *supra* note 349.

359. *See* NONPROFIT FIN. FUND, *supra* note 270.

360. New York and Massachusetts. *See id.*



programs and contracts generally;<sup>361</sup> several others have initiated on PFS studies;<sup>362</sup> and others have introduced PFS funding for specific purposes such as education and reducing recidivism.<sup>363</sup>

5. *New York's Recidivism Pay for Success Program and Massachusetts' Homelessness Pay for Success Program*

The Nonprofit Finance Fund conducted a review of the first ten PFS projects in the United States.<sup>364</sup> Of those ten, three focused on recidivism<sup>365</sup> and three focused on homelessness generally.<sup>366</sup> This Section will examine and compare two of these programs: NYC ABLE Project for Incarcerated Youth and Massachusetts Chronic Homelessness Pay for Success Initiative.

NYC ABLE is the only project that has come to completion.<sup>367</sup> This program's objective was to reduce recidivism of male adolescents incarcerated at Rikers Island by at least ten percent using cognitive behavioral therapy to improve personal responsibility and decision making.<sup>368</sup> This was a transplanted project, meaning it was modeled on programs from other locations and service providers.<sup>369</sup> It was designed as a four-year project but provided the investor with a choice to continue

361. General legislation has passed or been introduced in California, Ohio, Rhode Island, South Carolina, and Washington; contract legislation passed or introduced in Colorado, Florida, Pennsylvania, Texas, and the District of Columbia. *See id.*

362. Legislation has been passed or introduced in Hawaii, Maine, Nevada, and Vermont. *See id.*

363. Legislation has been passed or introduced in Colorado, Idaho, New Hampshire, and Oklahoma. *See id.*

364. *See* NONPROFIT FIN. FUND, *Pay for Success: The First Generation* (April 2016), [hereinafter *The First Generation*] [http://www.payforsuccess.org/sites/default/files/resource-files/Pay%20for%20Success\\_The%20First%20Generation\\_0\\_0.pdf](http://www.payforsuccess.org/sites/default/files/resource-files/Pay%20for%20Success_The%20First%20Generation_0_0.pdf) [https://perma.cc/HPB6-8WLY].

365. *See id.* at 4. NYC ABLE Project for Incarcerated Youth, launched in 2012; Increasing Employment and Improving Public Safety, launched in 2013; and Massachusetts Juvenile Justice PFS Initiative, launched in 2014. *See id.*

366. *See id.* Massachusetts Chronic Homelessness Pay for Success Initiative, launched in 2014; Project Welcome Home, launched in 2015; and Housing to Heath Initiative, launched in 2016. *See id.*

367. *See id.* at 25. The initial investment was \$9.6 million, the return to investors ranged from eleven to twenty-two percent, the service providers were Friends of Island Academy and the Osborne Association, and the back-payor was the NYC Department of Corrections. *See id.* at 25.

368. *Program Summary—ABLE*, NYC YOUNG MEN'S INITIATIVE, CTR. FOR ECON. OPPORTUNITY (2013), [http://www.nyc.gov/html/ceo/downloads/pdf/able\\_fy13q3\\_update.pdf](http://www.nyc.gov/html/ceo/downloads/pdf/able_fy13q3_update.pdf) [https://perma.cc/K2WG-37EK]; *see id.* at 4; *see also Fact Sheet: The NYC ABLE Project for Incarcerated Youth*, (Aug. 2, 2012) [http://www.nyc.gov/html/om/pdf/2012/sib\\_fact\\_sheet.pdf](http://www.nyc.gov/html/om/pdf/2012/sib_fact_sheet.pdf) [https://perma.cc/A8SF-8P5C] (“[This] program aims to reduce the reincarceration rate among adolescents at Rikers Island through an evidenced-based intervention that focuses on improving personal responsibility and decision-making.”).

369. *See The First Generation*, *supra* note 364, at 4, 7.

funding the program for a fourth year based on the first year participants' results after a two-year evaluation period.<sup>370</sup> This initial evaluation did not show an impact on the recidivism rate, so the program was terminated after the third year.<sup>371</sup> The other programs that have not yet been completed offer the first initial repayment in 2017.<sup>372</sup>

One program in particular caught the attention of the press:<sup>373</sup> the Massachusetts Chronic Homelessness Pay for Success Initiative.<sup>374</sup> This program was initiated to address the 1500 chronically homeless people in the state who lack access to stable housing and, as a result, use temporary shelters, Medicaid, and emergency services at a high-cost to the state.<sup>375</sup> The project intended to improve health, end homelessness, and increase personal stability by achieving one year of housing stability.<sup>376</sup> The goal of the program, designed to run for six years, is to provide at minimum five hundred supportive housing units to up to eight hundred program participants.<sup>377</sup> While the program is not yet complete, in its first year it surpassed its minimum goal and successfully housed over 250 individuals in supportive housing.<sup>378</sup>

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370. *Id.* at 5.

371. *See id.* The outcomes tied to payments were: (1) the number of people served by the program, and (2) the total days of jail avoided. *See id.* at 16. Bloomberg Philanthropies acted as the guarantor, and guaranteed \$7.2 million. *See id.* at 25. Thus, Goldman Sachs only incurred a net loss of \$2.4 million. *See id.*

372. *See id.* at 30. One program, Project Welcome Home, offers repayment annually.

373. *See, e.g.,* Deborah De Santis, *MA Pay for Success Worth Watching*, HUFFINGTON POST (Aug. 17, 2016), [http://www.huffingtonpost.com/deborah-de-santis/ma-pay-for-success-worth\\_b\\_11571894.html](http://www.huffingtonpost.com/deborah-de-santis/ma-pay-for-success-worth_b_11571894.html) [<https://perma.cc/69D6-EA98>].

374. *See The First Generation, supra* note 364, at 25. The initial investment was for \$3.5 million (senior investment: \$1 million from Santander Bank, \$1 million from United Way of Massachusetts Bay and Merrimack Valley, \$0.5 million from CSH; Grant money: \$0.25 million from Santander Bank and \$0.75 million from United Way of Massachusetts Bay and Merrimack Valley). *See id.* The investors will receive an interest rate that is calculated based on the level of success of the program and paid annually starting at the end of the second year of the program. *See id.* at 31 n.5. The service provider is the Massachusetts Housing and Shelter Alliance. *See id.* at 8. The back-payor is the Commonwealth of Massachusetts and the Project manager is the Massachusetts Alliance for Supportive Housing. *See id.*

375. *See id.* at 4. While there is an overlap in the homeless population and the formerly incarcerated population, this program focuses on the chronically homelessness. Formerly incarcerated people who are also homeless may benefit from these programs, but the program does not exclusively target that population. *See id.*

376. *See id.* at 16. The outcome tied to payments is that stable housing is achieved for at least one year.

377. *See id.* at 4.

378. *See Pay for Success 2016 Fact Sheet*, MASS. HOUS. & SHELTER ALL. (Oct. 2016), <http://www.mhsa.net/sites/default/files/PFS%20Fact%20Sheet%20October%202016.pdf> [<https://perma.cc/86LG-QN8T>]; *Press Release: Pay for Success Initiative to Reduce Chronic Individual Homelessness Successfully Houses over 250 Individuals in the First Year*, MASS. HOUS. & SHELTER ALL. (Aug. 3, 2016), <http://www.mhsa.net/news/pay-for-success-initiative->

The failure of the NYC program compared to the success of the Massachusetts program is attributable to differences in the financing, structure, and design of the two programs.

The NYC and Massachusetts programs were financed very differently. The investment in the NYC program by Goldman Sachs was guaranteed by the Bloomberg Philanthropies for up to \$7.2 million,<sup>379</sup> whereas the investors in the Massachusetts program have no such guarantee.<sup>380</sup> Also, the NYC program only had one investor whereas the Massachusetts program has three investors and was partly funded by grant money.<sup>381</sup> Presumably, the cost and efficacy of monitoring would be less for each individual investor in the Massachusetts program than Goldman Sachs as a single investor. Moreover, one can speculate that Goldman Sachs as a single investor with a substantial guarantee may not have monitored the program as rigorously as compared to the multiple investors in the Massachusetts program with no guarantee.

Additionally, the NYC and Massachusetts programs were designed very differently. The NYC program was a transplanted design to help assist a very high-risk population, unlike the Massachusetts program, which is a scaling project designed to help the chronically homeless.<sup>382</sup> First, the two program's target populations could be one factor that inhibited success: while both populations are in need, juveniles in Rikers are a particularly high-risk population.<sup>383</sup> Second, using a transplanted design is inherently riskier than scaling up a proven model for a target population.<sup>384</sup> Thus, the NYC program's lack of success in meeting its targets may be because the program was inherently risky.<sup>385</sup> In addition, the Massachusetts program is set to run for a longer period of time than the NYC program. It is possible that the targets set in the NYC program may have been unrealistic or unachievable within the shorter time frame. Further, the NYC program was

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to-reduce-chronic-individual-homelessness-successfully-houses-over-250-individuals-in-first-year [<https://perma.cc/BQL7-DVFC>].

379. See *The First Generation*, *supra* note 364, at 25.

380. See *id.*

381. See *id.*

382. See *id.* at 12.

383. See *MDRC Statement on the Vera Institute's Study of the Adolescent Behavioral Learning Experience (ABLE) Program at Rikers Island*, MDRC (July 2015), [hereinafter *MDRC Statement*] <http://www.mdrc.org/news/announcement/mdrc-statement-vera-institute-s-study-adolescent-behavioral-learning-experience> [<https://perma.cc/37W8-3B2Q>] (NYC ABLE was designed "to tackle one of New York City's most challenging problems—recidivism among adolescents incarcerated at Rikers Island. All of the parties understood that it was a high risk undertaking.").

384. See Burand, *supra* note 271, at 468.

385. See, e.g., *MDRC Statement*, *supra* note 383 ("As described in MDRC's 2013 report, the implementation of ABLE faced a number of challenges, including reaching adolescents who did not attend the Rikers school and the indeterminate lengths of stay for many of the young people.").

a cognitive behavioral therapy program, and as such, it may have been hard to value the positive effects of this program through the chosen metrics of measurement.

Instead of viewing the NYC program as a failure, we should learn from it.<sup>386</sup> Despite the fact that the NYC program did not meet its targets, it may have lasting positive effects at Rikers Island. The program was unique because it “attempted to change part of the culture in Rikers Island by introducing an intervention for a very high-needs population for whom little to no programming was previously offered.”<sup>387</sup> It encouraged Rikers management and non-uniform staff to participate and work closely with the service provider, which could result in a positive cultural change among the staff that benefits the incarcerated population.<sup>388</sup> Moreover, the program did in fact have some measurable positive impacts on the sixteen to eighteen year old population: in 2013, eighty-seven percent of those held for more than six days attended at least one ABLÉ session, and “44 percent reached a programmatic milestone found in prior studies to be associated with positive outcomes.”<sup>389</sup>

6. *Proven Models: Non-Profits that Address Housing Issues of Formerly Incarcerated People in New York*

There are several non-profit organizations that assist formerly incarcerated people with accessing safe, secure, affordable housing. This Note highlights three: the Fortune Society, the Osborne Association, and Community Access. These non-profits and their housing programs can be candidates for future PFS projects.

The Fortune Society provides a multitude of comprehensive services to formerly incarcerated people, including “low-threshold access to supportive emergency, phased-permanent, and permanent housing.”<sup>390</sup> Their emergency shelter service offers sixty-two beds.<sup>391</sup> While residing there, residents spend thirty-five hours per week doing productive activities, undergo daily drug screening, and participate in morning and evening support groups along with other supportive services.<sup>392</sup> Within one year, these residents are transitioned to supportive-permanent housing or other

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386. See Cohen & Zelnick, *supra* note 347.

387. MDRC Statement, *supra* note 383.

388. See *id.*

389. *Id.*

390. Housing, FORTUNE SOC’Y (Sept. 7, 2013), <http://fortunesociety.org/programs/housing> [<https://perma.cc/RFX5-AA5N>].

391. See Ross, *supra* note 114.

392. See *The Fortune Academy at a Glance 2013-2015*, FORTUNE SOC’Y (on file with author) [hereinafter *At A Glance*].

adequate housing placement.<sup>393</sup> These programs have had great success housing the formerly incarcerated in permanent housing.<sup>394</sup>

The Osborne Association also provides many services, including its Housing Placement and Assistance (“HPA”) program.<sup>395</sup> This program provides independent, supportive, and transitional housing options, in addition to Home Start-Up Kits and rental assistance.<sup>396</sup> Additionally, it offers housing retention activities that are available to participants for the first year following release.<sup>397</sup> The Osborne Association offers two supportive services: Safety Counts and Project HIRE. Safety Counts helps high risk drug users correct their behavior and partners with Project Street Beat to provide on-site HIV/HVC testing.<sup>398</sup> The program is offered in English and Spanish.<sup>399</sup>

Community Access is a supportive housing provider that first pioneered the integrated housing model in the mid 1970s to provide affordable housing to low income families, veterans, youth aging out of foster care, and individuals with psychiatric disabilities.<sup>400</sup> They have developed over twenty affordable housing projects in New York City.<sup>401</sup> They offer supportive services for mental and physical health, employment, education, and substance use.<sup>402</sup>

These proven models could be promising candidates for scaling up using the PFS financing structure so that they reach a larger population of formerly incarcerated people and help them obtain safe, stable, and affordable housing.

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393. See Ross, *supra* note 114; *At a Glance*, *supra* note 392.

394. See *At a Glance*, *supra* note 392 (stating that seventy-nine percent of those who participated in phase II of the program transitioned to permanent housing, and another five percent moved to another successful placement).

395. See *Wellness & Prevention*, OSBORNE ASS’N (2012), <http://www.osborneny.org/programs.cfm?programID=3> [<https://perma.cc/GY7N-22E6>].

396. See *id.*

397. See *id.*

398. See *id.*

399. See *id.*

400. See *Housing*, COMTY. ACCESS, <http://www.communityaccess.org/our-work/housing> [<https://perma.cc/RAC6-5DBS>].

401. See *id.*

402. See *id.*; *Education & Job Training*, COMTY. ACCESS, <http://www.communityaccess.org/our-work/education/jobreadiness> [<https://perma.cc/LCZ8-QVZU>]; *Health & Wellness*, COMTY. ACCESS, <http://www.communityaccess.org/our-work/health-a-wellness> [<https://perma.cc/N79Y-W5LW>].

### III. RECOMMENDATIONS FOR THE FUTURE: STATE AND LOCAL GOVERNMENT IMPLEMENTATION OF PAY FOR SUCCESS PROGRAMS FOR FORMERLY INCARCERATED PEOPLE

In order to ensure that formerly incarcerated people can access safe, affordable, and stable housing, states should first, continue to experiment with the PFS model and second, invest in programs that address the housing needs of the formerly incarcerated who reside in their states. While this Note advocates for the use of PFS to address the needs of this population, it does not ignore the legitimate fear of many in the public sector that PFS programs will eventually privatize the public sector.<sup>403</sup> Ideally, the government should be making more public investments to assist the formerly incarcerated; a population comprised of predominately people of color who are, in many cases, initially victims of a racialized criminal justice system and subsequently, victims of severe discrimination in housing. However, in a time in which local government budgets are constrained, and the President proposes reducing HUD's budget by six billion dollars<sup>404</sup> and slashing funding for many other administrative agencies responsible for a variety of social programs that states rely on,<sup>405</sup> it is unlikely such a plea to state and local governments to invest in public programs for formerly incarcerated people will be successful. To truly address this issue, it is critical to explore new and creative funding mechanisms that may be more attractive to local governments in a time of fiscal austerity. Moreover, the current litigation regime, standing alone, is simply deficient to combat instances of discrimination formerly incarcerated people face. PFS is not a panacea to replace public spending on all social ills. But in the interest of justice for the formerly incarcerated, we should strive for substance over form.

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403. See *supra* note 347 and accompanying text.

404. See Jose A. DelReal, *Trump Budget Asks for \$6 Billion in HUD Cuts, Drops Development Grants*, WASH. POST (Mar. 16, 2017), [https://www.washingtonpost.com/politics/trump-budget-asks-for-6-billion-in-hud-cuts-drops-development-grants/2017/03/15/1b157338-09a0-11e7-b77c-0047d15a24e0\\_story.html](https://www.washingtonpost.com/politics/trump-budget-asks-for-6-billion-in-hud-cuts-drops-development-grants/2017/03/15/1b157338-09a0-11e7-b77c-0047d15a24e0_story.html) [<https://perma.cc/SH69-FC4M>].

405. See Andrew Taylor, *Trump Budget Slashes Federal Agencies and the Arts to Focus on Border Wall, Defense Spending*, CHI. TRIB. (Mar. 16, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-budget-20170316-story.html> [<https://perma.cc/9QM6-DPZG>] (“President Donald Trump’s new \$1.15 trillion budget would reshape America’s government with the broad, conservative strokes he promised as a candidate, ordering generous increases for the military, slashing domestic programs and riling both fellow Republicans and Democrats by going after favored programs.”); Russell Berman, *President Trump’s ‘Hard Power’ Budget*, ATLANTIC (Mar. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/03/president-trumps-hard-power-budget/519702/> [<https://perma.cc/V3AY-WSJ7>] (“The Trump administration wants to eliminate federal funding of 19 agencies and commissions, including the National Endowments for the Arts and the Humanities, the Legal Services Corporation, the Institute of Peace, and an interagency council on homelessness.”).

The current litigation regime bars access to justice for many formerly incarcerated people who face housing discrimination. Formerly incarcerated litigants must bring their own FHA claims under the disparate impact theory to attempt to secure safe, stable, and affordable housing. Those who do bring claims have had limited success in the past, and the more stringent pleading requirements from *Texas v. Inclusive Communities*, make future success even less likely.<sup>406</sup> Litigation is slow, time consuming, expensive, and places a heavy burden on those already disadvantaged to bring these claims.<sup>407</sup> More significantly, disparate impact litigation cannot combat the massive volume of discrimination that occurs every single year.<sup>408</sup> Additionally, given the current political landscape, it is unlikely President Trump or Congress will support any reforms to increase the likelihood of success of disparate impact litigation.<sup>409</sup> For example, current HUD Secretary Ben Carson previously accused HUD of “social engineering” when the agency announced that state and local governments that received federal funding for housing must build affordable units in wealthier, healthier neighborhoods and not solely poor neighborhoods.<sup>410</sup> Some fear Secretary Carson will send a message to states that “it is again perfectly fine for governments around the country to return to a policy of racial isolation.”<sup>411</sup> It is also equally unlikely that a protected class of formerly incarcerated people will be established, and even if it were, similar litigation challenges would apply.<sup>412</sup> Thus, if reform is to occur it must be undertaken by states and reach beyond litigation.

The potential social benefits of the PFS models outweigh the potential risks—if PFS programs for the formerly incarcerated are structured responsibly, effectively, and with appropriate safeguards. The structure of PFS increases the chances of achieving the best possible services for communities by focusing all stakeholders around achieving a social good;<sup>413</sup>

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406. See *supra* Section II.A.

407. See *supra* Section II.A.

408. See *supra* Section II.A.

409. See, e.g., Matt Apuzzo, *Under Trump, Approach to Civil Rights Law is Likely to Change Definitively*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/us/politics/civil-rights-justice-department-donald-trump.html> [<https://perma.cc/4VNA-WDKW>] (describing Trump’s pick for Attorney General, Jeff Sessions’ views on civil rights litigation and discrimination. During Session’s confirmation hearing, when asked about prosecuting sex and gender discrimination cases at the federal level, Sessions is quoted saying “I am not sure women or people with different sexual orientations face that kind of discrimination. I just don’t see it.”).

410. See Carson, *supra* note 23.

411. See The Editorial Board, *Ben Carson’s Warped View of Housing*, N.Y. TIMES (Dec. 19, 2016), <http://www.nytimes.com/2016/12/19/opinion/ben-carsons-warped-view-of-housing.html> [<https://perma.cc/WPL6-G3GV>].

412. See *supra* Section II.B.

413. See *supra* notes 278-80 and accompanying text.

PFS will support prevention programs and only spend tax payer dollars on positive social outcomes;<sup>414</sup> it will allow for more creative collaboration and innovation;<sup>415</sup> it will vastly expand data collection and transparency, allowing government to continue to create more effective programs that address actual community needs;<sup>416</sup> it will encourage cost-effective ways to achieve social good;<sup>417</sup> it will provide financial stability to service providers;<sup>418</sup> and it will expand the market available to finance non-profits doing good work.<sup>419</sup> While there are risks, the government can mitigate many by relying on proven models;<sup>420</sup> ensuring metrics are appropriate;<sup>421</sup> conducting due diligence;<sup>422</sup> agreeing to termination terms in contracts to curb bad behavior;<sup>423</sup> supporting watch dog organizations;<sup>424</sup> creating best practices for intermediaries;<sup>425</sup> and setting aside budget dollars and creating legislation to ensure the duration of PFS contracts.<sup>426</sup> Moreover, any instances of early failure offer learning opportunities to enable better designed and successful future programs, and even then, less measurable but positive effects can still result.<sup>427</sup>

States should take this opportunity to invest in PFS programs specifically designed to help formerly incarcerated people access stable, affordable housing by dedicating state budget dollars to these programs, and investing based on need. For example, states can work within the flexible PFS framework to allocate funding using government data sets to examine how many released persons annually lack stable homes to re-enter, and how many would benefit from housing with supportive services for drug addiction and mental health. They can then allocate funds accordingly, using proven models to further mitigate risk. If contracts are written to encourage collaboration between service providers, then there will be a steady stream of funding that can be adjusted annually based on the needs of the annual outgoing prison population. Each year, the data sets will grow, allowing programs to be better tailored to population needs. Moreover, the funding

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414. *See supra* notes 281-84 and accompanying text.

415. *See supra* notes 285-88 and accompanying text.

416. *See supra* notes 289-92 and accompanying text.

417. *See supra* notes 293-97 and accompanying text.

418. *See supra* notes 298-301 and accompanying text.

419. *See supra* notes 302-06 and accompanying text.

420. *See supra* note 311 and accompanying text.

421. *See supra* note 313 and accompanying text.

422. *See supra* note 319 and accompanying text.

423. *See supra* note 320 and accompanying text.

424. *See supra* note 321 and accompanying text.

425. *See supra* note 325 and accompanying text.

426. *See supra* notes 326-33 and accompanying text.

427. *See supra* Section II.C.5.



will come from private investors, and tax payers will only have to pay for successful outcomes so there will not be an additional strain on state budgets. Successful housing programs for formerly incarcerated people that reduce recidivism will also reduce state expenditures on recidivism, resulting in an aggregated cost savings in budgetary dollars. Therefore, since the state will only be responsible for paying for successful outcomes, PFS provides states with a great opportunity to help not only those who are high risk, but to engage in preventative measures to assist first time offenders and stop the cycle of poverty and recidivism before it can begin.

States can also set outcome targets that are tailored to each specific program and need. For example, for those struggling with drug addiction, a metric of success could be six months of stable housing and sobriety. Particularly when implementing scaled up versions of proven non-profit models, states can set reasonable and achievable targets by looking to the metrics non-profits use to measure their own success. Likewise, states may also experiment with different targets that may be more effective at illustrating results and success. Moreover, states can even collect data through PFS on other related and important metrics. For instance, a program that helps those struggling with drug addiction can also collect information on the number and cost of emergency room visits of those participating in the program. Thus, states can not only help individuals, but can also collect data related to important state services that are otherwise difficult to ascertain.

### CONCLUSION

Hundreds of thousands of individuals are released from prison annually and face a host of barriers to securing housing upon their reentry. Housing is the key to successful re-entry. Without housing, everything else falls apart. States can not only save budget dollars by reducing recidivism through securing safe housing for formerly incarcerated people, but also can help whole communities and provide meaningful second chances for many individuals.

The current litigation regime is too limited to make any real systemic difference in society or to offer practical help to those being discriminated against due to their criminal histories. State governments are currently facing a crisis of funding at the federal level, and are likely unwilling or unable to fund housing programs for the formerly incarcerated through traditional government public financing mechanisms. The PFS model is a unique tool that would allow states to invest in programs that offer true second chances to formerly incarcerated people that begin with securing safe, stable, and affordable housing. States have used this model to tackle issues that overlap with recidivism; however, few states have focused specifically on reducing recidivism with a primary focus on housing.

Responsibly designed, implemented, and operated PFS programs provide states with the unique opportunity to do just that.