January 2016

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NO HOPE FOR REDEMPTION: THE FALSE CHOICE BETWEEN SAFETY AND JUSTICE IN HOPE VI EX-OFFENDER ADMISSIONS POLICIES

KATHLEEN F. DONOVAN*

INTRODUCTION

Since the beginning of America’s current real estate-fueled recession, the nation’s focus has been on one of our most limited resources—affordable housing. As unemployment and foreclosure rates rose during 2008 and the beginning of 2009, major cities reported large increases in homelessness. The economic

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2 Trymaine Lee, Families With Children in City Shelters Soar to Record Level, N.Y. TIMES, Dec. 22, 2008, at A27 (“The number of homeless families with children entering New York City shelters hit a record high last month, climbing more than 40 percent from the same period last year.”); Lisa Black, More Economic Fallout: Homelessness in Students, CHI. TRIB., Feb. 13, 2009, § 4,
downturn will likely put further stress on the already strained public housing supply, as more and more Americans seek access to affordable housing. For Americans with the lowest incomes, federally subsidized public housing is one of the only viable options. Current public housing options, however, cannot provide sufficient housing units required by the growing number of Americans in need of these services.

Despite the recent focus on these issues, the United States has faced a crisis in affordable housing availability for decades. In fact, "[s]ince 1937, when the first federal legislation was enacted to provide housing for low income people, there has been an acknowledged crisis in affordable housing." The Department of Housing and Urban Development (HUD) estimates that less than one-third of the 15 million Americans eligible for public housing receive federally-subsidized assistance. The consequences of this shortage are increased homelessness, long wait-

1 (discussing the 67% rise in the number of students in Chicago schools who are homeless).
3 Joint Center for Housing Studies, Harvard University, Meeting Multifamily Housing Finance Needs During and After the Credit Crisis: A Policy Brief 3 (describing the lack of available affordable multifamily rental housing in the United States, as well as the number of Americans in need of such housing). “[A] staggering 79 percent of multifamily renters in the lowest quartile and 45 percent in the lower-middle income quartile spend more than half their income on housing.” Id.
4 For example, the New York City Housing Authority (NYCHA), the largest public housing authority in the United States, reported that as of January 31, 2010, their waitlist consisted of over 130,000 families. These families are waiting for one of the 178,556 apartments run by the NYCHA, though it is unlikely they will get off the waitlist soon because of the authority’s small 3.21% turnover rate. N.Y. City Hous. Auth., About NYCHA (2010), http://www.nyc.gov/html/nycha/html/about/factsheet.shtml.
ing lists, and stringent admission policies by public housing authorities (PHAs).

These admission policies have become increasingly important in the 21st Century since the implementation of HOPE VI, a “program provid[ing] grants to public housing authorities to demolish severely distressed public housing units.” HOPE VI, which was permanently authorized in the Quality Housing and Work Responsibility Act of 1998, eliminated the historical “one for one” replacement requirement, mandating that PHAs replace each demolished housing unit with a new unit. Instead, under HOPE VI, eliminated units are only partially replaced by units in new mixed-income projects. Consequently, the implementation of HOPE VI has resulted in an overall decrease in public housing units in some cities, coupled with a decrease in the percentage of units available to the neediest families. “Chicago’s HOPE VI, ‘Plan for Transformation,’ is arguably the country’s most ambitious recent public housing reform plan.” For this reason, this article will use the “Plan for Transformation” as the primary example of the policies and realities of HOPE VI public housing.

7 For example, Chicago’s waiting list contains 56,000 families, and the list has been closed since 2001. Jason Grotto, Laurie Cohen, & Sara Olkon, Public Housing Limbo, CHI. TRIB., Jul. 6, 2008, at 1.
9 Williams, supra note 5, at 439.
12 Id. at 1109.
13 For example, under Chicago’s “Plan for Transformation,” the total number of public housing units will be reduced by 13,000. Lisa T. Alexander, A Sociological History of Public Housing Reform in Chicago, 17 J. AFFORDABLE HOUS. & CMTY DEV. L. 155, 160 (2008).
14 Id. at 155.
One of the many admissions policies used to weed through applicants is the denial of public housing to applicants who have a criminal background. PHAs are authorized by HUD to screen for "[a] history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants." PHAs apply the HUD application standards with varying levels of stringency, with some issuing blanket exclusions to tenants who commit specific offenses for a set period of years. Additionally, under the "one-strike-and-you’re-out" policy advocated by President Clinton in the heat of the "War on Drugs," PHAs utilize and enforce strict eviction rules for tenants who use drugs or commit crimes during their tenancy. These exclusionary policies are typically justified by the PHAs’ responsibility to provide “decent and safe” public housing for all tenants.

This article advocates a change to exclusionary policies that deny public housing admission to ex-offenders. Such policies run contrary to the general purpose of public housing, they do not adequately accomplish their goal of making public housing and the surrounding communities safer, and they are far too punitive while lacking justification under any traditional theory of criminal punishment. In sum, the few benefits of these exclusionary

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15 Nussbaum, supra note 8, at 710 n.63 (identifying the authority of PHAs to look at criminal background information).
19 No Second Chance, supra note 17, at 560.
policies are outweighed by the unfair burden placed on applicants with criminal backgrounds.

In analyzing exclusionary housing policies, it is necessary to look first to the development of public housing laws in the U.S. Part I will describe the evolution of federally funded and subsidized housing in the U.S., and current exclusionary policies that deny admission to ex-offenders. Part II will seek to show that excluding applicants with criminal backgrounds does not adequately serve either of the public housing goals of providing housing for Americans in need or providing for the safety of housing tenants. Finally, Part III will evaluate the punitive effect of the exclusionary admission policies and argue that these policies lack grounding in the traditional theories of criminal punishment. In closing, this article proposes some reforms to housing policies to bring them in line with the goals of public housing and limit the punitive impact on ex-offenders.

I. DEVELOPMENT AND CURRENT STATE OF THE LAW

Responding to the economic blight created by the Great Depression, the U.S. initiated its first public housing program with the passage of the Housing Act of 1937 (1937 Act). The 1937 Act was intended “to assist the several States and their political subdivisions” in addressing, among other things, “the acute shortage of decent, safe, and sanitary dwellings for families of low income.” The system was designed so that local PHAs must apply for funding from the federal government, in order to receive the capital financing needed to develop public

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22 Id. at 888.
housing projects. In return for the government’s role in “underwriting the full capital cost of the development,” the PHAs agreed to federal regulatory oversight. Interestingly, Congress chose this format in response to federal court rulings holding that the acquisition of land by the federal government for public housing violated the Takings Clause. As a result, Congress vested the primary responsibility for development of public housing projects in local PHAs, which are “municipal corporation[s] created pursuant to state enabling legislation.”

Twelve years later, Congress followed with its second major piece of housing legislation, the Housing Act of 1949. Congress recognized the “serious housing shortage” in the U.S. and stated that the general welfare required “the realization ... of a decent home and suitable living environment for every American family.” At the same time, however, Congress also initiated the seemingly competing agendas of slum clearance and urban redevelopment. It is important to note that even early housing legislation recognized the trade-off between providing housing for

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23 Id. at 891. See Michael H. Schill, Distressed Public Housing: Where Do We Go From Here?, 60 U. CHI. L. REV. 497, 499-500 (1993) [hereinafter Schill, Distressed Housing], for a good description of how the 1937 program was designed to work.

24 Schill, Distressed Housing, supra note 23, at 499-500; see also Stone, supra note 20, at 6-7 (providing a brief description of the program developed by the Housing Act of 1937).

25 United States v. Certain Lands in Louisville, 78 F2d 684, 687 (6th Cir. 1935); Schill, Distressed Housing, supra note 23, at 499 n.12.

26 Schill, Distressed Housing, supra note 23, at 499 n.11.


28 Id. at 413.

29 Id.; See also Williams, supra note 5, at 427 (calling the goals of providing housing for low income families and achieving slum clearance “somewhat contradictory purposes”); Michael Schill, Privatizing Federal Low Income Housing Assistance: The Case of Public Housing, 75 CORNELL L. REV. 878, 904 (1990) [hereinafter Schill, Privatizing Housing] (explaining why these two goals are contradictory and how slum clearance became the focus and priority of the 1949 and 1954 housing legislation).
all needy Americans and providing housing that was free of the dangers associated with urban slums.

The Department of Housing and Urban Development Act of 1965 created a cabinet-level agency to administer the public housing program.30 HUD exists today as the regulatory body that guides PHAs in the administration of their housing programs.31 After Congress recognized “the increasing importance of housing and urban development in our national life” in 1965,32 President Nixon halted construction of federal housing projects by declaring a “moratorium” in 1973.33 Responding to pressure from the real estate and construction industries that were concerned that federal housing was too competitive with the private market,34 Congress passed the Housing and Community Development Act of 1974 (1974 Act).35 The 1974 Act initiated the Section 8 Housing Assistance Program (Section 8), a private market solution to the federal housing program problem that subsidized low-income housing developed by private owners.36 In addition, the 1974 Act created a tenant-based housing program, through which individual tenants could rent apartments from private owners with the use of Section 8 subsidies.37

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31 No Second Chance, supra note 17, at 561.
32 Department of Housing and Urban Development Act of 1965 § 3, supra note 30 at 667-668.
33 Williams, supra note 5, at 430 (discussing the circumstances leading to the moratorium and why public housing was so controversial in the 1970s).
34 Id. at 429.
36 Williams, supra note 5, at 430. The project-based assistance portion of the 1974 Act, which provided funds for the development of public housing projects by private developers, is no longer an extremely relevant portion of the Act. “After 1981, no new project-based subsidies were authorized.” Id. at 440.
37 DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SECTION 8 TENANT-BASED HOUSING ASSISTANCE: A LOOK BACK AFTER 30 YEARS 5 (2000) [hereinafter HUD, SECTION 8]. The rent subsidy was originally set so
The Section 8 program was expanded under the Department of Housing and Community Development Act of 1987 (1987 Act). The 1987 Act adjustments gave families added flexibility and freedom to choose more costly apartments—despite the government subsidy remaining the same—and apartments outside the jurisdiction of the issuing PHA.

The most recent large-scale change to the public housing program came in 1993, when Congress codified HUD’s HOPE VI program. The program aims to replace distressed public housing units with newer housing in mixed-income developments. HOPE VI faces criticism for several reasons: the lack of a one-for-one replacement of units, the potential that new units will be too expensive for existing public housing tenants, and the

that tenants would pay 15-25% of their income toward their apartment rent, but this amount was later raised to 30%. Id.


39 HUD, Section 8, supra note 37, at 5-6.


42 Garnett, supra note 11, at 1110-11 (“Perhaps most significantly, the 1998 Act eliminated the requirement that public-housing authorities replace demolished public-housing on a one-for-one basis, thus clearing the way for the demolition of high-rise projects and their replacement with privately managed, less dense, mixed-income developments.”); see also Alexander, supra note 13, at 166.

43 Williams, supra note 5, at 439 (discussing several criticisms of the HOPE VI program, such as that the new housing will be “financially out of the reach of the people who were displaced.”).
reality that some new units will be unavailable to the neediest tenants based on the mixed-income nature of the project.44

The Chicago Housing Authority’s (CHA) “Plan for Transformation”45 provides an illustrative look at the problems that arise from HOPE VI reformation plans.46 The CHA’s plan is typical of the HOPE VI mixed-income replacement model. It aims to replace high-rise public housing projects with low-rise buildings and townhomes, approximately 30% of which will be located in mixed-income developments.47 The demolition of old units was justified based on the physical state of the high-rises,48 the high concentration of poverty and crime,49 and criticisms of racial segregation.50 Despite its laudable goals, Chicago’s plan fails in one major respect: it reduces Chicago’s public housing stock by

44 For example, Chicago’s HOPE VI Plan for Transformation includes designs for mixed-income development that will reserve only 1/3 of its units for public housing tenants. The remainder of the units are split between individuals with incomes between 50-80% of the median county income and individuals earning over 80% of the median county income. Alexander, supra note 13, at 160 and 166.
46 Alexander, supra note 13, at 155 (“Chicago’s HOPE VI, ‘Plan for Transformation,’ is arguably this country’s most ambitious recent public housing reform plan given the number of units being demolished and rebuilt, as well as the complex network of public and private partnerships the plan necessitates.”); Popkin, supra note 41, at 151 (reflecting on Chicago’s status as having the worst distressed public housing in the nation).
49 Garnett, supra note 11, at 1109-10.
50 Grotto et al., supra note 7.
13,000 units. This number does not completely reflect the number of displaced public housing residents, however, because only one-third of the 25,000 new units will be available for public housing residents.

Further, delays in production of new units because of government inefficiencies and the recent housing market crash have only exacerbated the situation, as many of the old units have already been demolished.

In addition to displacing current public housing residents, the program imposes higher standards on current residents seeking mixed-income site housing. These site-based selection criteria are in addition to, not in replacement of, the initial PHA requirements. Few public housing residents meet screening criteria for these mixed-income sites. For displaced residents unable to meet mixed-income development screening criteria, Chicago's plan, like many HOPE VI plans, offers Section 8 vouchers or the opportunity to move to another public housing project.

The development of housing laws in the U.S. highlights both the lack of adequate public housing to shelter low income families, as well as the government's interest in reducing crime and promoting safety in public housing. Recent HOPE VI measures indicate that current public policy favors housing that avoids a

51 Alexander, supra note 13, at 160. For example, the Robert Taylor Homes, once the nation's largest public housing development, was chosen by the CHA for demolition under the federal government’s “Hope VI” program. Garnett, supra note 11, at 1108-09.
52 Alexander, supra note 13, at 160.
53 Grotto et al., supra note 7. Some developments have bank loans that require 50% of the market rate homes to be sold before construction can be initiated. After the recession began, it became impossible to sell these new homes, preventing the start of construction on even the public housing portion of the development. Id.
55 Popkin, supra note 41, at 152.
concentration of poor residents in an effort to promote the safety of the residents able to acquire a coveted spot in the new mixed-income developments. HUD and PHAs justify exclusionary admission policies targeting individuals with criminal backgrounds based on this same logic. HOPE VI has increased the importance on these exclusionary policies in traditional public housing because of the reduction in the overall number of units and the strengthening of admissions requirements. The Section 8 voucher remedy is also problematic due to its reliance on the private market, which provides its own unpredictable limitations on the admissibility of ex-offenders. An analysis of exclusionary policies can best be broken down into those affecting traditional public housing and those affecting the Section 8 voucher program.

A. Exclusionary Policies in Traditional Public Housing Programs

Exclusionary policies in traditional public housing come in two forms: policies excluding ex-offenders at the application phase and policies allowing for the eviction of tenants who commit crimes during their tenancy.

57 See Garnett, supra note 11, at 1109-11 (discussing the policies behind HOPE VI, and the Chicago Plan for Transformation).
58 Manigo v. New York City Hous. Auth., 273 N.Y.S.2d 1003, 1004 (N.Y. Sup. Ct. 1966) (“Without a proper screening of prospective tenants the dangers to those persons residing therein would be multiplied many times over.”); Michael Pinard & Anthony C. Thompson, Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594 (2006) [hereinafter Pinard, Offender Reentry] (arguing that in some ways the exclusionary policies make sense because they are “designed to ensure safety of public housing tenants by empowering officials to remove a current threat”).
59 This note uses the term “traditional public housing” to describe both the older high-rise projects developed under the original housing laws and the new mixed-income developments created under HOPE VI.
1. Exclusionary Admissions Policies

The Code of Federal Regulations (The Code) provides guidance to PHAs in developing admission criteria for public housing.\(^{60}\) The Code advises PHAs to evaluate each family’s suitability for tenancy in public housing based on a variety of factors.\(^{61}\) In determining suitability for tenancy, the PHA is required to consider whether any of the family members have “[a] history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants.”\(^{62}\) Legislation provides that the National Crime Information Center and law enforcement agencies will make criminal records available to PHAs upon request for the purpose of assistance in admission screening and eviction.\(^{63}\)

Despite the suggested screening requirements, Congress also mandated a case-by-case analysis based on the “time, nature, and the extent of the applicant’s conduct (including the seriousness of the offense)”\(^{64}\). The guidelines suggest that PHAs look to the likelihood of future offenses based on evidence of rehabilitation and willingness to cooperate with counseling services.\(^{65}\) There are only two crimes that carry automatic lifetime bans from federal housing: crimes resulting in lifetime registration on a state sex offender registration program\(^{66}\).


\(^{61}\) Id. (providing the following factors for guidance: ability to pay rent and other financial obligations; history of disturbance, destruction of property, and poor housekeeping; and history of criminal activity).


\(^{63}\) 42 U.S.C. § 1437d(q)(1)(A) (2000); 24 C.F.R. § 5.903(a)-(c) (2003). There are limitations on the availability of juvenile criminal records. 42 U.S.C. § 1437d(q)(1)(C). The release of juvenile record information must be authorized by applicable State and local law. Id.


\(^{65}\) Id.

and conviction for the manufacture and production of methamphetamine.\(^{67}\)

Aside from these guidelines, "Congress gave vast discretion to local housing authorities to establish their own eligibility standards regarding criminal records."\(^{68}\) As a result, PHA-mandated admissions requirements vary greatly based on locality. Although many PHAs do not completely advertise their admission standards, a recent Legal Action Center study on the obstacles to prisoner reentry details the admission policies of the major housing authorities in each state and the District of Columbia.\(^{69}\) The study highlights restrictive policies in PHAs across the country. Although the two largest city PHAs, New York and Chicago, do not base admission decisions on arrests that do not result in conviction, many PHAs do consider arrests themselves.\(^{70}\) Housing authorities in Atlanta, Birmingham, Indianapolis, Las Vegas, Newark, Philadelphia, Salt Lake City, and elsewhere allow a prior arrest without conviction to impact an

\(^{67}\) 24 C.F.R. § 966.4(l)(5)(i)(A) (2006). Methamphetamine carries consequences that are more severe than other drug-related offenses because of the volatile production process, which often results in unsafe living conditions and risk of explosion.

\(^{68}\) Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. REV. 623, 638 (2006) [hereinafter Pinard, Integrated Perspective] (discussing the wide discretion given to PHAs in determining admissions standards, and how this has led to a massive increase in collateral consequences for ex-offenders).

\(^{69}\) Legal Action Center, After Prison: Roadblocks to Reentry, http://www.lac.org/roadblocks-to-reentry/index.php [hereinafter Roadblocks to Reentry]. The Roadblocks to Reentry study was completed in 2004, but Legal Action Center has updated the study to include changes in state law as these changes have come to their attention. The study contains state law material on subjects other than housing; however, the housing material is easily accessible. The "What’s the Law" tab will navigate to a page where it is possible to look up the relevant laws and regulations by state. Id.

\(^{70}\) Id.; see also Council of Large Public Housing Associations, Largest PHAs by Unit, http://www.clpha.org/page.cfm?pageID=490 (listing the largest PHAs by unit size, and ranking New York and Chicago as the largest two city PHAs).
applicant's admissibility for public housing. Additionally, PHAs in Minnesota consider arrests if there have been a pattern of arrests in individuals' criminal history, while the District of Columbia considers arrests for certain offenses, such as drug-related and violent offenses, sex offenses, and offenses against people and property.

Many PHAs have admission standards that completely bar applicants who committed certain crimes from receiving public housing for a certain number of years. Because of the latitude given to PHAs discretion, there is wide variation in the number of years an applicant can be barred, as well as the types of crimes that warrant a bar. For example, PHAs in Atlanta, Boston, Dallas, the District of Columbia, and Los Angeles utilize no specific time bars. Other cities, including Chicago, Detroit, Philadelphia, and Salt Lake City only employ bars for applicants

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71 Roadblocks to Reentry, supra note 69; see also Atlanta Housing Authority, Application for Housing 4, available at http://www.atlantahousing.org/pdfs/Leasing%20Application-Online-070105-Family%20Communities.pdf (asking applicants to explain any past criminal history, including arrests); Housing Authority of the Birmingham District, How Families are Selected to Participate, http://www.habd.org/Housing%20Management.htm (“All family members must be clear of any history of criminal activity involving drug or alcohol abuse or crimes of physical violence to persons or property.”); Indianapolis Housing Agency, The Georgetown Admissions & Continued Occupancy Policy 19, available at www.indyhousing.org/ACOP%20-%20Georgetown.pdf (providing the agency’s admissions standards and indicating that applicants who have been “convicted of, or arrested in connection with” crimes such as drug distribution, assault, theft, fraud, and disturbance of the peace may be denied public housing) (emphasis added).


73 See Roadblocks to Reentry, supra note 69.

74 Id.; see also Housing Authority of the City of Los Angeles, Admissions and Continued Occupancy Policy 6-7 (2007), available at http://www.hacla.org/attachments/wysiwyg/10/ACOPPlan2008.pdf (describing the
who committed drug-related or violent offenses.\textsuperscript{75} These bars are arguably the most relevant because of the consensus that they are most harmful to the safety and health of other residents.\textsuperscript{76} One drug possession conviction will result in bars from public housing in Seattle and in Norfolk.\textsuperscript{77}

The most troubling bars are those attached to offenses that are neither violent nor drug-related. It is difficult to see how these crimes can be justified on the basis of the health and safety of other residents. For example, a single prostitution offense carries a bar between two and five years with the Seattle Housing Authority.\textsuperscript{78} In PHAs in Virginia, public urination and "immoral conduct" carry bars between three and 10 years.\textsuperscript{79} Finally, some bars are suspect simply because of their length. Drug trafficking carries a 10-year ban in Birmingham, and arson carries a lifetime ban in Chicago.\textsuperscript{80}

\textsuperscript{75} Roadblocks to Reentry, supra note 69. Chicago, Detroit, and Philadelphia have three-year bars for these offenses, and Salt Lake City has a ten year bar. Id.

\textsuperscript{76} Pinard, Offender Reentry, supra note 58 and accompanying text.

\textsuperscript{77} Roadblocks to Reentry, supra note 69. The Seattle PHA imposes a two to five year bar for drug possession. Id. But see Seattle Housing Authority, Eligibility, http://www.seattlehousing.org/housing/ipm/eligibility/ (indicating that the time bar for drug possession is two years but substance delivery will bar an applicant for five years). A single drug possession conviction will result in a three year bar in Norfolk, but multiple convictions will increase the ban to five or ten years, depending on the conviction number. Roadblocks to Reentry, supra note 69. Additionally, PHAs in Ohio impose three-year bars for drug-related misdemeanors. Id.

\textsuperscript{78} Roadblocks to Reentry, supra note 69.

\textsuperscript{79} Id. Virginia also bars applicants with multiple convictions for forgery, shoplifting, and altering prices for a period between three and five years. Id.

\textsuperscript{80} Roadblocks to Reentry, supra note 69.
2. Exclusionary Eviction Policies\textsuperscript{81}

HUD guidelines call for PHA lease provisions to require tenants to refrain from criminal activity, drug-related criminal activity and drug or alcohol abuse on or off the premises under threat of eviction.\textsuperscript{82} Congress enacted the “one-strike-and-you’re-out” statute\textsuperscript{83} in 1996 as an “anti-crime measure” to solve the issues of rampant crime in public housing.\textsuperscript{84} “The statute provides for the eviction of tenants living in housing projects funded by the Federal government, or otherwise receiving Federal housing assistance, if they . . . engage in certain types of criminal activity on, and in some cases, off, the public housing premises.”\textsuperscript{85} Moreover, in grading the PHAs, HUD awards points to those PHAs that can show that they have policies and procedures in place to evict such violators.\textsuperscript{86}

In \textit{Lowell Hous. Auth. v. Melendez}, the Supreme Judicial Court of Massachusetts upheld the eviction of a public housing tenant for the robbery of a convenience store located one mile from the housing project.\textsuperscript{87} Rejecting the tenant’s claim that a crime committed off of the public housing site could not

\begin{itemize}
\item This Note will primarily focus on exclusionary admissions policies, rather than exclusionary eviction policies. It is important to recognize the impact of exclusionary eviction policies on public housing residents. However, they are less suspect because individuals who commit crimes while residents of publicly-assisted housing violate the leases that are signed with the PHAs. See infra note 83 and accompanying text. Additionally, they are not speculative in nature like the admissions policies, which essentially predict criminal behavior based on past criminal actions. Crimes committed during tenancy pose threats to other residents at that moment, and thus eviction based on these crimes is not speculative of future criminal activity.
\item 42 U.S.C. § 1437d(1)(6) (2000); see also supra note 18 and accompanying text.
\item \textit{Id.}
\item \textit{Lowell Hous. Auth.}, 865 N.E.2d at 741-42.
\end{itemize}
“threaten the health, safety, or right to quiet enjoyment of other tenants,” the court ruled that certain types of criminal activity are so violent or dangerous that they threaten and incite fear in tenants forced to live near the actor. Further, the court noted that the Massachusetts version of the “one-strike” law stipulates that tenants facing eviction for such activities are not entitled to an eviction hearing, a common right of tenants facing eviction.

Eviction guidelines also call for tenants to prevent other household members and guests from engaging in similar criminal activities. These control requirements are the focus of much legal scholarship and litigation. The Supreme Court interpreted these lease regulations as containing a strict liability, or no fault, requirement. According to the Court in Department of Housing and Urban Development v. Rucker, the Code’s plain language “requires leases that grant public housing authorities the discretion to terminate tenancy without regard to the tenant’s knowledge of the drug-related criminal activity.” The Court expressed approval for this lease requirement, citing the benefits of deterrence and efficient enforcement.

Despite PHA authority to develop strict eviction policies, Congress indicated that it still expected a case-by-case analysis. Because the PHA is in the best position to judge the pros and cons of an eviction, each potential eviction must be reviewed by the PHA. The federal regulations clearly indicate, moreover, that eviction is an available, but not mandatory, remedy. Evidence of this can be found in the language of the federal regula-
tions themselves. In determining whether eviction is appropriate in a particular case, the PHA can consider several factors, including:

the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity, and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

B. Exclusionary Policies in the Section 8 Voucher Program

Exclusionary policies are of equal importance in the Section 8 program. As the public housing stock grows smaller, more and more applicants must turn to Section 8 vouchers to secure housing. Unfortunately, extremely long waiting lists are also characteristic of the Section 8 program. Facing the same pressure as traditional public housing to narrow their waitlists and promote the safety of other tenants, the federal government also established guidelines for admission into the Section 8 voucher program. According to government policy, “tenant screening and selection is the responsibility of the landlord;” however, PHAs are still encouraged to screen tenants, because they have

96 Throughout the statute, permissive language is used. It is said that certain offenses “permit” or are “grounds” for eviction or termination of tenancy, but not that these offenses mandate termination. 24 C.F.R. § 966.4 (2003).
97 24 C.F.R. § 966.4(l)(5)(vii)(B) (2003); Rucker, 535 U.S. at 134. (listing the factors to consider, including the crime level at the housing project, the severity of the crime in question, and whether the tenant tried to prevent the occurrence of the crime. Id.
98 See supra, notes 40-59 and accompanying text.
100 See supra note 58.
more resources at their disposal. This means that not only will local PHAs have the authority to develop admissions criteria that will apply to voucher holders, but ex-offenders and their families will face the additional obstacle of approval by the property owner.

Landlords who participate in the Section 8 program are free to use their own screening devices, which can be even more stringent than the federal rules. There would appear to be nothing to prevent a private landlord from saying that he or she will not accept Section 8 voucher holders who have convictions for even minor offenses.

Section 8 landlords are entitled to criminal background information as well. After a request by the owner is made, the PHA within the landlord’s jurisdiction will access the criminal records and “perform determinations for the owner regarding screening, lease enforcement and eviction based on criteria supplied by the owner.”

Because private landlords often use the same admissions requirements as PHAs, Section 8 vouchers are not a realistic alternative to traditional housing projects. “[I]t is unlikely that a privately managed program like Section 8 would work effectively with [ex-offenders].” Ex-offender applicants seeking

102 HUD, Section 8, supra note 37, at 6, 12.
103 42 U.S.C. § 1437f(d)(1)(A) (2000) (“To be eligible to receive assistance under this subsection, a family shall, at the time a family initially receives assistance under this subsection, be . . . a low-income family that meets eligibility criteria specified by the public housing agency.”).
104 42 U.S.C. § 1437f(d)(1)(A) (“[T]he selection of tenants shall be the function of the owner.”).
105 John J. Ammann, Criminal Records of the Poor and Their Effects on Eligibility for Affordable Housing, 9 J. AFFORDABLE HOUS. & COMM. DEV. L. 222, 225 (2000).
106 42 U.S.C. § 1437d(q)(1)(B) (2000); 24 C.F.R. § 5.903(d) (2003). The PHA’s authority to access records was discussed in the previous section. See supra text accompanying notes 63-64.
107 Williams, supra note 5, at 436 n.188.
Section 8 housing will first have to meet the eligibility requirements set forth by their local housing authority.\textsuperscript{108} For many applicants with criminal records, this will be impossible.\textsuperscript{109} If, however, they are able to qualify under PHA requirements, they will be placed on a long waitlist and may ultimately be denied by private landlords based on the very same criminal record.\textsuperscript{110}

II. \textsc{The Efficacy of Ex-Offender Exclusions}

An analysis of exclusionary housing policies must take into account the effect of such policies on both the applicants themselves and the current residents within public housing developments. As previously discussed, PHA regulations denying admission to ex-offenders affects a significant proportion of the population in need of public housing.\textsuperscript{111} In enacting these policies, HUD and the PHAs are implicitly valuing the public safety of other tenants over the ex-offenders' need for housing.\textsuperscript{112} This section will detail why ex-offenders are some of those most in need of public housing. I also argue that the goal of public safety fails to justify these exclusionary practices and ex-offenders' access to public housing should prevail over such considerations.

\textsuperscript{108} See \textit{supra} Part I(A)(1) for a discussion of the eligibility requirements set forth by PHAs in accordance with federal guidelines.  
\textsuperscript{109} Williams, \textit{supra} note 5, at 436 n.188.  
\textsuperscript{110} See Ammann, \textit{supra} note 105, at 225.  
\textsuperscript{111} \textsc{Urban Institute Justice Policy Center, \textit{Taking Stock: Housing, Homelessness, and Prisoner Reentry}} ii–iii (2004), http://www.urban.org/UploadedPDF/411096_taking_stock.pdf [hereinafter \textsc{Urban Institute, Taking Stock}] (describing the variety of housing challenges faced by prisoners attempting to return to their communities).  
\textsuperscript{112} \textit{No Second Chance}, \textit{supra} note 17, at 554.
A. Ex-Offenders’ Desperate Need for Public Housing

Over 600,000 state and federal prisoners are released each year, in addition to the 10 million released from local jails. A majority of these released prisoners are considered low-income, and around 10% were homeless when they entered prison. These ex-offenders “return to their communities with fewer resources and more needs than when they left.” Most people intuitively understand that ex-offenders are some of the neediest public housing applicants. However, the situation is more serious than many may think.

Ex-offenders face major challenges in acquiring housing that goes beyond the typical affordability issues faced by other low-income families. Because they were not income earners while incarcerated, they typically lack the funds necessary to pay rent

113 URBAN INSTITUTE, TAKING STOCK, supra note 111, at ii (discussing the large increase in the number of prisoners released over the last few decades); see also URBAN INSTITUTE JUSTICE POLICY CENTER, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE’S PRISONER REENTRY PORTFOLIO 2 (2006), http://www.urban.org/url.cfm?ID=411289 [hereinafter URBAN INSTITUTE, PRISONER REENTRY PORTFOLIO] (estimating the number of prisoners released in 2003 to be as many as 650,000).


115 PRISONER REENTRY AND CRIME IN AMERICA 26 (Jeremy Travis & Christy Ann Visher eds., Cambridge Univ. Press 2005) [hereinafter CRIME IN AMERICA] (describing the make-up of the current U.S. state and federal prisoner population). The 10% statistic refers to those prisoners entering into state prisons; the number of federal prisoners that were homeless before conviction is 4.9%. An additional 4.8% of prisoners at the state level and 2.2% of prisoners at the federal level were considered to be in “unstable housing at [the] time of arrest.” Id.

116 HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 2 (2004).

117 URBAN INSTITUTE, PRISONER REENTRY PORTFOLIO, supra note 113, at 8 (“The process of obtaining housing is often complicated by a host of factors: the scarcity of affordable and available housing, legal barriers and regula-
or put down a deposit. These prisoners return to their communities jobless, and many do not have a high school diploma to assist in acquiring stable employment. Additionally, most employers inquire into applicants' past criminal history and often reject applicants based on past convictions or arrests that bear little to no relationship to the job itself.

Most states permit employers to deny jobs across the board to anyone who has been convicted of a crime or a certain category of crime, without considering the circumstances of the offense, its relevance to the job, the amount of time that has elapsed, the job being sought, evidence of rehabilitation, or the "business necessity" for barring the applicant, in potential violation of [Equal Employment Opportunity Commission] guidelines.

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119 Joan Petersilia, When Prisoners Come Home 21 (Oxford Univ. Press 2003) (listing the demographic of U.S. prisoners, including employment statistics); Crime in America, supra note 115, at 25 (providing a breakdown of employment statistics between state and federal prisoners); see also Urban Institute, Prisoner Reentry Portfolio, supra note 113, at 2 (describing returning prisoners as having "limited marketable work experience [and] low levels of educational or vocational skills" that impair their ability to find employment).

120 Roadblocks to Reentry, supra note 69. According to Legal Action Center, 38 states allow employers to consider arrests that do not lead to conviction. Id.

121 Roadblocks to Reentry, supra note 69. The Equal Employment Opportunity Commission requires a "business justification" for application denial based on a prior arrest, and a "business necessity" for denials based on prior convictions. Id. This is made worse by the fact that most states do not exercise their power to grant certificates of rehabilitation, meant to remove many of the roadblocks typically burdening ex-offenders in the case of offenders who have shown evidence of rehabilitation. Id.
Some ex-offenders who are able to find employment are further burdened by state laws that prevent them from obtaining drivers' licenses. These laws are sometimes imposed even when the conviction is unrelated to driving, and not all states offer restricted licenses that allow travel for work-related purposes.

Ex-offenders' financial situations may be worsened by laws that ban ex-offenders from various types of public assistance, such as welfare. Federal law bans the provision of welfare benefits and food stamps to anyone who has committed a drug-related state or federal felony. States may opt out of the law, known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, but 17 states have fully adopted it. The removal of the welfare benefits safety net means that ex-offenders have even less means available to procure affordable housing.

Even if a returning prisoner was able to pay for private housing, many private landlords refuse to rent to ex-offenders. Some landlords refuse to rent to ex-offenders, because they are afraid they will be held liable for the ex-offenders' future crimes.

122 Roadblocks to Reentry, supra note 69; see also Nora V. Demleitner, “Collateral Damage”: No Re-Entry for Drug Offenders, 47 VILL. L. REV. 1027, 1037 (2002) [hereinafter Demleitner, Collateral Damage]. States have enacted these laws under pressure from the federal government. Ten percent of highway funds may be withheld if the state does not revoke or suspend the drivers license of an individual convicted of a drug-related offense. Roadblocks to Reentry, supra note 69.

123 Roadblocks to Reentry, supra note 69 (discussing the restrictive licenses that are available in 40 states for work, employment, and attending drug treatment programs).


125 Id.

126 Roadblocks to Reentry, supra note 69 (listing the seventeen states that have adopted the law in full form, the twelve states who have fully opted out, and explaining how the remaining states have provided that ex-offenders may receive benefits if they fulfill certain requirements).

127 Demleitner, Collateral Damage, supra note 122, at 1036; supra Part I(B).
nal acts. While the general rule is that a private landlord cannot be held responsible for crimes committed by tenants on the premises, some successful claims have been brought when it can be shown that the landlord knew of the tenant’s “dangerousness.” From the perspective of private landlords, many ex-offenders simply pose too great a risk.

Unable to afford or acquire housing in the private rental sector, “publicly supported housing is the only realistic option for [ex-offenders to find] safe and stable places to live.” Individuals’ status as ex-offenders diminishes the likelihood that they can afford private housing due to employment restrictions, and it attaches a social stigma that results in the unwillingness of landlords to rent to them. As a result, approximately 10% of prisoners returning home wind up homeless; in urban areas, this percentage increases anywhere from 30 to 50%.

Denying housing to ex-offenders, people who are otherwise incapable of finding acceptable housing options, directly conflicts with the federal government’s goal of providing decent homes for Americans in need. Instead, exclusionary admi-
sion policies are justified based on the goal of protecting the safety of other public housing tenants.\textsuperscript{134} Public housing projects are well-known havens for crime, gang warfare, and drug dealing.\textsuperscript{135} Although national statistics on the extent of crime in housing projects are unavailable, within some housing projects crime is more pervasive than in the surrounding communities.\textsuperscript{136} Although the majority of public housing projects are safe,\textsuperscript{137} the amount of crime in public housing became the source of national attention during the 1990s due to the proliferation of drug-related crime and the escalation in the “War on Drugs.”\textsuperscript{138}

B. Balancing Safety and Need: A Closer Look

Promoting the safety of residents is undoubtedly a legitimate and appropriate goal for HUD and PHAs. Exclusionary admission policies do not adequately accomplish this goal, because they are overbroad and fail to address a myriad of more impor-

\textsuperscript{134} No Second Chance, supra note 17, at 563. But see Id., at 564 (suggesting that these policies are also in place for two other reasons: 1) the “belief in the United States that people who have broken the law do not deserve a second chance,” and 2) because they provide a “politically cost-free” way to relieve some of the pressure on the already stressed housing supply).

\textsuperscript{135} Robyn Minter Smyers, High Noon in Public Housing: The Showdown Between Due Process Rights and Good Management Practices in the War on Drugs and Crime, 30 Urb. Law. 573, 573–74 (1998) (discussing the dangers of public housing projects in the United States and the national debate over how to handle these dangers); see also Schill, Distressed Housing, supra note 23, at 497.


\textsuperscript{137} Smyers, supra note 135, at 577; Schill, Distressed Housing, supra note 23, at 501.

\textsuperscript{138} Fagan, et al., supra note 136.
tant sources of crime in public housing projects. Further, they push ex-offenders toward recidivism.

1. The Truth about Recidivism

Current exclusionary admission policies are overbroad in both the type of offenses they cover and the number of applicants they exclude. Some exclusionary admission policies do not protect resident safety, because there is often only a "tenuous relationship" between the offending behavior and the safety of other residents. These policies are contrary to the HUD mandate, because they "cover individuals who may pose no current danger, but who happen to have criminal histories." For example, policies that exclude prospective residents for minor non-violent offenses, such as writing bad checks or shoplifting, do not relate to the safety of other public housing tenants. Similarly, the Seattle Housing Authority policy, mentioned above, denying admission to former prostitutes does not enhance the safety of Seattle Housing Authority residents. An applicant who has only written a bad check or has been convicted of a single prostitution offense cannot reasonably be pre-

139 Shill, Distressed Housing, supra note 23, at 507 (arguing that the physical distress of public housing units and the concentration of the poor leads to social disorder).
140 No Second Chance, supra note 17, at 546. (discussing how denying ex-offenders housing can be counter-productive for the communities they will return to). As previously discussed, a large number of prisoners returning home would otherwise be eligible for public housing because they are low income individuals. Because these individuals will likely be returning to low-income urban areas, and these are the areas where the housing projects are located, any resulting recidivism will affect the housing projects' communities. See Schill, Distressed Housing, supra note 23, at 504 for a discussion of how public housing projects came to be developed in low-income urban areas.
141 No Second Chance, supra note 17, at 546.
142 Pinard, Offender Reentry, supra note 58, at 594–95.
143 No Second Chance, supra note 17, at 567–68.
144 See supra note 78 and accompanying text.
sumed a safety risk to other public housing tenants. Therefore, safety concerns cannot adequately justify these broad exclusionary policies.

Moreover, exclusionary admission policies that automatically bar applicants for a specific number of years are overbroad, because they exclude many applicants unlikely to repeat offend.\footnote{See supra notes 73–80 and accompanying text (providing examples of some automatic time bars imposed by housing authorities across the country).} Studies show that approximately two-thirds of released prisoners are arrested for another offense within three years.\footnote{BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf; see also, e.g., URBAN INSTITUTE, PRISONER REENTRY PORTFOLIO, supra note 113, at 2.; URBAN INSTITUTE, TAKING STOCK, supra note 111, at iii.} Around 46\% of those arrests will result in another conviction.\footnote{BUREAU OF JUSTICE STATISTICS, supra note 146 at 1.} While at first glance, this statistic seems to support exclusionary housing policies, a further look at recidivism statistics highlights the need for an individualized review of ex-offender housing applicants. First, two-thirds of all recidivist offenses occur within the first year following release, so the majority of ex-offenders who recidivate will do so within the first year of their release.\footnote{BUREAU OF JUSTICE STATISTICS, supra note 146, at 3; URBAN INSTITUTE, TAKING STOCK, supra note 111, at iii.} Of these recidivist offenses, ex-offenders rearrested during the first year are typically arrested for property offenses, rather than violent offenses, undercutting the premise that such individuals pose safety risks in the future.\footnote{URBAN INSTITUTE, TAKING STOCK, supra note 111, at 12.} Exclusionary housing policies imposing elongated time bars ignore this fact. Because an applicant who has been crime-free for at least one year is far less likely to commit another crime than overall recidivism statistics suggest, housing bars that prevent admission for periods of over
one year are overly restrictive. The applicant who has been crime-free for at least one year should not be held to the same admission standard as another ex-offender applicant, because he has shown his ability to be a law-abiding citizen. Although HUD envisions application review on a case-by-case basis, taking into account factors such as remoteness in time, the automatic time bars put in place by many PHAs run contrary to this ideal. The imposition of a three-year bar on admission of individuals convicted of drug-related misdemeanors in Cleveland, Ohio housing authorities, for example, unnecessarily burdens many ex-offenders who would not re-offend or pose a safety risk. Automatic exclusions without individualized review are problematic, as they affect too many non-violent ex-offenders to be justified by a marginal or non-existent safety benefit.

Because exclusionary admission policies do not address the many causes of violence in public housing, safety in the public housing projects is not substantially improved. For example, many argue that there is a link between the physically distressed state of public housing and social disorder and crime. Deteriorated housing units with “leaky roofs, broken plumbing, and insufficient heat” diminish tenants’ quality of life, thus increasing the likelihood of criminal behavior. Units that are too dilapidated to rent are left vacant. These “units are vandalized and frequently used for illegal purposes, such as drug distribution or consumption.” This argument is similar to the “broken windows theory” used by Mayor Rudy Giuliani in New York City

150 See supra notes 73–80 and accompanying text (providing examples of some automatic time bars imposed by housing authorities across the country, many of which are longer than one year).
151 See supra note 64.
152 See supra notes 73–80.
153 Roadblocks to Reentry, supra note 69.
154 Schill, Distressed Housing, supra note 23, at 507.
155 Id.
156 Id.
during the 1990s to develop a strategy to reduce crime.\textsuperscript{157} This theory posits that signs of societal abandonment, such as broken windows, encourage vandalism by others, even “people who ordinarily would not dream of doing such things and who probably consider themselves law-abiding.”\textsuperscript{158} Further, abandonment and vandalism leads to the “breakdown of community controls.”\textsuperscript{159} This suggests that crime in public housing projects is less a product of admitted residents than of the physical state of the projects themselves. Therefore, policies excluding certain individuals from public housing will not increase safety because the physical state of the units will encourage criminal behavior, even in those individuals who would not otherwise be criminally-inclined.

The concentration of poverty, characteristic of most urban public housing projects,\textsuperscript{160} and poor management by public housing authorities\textsuperscript{161} have also been blamed for public housing’s violence and social disorder. Exclusionary admissions policies, by themselves, do not address these causes. Denying admission to ex-offenders does little, if anything, to reduce the concentration of poverty within a housing project, and these policies certainly do not affect PHA management.

2. \textit{Danger of Exclusionary Policies}

Most problematically, exclusionary admissions policies actually decrease safety in housing project communities. Studies have shown that returning prisoners who cannot find housing

\textsuperscript{157} Fagan, et al., \textit{supra} note 136, at 426 (addressing the policy in New York City to decrease crime by addressing “minor disorders such as public drunkenness and loitering, and concentrat[ing] on neighborhoods with visible signs of non-criminal disorder, such as empty lots, abandoned cars, and dilapidated buildings”).


\textsuperscript{159} Id.

\textsuperscript{160} Schill, \textit{Distressed Housing, supra} note 23, at 507.

\textsuperscript{161} Smyers, \textit{supra} note 135, at 574.
are more prone to repeat offenses. Indeed, an ex-offender’s inability to access subsidized housing ‘significantly diminishes’ her ability ‘to obtain and retain employment and [to] remain drug- and crime-free.’” Housing is inextricably linked with self-sufficiency, and “the tension and despair that bad housing can cause makes it extraordinarily difficult for persons forced to live in bad housing to rise above the circumstances of their surroundings.” Because many prisoners will return to communities that include public housing projects, these projects may suffer the consequences of the increased likelihood of recidivism. For example, the majority of prisoners in Chicago move to some of Chicago’s poorest neighborhoods, also home to many of the CHA’s remaining housing projects.

Exclusionary admissions policies are contrary to the general goal of public housing of providing a safety net for low-income Americans. These policies imply that ex-offenders do not deserve housing support. By denying admission to ex-offenders, PHAs value their responsibility to protect the safety of other

162 Archer & Williams, supra note 124, at 542–43; Demleitner, Collateral Damage, supra note 122, at 1028 (“[C]ommon sense indicates that depriving individuals access to legitimate means of survival contributes to higher rates of recidivism.”).
164 Salsich, supra note 6, at 51.
165 Urban Institute, Chicago Prisoners’ Experiences Returning Home 5 (2004), available at http://www.urban.org/url.cfm?ID=311115 [hereinafter Urban Institute, Chicago Prisoners] (stating that approximately 1/3 of Chicago’s returning prisoners move to six of Chicago’s poorest neighborhoods, including Austin, Humboldt Park, North Lawndale, Englewood, West Englewood, and East Garfield Park). The neighborhood of Englewood, for example, is home to two of Chicago’s public housing projects and is within a short distance of many more projects, including the Robert Taylor Homes. For a map of Chicago plotting the location the CHA’s housing projects, see cha.org, Housing, http://www.thecha.org/pages/housing/19.php.
166 No Second Chance, supra note 17, at 554.

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residents over their duty to act as the housing option of last resort for America’s destitute. This raises particularly troubling issues because of the questions regarding the actual effect of these policies on the safety of public housing projects. Exclusionary admissions policies fail to address some of the most commonly recognized causes of violence and social disorder in public housing, including the concentration of poverty in these projects, poor management by PHAs, and the deterioration of the physical state of these buildings. Further, these policies potentially decrease the safety of housing projects, because prisoners returning to those communities are more likely to recidivate if they do not have stable housing. Exclusionary admissions policies that are only tenuously related to the safety of other residents should be repealed, not only because they are of dubious efficacy, but also, extremely harmful to a large number of Americans in need of housing assistance.

III. Exclusionary Policies as Punitive Collateral Consequences

Part II showed that current PHA admission policies exclude one of the neediest groups of American citizens from publicly assisted housing. These policies seek to promote the safety of the remaining housing tenants, but for various reasons, they may not accomplish that goal. As such, given their minimal impact on the overall safety of the housing projects and the vast punitive impact on the lives of a growing number of ex-offenders, can these policies be justified? This section discusses the punitive nature of the exclusionary policies and analyzes these policies in light of different theories of punishment.

167 Archer and Williams, supra note 124, at 542-43.
168 See supra Part II (discussing how exclusionary admissions policies do not solve the crime problems in public housing because they do not address crime rates in the surrounding communities, management problems, and the physical state of disrepair of these projects, in addition to the risk they create of pushing ex-offenders toward recidivism).
Exclusionary admission policies are collateral consequences of crimes. Because these consequences constitute civil, rather than criminal, sanctions, they are “imposed without the protections and guarantees of the criminal justice system.” Despite their civil nature, however, these collateral consequences are inherently punitive, because they are a direct and automatic consequence of the crime. Additionally, they are typically justified using the same theories of punishment used in criminal sentencing decisions. The primary theories of punishment are incapacitation, retribution, rehabilitation, denunciation, and deterrence. Although it is generally accepted that punishment may only be justified if “some combination” of the theories support the punishment, exclusionary admissions policies do not succeed under any of the aforementioned theories.

A. Incapacitation

Incapacitation is the primary justification for exclusionary admission policies. This theory suggests that punishment of criminals is supported by the reduction in crime resulting from the individuals’ imprisonment. In the context of criminal sen-

169 Demleitner, Collateral Damage, supra note 122, at 1032.
170 Id. ("Collateral consequences are justified either on punitive, deterrent or preventative grounds."). As previously discussed, the most common justification for exclusionary admissions policies is that it will protect other public housing tenants. This is, essentially, the incapacitation theory of punishment. 171 See e.g., Carissa Byrne Hessick, Motive's Role in Punishment, 80 S. Cal. L. Rev. 89, 112 (2006); Ronald J. Rychlak, Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment, 65 Tul. L. Rev. 299, 300-301 (1990).
172 Hessick, supra note 171, at 112.
174 Id. at 161.
tencing, criminals may be imprisoned because society will be safer with them off of the streets. In terms of public housing, the theory is that public housing developments will be safer if these individuals are excluded. However, as discussed in Part II, this reasoning fails in the case of exclusionary housing policies. Ex-offenders often return to neighborhoods with housing developments. Refusing housing to ex-offenders does not keep criminals off of the streets but relegates criminals to homelessness, increasing the likelihood of recidivism. As such, exclusionary admission policies fail to keep ex-offenders away from public housing developments while increasing their potential dangerousness and decreasing the overall safety of the neighborhood.

Research completed on one branch of the incapacitation theory, selective incapacitation, provides more insight into the inefficiency of these exclusionary admission policies. "Selective incapacitation theory asserts that the effect of imprisonment on street crime is a direct function of the rate at which incarcerated offenders would have committed crimes if they were not confined." It focuses on the societal benefits that would come from imprisoning "career criminals" for extended periods of time. The success of this punishment strategy, however, depends on the ability to predict who will be a "career criminal," or recidivist. Because exclusionary admission policies exclude ex-offenders to protect tenants from the potential future acts of these individuals, they are necessarily predictive in nature. Thus, the statistics from selective incapacitation and recidivist studies are particularly relevant to an analysis of exclusionary housing policies.

176 See supra notes 162–65 and accompanying text.
177 Urban Institute, Chicago Prisoners, supra note 165 and accompanying text.
178 See supra notes 162–65 and accompanying text.
179 Selective Incapacitation, supra note 175, at 512.
180 Id. at 511.
These studies show that several factors incorporated in the exclusionary admission policies of many PHAs are not good indicators of future criminal behavior. An Institute for Law and Social Research study illustrates that arrest of individuals without a previous criminal record for a misdemeanor drug offense does not reliably predict future recidivism.\(^{181}\) Another study shows that prior prison sentences and prior felony convictions are “poor predictors of an offender’s level of criminal activity.”\(^{182}\) Many PHAs deny admission to applicants with a single drug offense or felony based on the presumption that these offenses indicate a high likelihood of future criminal conduct.\(^{183}\) These studies indicate that this premise is unsound, if not definitely false. Therefore, exclusionary admission policies cannot be justified by the incapacitation theory.

### B. Retribution

The retribution theory holds that an offender should be punished because their actions were blameworthy and deserving of punishment.\(^{184}\) However, the criminal punishments imposed on ex-offenders, such as prison time or the imposition of a fine, already reflects the offenders’ “just deserts.” By the time the ex-offenders are applying for housing, they “have paid their debt to society.”\(^{185}\) Collateral consequences only serve to punish ex-offenders more than the jury believed they deserved. Further, the

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\(^{181}\) Id. at 516 n.27 (describing “an arrest for a misdemeanor drug offense when the defendant had had no prior criminal record” as having “a negative correlation with recidivism”).

\(^{182}\) Id. at 517 n.37 (detailing the findings of the Rand Corporation’s Habitual Offender Project).

\(^{183}\) Illinois, Virginia, and Washington are just some of the states whose PHAs use single drug offenses or felony convictions to bar applicants for a term of years. Roadblocks to Reentry, supra note 69.

\(^{184}\) Hessick, supra note 171, at 113 (describing retribution theory).

\(^{185}\) Ben Geiger, The Case for Treating Ex-Offenders As a Suspect Class, 94 Cal. L. Rev. 1191, 1220 (2006); see also Demleitner, Preventing Internal Exile, supra note 173, at 160.
principle of proportionality is central to retribution theory, as punishments are to be allotted proportionally, reflecting the severity of the crime committed.\textsuperscript{186} Collateral consequences, such as exclusionary housing policies, are typically not proportional; rather, they are applied without being “calibrated specifically to the offense and the offender’s background.”\textsuperscript{187} For example, PHA policies that ban admission of all applicants who have been convicted of a felony within the last five years fail to consider any individual difference between applicants.\textsuperscript{188} Blanket denials such as these do not proportionally reflect society’s assessment of the proper punishment for the crime committed.

\textbf{C. Rehabilitation}

The rehabilitation theory focuses on punishing criminals in order to rid them of their criminal propensities and reduce the likelihood of future criminal behavior.\textsuperscript{189} This theory cannot be used to justify collateral consequences, such as exclusionary housing policies, for similar reasons as those establishing the insufficiency of the incapacitation theory. “There is widespread agreement that collateral sentencing consequences do not serve a rehabilitative function and may even actively thwart attempts at rehabilitation by preventing the ex-offender’s reintegration

\textsuperscript{186} Hessick, \textit{supra} note 171, at 113. ("The amount of punishment must be proportional to the punishment assigned to other similar (and dissimilar) offenses, and the amount of punishment must also be in proportion to the gravity of the offense itself.").
\textsuperscript{187} Demleitner, \textit{Preventing Internal Exile, supra} note 173, at 160.
\textsuperscript{188} \textit{No Second Chance, supra} note 17, at 546.
\textsuperscript{189} Hessick, \textit{supra} note 171, at 119. Once the primary justification for criminal punishment, rehabilitation has become less popular in the last few decades because of the general distaste for the indeterminate sentencing that was seen as a byproduct of rehabilitation theory. See generally Michael Vitiello, \textit{Reconsidering Rehabilitation}, 65 Tul. L. Rev. 1011 (1991).
Denying housing to ex-offenders creates a barrier to reintegration, leading to increased recidivism rates.\textsuperscript{191} 

D. Denunciation

"The denunciation theory of punishment says that those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents."\textsuperscript{192} Exclusionary housing policies certainly shame ex-offenders. It remains unclear, however, whether the rest of society believes that these ex-offenders should be treated this way. An Urban Institute of Chicago study of communities that house a large number of the city’s returning prisoners indicates that members of these communities may actually be sympathetic toward ex-offenders.\textsuperscript{193} In fact, these residents often felt that these ex-offenders were not responsible for crime in their communities.\textsuperscript{194} For the denunciation theory to operate properly, the values imposed on the shamed individual should reflect the values of society as a whole. Therefore, it is important to determine whether Americans believe exclusionary housing policies properly, rather than needlessly, shame the individual.

At the heart of the denunciation theory is the ability of ex-offenders to reintegrate into society.\textsuperscript{195} However, exclusionary admission policies fail to follow the denunciation theory because they do not provide ex-offenders with a realistic way to reintegrate into society.\textsuperscript{190} See supra notes 162–65 and accompanying text.\textsuperscript{191} Rychlak, supra note 171, at 331.\textsuperscript{192} Urban Institute, Chicago Prisoners, supra note 165, at 15. It should be noted that the individuals surveyed “were personally acquainted with at least one released prisoner, and the vast majority had close relatives and/or friends in the penal system.” Additionally, these individuals acknowledged that the rest of their community might feel differently toward ex-offenders. Id.\textsuperscript{193} Urban Institute, Chicago Prisoners, supra note 165, at 15.\textsuperscript{194} Demleitner, Preventing Internal Exile, supra note 173, at 160.
grate. 196 Lifetime bars for offenses, such as the production of methamphetamines, permanently denounce offenders. 197 More commonly, bars on admission do not last for the extent of the ex-offender's lifetime, 198 but they still last longer than the one-year period during which the offender is most likely to recidivate. 199

**E. Deterrence**

Criminal punishments are often justified based on their deterrent value. Under the deterrence theory, punishment is imposed to discourage future criminal conduct. 200 Specific deterrence is designed to discourage recidivism, while general deterrence is designed to discourage the rest of the population from committing the same offense. 201 The most common criticism of deterrence theory is that most crimes are committed under impulse and without a rational weighing of consequences. 202 Additionally, it is unlikely that exclusionary admission policies accomplish an actual deterrent effect, because collateral consequences are only a proportionally small addition to the overall criminal punishment, 203 and marginal increases in punishment typically do not decrease the number of crimes committed. 204 If a term of imprisonment is unable to deter an individual from committing

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196 *Id.* (“Denunciation does not aim at permanent exclusion but rather at reintegrating the offender into society after shaming her. Collateral consequences, on the other hand, stigmatize the offender ... and frequently make it impossible for her ever to regain full societal membership.”).

197 *See supra* notes 67 and 68.

198 *See supra* notes 73–80 and accompanying text.

199 **BUREAU OF JUSTICE STATISTICS, supra** note 146, at 3.

200 Hessick, *supra* note 171, at 115 (“Deterrence is the notion that the threat or fear of punishment will result in law abiding behavior.”).

201 *Id.*

202 *Id.* at 116; Demleitner, *Preventing Internal Exile, supra* note 173, at 161 (“[P]otential offenders do not usually weigh the costs and benefits of their actions.”).


a given crime, it is unlikely that a bar from public housing assistance will provide that incentive.

The lack of deterrent effect is compounded by the fact that collateral consequences are generally unknown to the public.\textsuperscript{205} Individuals unaware that they could lose their eligibility for public housing are incapable of factoring this consequence into their decision making. This renders void any deterrent value of exclusionary policies.

"To be justifiable, collateral sentencing consequences should be based on sound penological goals and be narrowly circumscribed to accomplish these goals."\textsuperscript{206} Exclusionary housing policies, however, cannot be justified by any of the theories of punishment used in criminal law. Ex-offenders have already served their time and paid their debt to society. Exclusionary policies compound their criminal sentences without justification and may in fact increase the likelihood of future criminal acts. As such, these overly broad policies should be amended.

CONCLUSION

Exclusionary admission policies bar thousands of otherwise eligible Americans from access to public housing each year. PHAs have interpreted HUD's general directions to allow automatic denials for a wide range of offenses. Many of these offenses are non-violent, and bars may last for periods unsupported by recidivism statistics.\textsuperscript{207} These individuals need housing to effectuate their successful reentry and reintegration into society. The Section 8 program, often offered as an alterna-

\textsuperscript{205} Demleitner, Preventing Internal Exile, supra note 173, at 160; Pinard, Offender Reentry, supra note 58, at 590 ("Not only offenders, but many participants in the criminal justice system remain wholly unaware of these consequences.").

\textsuperscript{206} Demleitner, Preventing Internal Exile, supra note 173, at 160.

\textsuperscript{207} See supra notes 69–80.
tive to traditional public housing, is not an adequate remedy because applicants face the same or stricter admission criteria.\textsuperscript{208}

Because of the extensive punitive impact of these policies, they can only be justified if they serve a sufficient penological purpose.\textsuperscript{209} However, the theories of deterrence, incapacitation, rehabilitation, denunciation, and retribution cannot be used to support these broad policies. Admission denials are counterproductive to incapacitative and rehabilitative goals, because ex-offenders who do not have access to decent housing are more likely to recidivate.\textsuperscript{210} These ex-offenders have already completed the punishments allotted to them through the criminal justice system. Without concrete evidence that prohibition of these ex-offenders from public housing actually accomplishes a further goal, exclusionary policies are unjust.

The safety of public housing projects is an important goal and can be upheld through the maintenance and strengthening of eviction policies to rid housing projects of those actually committing crimes.\textsuperscript{211} Policies that exclude applicants for prior minor non-violent or misdemeanor drug charges alone and lengthy time bars longer than the period within which an individual is likely to recidivate should be repealed. Bringing offense-based admission policies in line with recidivism statistics is likely to keep the housing projects as safe as the current system—without the negative and unjust consequences. Therefore, admission bars to public housing must be limited and reasonable. More importantly, PHAs must only institute time bars for those crimes related to the safety of other residents and reliably predictive of future criminal behavior.

While any reform of public housing must carefully weigh safety and accessibility, current law fails to address the root problems afflicting public housing. Instead, PHAs unjustifiably

\textsuperscript{208} See supra Part I(B).
\textsuperscript{209} Demleitner, Preventing Internal Exile, supra note 173, at 160.
\textsuperscript{210} See supra note 162.
\textsuperscript{211} See supra Part I(A)(2).
and mistakenly level blame at desperate ex-offenders. Too many Americans are denied admission to public housing because of their criminal backgrounds without sufficient justification or consideration. Ex-offenders should not be automatic casualties in the American affordable housing shortage crisis.