

NO SECOND CHANCE

**People with Criminal Records
Denied Access to Public Housing**

Human Rights Watch

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You deserve a chance, no matter what you did. . . . It's done and over with, it's in the past. I'm tryin' to do the right thing; I deserve a chance. Even if I was the worst criminal, I deserve a chance. Everybody deserves a chance.

—P.C., a forty-one-year-old African American mother denied housing because of a single arrest four years prior to her application. She was not convicted of the offense.

What you want is a way for housing projects to be safe. Some restrictions based on real safety make all the sense in the world, but you want those restrictions to be reasonable, and you want people to be able to earn their way back in.

—JoAnne Page, Executive Director, Fortune Society, interviewed by Human Rights Watch on March 2, 2004.

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I. Summary

Decent and stable housing is essential for human survival and dignity, a principle affirmed both in U.S. policy and international human rights law. The United States provides federally subsidized housing to millions of low-income people who could not otherwise afford homes on their own. U.S. policies, however, exclude countless needy people with criminal records, condemning them to homelessness or transient living.

Exclusions based on criminal records ostensibly protect existing tenants. There is no doubt that some prior offenders still pose a risk and may be unsuitable neighbors in many of the presently-available public housing facilities. But U.S. housing policies are so arbitrary, overbroad, and unnecessarily harsh that they exclude even people who have turned their lives around and remain law-abiding, as well as others who may never have presented any risk in the first place.

There is no national data on the number of people excluded from public housing because of criminal records, or even the number of people with criminal records who would be ineligible if they applied. But we know that there are several million ex-felons in the United States; under current housing policies, everyone convicted of a felony is automatically ineligible for a minimum of five years. We also know that there are tens of millions of Americans who have been convicted of misdemeanors, or merely arrested but never convicted of any offense, and they too can be and often are excluded from public housing on the basis of their criminal records.

Under existing policies, criminal records will shadow people for the rest of their lives. Even an arrest that is not followed by conviction can have a lifelong impact. Whether the offense is a violent crime or a low-level drug or property offense—and even most felonies do not involve violence against persons—a criminal record can be a barrier to employment, education, the right to vote, and certain public benefits, including public housing.

The tenuous relationship between public housing restrictions and legitimate safety goals is exemplified by policies that, for example, automatically deny housing to a person convicted of a single shoplifting offense four years earlier, or to someone convicted of simple possession of marijuana ten years earlier. Denying these people a home does little to promote the welfare of existing tenants. But it can cause homelessness or transient living for those excluded—and it can be counterproductive for community safety, as it is difficult to be law-abiding while living on the streets.

In addition to the explicit goal of protecting tenant safety, there seem to be at least two other reasons for criminal record exclusions in public housing. The first is a widespread belief in the United States that people who have broken the law do not deserve a second chance and are the legitimate target of policies that are little more than expressions of disdain and hostility. Such a punitive view ignores the right of all people to a life with dignity and should have no place in housing policy.

The second reason is that the demand for public housing far exceeds the supply. Neither the federal nor state governments have taken upon themselves the goal of dramatically increasing the availability of affordable housing. Instead, by requiring strict admissions policies, the federal government has tacitly adopted a method of “triage” to whittle down the numbers of qualified applicants. Excluding those with criminal records has proven to be a politically cost-free way to entirely cut out a large group of people from the pool of those seeking housing assistance.

Exclusions from public housing are among the harshest of a range of punitive laws that burden people with criminal records. Nevertheless, to date they have received scant attention from policymakers, elected officials, advocates for the poor, and the public at large.

There is, however, growing recognition nationwide of the wisdom of providing transitional services and assistance to help over half a million men and women who leave prison each year. Indeed, as President Bush pointed out in his 2004 State of the Union address, such services are crucial if these former prisoners are to successfully navigate their reentry to life outside prison walls. An overwhelming majority of those who are incarcerated were poor when they were arrested, and they will return to their communities with fewer resources and more needs than when they left.

The Bush administration and Congress have endorsed the concept of providing transitional housing to at least some former prisoners, but transitional housing is, by definition, temporary. Policymakers to date have failed to recognize the devastating impact of public housing exclusionary policies that outlast the transition period.

As long as those policies remain unchanged, former prisoners, as well as people with criminal records who were never sent to prison, will find themselves condemned to living on the streets, in overcrowded shelters, in squalid transient motels, or crowded into the homes of friends and relatives.

* * *

The exclusion of people with criminal records from public housing is often referred to as the “one strike” policy. This policy developed in the 1990s as an attempt to address drug trafficking, violent crime, and disorder in public housing, especially urban high-rise developments. In 1996, President Bill Clinton declared: “The rule in public housing should be one strike and you’re out.”¹ That is, commission of one offense suffices to render a person ineligible to be admitted to or remain in public housing. Congress subsequently incorporated the “one strike” policy into federal housing law. Today, federal law requires public housing authorities (PHAs), the agencies that administer housing assistance and manage public housing property, to exclude people with certain types of criminal records and gives them broad discretion to deny admission to others.

Federal law bans outright three categories of people from admission to public housing: those who have been convicted of methamphetamine production on the premises of federally funded housing, who are banned for life; those subject to lifetime registration requirements under state sex offender registration programs; and people who are currently using illegal drugs, regardless of whether they have been convicted of any drug-related offense.

PHAs have the discretion to deny admission to three additional categories of applicants: (1) those who have been evicted from public housing because of drug-related criminal activity for a period of three years following eviction; (2) those who have in the past engaged in a pattern of disruptive alcohol consumption or illegal drug use, regardless of how long ago such conduct occurred; and, (3) the catch-all category of those who have engaged in any drug-related criminal activity, any violent criminal activity, or any other criminal activity, if the PHA deems them a safety risk. Our research indicates that, in practice, these discretionary categories are used to exclude a wide swath of people with criminal records without any reasonable basis to believe they may actually pose a risk.

Federal regulations advise PHAs to take into consideration in their admissions decisions the nature and remoteness of applicants’ offenses, as well as mitigating factors and evidence of rehabilitation. But they do not require PHAs to do any individualized evaluations of whether or not a specific applicant is likely to pose a risk to the safety of existing public housing residents—and few of them provide a meaningful evaluation before issuing a rejection. Nor does the Department of Housing and Urban

¹ President Bill Clinton, “State of the Union Address,” January 23, 1996, available online at: <http://www.c-span.org/executive/stateoftheunion.asp>, accessed on June 17, 2004.

Development (HUD)—the federal agency that administers housing programs—review admissions criteria established by the PHAs to determine if, on their face, they are consistent with federal housing policy and goals.

Most PHAs automatically deny eligibility to an applicant with a criminal record without considering rehabilitation or mitigation. Consideration of those factors typically occurs only if and when an applicant for housing seeks administrative review of a denial of eligibility. Those who have lawyers often win such appeals. But many applicants for public housing are unable to secure representation, and are therefore unable to successfully challenge denials.

* * *

In a country with the wealth of the United States, the fundamental human right to housing is surely not satisfied when an estimated 3 million people are homeless in any given year, including many who have been excluded from federally subsidized housing.

This report, however, does not address the broader problem of homelessness in the United States, but assesses public housing exclusionary policies against human rights standards. Our research demonstrates that these policies are arbitrary and unreasonably overbroad. By singling out whole classes of people for exclusion—in some cases by law; in others, by overly rigid application of screening criteria—these policies violate the rights of individuals who do not actually pose a risk but who are nonetheless denied access to public housing facilities. Such exclusionary policies are also discriminatory. Racial and ethnic minorities suffer disproportionately from exclusionary housing policies because of their overrepresentation among those who experience arrest and prosecution, those who currently live in poverty, and those who seek public housing. Human Rights Watch is not aware of any other country that deprives people of the right to housing because of their criminal histories.

The United States should abandon “one strike” policies, reject all automatic federal exclusions, and prohibit local housing authorities from establishing their own. PHAs should be required to undertake individualized and meaningful assessments of each applicant to ascertain whether they pose a risk to the safety, health, and welfare of existing tenants. The United States must recognize that all its residents—even those who may not be appropriate for traditional public housing because of the risks they pose—have a right to decent and affordable housing.

Methodology

There are some four thousand PHAs in the United States providing federal housing assistance. To undertake this report within a reasonable timeframe, Human Rights Watch gathered information from forty-two PHAs, diverse in terms of geographic location, urban or rural base, and size. From February 2003 to February 2004, Human Rights Watch visited seventeen housing authorities in fifteen cities and collected information from an additional twenty-five about their policies and practices with regard to applicants with criminal histories.²

In addition to collecting copies of admissions, “one strike,” and appeal policies, and meeting with key staff from each of the PHAs we visited, HRW met with and interviewed over one hundred applicants who had been denied admission, hundreds of homeless people with criminal records, and scores of social service providers, homeless outreach and shelter workers, probation and parole officers, and housing, criminal justice, and prisoner reentry advocates working locally and nationally.

During the course of the research, HUD officials repeatedly refused our written requests to meet with them to discuss public housing admissions policies and practices.

² Human Rights Watch contacted nearly fifty housing authorities to request copies of their policies and request meetings with key staff. Only two PHAs flatly refused to meet with Human Rights Watch. The Housing Authority of Baltimore City, which has been under threat of litigation for its blanket exclusionary admissions practices, declined to meet with Human Rights Watch to discuss its policies. And the executive director of the Jasper Housing Authority, a small housing authority in rural Alabama, refused to meet with HRW to clarify her statement with regard to the housing authority's admissions policy: “We are very strict. We do what we have to and we don't care who likes it. . . . We are probably stricter than what our policy says.” Human Rights Watch telephone interview with Mavis B. Adams, executive director, Jasper Housing Authority, December 5, 2003.

II. Recommendations

The extent of homelessness and barriers to prisoner reentry are vast social problems, and Human Rights Watch believes that the U.S. must do far more to address them. Our recommendations, however, focus on the narrow question of the exclusion of people with criminal records from federally-assisted housing. If implemented, these recommendations would allow PHAs to pursue the goal of safe housing without excluding those who pose no risk. Such careful evaluations would afford people with criminal records a second chance.

To the U.S. Congress

- ◆ Repeal federal laws that impose outright bans on public housing for certain types of offenders.
- ◆ Pass federal legislation that requires PHAs to conduct an individualized evaluation of each applicant with a criminal record before making a decision on the application.
- ◆ Ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR) and acknowledge the right of all residents of the United States to adequate housing that is decent, safe, and affordable.

To the U.S. Department of Housing and Urban Development

- ◆ Adopt policies that require individualized consideration of each applicant with a criminal record, prior to making a decision on an application, to determine whether he or she will pose a risk to existing housing tenants. Require the following factors be included in the consideration: (1) evidence of rehabilitation, either during incarceration or in the community; (2) the effect of denial on minor children and efforts to reunify families; and (3) whether denial will render the applicant homeless.
- ◆ Require PHAs to adopt admissions policies that ensure:
 - criminal records that are more than ten years old do not prevent admission, absent extraordinary circumstances;
 - offenses upon which denials are based are relevant to being a good tenant; and
 - absent a pattern of continuing arrests, consideration of a criminal record is limited to convictions.

- ◆ Monitor denials of public housing to ensure that they are not arbitrary, that they are based on reasonable and individualized determinations of risk, and that they do not have a disproportionate and unjustifiable impact on applicants from racial and ethnic minorities.
- ◆ Require PHAs to compile and make public on an annual basis the number of applications made for public housing, the number of applicants denied because of negative criminal history information, the number of those denied who appeal, and the number of those challenging their denials who prevail following administrative hearings.
- ◆ Conduct expert and ongoing evaluations of whether policies excluding people with criminal records from public housing have an effect on crime patterns, public safety, and quality of life in public housing.
- ◆ Provide guidance and training to PHAs about how to conduct individualized evaluations of applications for housing assistance.
- ◆ Research the feasibility and design of expanded alternative housing programs for people with criminal records who cannot be accommodated in existing public housing models because of their criminal histories.

To Public Housing Authorities

- ◆ Adopt policies that require individualized consideration of each applicant with a criminal record, prior to making a decision on an application, to determine whether he or she will pose a risk to existing housing tenants. Ensure that the following factors be included in the consideration: (1) evidence of rehabilitation, either during incarceration or in the community; (2) the effect of denial on minor children and efforts to reunify families; and (3) whether denial will render the applicant homeless.
- ◆ Adopt criminal record admissions screening policies that consider:
 - only criminal records that are less than ten years old, absent extraordinary circumstances;
 - only those offenses that are relevant to being a good tenant; and
 - only convictions, absent a pattern of continuing arrests.
- ◆ Provide an administrative appeal process for those deemed ineligible for public housing that ensures the full range of due process rights including: adequate notice of the reason for denial; the opportunity to appear with representation, to question witnesses and present evidence and testimony; a written and publicly-available decision setting forth reasons for the

administrative decision; and a meaningful opportunity to appeal the administrative decision to a court of law.

- ◆ Advise applicants who are denied eligibility for public housing of the availability of local legal assistance to represent them should they choose to challenge their denials.
- ◆ Ensure that applicant criminal records are obtained from a reliable source.

To Publicly-Funded Legal Services Organizations

- ◆ Reconsider any policy or practice against providing legal assistance to applicants who are denied admission to public housing and train attorneys, paralegals, and law students to represent applicants in administrative hearings.
- ◆ Monitor local PHA policies and practices to determine whether they violate federal law or policy.
- ◆ Conduct outreach to ensure that applicants understand their right to apply for public housing, to challenge their denials in administrative proceedings, and to appeal adverse administrative decisions to courts of law.

To the United Nations

- ◆ The Committee on Economic Social and Cultural Rights should issue a comment on the human rights dimensions of government-assisted housing, with particular attention to arbitrary criteria used to determine eligibility for assistance and to whether denials of assistance result in outright homelessness.
- ◆ The U.N. Special Rapporteur on the Right to Adequate Housing should report on the United States' denial of housing assistance to individuals because of their criminal histories.

III. Background

The exclusion of people with certain criminal records from public housing and the massive impact of that exclusion reflects the intersection of two discrete public policies in the U.S.—public housing policy and criminal justice policy. In concert they operate to exclude those with criminal records from housing designed to meet the needs of those unable to afford housing on their own. Ineligibility for public housing is just one of many “collateral consequences” or forms of “invisible punishment” that continue to affect people with criminal records long after they have completed any sentence they received for their offense.

Mass Incarceration Policies

The number of people potentially affected by criminal record exclusions from public housing is enormous. Since the 1970s, harsh sentencing laws and stepped-up law enforcement for even minor nonviolent offenses have led to a stunning and historically unprecedented increase in the number of U.S. residents who have been arrested, prosecuted, and incarcerated.

According to Federal Bureau of Investigations (FBI) statistics, 13.7 million people were arrested in 2002 for criminal infractions.³ Nearly 925,000 Americans were convicted of felony offenses in the nation’s courts in the most recent year for which data is available, and some 600,000 were incarcerated as a result.⁴ Nearly 6.9 million adult men and women were either incarcerated or on probation or parole by the end of 2003.⁵

³ Federal Bureau of Investigations (FBI), *Uniform Crime Reports, Crimes in the United States, 2002*, table 29, p. 234, available online at: http://www.fbi.gov/ucr/cius_02/pdf/4sectionfour.pdf, accessed on April 8, 2004. This number excludes those charged with mere traffic violations. According to the Bureau of Justice Statistics (BJS), there are approximately 64,282,700 state criminal history records, and approximately 48,233,583 FBI records (29,083,532 reported by states, an additional 19,150,051 reported by federal law enforcement). U.S. Department of Justice, Office of Justice Programs, BJS, *Survey of State Criminal History Information Systems, 2001: A Criminal Justice Information Policy Report* (August 2003), available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis01.pdf>, accessed on April 8, 2004. The total number of individuals who have criminal records is unknown, however, because there is no way to account for those who may have a criminal record in more than one state.

⁴ BJS, *Crime*, available online at: <http://www.ojp.usdoj.gov/bjs/glance.htm#Crime>, accessed on April 1, 2004.

⁵ BJS, *Probation and Parole in the United States, 2003*, available online at: <http://www.ojp.usdoj.gov/bjs/abstract/ppus03.htm>, accessed on July 28, 2004. Over two million adult men and women were serving jail or prison sentences, and over 4.8 million adult men and women

With over thirteen million ex-felons—6.5 percent of the entire adult population⁶— “America has become a nation of ex-cons.”⁷ The federal Bureau of Justice Statistics (BJS) predicts that “[i]f rates of first incarceration and mortality in 2001 remain unchanged, nearly 1 in 15 persons born in 2001 will go to State or Federal prison during their lifetimes.”⁸

These stunning numbers are less a reflection of rates of serious crime in the United States than they are of “tough on crime” sentencing policies that have emphasized harsh punitive policies—mandatory prison sentencing and three strikes policies, for example—for even low level and nonviolent crimes.⁹ Arrest rates also reflect the U.S. “war on drugs” which results in over 1.5 million arrests per year, over 80 percent for simple possession.¹⁰

Arrests, convictions, and incarceration differ sharply among socio-economic sectors and racial groups in the United States. The vast majority of those in the criminal justice system were either impoverished or among the working poor at the time of their arrest.¹¹ And racial and ethnic minorities are disproportionately represented among those arrested, convicted, and incarcerated. (See the box entitled “Racial Disparities in the Criminal Justice System” under the “Discrimination” section of Chapter X.)

were under federal, state or local probation or parole at the end of 2003. There were 4,073,987 American adults on probation and 774,588 on parole as of December 31, 2003.

⁶ Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press, 2003), p. 10.

⁷ Jennifer Gonnerman, *Life on the Outside: The Prison Odyssey of Elaine Bartlett* (New York: Farrar Straus Giroux, 2004).

⁸ BJS, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (August 2003), p. 7, available online at: <http://www.ojp.usdoj.gov/bjs/abstract/piusp01.htm>, accessed on June 17, 2004. BJS estimates that one in seventeen white males, one in six Hispanic males, and one in three Black males will go to prison within their lifetimes. *Ibid.*, p. 1.

⁹ See Marc Mauer, *Race to Incarcerate* (New York: The New Press, 1999). Twenty-four percent of those currently serving sentences in U.S. jails or prisons have been convicted of drug offenses, and 18 percent have been convicted of property offenses. U.S. Department of Justice, Office of Justice Programs, BJS, *Prison and Jail Inmates at Midyear 2003* (May 2004), table 15, p. 10 and table 18, p. 11, available online at: <http://www.ojp.usdoj.gov/bjs/abstract/pjim03.htm>, accessed on July 6, 2004.

¹⁰ The number of arrests for drug abuse violations far exceeded the number of arrests for any other single offense in 2002, and 80.3 percent of all drug-related arrests were for simple possession. Federal Bureau of Investigation, *Uniform Crime Reports*, tables 28 & 29, p. 234; table 28.

¹¹ U.S. Department of Labor, Bureau of Labor Statistics (BLS), *A Profile of the Working Poor, 2000* (March 2002), available online at: <http://www.bls.gov/cps/cpswp2000.htm>, accessed on June 17, 2004.

Lack of Affordable Housing

The United States has long recognized the importance of housing to the standard of living of its people. The United States Housing Act of 1937 affirmed as national policy:

the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State and local government, and by the independent and collective actions of private citizens, organizations, and the private sector.¹²

The U.S. Congress reiterated this commitment to housing in the 1990 Cranston-Gonzalez National Affordable Housing Act which states, “The objective of national housing policy shall be to reaffirm the long-established national commitment to decent, safe, and sanitary housing for every American.”¹³

Today the United States provides a wide variety of housing programs from loans to first-time homebuyers and subsidies and tax credits for homeowners and housing developers, to supportive housing for the elderly and disabled and direct provision of housing to Americans unable to compete for housing in the private market.¹⁴ It administers a vast system of public housing¹⁵ for Americans with

¹² United States Housing Act of 1937, 42 U.S.C. 1437(a), et seq.

¹³ Pub. L. No. 101-625, 104 Stat. 4079 (1990).

¹⁴ *Meeting Our Nation’s Housing Challenges, Report of the Bipartisan Millennial Housing Commission*, Appointed by the Congress of the United States, Pursuant to Section 206(b) of Public Law 106-74, as Amended (Washington, D.C.) May 30, 2002, Appendix 3 (MHC Report).

¹⁵ We use the term public housing to refer to the two largest housing programs administered by HUD—conventional public housing and Section 8, or the Housing Choice Voucher program. Human Rights Watch examined exclusionary policies that apply to these two forms of assistance, because project-based public housing and direct rental assistance in the form of housing vouchers serve far more poor people than all other government programs combined (MHC Report, Appendix 3, p. 106, 109, 114, 115). Different eligibility criteria apply to other federal housing programs, but we did not include them in our study. *Conventional public housing* was established to provide decent and safe rental housing—from scattered single family homes to high rise apartments—for eligible low-income families, the elderly, and persons with disabilities. There are approximately 6.5 million Americans living in public housing, managed by some 3,200 PHAs. *Section 8, or the Housing Choice Voucher program* provides assistance to very low-income families, older adults, and people with disabilities in the private market. Voucher holders are free to choose any housing that meets the program’s requirements and are not limited to units located in subsidized housing projects. HUD provides federal funding through vouchers to individuals PHAs, which in turn distribute the vouchers. Once a family has found suitable housing, the owner agrees to rent under the program, and the PHA approves the housing according to its health and safety standards, the PHA pays the housing subsidy directly to the landlord. The family is responsible for covering the difference between the actual rent charged by the landlord and the subsidy.

the lowest incomes that is supported by over \$34 billion in federal funds¹⁶ and managed by over four thousand local public housing authorities (PHAs).¹⁷ PHAs provide nearly 2.7 million units of affordable housing to over 6.5 million Americans.¹⁸

Nevertheless, the United States has failed to ensure that the supply of affordable housing is sufficient to meet the demand. Indeed, the U.S. currently faces an affordable housing crisis. A growing number of Americans, including many who work full-time, are unable to rent—much less own—their own homes in the private market. At the same time, the federal administration has made deep cuts in conventional public housing programs, and PHAs are struggling to retain the number of housing vouchers and units that they currently administer.¹⁹ Requests for federally-assisted housing continue to increase,²⁰ while the absolute number of public housing units has declined.²¹

A recent report on American hunger and homelessness by the U.S. Conference of Mayors estimates that only one-third of eligible low-income households are

¹⁶ Ethan Handelman, *Recapitalization Advisors* (January 2004), available online at: <http://www.recapadvisors.com/learn/hudappropr2004.html> (citing Consolidated Appropriations Act, 2004, P.L. 108-199, Div. G, Title 2), accessed on October 18, 2004.

¹⁷ PHAs are agencies chartered by state governments that administer, on a local level, funding from HUD and manage conventional public housing developments.

¹⁸ U.S. Department of Housing and Urban Development (HUD), *A Picture of Subsidized Households General Description of the Data and Bibliography*, available online at: <http://www.huduser.org/datasets/assthsq/statedata98/descript.html#foot11>, accessed on May 17, 2004.

¹⁹ “Bush Budget Contains 40 Percent Cut in the Nation’s Principal Low-Income Housing Program by 2009,” *U.S. Newswire*, February 11, 2004. The most recent cuts may force some PHAs to eliminate existing vouchers or raise the amount of rent contribution from tenants. “NAHRO: New HUD Voucher Proposal Slashes Funding Levels for Affordable Housing,” *U.S. Newswire*, February 19, 2004 (“By one estimate, approximately 250,000 families could lose services in FY 2005”); “HUD cuts place financial strain on housing agencies,” *Associated Press*, May 24, 2004; Sherri Williams, “Federal Housing-Voucher Cuts Could Put Thousands on Street,” *The Columbus Dispatch*, April 21, 2004. The reduction in the absolute number of conventional public housing units has also been exacerbated by the Hope VI Program, widely criticized for demolishing entire housing complexes and replacing them with smaller numbers of units designed for “mixed income” populations. See, e.g., Sudhir Alladi Venkatesh, *The Robert Taylor Homes Relocation Study* (Columbia University: Center for Urban Research and Policy, September 2002) available online at: http://www.sociology.columbia.edu/people/faculty/venkatesh/papers/robert_taylor.pdf, accessed on August 6, 2004.

²⁰ Eugene T. Lowe, United States Conference of Mayors, *Sodexo Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities, A 25-City Survey* (December 2003), p. 81, available online at: <http://www.usmayors.org/uscm/hungersurvey/2002/onlinereport/HungerAndHomelessReport2002.pdf>, accessed on August 6, 2004 (2003 U.S. Conference of Mayors Survey).

²¹ MHC Report, Appendix 3, p. 106.

being served by current housing programs.²² Waiting lists maintained by individual PHAs show hundreds of thousands of people seeking housing assistance.²³ According to HUD, applicants wait an average of one to two years, and often much longer, for access to conventional public housing and the voucher program.²⁴ Despite its commitment to “End Homelessness in 10 Years” and its subsequent call for increased appropriations for homeless services (which include such things as nightly shelter beds and social services), the federal government has not met increases in homelessness and poverty with an increase in the development of new units of subsidized housing.²⁵

The latest census figures show that 35.9 million people, or 12.5 percent of the American population, live at or below the official poverty level.²⁶ According to a 2003 National Low Income Housing Coalition (NLIHC) report, families with extremely low incomes are unable to afford housing at fair market rates in almost every U.S. jurisdiction.²⁷ But it is not just the impoverished who cannot afford housing in the private market; even the working poor are unable to pay for adequate housing on their own. As one analyst has noted, “the working poor have been left practically helpless, unable to get into the market and unserved by underfunded federal and state housing programs.”²⁸

²² 2003 U.S. Conference of Mayors Survey, p. 87.

²³ Human Rights Watch interviews with housing officials in Salt Lake City, Utah; Pittsburgh and Williamsport, Pennsylvania; Los Angeles, New York, and Birmingham, Alabama.

²⁴ HUD, *Waiting in Vain: An Update on America's Rental Housing Crisis* (March 1999), summary available online at: http://www.huduser.org/periodicals/rrr/rrr5_99art1.html, accessed on October 18, 2004. See also 2003 U.S. Conference of Mayors Survey, p. 84. Many PHAs have even closed their waiting lists and stopped taking applications for Section 8 Housing.

²⁵ President Bush made “ending chronic homelessness in the next decade a top objective” in his 2003 budget. *Strategies for Reducing Chronic Street Homelessness Final Report*, Prepared for the U. S. Department of Housing and Urban Development Office of Policy Development and Research (January 2004), p. 384. However, a New York Times editorial accused both Congress and the administration of paying “lip service to the goal of ending chronic homelessness” and playing a “shell game” of making up for cuts to the Section 8 program with funding for services for the homeless. “Congress Plays the Housing Game,” *New York Times*, July 22, 2004.

²⁶ U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2003* (August 2004), available online at: <http://www.census.gov/prod/2004pubs/p60-226.pdf>, accessed October 25, 2004.

²⁷ National Low Income Housing Coalition, *Out of Reach 2003: America's Housing Wage Climbs*, available online at: <http://www.nlihc.org/oor2003/>, accessed on May 24, 2004 (NLIHC report).

²⁸ David K. Shipler, *The Working Poor: Invisible in America* (New York: Alfred A. Knopf, 2004), p. 228-29.

As the authors of the NLIHC report conclude:

Millions of American families [are] unable to afford safe and decent rental housing. Wages have failed to keep pace with rental costs, rental costs have increased faster than costs of other basic needs, affordable rental housing is being lost to homeownership and market-rate rentals, and little or no new affordable housing is being built. As a result, these families are living in substandard conditions, are homeless, or are making choices each day to spend money on housing and do without health care, child care, or other basic necessities. As sobering as this is . . . this is not the beginning of the crisis, and . . . it has only gotten worse in recent years. . . . Our nation strives to be a standard-bearer for the world in fairness, compassion and quality of life, yet overlooks this problem year after year at the cost of the safety, health and security of millions of its citizens.²⁹

HUD reported to the United Nations in 2001 that 4.9 million Americans have “worst-case housing needs,” that is, they spend more than 50 percent of their income on housing, or they live in substandard housing.³⁰ The agency also reported that the number of rental housing units affordable for very low income families declined by 1.1 million, a loss of 7 percent, from 1997 to 1999.

In its report, HUD estimated that six hundred thousand individuals may be homeless on any given night. A recent report by the National Law Center on Homelessness and Poverty estimates that between 2.5 and 3.5 million people over the course of a year will experience homelessness; seven million will experience homelessness over the course of five years.³¹ One survey showed that 12.5 million, or 6.5 percent of the U.S. resident population, has been homeless at some point during the course of their lives.³²

²⁹ NLIHC Report.

³⁰ HUD, *Habitat II Progress Report*, 2001, p. 6, n. 14 (Habitat Report), citing HUD, *A Report on Worst Case Housing Needs in 1999-A New Opportunity Amidst Continuing Challenges*, 2001. Two years later, HUD’s estimate of “worst case housing needs” was up to 5.07 million. HUD, *Trends in Worst Case Needs for Housing, 1978-1999: A Report to Congress on Worst Case Housing Needs (Plus Update on Worst Case Needs in 2001)*, December 2003, page xix, available online at: www.huduser.org/Publications/PDF/trends.pdf, accessed on September 15, 2004.

³¹ National Law Center on Homelessness and Poverty, *Homelessness in the United States and the Human Right to Housing* (January 14, 2004), p. 6.

³² *Ibid.*

Barriers to Reentry and Housing

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit more crimes and return to prison. So tonight, I propose a four-year, 300 million dollar Prisoner Re-Entry Initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of the second chance—and when the gates of the prison open, the path ahead should lead to a better life.³³

—President George W. Bush

Over six-hundred-fifty thousand people per year are expected to return home from America's prisons and jails in the coming years.³⁴ The consequence of America's overreliance on incarceration during the past two decades, these numbers have shocked the country into paying increased attention to ensuring that the return from prison to the free world—a process now known as reentry—is successful.

Politicians have for decades enhanced their “tough on crime” credentials by creating laws and policies that impose adverse collateral consequences on many categories of those with criminal records.³⁵ According to the New York-based Legal Action Center “people with criminal records seeking reentry [now] face a daunting array of counterproductive, debilitating and unreasonable roadblocks in almost every important aspect of life.”³⁶ These include restrictions on voting

³³ President George Bush, “State of the Union Address,” January 20, 2004, available online at: <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>, accessed on October 25, 2004.

³⁴ In 2002, 632,000 offenders were released from state prisons and jails. Human Rights Watch telephone interview with Allen Beck, Ph.D., chief, Corrections Statistics Program, BJS, April 1, 2004. The numbers of those returning will continue to rise until rates of incarceration drop. For example, in 2001, 592,000 offenders were released from state prison, a 46 percent increase over the 405,400 offenders that were released in 1990. U.S. Department of Justice, Office of Justice Programs, BJS, *Reentry Trends in the United States*, available online at: <http://www.ojp.usdoj.gov/bjs/prisons.htm>, accessed on March 25, 2004.

³⁵ See Mauer, “Crime as Politics,” in *Race to Incarcerate*, p. 56.

³⁶ Legal Action Center (LAC), *After Prison: Roadblocks to Reentry* (2004), available online at: <http://www.lac.org/lac/>, accessed on May 24, 2004. The LAC released a state-by-state report in May 2004 that compiles state laws restricting the rights of those with criminal records to vote, gain access to housing, public assistance, employment, loans for higher education, driver's licenses, and criminal records; as well as laws affecting their ability to keep their families intact. Such laws and policies are commonly referred to as “collateral consequences” or “collateral sanctions.” The American Bar Association (ABA) has established standards seeking to limit the impact of collateral sanctions and ensure they are used appropriately. “Collateral Sanctions and Discretionary Disqualifications of

rights, housing, employment, and government welfare assistance. No matter how exemplary their subsequent lives, people who have a criminal record bear a modern-age “scarlet letter,” or a new civil identity that they cannot shed.³⁷ On every application they will constantly confront questions about their criminal records—from applications for welfare or for a job at a fast food restaurant, to a volunteer dog-catcher position at the SPCA (Society for the Prevention of Cruelty to Animals), and even a box on the application to join a Parent-Teacher Association.³⁸

Some attention is appropriately and finally being paid to the needs of many returning prisoners for supportive, transitional services. But there has been relatively little attention so far to the many “collateral consequences” of imprisonment or having a criminal record that erect often insurmountable barriers to successful reentry. Many of these barriers are the result of public laws and directly restrict the rights and opportunities of those with criminal records.

Exclusionary housing policies constitute one of the most significant barriers to reentry. People leaving prison and jail are typically among Americans with the most dire housing needs. For them, publicly supported housing is the only realistic option for safe and stable places to live. Excluded from public housing, they often end up swelling the ranks of the homeless, become inhabitants of grimy and unsafe transient hotels and motels, or crowd into the homes of relatives and friends. None of these options is conducive to the development of stable, productive lives for former prisoners or their children.

HUD’s current exclusionary policies and those of local PHAs ignore the changing landscape of the poor in the U.S. As the number of people with criminal records continues to soar, so their proportion among the impoverished in the United States grows. Policies that exclude them from housing thus have the effect of excluding an ever growing number of those in need. As one tenant advocate in Pittsburgh, Pennsylvania told us:

Convicted Persons,” *ABA Standards for Criminal Justice*, 3rd ed., August 2003, (ABA Publishing, 2002), Standard 19 (“ABA Standards”).

³⁷ Gonnerman, *Life on the Outside*, p. 9.

³⁸ Remarks of Dorsey Nunn at the Biennial Conference of the Drug Policy Alliance, East Rutherford, New Jersey, November 5, 2003. As one reporter found, even Santa Claus and his elves undergo criminal background checks. “Santas Undergo Background Checks, Drug Testing,” *Associated Press*, November 25, 2002.

No one's in more need than ex-offenders. That's what this housing is for. I understand that originally it was for women and children and vets, but as times change, our federal programs need to recognize who's needy in our society.³⁹

Another housing advocate in Austin, Texas said:

They have a responsibility for tenants, but also the responsibility to be the housing of last resort. They receive large sums of federal money to be the bottom-line safety net of housing for folks out there. The Housing Authority is that safety net. That's why they can get all those grants. If it wasn't the intention to make sure that the safety net is there, why give them all that money? . . . If all they want to do is cream the population and take the best, why are they getting all that money? . . . Housing authorities used to be the ones that would give people a second chance.⁴⁰

President Bush called attention to certain barriers to reentry, including the need for transitional housing, in his 2004 State of the Union address.⁴¹ Members of Congress responded with bipartisan bill introduced in mid-2004. The Second Chance Act of 2004 ("house bill"), pending in the United States House of Representatives, found that "from 15 percent to 27 percent of prisoners expect to go to homeless shelters upon release from prison," and calls for:

structured post-release housing and transitional housing,
including group homes for recovering substance abusers,

³⁹ Human Rights Watch interview with Ronell Guy-Curtis, community activist, director, Northside Coalition for Fair Housing, Pittsburgh, Pennsylvania, January 29, 2004.

⁴⁰ Human Rights Watch interview with Katherine Stark, executive director, Austin Tenant's Council, Austin, Texas, February 12, 2004.

⁴¹ Even prior to Bush's State of the Union address, his administration awarded nearly \$1.3 billion to HUD as part of its strategy to end chronic homelessness, and HUD has partnered with the U.S. Department of Justice and other federal agencies to address prisoner re-entry issues. U.S. Department of Justice, Office of Justice Programs, *Learn About Reentry, Overview, Serious and Violent Offender Reentry Initiative*, available online at: <http://www.ojp.usdoj.gov/reentry/learn.html#go3>, accessed on March 25, 2004; a state-by-state listing of grantees is available online at: <http://www.ojp.usdoj.gov/reentry/sar/welcome.html>, accessed on March 25, 2004.

through which offenders are provided supervision and services immediately following reentry into the community [and] assisting offenders in securing permanent housing upon release or following a stay in transitional housing.⁴²

The house bill would provide states with a small amount of money to develop a system of reentry services, including transitional housing, and calls only for a study of existing barriers to accessing housing.

The Senate followed with two of its own versions of the Second Chance Act. The first mirrors the provisions of the house bill with which it shares a name.⁴³ The second, the Enhanced Second Chance Act, contains many of the same provisions, but among its chief differences is a call to strengthen HUD rules to require PHAs to conduct individualized determinations of housing applications from those with criminal records.⁴⁴ At this writing, all three bills were still pending in Congress.

Human Rights Watch recognizes the importance of increasing the supply of transitional housing. But transitional housing is by definition temporary. It is not a solution to the need for permanent housing. Thus far, there has been inadequate federal recognition of the basic reality articulated by Nan Roman of the National Alliance to End Homelessness: "Effective reentry will require expanding the supply of affordable housing."⁴⁵

To date, no federal reentry initiative has proposed to increase the supply of public housing. And the Enhanced Second Chance Act is the only legislation thus far that would address the barriers to successful reentry that are embedded in existing housing policies. Finally, there is no designated federal funding for alternative facilities to house those currently excluded from existing public housing because of their criminal records.

⁴² Second Chance Act of 2004, H.R. 4676, Section 3(a)(4), (5), amending Section 2976 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797w), introduced June 23, 2004.

⁴³ Second Chance Act of 2004, S. 2789, introduced September 10, 2004.

⁴⁴ Enhanced Second Chance Act of 2004, S. 2923, introduced October 8, 2004, see specifically, section 20.

⁴⁵ Human Rights Watch e-mail correspondence with Nan Roman, executive director, National Alliance to End Homelessness, May 27, 2004.

The impact of federal and local exclusionary policies is not limited to public housing. Increasingly, private landlords are following the lead of public housing and screening people for criminal histories.⁴⁶ Federal law allows “owners” of private housing to decline to rent to those who have been deemed eligible and awarded a voucher by a PHA.⁴⁷ But housing advocates told Human Rights Watch that landlords are also refusing to rent to prospective tenants in the private market because of their criminal records. “Once the housing authority did it, everybody started to do it,” one reentry advocate told Human Rights Watch. “Any housing complex, any apartment, if you have an ‘x,’ they’ll deny you.”⁴⁸

“Deserving” Tenants

Exclusions based on criminal records are usually justified in terms of promoting the safety of public housing tenants. But the choice of criminal records as an exclusionary factor cannot be understood solely in terms of the goal of tenant safety.

Given the enormous gap between the supply of public housing and the demand for it, public authorities have been forced to adopt a form of triage to determine who will receive it. Language in HUD’s guidance on the “one strike” policy explicitly addresses the zero-sum nature of public housing choices:

In deciding whether to admit applicants who are borderline in the PHA’s evaluation process, the PHA should recognize that for every marginal applicant it admits, it is not admitting another applicant who clearly meets the PHA’s evaluation standards.⁴⁹

⁴⁶ For instance, in March 2003, Georgia established a website called “Know Thy Neighbor Parolee Database” that allows people to find parolees that live in their neighborhood, available online at: http://www.georgia.gov/00/channel_title/0,2094,4802_5047,00.html, accessed on May 31, 2004.

⁴⁷ 24 CFR § 982.307

⁴⁸ Human Rights Watch interview with Anthony Barber, reentry advocate, Texas Criminal Justice Reform Coalition, San Antonio, Texas, February 10, 2004. “Well, if they can’t get housing there [with the PHA], they can’t get housing anywhere in the county,” one social service provider in Alabama said. “If they’re denied by the housing authorities, they apply for the housing complex here. But if they’re denied by the housing authority, they will probably be denied by the [private] housing complex, too.” Human Rights Watch interview with Eula Morton, service supervisor for Family and Childrens’ Services Unit, Greene County Department of Human Resources, Eutaw, Alabama, December 12, 2003.

⁴⁹ HUD, *Public Housing Occupancy Handbook*, Directive No. 7465.1 Rev.-2, Chapter 4, 4-3(b)(3).

Criminal record exclusions have the important effect of helping reduce the pressure on a limited public resource. From the perspective of public housing authorities trying to ration a scarce resource, the exclusion is also an easy one to sell publicly. The public views people with criminal records with suspicion, fear, hate and anger. It is not going to protest the exclusion of “bad” people from public housing.

HUD guidelines, echoed in the policies of individual PHAs, suggest that only those who “play by the rules” should be housed:

Because of the extraordinary demand for affordable rental housing, public and assisted housing should be awarded to responsible individuals. . . . At a time when the shrinking supply of affordable housing is not keeping pace with the number of Americans who need it, it is reasonable to allocate scarce resources to those who play by the rules. There are many eligible, law-abiding families who are waiting to live in public and assisted housing and who would readily replace evicted tenants. By refusing to evict or screen out problem tenants, we are unjustly denying responsible and deserving low-income families access to housing and are jeopardizing the community and safety of existing residents who abide by the terms of their lease.⁵⁰

To some extent, HUD is merely indicating that it makes sense to exclude those who will be problem tenants. But the language is also moralistic. Embedded in the exclusion is an implicit moral calculus: not everyone deserves public housing, regardless of whether they would pose any risk to tenants. Access to public housing should be restricted to those who have never broken the law, those who are “responsible and deserving.”

The needs of those with criminal records—and, indeed, their right to housing—are left out of the equation. Where, or how, they will live is of scant public concern.

⁵⁰ HUD, Office of Public and Indian Housing, “One Strike and You’re Out’ Policy in Public Housing” (March 1996), contained in HUD Directive No. 96-16 (April 12, 1996), *Guiding Principles of a One Strike Policy*, Section I(b).

HUD's argument of an essentially zero-sum game between deserving and undeserving families in housing allocation also ignores the fact that many of those who seek access to public housing want to join families who are already public housing tenants.⁵¹ Permitting people with criminal records to join their families would not reduce the overall number of available housing units.

The safety of tenants is obviously an important consideration in making decisions about public housing applicants. As this report will make clear, the existing criteria invite arbitrary rejection of applicants without any careful assessment of any real safety risks they might pose. It is hard to avoid the suspicion that moral judgments, public prejudices and fears, and political opportunism play a role in the selection of those criteria. It is hard to find any other convincing explanation, for example, for federal legislation that would deny a sixty-year-old access to public housing because of a single sex offense committed decades earlier.

Restricting public benefits for the virtuous has obvious public appeal. But human rights are not a privilege of the deserving.

⁵¹ Under current housing rules, a family member who wishes to live with family who are currently public housing tenants must satisfy the admissions criteria for eligibility to be able to join them.

IV. The Right to Adequate Housing

*[E]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*⁵²

—Universal Declaration of Human Rights (UDHR)

International human rights law acknowledges the right to housing as an integral component to the right to an adequate standard of living. The United States has been reluctant to fully embrace the idea of the right to housing and has been inconsistent in its position on this point in international fora. United States officials have been clear, however, that they do not view public housing as a right. And there is little sign that officials have acknowledged the fact that access to public housing may be the only realistic way of realizing the right to adequate housing.⁵³

The UDHR, ratified in the General Assembly of the United Nations in 1948, was the first international document acknowledging the importance of housing to human dignity.⁵⁴ Numerous international treaties and documents have subsequently acknowledged the right to housing.⁵⁵ The most important is the International Covenant

⁵² UDHR, G.A. Res. 217, U.N. GAOR, 3rd Sess., pt. 1, art. 25(1), U.N. Doc A/810 (1948).

⁵³ “Public housing has never been a right, it has always been a privilege.” President Bill Clinton, “Remarks by the President at One Strike Symposium.” See also, The White House, Office of the Press Secretary, “Press Briefing by Secretary of Housing and Urban Development Henry Cisneros,” March 27, 2003, available online at <http://clinton6.nara.gov/1996/03/1996-03-28-cisneros-briefing-on-public-housing-policy.html>, accessed on February 4, 2003. Then-Missouri Senator John Ashcroft, now the U.S. attorney general, stated on the floor of Congress that exclusionary provisions were not only designed to ensure public safety, but also to “emphasize that federal housing assistance is a privilege, not a right.” Senator John Ashcroft, 144 Cong. Rec. S. 8330, 8367, 105th Congress, 2nd Sess. (July 16, 1998). Consequently, the U.S. does not acknowledge that laws or policies that restrict access to housing must be justifiably reasonable in light of legitimate state goals, and it does not hold itself to the proscriptions against discriminatory effect embodied in international law.

⁵⁴ UDHR, G.A. Res.217A (III) art. 25(1), U.N. Doc. A/810 (adopted December 10, 1948).

⁵⁵ See also, article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, U.N. Doc. A/32/18 (entered into force January 4, 1969); article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1249 U.N.T.S. 13, U.N. Doc. A/34/46 (entered into force September 3, 1981); article 27 (3) of the Convention on the Rights of the Child (CRC), G.A. Res. 44/25, U.N. Doc. A/44/49, (entered into force September 2, 1990). See, e.g., Declaration on Social Progress and Development G.A.R. 2542 (XXIV), U.N. Doc. A/RES/41/146 (December 11, 1969), Part II, Art. 10(f); Resolutions on the realization of the right to adequate housing: G.A. Res. 41/146, U.N. Doc. A/RES/41/146 (December 4, 1986); G.A. Res. 42/146, U.N. Doc. A/RES/42/146 (December 7, 1987); Economic and Social Council Res. 1987/62 (May 29, 1987); Commission on Human Rights Res. 1986/36 (March 12, 1986); Commission on Human Rights Res. 1987/22 (March 10, 1987); Commission on Human Rights Res. 1988/24 (March 7, 1988); Resolutions on Forced Evictions: Commission on Human Rights Res. 1993/77 (March 10, 1993); Sub-Commission on Prevention of Discrimination and Protection of Minorities Res.

on Economic, Social and Cultural Rights (ICESCR), entered into force in 1976 and signed by 156 countries to date.⁵⁶ The ICESCR codifies the right and requires ratifying states to strive to ensure that all their residents have adequate housing.⁵⁷

Article 11(1) of the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”⁵⁸ States parties are required to take “appropriate steps to ensure the realization of this right.”⁵⁹

The United States has not ratified the ICESCR. Nevertheless, as a signatory it is bound not to undertake policies or practices that would defeat the covenant’s object and purpose.⁶⁰

The most comprehensive recent international affirmation of housing rights and state housing responsibilities is the 1996 Istanbul Declaration, and the accompanying “Habitat Agenda.”⁶¹ The Habitat Agenda contains over one hundred commitments and six hundred recommendations on human settlements and housing concerns.⁶² The preamble to the Agenda reaffirms signatories’ commitment “to the full and progressive realization of the right to adequate housing”⁶³ and pledges to “work to expand the

1991/12 (August 26, 1991); Resolution on the human right to adequate housing: Commission on Human Settlements Res. 14/6 (May 5, 1993); Resolution on promoting the realization of the right to adequate housing: Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1991/26 (August 29, 1991).

⁵⁶ As of June 9, 2004, 149 countries of the 156 that had signed, ratified the Covenant.

⁵⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 U.N.T.S. 3, art. 11(1), U.N. Doc. A/6316 (entered into force January 3, 1976).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ See Vienna Convention on the Law of Treaties, art. 18, concluded May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980). Although the United States has signed but not ratified the Vienna Convention on the Law of Treaties, it regards this convention as “the authoritative guide to current treaty law and practice.” S. Exec. Doc. L., 92nd Cong., 1st Sess. (1971), p. 1; Theodor Meron, “The Meaning and Reach of the International Convention On The Elimination Of All Forms Of Racial Discrimination,” 79 *Am. J. Int’l Law* 283, 285 (1985).

⁶¹ These documents emerged from the U.N. Conference on Human Settlements in Istanbul, known as Habitat II, an international conference on housing and human settlements in 1996 in Istanbul, Turkey. Habitat II followed an earlier conference, Habitat I, held in Vancouver in 1979. For more information and discussion on the various international conferences discussing housing rights see *Habitat II and U.S. Implementation: Background and Overview*, National Law Center on Homelessness & Poverty, available online at: <http://www.nlihc.org/mahn/habitat.htm>, accessed on June 12, 2004.

⁶² The Habitat Agenda is the official document of the 1996 United Nations Conference on Human Settlements in Istanbul, Turkey. The document is available online at: www.unhabitat.org/unchs/english/hagenda/ist-dec.htm, accessed on August 6, 2004.

⁶³ *Ibid.*, para. 8.

supply of affordable housing . . . and assisting those who are unable to participate in housing markets.”⁶⁴

The Declaration, though not a binding treaty, was signed by 171 countries, including the United States. But some who observed the proceedings described a considerable amount of resistance on the part of U.S. delegates to the notion of housing as a right. Indeed, as Philip Alston describes, during preparatory meetings leading up to the conference:

The United States delegation insisted that there is no human right to adequate housing, that this right is not recognised in international human rights law and that the right has never been recognised in international treaties. The delegation indicated that it attached great importance to this issue, that it would call for a vote upon any paragraph which included a reference of any type to the right to housing, and that the United States would vote against the inclusion of any such reference.⁶⁵

The U.S. had changed its position by the time of the conference and signed the Declaration despite the inclusion of language specifically noting a right to housing.⁶⁶ But, as Alston notes, “[i]n place of outright opposition came a statement with enough nuances, convolution, and circumlocution as to enable both supporters and opponents of the right to housing to claim victory on the basis of the same text.”⁶⁷

⁶⁴ *Ibid.*, para. 9.

⁶⁵ Phillip Alston, “The U.S. and the Right to Housing: A Funny Thing Happened on the Way to the Forum,” *European Human Rights Law Review*, vol. 1, no. 2 (London: Sweet & Maxwell, 1996). Alston wrote extensively on the efforts of the U.S. to limit the language of rights in the Habitat Agenda. He noted that:

At the Nairobi [Preparatory Committee] it succeeded, not quite but almost singlehandedly, in having every provision in the draft Habitat II documents which had referred to the right to housing either deleted or placed in square brackets (used in such international diplomatic negotiations to denote a strong objection and to underline the lack—be it temporary or permanent—of the consensus assumed to be necessary in order to secure inclusion of the relevant provision in the final text).

Ibid. p. 127

⁶⁶ The U.S. delegate thus addressed the opening session of the conference: “[M]y delegation comes to this historic Conference to reaffirm the existence of the right to adequate housing as a component of existing human rights.” Honorable Michael A. Stegman, alternate head of the U.S. Delegation, “Statement at the Opening Plenary of the United Nations Conference on Human Settlements” (HABITAT II) (June 3, 1996).

⁶⁷ Alston writes:

[I]n essence, the new position [of the United States] consists of three elements: (a) acceptance that the right to an adequate standard of living is “universally accepted”; (b) a belief that “the issue of housing rights is best pursued” in the context of that broader

In 2001, however, the Bush administration reaffirmed its promise to fulfill the Agenda's mandate,⁶⁸ and submitted a seventy-page report⁶⁹ to UN-Habitat, the U.N. agency that monitors compliance with the Agenda.⁷⁰ While the report acknowledges homelessness and the shortage of affordable housing in the U.S., it does not refer in any way to public housing exclusionary policies or their impact.

Experts charged with interpreting the right to housing have attempted to clarify what adequate housing means in the context of disparate national resources. There is a general recognition, however, that the right to housing means the "right to live somewhere in security, peace and dignity." The Committee on Economic, Social, and Cultural Rights (CESCR) noted that:

[T]he right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. . . . Adequate shelter means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities—all at a reasonable cost.⁷¹

We have not attempted in this report to assess whether life in single room occupancies (SROs), transient motels, or shelters satisfies the minimum standards of decent housing.⁷² What is clear is that people who are forced to move day to day, or even month to month, from motel to shelter to the couch of a relative do not have access to the stability that is inherent in the right to housing.

formulation; and (c) insistence that the "basic components of the shelter aspect of the right to an adequate standard of living" conveniently mirror existing United States domestic policies with their twin anti-discrimination and free market emphases.

Alston, "The U.S. and the Right to Housing," p.121.

⁶⁸ "Statement of Mel Martinez, Secretary, United States Department of Housing and Urban Development," Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Habitat Agenda, June 7, 2001, available online at: http://www.un.int/usa/01_080.htm, accessed on July 10, 2003. Secretary Martinez deftly avoided mention of a right to housing, stating instead: "[m]y country shares with you a commitment to the 'fair idea' of secure, safe, and adequate housing for all."

⁶⁹ U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *United States-Habitat II: Progress Report*, June 2001, available online at: <http://www.huduser.org/Publications/pdf/habitat.pdf>, accessed on July 14, 2003.

⁷⁰ For more information on UN-HABITAT's mandate see: <http://www.unchs.org/unchs/english/whdbro.htm>.

⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No. 4, para. 7.

⁷² *Ibid.*, para. 8 sets forth seven core principles embodied in the right to housing, including legal security of tenure, availability of services, resources and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.

If the right to housing means anything, it means that one should not have to be homeless. It also means, at a minimum, that governments should avoid policies that predictably increase homelessness or that reduce affordable housing opportunities that previously existed.⁷³ Rajindar Sachar, the U.N. special rapporteur on the right to adequate housing, has noted that governments infringe that right if they adopt policies that “result in homelessness, greater levels of inadequate housing, [or] the inability of persons to pay for housing . . . [.]”⁷⁴ Yet between 1988 and 1998, with its public housing exclusionary policies, the United States deliberately removed affordable housing options that had previously been available to low-income people with criminal records.

The extent of homelessness in the United States, estimated at 2.5 to 3.5 million a year, certainly raises serious questions about the meaning of a right to housing in the United States.⁷⁵ The causes of homelessness are many, and not all can be placed at the feet of the federal government. But an estimated half of those who are homeless on any given night have criminal records.⁷⁶ And with regard to them, the government’s exclusionary policies have clearly played a devastating role that directly undermines their right to housing.

⁷³ The Committee on Economic, Social and Cultural Rights, the U.N. body that is the authoritative interpreter of the Covenant, has elaborated the article 2 requirement that states parties take steps “to the maximum of its available resources” with a view towards “achieving “progressively” the Covenant’s rights. In explaining what “progressive realization” entails, the Committee has said, “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and *housing*, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.” Committee on Economic, Social and Cultural Rights, General Comment No. 3, para. 10 (emphasis added). “Progressive realization” also means, at minimum that “any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.” *Ibid.*, para. 9.

⁷⁴ Rajindar Sachar, *1993 Special Rapporteur’s Report*, UN Doc. E/CN.4/Sub.2/1993/15, para. 144.

⁷⁵ “The plea of lack of resources sounds hollow,” said Mr. Sachar in a 1995 report, “in view of the finding of the United Nations Development Programme in 1992 that only a 3 percent reduction in worldwide arms expenditure per year during the 1990s would make available by the year 2000 an amount of US \$1.2 trillion for the industrialized countries and an amount of \$279 billion for the developing countries.” United Nations Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, *The Realization of Economic, Social and Cultural Rights: The Right to Adequate Housing, Final Report Submitted by Mr. Rajindar Sachar*, E/CN.4/Sub.2/1995/12, p. 6, para. 16 (July 12, 1995).

⁷⁶ According to one HUD estimate, 54 percent of the homeless have criminal records. HUD, *Homelessness: Programs and the People they Serve*, Interagency Council on the Homeless, ed. (December 1999), table 3.6, available online at: http://www.huduser.org/publications/homeless/homelessness/ch_3c.html#table3.6, accessed on August 6, 2004. While these numbers have been used to provoke fear of the criminal homeless population, HUD estimates that only 18 percent of the homeless have ever spent time in state or federal prison for a serious offense. Comprehensive statistics on those released from prisons and jails without adequate housing do not exist, but it is estimated that 15 to 27 percent of all prisoners go to homeless shelters upon release. H.R. 4676, the Second Chance Act of 2004, Section 2(15).

Human rights law does not preclude public housing authorities from establishing criteria for admission. But those criteria should not be unreasonable or discriminatory.⁷⁷ Moreover, given the nature of the existing housing market and the high cost of private housing, public housing admissions policies should not have the effect of denying people any realistic opportunity of finding safe and stable housing. They should not undermine, much less negate, the right to adequate housing.

⁷⁷ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), UN Doc. E/CN.4/1987/17, were written by a group of distinguished international law experts and serve as guidance to nations interpreting the ICESCR. Article 4 of the Limburg Principles states: "Laws imposing limitations on the exercise of economic, social and cultural rights shall not be arbitrary or unreasonable or discriminatory."

V. Federal “One Strike” Legislation

*If you break the law, you no longer have a home in public housing, one strike and you're out. That should be the law everywhere in America.*⁷⁸

—President Bill Clinton

The right of every person to adequate housing includes the right to housing that is decent and safe. The United States, through the policies and practices of HUD as well as local public housing authorities, has taken various steps to try to ensure that the housing it provides is safe. One of the measures it has employed has been to screen applicants by using criminal background information. While PHAs have long been authorized to conduct such screening, the U.S. Congress passed harsh new laws between 1988 and 1998 imposing new responsibilities and authority on PHAs to exclude housing applicants with certain criminal records as well as to evict tenants who break the law.

The Anti-Drug Abuse Act of 1988, a broad statute Congress passed to further the war on drugs, called for strict lease enforcement and eviction of public housing tenants who engage in criminal activity.⁷⁹ Citing a “reign of terror” in public housing,⁸⁰ the Act required PHAs to utilize leases, which called for eviction if a tenant or a household member or guest engaged in any criminal activity on or near public housing premises.⁸¹

These new eviction rules became the foundation for what subsequently became the federal government’s “one strike” policy. In 1990, Congress strengthened the eviction requirements of the Anti-Drug Abuse Act by prohibiting public housing authorities from giving any preference to applicants who otherwise qualified for preferential

⁷⁸ President Bill Clinton, “Remarks by the President at One Strike Symposium,” The White House, Office of the Press Secretary, March 28, 1996, available online at: <http://clinton6.nara.gov/1996/03/1996-03-28-president-remarks-at-one-strike-crime-symposium.html>, accessed on February 4, 2004.

⁷⁹ Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the United States Code). Among other initiatives, the Act created the Office of National Drug Control Policy, supervised by a Director appointed by the President and approved in the Senate (commonly known as the “Drug Czar”) and provided for block grants to housing authorities to combat drug trafficking in public housing projects.

⁸⁰ *Ibid.*, § 5122.

⁸¹ *Ibid.*, § 5101. Subsequent legislation broadened these grounds for eviction, calling for eviction from public housing whenever and wherever a household member or guest engages in criminal activity. The U.S. Supreme Court in *HUD v. Rucker*, 535 U.S. 125 (2002) upheld the eviction of several elderly tenants for criminal activity engaged in by household members, despite the tenants’ lack of actual knowledge of their actions.

treatment,⁸² if they had previously been evicted from public housing for drug-related activity.⁸³

President Bill Clinton's 1996 State of the Union address gave momentum and the new "One Strike" name to Congress' efforts to control who lives in public housing.⁸⁴

Congress responded to the president by passing the Housing Opportunity Extension Act of 1996 (Extension Act),⁸⁵ which again strengthened eviction rules and, for the first time, strongly urged that certain applicants for federally-subsidized housing be excluded based on their criminal records.⁸⁶ The Extension Act called on the National Crime Information Center and local police departments to provide criminal conviction records to PHAs for "purposes of applicant screening, lease enforcement, and eviction."⁸⁷ In addition, the Act established a three year ban on public housing for those evicted from public housing for drug-related activity.⁸⁸ Finally, the Act allowed PHAs to bar applicants believed to be using drugs or abusing alcohol, or anyone who the PHA found had a pattern of drug or alcohol abuse that could threaten the health and safety of residents.⁸⁹

Congress' vigor in creating a statutory framework for the "one strike" rule in 1996 was matched by HUD's efforts to create a regulatory scheme for its enforcement. Spurred on by a policy memorandum from President Clinton,⁹⁰ HUD developed guidelines to press PHAs to "evict drug dealers and other criminals" and "screen tenants for criminal

⁸² Because there is not enough federally-subsidized housing for all those who are eligible, PHAs have established preference criteria that give priority to certain families waiting for assistance. For example, domestic violence victims, the elderly, families with minor children, and those with disabilities are often chosen for preference lists by local PHAs.

⁸³ Cranston-Gonzalez National Affordable Housing Act of 1990, Pub. L. No. 101-625, 104 Stat. 4079 (1990) (codified as amended in scattered sections of 12 & 42 U.S.C.) at § 501. Section 501 of the 1990 Act required PHAs to remove families evicted from public housing for drug-related activity for a period of three years following eviction.

⁸⁴ President Bill Clinton, "State of the Union Address," January 23, 1996.

⁸⁵ Pub. L. No. 104-120, 110 Stat. 834 (1996).

⁸⁶ The Extension Act authorized housing authorities to evict tenants for criminal or drug-related activity "on or off" housing authority premises. § 9(a)(1)(A). Previously, such activity allowed for eviction when occurring "on or near" housing authority premises. Congress also struck the word "criminal" from the mandatory lease provisions so that "any activity" which threatened the safety of residents could result in eviction. § 9(a)(1)(B).

⁸⁷ *Ibid.*, § 9(b)(1)(A). See also footnote 225 for a more in-depth discussion of this issue.

⁸⁸ *Ibid.*, § 9(c).

⁸⁹ *Ibid.*, § 9(d)(2).

⁹⁰ "Memorandum from President Clinton to HUD Secretary on 'One Strike and You're Out' Guidelines," March 28, 1996, available online at: <http://clinton6.nara.gov/1996/03/1996-03-28-memo-on-one-strike-and-you-re-out-guidelines.html>, accessed on February 4, 2003.

records.”⁹¹ HUD’s “One Strike Guide”⁹² calls on PHAs to “take full advantage of their authority to use stringent screening and eviction procedures[.]”⁹³

The One Strike Guide’s most far-reaching initiative is the promotion of applicant criminal screening procedures.⁹⁴ Housing authorities are encouraged to not only screen all applicants’ criminal records but to develop their own exclusion criteria.⁹⁵ To ensure that all housing authorities screen applicants, the guide notes that PHA ratings and funding are tied to whether they are “adopting and implementing effective applicant screening.”⁹⁶

The effect has been PHA adoption of stringent exclusionary policies. Unfortunately, as discussed in more detail in this report, PHAs have chosen not to exercise with care the discretion HUD granted them to construct their screening mechanisms. HUD encourages PHAs to:

Consider applications for residence by persons with such criminal histories on a case-by-case basis, focusing on the concrete evidence of the seriousness and recentness of criminal activity as the best indicators of tenant suitability. PHAs should also take into account the extent of criminal activity and any additional factors that might suggest a likelihood of favorable conduct in the future, such as evidence of rehabilitation.⁹⁷

Congress passed the last substantive statutory amendments to the “one strike” policy as part of the Quality Housing and Work Responsibility Act of 1998 (QHWRA).⁹⁸ Under the QHWRA, PHAs should deny applicants public housing benefits if:

⁹¹ President Bill Clinton, “Remarks by the President at One Strike Symposium.”

⁹² HUD Notice PIH 96-16 (HA), April 29, 1996 and attached “one strike” guidelines: HUD, *‘One Strike and You’re Out’ Screening and Eviction Guidelines for Public Housing Authorities*, April 12, 1996.

⁹³ *Ibid.*, p. 2.

⁹⁴ *Ibid.*, p. 4-5.

⁹⁵ *Ibid.*, p. 5.

⁹⁶ *Ibid.*, p. 3. A later measure, discussed in more detail below, codified the requirement that PHAs be graded on their ability to screen and evict criminal offenders. See, Section 564(1)(A) of the Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 1643 (1998). Also see footnote 177 and accompanying text.

⁹⁷ *Ibid.*, p. 6.

⁹⁸ Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, 112 Stat. 1643 (1998).

during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, [a household member] engaged in any drug-related 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[.]⁹⁹

The “reasonable time” was left undefined and at the housing authority’s discretion. Similarly, housing authorities were left to decide what types of offenses could lead to exclusion.

The QHWRA thus granted Congressional approval of admissions rules formulated by HUD during the 1996 “one strike” initiative. Its broad mandate to exclude anyone with a criminal record who PHA authorities determine might pose a risk continues to affect the housing options of hundreds of thousands of people with criminal records and their families.¹⁰⁰

In addition to giving PHAs discretion to determine the applicants they may reject based on criminal records, Congress has also enumerated three specific categories of applicants that PHAs must reject. These federally designated *persona non grata* include anyone the PHA believes to be using drugs, anyone subject to registration requirements under state sex offender registration laws, and anyone convicted of manufacturing methamphetamines on public housing property.

How Many Are Excluded?

It is difficult to quantify the effect of these criminal record exclusions. There is no comprehensive, reliable national data on the number of applicants who are rejected because of criminal records and no way of calculating the number of people who, believing they would be ineligible under the policies, never even bother to apply for public housing.

In response to a Freedom of Information Act request, HUD told Human Rights Watch that 46,657 applicants for conventional, project-based public housing were denied

⁹⁹ Ibid.

¹⁰⁰ Scattered throughout the U.S. code and the Code of Federal Register, the rules governing screening and eviction are so complicated that a booming consulting business has grown up around the process. Agencies like Nan McKay & Associates, for example, provide guidance on constructing policies which comport with federal law, and they actually write the policies for many PHAs. A chart outlining the rules is available on the agency’s website at: http://www.nmauniversity.com/nanmckay_corp/nlha.pdf, accessed on December 22, 2003.

admission in 2002 because of “one strike” criteria.¹⁰¹ This figure, however, represents only a fraction of applicants rejected because of their criminal records.

First, this number does not include those who are denied Section 8 housing assistance, as PHAs are not required to report Section 8 denials to HUD. Second, while HUD requires PHAs to report the number of applicants found ineligible under “one strike” policies as part of its periodic review of PHA operations, HUD has not provided a uniform definition of what exclusions fall under “one strike.”¹⁰² For example, PHA officials are provided with no guidance about whether such a number includes all criminal record exclusions, or only those mandated by Congress. In fact, we discovered considerable inconsistencies in the numbers some individual PHAs provided to Human Rights Watch and the numbers they provided to HUD.¹⁰³

Many PHA officials told HRW that they did not even keep statistics on criminal exclusions. Several housing authorities indicated that because of the way they evaluate applications, it is impossible to determine whether an applicant was denied solely because of a criminal record, or whether the denial was the result of a combination of factors, including poor credit.¹⁰⁴ Some PHAs could not even explain to us how they arrived at the numbers they sent to HUD. Finally, no PHAs kept track of how many applicants given housing vouchers by the PHAs were turned away by landlords because of their criminal histories.

Even if PHAs collected accurate data showing the number of those denied because of criminal background information, that data would not capture the total number of people unable to access housing because of criminal records. It would not reflect the

¹⁰¹Letter to Human Rights Watch from Carole W. Wilson, associate general counsel, Office of Litigation, U.S. Department of Housing and Urban Development, December 22, 2003. The figure was based on data provided to HUD by PHAs.

¹⁰² Guidance to PHAs is provided in a HUD guidebook available online at: http://www.hud.gov/offices/reac/pdf/guidebook_oct01.pdf, accessed March 3, 2004.

¹⁰³ HUD provided Human Rights Watch with the number of PHA exclusions by each PHA. Human Rights Watch also requested data from PHAs reflecting “the number of denials of admission or findings of ineligibility based on someone’s criminal history by the housing authority for the year 2002.” The Housing Authority of the City of Pittsburgh, for example, told Human Rights Watch that it denied 446 applicants, who had applied for conventional public housing in 2002, based on the applicants’ criminal history. Human Rights Watch e-mail correspondence with Anthony Williams, director, Housing Authority of Pittsburgh, January 27, 2004. However, the number of denials reflected in HUD’s data is only 184.

¹⁰⁴ For example, the Housing Authority of the County of Los Angeles (HACoLA) evaluates a number of eligibility factors simultaneously. If negative information is received about both the applicant’s credit history and criminal background, the applicant receives a letter of ineligibility, but HACoLA cannot determine the precise reason for the denial; hence, it does not include such a rejection in the data it reports to HUD. Human Rights Watch interview with Esther Keosabian, assistant director, Housing Management Division, Community Development Commission, County of Los Angeles, HACoLA, February 6, 2004.

number of people who chose not to submit a full application after seeing that the application called for criminal record information, applicants who were turned away at the applications counter by PHA staff who said they were not eligible, and those discouraged from even approaching a PHA because they were told by social service providers, prison officials, peers, and even PHA staff that “people with felonies,” or “people with drug charges” could not apply.

“They don’t even let them turn them [applications] in,” a Birmingham, Alabama attorney told Human Rights Watch, noting that the numbers provided by the housing authority were not reflective of the number of individuals affected by the PHA’s strict exclusion policies. “They turn them away at the applications desk. They don’t let them fill it out. That way, they don’t have to count them.”¹⁰⁵

Given the imprecise methods used to collect these figures and the impossibility of quantifying those discouraged from ever applying, it is impossible to know—and indeed HUD itself clearly does not know—how many of the millions of people with criminal records have been affected by the exclusionary policies.¹⁰⁶ We have developed a minimal estimate, however, that gives a sense of the magnitude.

Our research suggests that PHAs typically reject applications from people convicted of felonies within five years of the application. We estimate that over the past five years, the number of convicted felons is at least 3.5 million.¹⁰⁷ That is, we believe that at least 3.5

¹⁰⁵ Human Rights Watch telephone interview with Kenneth Lay, managing attorney, Legal Services of Metro Birmingham, December 12, 2003.

¹⁰⁶ HUD’s failure to obtain accurate and complete data on the effect of exclusionary policies is inconsistent with international norms. International law calls on states to monitor the implementation of housing rights. See, Committee on Economic, Social and Cultural Rights, General Comment No. 4, para. 13, citing also general guidelines regarding the form of reports adopted by the Committee (E/C.12/1991/1), which emphasize the need to “provide detailed information about those groups within . . . society that are vulnerable and disadvantaged with regard to housing.” The Habitat Agenda also requires states to monitor their progress in fulfilling the right to housing by collecting data. Habitat Agenda para. 61(d), para. 240. In its 2001 report to Habitat, the United States devoted only two pages out of its seventy page report to homelessness and affordable housing. HUD, Habitat Report, 2001. Committee on Economic, Social and Cultural Rights has stated: “Effective monitoring of the situation with respect to housing is [an] obligation of immediate effect.” See Committee on Economic, Social and Cultural Rights, General Comment No. 4, para. 13, citing also general guidelines regarding the form of reports adopted by the Committee (E/C.12/1991/1) which emphasize the need to “provide detailed information about those groups within . . . society that are vulnerable and disadvantaged with regard to housing.” The UN Commission on Human Settlements (UNCHS or “Habitat”), the body responsible for the implementation and oversight of the Habitat Agenda, has urged states to establish appropriate monitoring mechanisms to evaluate quantifiable data on commitments that are measurable. Habitat recommends several kinds of data which should be collected, including data on the number of those evicted, but the list is certainly not exhaustive. Habitat Agenda, para. 61(b).

¹⁰⁷ We arrived at this number (3,504,483) by taking the number of new felony convictions in the years for which data is currently available (1996, 1998, and 2000), adding them, and dividing the total number (3,003,843) by

million would be ineligible for public housing. That number, of course, does not include people ineligible for other reasons, e.g. those convicted of misdemeanors or whose criminal records consist only of arrests; nor does it include those whose felony convictions are years earlier, but nonetheless might warrant exclusion either under local or federal rules.

three to come up with an average number of felony convictions per year (1,001,281). We then multiplied that number by five to come up with an estimated number of total felony convictions for the previous five years (5,006,405), and reduced that number by 30 percent, a generous recidivism figure, to account for offenders who committed more than one felony. Since a person who committed a felony within the past five years would be automatically ineligible for housing assistance under every housing authority policy we reviewed, this is a conservative estimate of the number of those currently ineligible for housing assistance, as many PHAs exclude offenders whose crimes do not rise to the level of a felony, and exclude convicted felons for much longer than five years. Matthew R. Durose and Patrick A. Langan, Ph.D., *Felony Sentences in State Courts, 2000* (BJS, June 2003), p. 3 (citing also *Compendium of Federal Statistics, 2000*); Matthew R. Durose, David J. Levin, and Patrick A. Langan, Ph.D., *Felony Sentences in State Courts, 1998* (BJS, October 2001), p. 3 (citing also *Compendium of Federal Statistics, 1998*); Jodi M. Brown, Patrick A. Langan, Ph.D., and David J. Levin, *Felony Sentences in State Courts, 1996* (BJS, May 1999), p. 2 (citing also *Compendium of Federal Statistics, 1999*). These reports are available online at: <http://www.ojp.usdoj.gov/bjs/pubal/p2.htm#fssc>, accessed on October 22, 2004.

VI. Public Safety

*What you want is a way for housing projects to be safe. Some restrictions based on real safety make all the sense in the world, but you want those restrictions to be reasonable, and you want people to be able to earn their way back in.*¹⁰⁸

—JoAnne Page, executive director, Fortune Society

The right of every person to adequate housing includes the right to housing that is decent and safe. Human Rights Watch recognizes the responsibility of the U.S., through HUD and local PHAs, to ensure, to the extent possible, that government-assisted housing is safe. Current public housing policies that automatically exclude individuals with a wide range of criminal histories for long periods of time (for a lifetime, in some cases) are an unreasonable means of furthering that goal. They reflect widely shared but flawed assumptions about public safety and about people who have broken the law. First, they reflect the belief that the longer people who have committed crimes are excluded from public housing, the safer other tenants will be. That mistaken belief is predicated on mostly unexamined beliefs about the character of people who commit crimes.

Criminologists recognize that the longer people with criminal records go without committing a crime, the less likely they are to commit another offense.¹⁰⁹ In fact, Joan Petersilia, noted criminologist and author of a definitive study of reentry, suggests that parole supervision beyond five years is ineffective because recidivism is unlikely after five years of arrest-free behavior. Periods of exclusion beyond five years, especially lifetime exclusions, make little sense in light of this reality.

HUD has not attempted to document the relationship between restrictive admissions policies and crime, despite the fact that the agency has its own Office of Policy Development and Research and employs several criminologists. Many public housing officials say that public safety has improved in their facilities and cite the adoption of exclusionary policies as the reason. But we are aware of no concrete studies supporting such claims and, despite requests, neither HUD nor PHA officials provided Human Rights Watch with facts that could support this conclusion.

¹⁰⁸ Human Rights Watch telephone interview with JoAnne Page, March 2, 2004.

¹⁰⁹ Petersilia, *When Prisoners Come Home*, p. 18.

Human Rights Watch does not doubt that crime rates have decreased in public housing facilities: such rates have decreased nationwide in recent years. But it is difficult to establish the extent to which exclusionary policies themselves contributed to the decrease. As one housing official in Cleveland, Ohio told us, looking at crime statistics as support for exclusionary policies is “useless. Do we know if it is because of ‘one strike’? It becomes hard to judge whether ‘one strike’ works.”¹¹⁰ Declining crime rates in public housing no doubt reflect many factors. But surely most of them are the same factors responsible for declining rates in cities and rural areas across the country—factors that have nothing to do with housing policies. “Crime is down in public housing,” New York City Housing Authority’s (NYCHA’s) general manager told Human Rights Watch, “but it looks similar to reductions in the city as a whole.”¹¹¹ Moreover, our research indicated that PHA officials with very different exclusionary policies all nonetheless believe their crime rates have dropped.

Despite a lack of evidence that strict exclusionary policies are necessary for public safety, PHAs are reluctant to explore whether they should be changed. “It’s not a causal relationship I can draw,” said NYCHA’s general manager, “but if we change [the policy], we don’t know what would happen. . . . I’m not sure I’d want to find out.”¹¹²

Curiously, there has been relatively little discussion among federal or local housing officials as to what, in fact, predicts a good tenant, much less the predictive value of a criminal record. Pressured by local advocates, housing officials in Portland, Oregon in 2003 agreed to impose a sort of moratorium on the strictest of their exclusion policies and commission a study at Portland State University (PSU) to examine whether someone with a criminal record can be a good tenant. Annette Jolin, Chair of the PSU Department of Criminology and Criminal Justice told Human Rights Watch:

Before we began designing the study, I had students look for existing studies that had been done on the connection between ex-offenders and public housing. We wanted to know: do they make good or bad tenants? They couldn’t find anything, and I thought, well, maybe they’re

¹¹⁰ Human Rights Watch interview with Scott Pollack, executive assistant, Cuyahoga Metropolitan Housing Authority, Cleveland, Ohio, May 7, 2003.

¹¹¹ Human Rights Watch interview with Douglas Apple, general manager, New York City Housing Authority, New York, New York, May 25, 2004.

¹¹² *Ibid.*

not looking in the right places. And I had others look, and there was nothing. I was surprised.¹¹³

While Jolin explained that much has been written about crime in public housing, there was nothing about what, in fact, makes for a good tenant. “People had always just gone with the assumption that having a criminal record makes someone a bad tenant,” she said, “and that has never been empirically demonstrated.”¹¹⁴

Slated to begin in the summer of 2004, the PSU study will track people with criminal records who were admitted to public housing in Portland in 2000 for a period of four to five years.

Based on interviews with public housing officials, Jolin and her team will operationalize the definition of a “good tenant.” They will then look at whether tenants in the subject population pay their rent on time, maintain their apartments, create problems for neighbors, or get evicted. While she plans to look at rates of recidivism, Jolin said, “that’s not really the point. We really want to focus on whether or not they are good tenants.”

Although advocates for harsh exclusionary policies argue they are necessary to reduce crime in public housing, the experience of many PHAs suggests otherwise.

For example, neither the New York nor the Los Angeles city housing authorities consider arrest records, and both limit the types of offenses that warrant exclusion, as well as the length of time applicants with criminal records are excluded. Yet officials at both PHAs told Human Rights Watch that they believe they combat crime just as effectively with their policies as PHAs with far harsher ones. They also have acknowledged the importance of including consideration of prisoner reentry needs in developing public housing policies. “We try to have an enlightened, balanced policy, recognizing that people do have the ability to rehabilitate,” the general manager of the NYCHA told Human Rights Watch. “Understanding the role of probation, parole, and treatment, we try to balance the interests of residents and applicants.”¹¹⁵

¹¹³ Human Rights Watch telephone interview with Annette Jolin, chair, Department of Criminology and Criminal Justice, Portland State University, April 16, 2004.

¹¹⁴ Ibid.

¹¹⁵ Interview with Douglas Apple, May 25, 2004.

Additional evidence that highly restrictive criminal record policies are not responsible for reduced crime rates in public housing developments comes from comparisons between PHAs located in the same geographic area but with radically different admissions criteria.¹¹⁶ For example, the Salt Lake City Housing Authority uses automatic exclusion policies that restrict access to housing for long periods of time and for minor offenses, while the Housing Authority of the County of Salt Lake undertakes individualized review of each applicant. Yet officials in both PHAs believe they have achieved increased safety and reduced crime.

Different housing authorities have different philosophies, legal service representatives and social service providers told us. The “Williamsport Housing Authority sees itself as a social service agency,” one experienced paralegal told us of a small town housing authority in Pennsylvania, while the county housing authority does not. “They take a more conservative view. The [town PHA] says, ‘let them prove themselves;’ [the county PHA] is not willing to make that choice.”¹¹⁷

Ironically, many housing providers told Human Rights Watch that it was not people who had committed crimes in the past that created a risk to safety or presented management problems.¹¹⁸ Such people, they said, were often grateful for a second chance, and were eager to put their lives back together. One manager of a Single-Room Occupancy (SRO) housing program catering to single homeless people in Austin, Texas described having to persuade the PHA that administers the program to let them admit those with criminal records. “Some of those we advocated for have been fine,” he told Human

¹¹⁶ Human Rights Watch interviews with housing officials in Williamsport, Pennsylvania, with the Williamsport Housing Authority and the Lycoming County Housing Authority in November 2003, the city and county of Los Angeles in February 2004, and the city and county of Salt Lake, Utah in October 2003.

¹¹⁷ Human Rights Watch interview with Linda Milton, paralegal, North Penn Legal Services, Williamsport, Pennsylvania, December 1, 2003.

¹¹⁸ Some may dispute this notion, pointing to high levels of recidivism, but studies show that those with access to basic services are less likely to re-offend. For example, the Texas Criminal Justice Policy Council found in 2002 that only 7 percent of those who completed the state substance abuse program committed another offense within 2 years, compared to a recidivism rate of 25 to 31 percent for those who failed to complete the treatment program. Tony Fabelo, *Recidivism Rates and Issues Related to TDCJ Substance Abuse Treatment Programs* 8 (March 13, 2002), available online at: <http://cjpc.state.tx.us/reports/adltrehab/RecidTDCJ.pdf>, accessed on October 18, 2004. Likewise, a study by the Corporation for Supportive Housing in New York showed that the use of state prisons and city jails dropped by 74 percent and 40 percent, respectively, when people with mental illness and past criminal records were provided supportive housing. Dennis P. Culhane, Stephen Metraux, and Trevor Hadley, *The New York, New York Agreement Cost Study: The Impact of Supportive Housing on Services Use for Homeless Mentally Ill Individuals* 4 (Corporation for Supportive Housing, May 2001), available online at: <http://www.csh.org/html/NYNYSummary.pdf>, accessed on October 22, 2004.

Rights Watch. “They are the ones that want to get their lives back together. Those [who had no criminal records and] went through smoothly, we have problems with.”¹¹⁹

Probation and parole agents told us that some of those that they supervise may be among those least likely to threaten public safety because they fear returning to prison. “People on my caseload with long records, they do a 360—‘I’m not going back, I’ve learned my lesson.’ A past record alone is not a good predictor for reoffense. They may have messed up before, but it scared them straight.”¹²⁰

Leslie Steckler, program coordinator for the Women & Children’s Unit at the Birmingham Salvation Army said of two of her clients interviewed by Human Rights Watch:

They are at the tail end of their treatment. They’ve already paid back their communities. They resided in the shelter as the judge told them, and they’ve worked through their IOP [Intensive Outcare Program]. . . . They would not be a risk. They made a mistake, they got in trouble with drugs, they’ve never caused a problem in the shelter. I’ve never had a problem with these women. They are a couple of my best clients because they’ve hit that bottom and they’ve dealt with and gotten over their addiction.¹²¹

Human Rights Watch asked a building manager of one of New York’s many private SROs about the difficulties he faced housing people coming out of prison with serious charges—people no one else would house. “They don’t bother nobody,” he said, “Sometimes they’re even more careful not to bother other people. Look, they’ve got a place to live, they’ve just gotten out, they don’t want to jeopardize that. I’ve never had any problems.”¹²²

People with criminal records sometimes saw themselves as assets to housing programs. “Why are we not given a chance?” asked one woman in a transitional housing program

¹¹⁹ Human Rights Watch interview with Ramon Martinez, property manager, Garden Terrace, Austin, Texas, February 12, 2004.

¹²⁰ Human Rights Watch interview with Jaqueline Hawkins, parole agent, Baltimore, Maryland, November 18, 2003.

¹²¹ Human Rights Watch interview with Leslie Steckler, program coordinator, Women & Children’s Unit, Salvation Army, Birmingham, Alabama, December 10, 2003.

¹²² Human Rights Watch interview with a building manager, who wished to remain anonymous, at a single-room occupancy (SRO) hotel in Manhattan, New York, November 4, 2003.

in Baltimore, Maryland. “Ex-offenders that are really trying to do something, women that’s showing up for the program . . . we’d be a huge asset. We would work harder because we know the odds are stacked against us—we’d try to prove them wrong.”¹²³

No one argues that exclusionary policies reflect a considered effort to balance the rights of would-be tenants with those of existing tenants. They were adopted at a time in the United States when public officials—and the public at large—were willing to ignore the rights of criminal offenders because of the putative gains of “tough on crime” policies.

Many of those we interviewed for this report were living on the streets, in overcrowded shelters, and in squalid transient or SRO hotels. In the best of circumstances, they were crowded into the homes of family or friends for short periods of time or living in apartments they would not be able to afford the following month. Many of them had no housing options other than those which, as they themselves recognized, were rife with domestic abuse, violence, crime, and surrounded by harmful drug and alcohol use.

Homelessness: A Downward Spiral

R.Y., a forty-two-year-old African American man, told Human Rights Watch that in 1996 he had applied for housing for himself and his three children who were living with him at the time. He was denied housing because of a drug possession charge for which he had pled guilty and served 30 days in jail a year earlier. Since being denied he has lost custody of his children, and many nights he sleeps outside on the streets.

*I’m homeless now. . . . It’s real hard to stay not using when you’re outside. I’ve been diagnosed with depressed [sic] and I haven’t received any treatment for it. I think that’s what kept me using, takes me out of my misery and the shame and guilt of homelessness. Hey, you need a place to create some stable place in your life. You have to ad lib your day instead of plan it when you’re homeless.*¹²⁴

Indeed, denying people with criminal records some form of affordable housing may create a greater threat to public safety for communities surrounding PHA developments. Life on the streets can create desperation and incentives to break the law. “Homeless people are much more likely to collect criminal records just for being there—for living private lives in public places,” explained the director of Baltimore’s Healthcare for the

¹²³ Human Rights Watch interview with T.S., Baltimore, Maryland, November 18, 2003.

¹²⁴ Human Rights Watch interview with R.Y., Baltimore, Maryland, November 20, 2003.

Homeless. “If I want to drink a couple of bottles of wine, no problem. On a street corner, there are consequences.”¹²⁵

The consequences of denying people the only means of securing safe and affordable housing are as obvious as they are tragic:

- ◆ Lacking stable housing, parents returning from incarceration are unable to regain custody of their children.¹²⁶ Child welfare officials remove children from families that cannot provide them with stable housing. Human Rights Watch met families who were forced to choose between staying together or excluding a member of the household with a criminal record, in order to secure affordable housing for the rest of the family. Policies that so obviously impede the ability of families to reunite or remain together flatly contradict the “family values” espoused in the United States.¹²⁷ They also violate principles of international law.¹²⁸

- ◆ Transient living disrupts a child’s education, emotional development, and sense of well-being. There is no way to know how many children are excluded along with their parents from public housing. But we do know that an estimated 1.5 million minor children have at least one parent in prison on any given day in the United States, and over ten million had a parent in prison at one point in their lives.¹²⁹ Children are “[i]n some ways . . . the

¹²⁵ Human Rights Watch interview with Kevin Lindamood, executive director, Healthcare for the Homeless, Baltimore, Maryland, November 21, 2003.

¹²⁶ The Adoption and Safe Families Act of 1997, Pub. L. 105-898 (codified in scattered sections of the U.S. code (U.S.C.)), imposes strict time limits on parents’ separation from their children during periods of incarceration. States are required to file proceedings to permanently terminate all parental rights if children remain in the custody of the state for fifteen out of twenty-two consecutive months. Required to provide adequate housing for their children before regaining custody, some parents are unable to access housing in time, and their children are separated from them forever.

¹²⁷ One study even attributed rates of recidivism to loss of child custody. Vera Institute of Justice and Administration for Children’s Services, *Patterns of Criminal Conviction and Incarceration Among Mothers of Children in Foster Care in New York City* (December 2003), available online at: http://www.vera.org/publication_pdf/210_408.pdf, accessed on October 12, 2004.

¹²⁸ See, for example, the prominence placed on the integrity of the family in the Convention on the Rights of the Child (CRC), adopted by the UN GA November 20, 1989 (entered into force September 2, 1990, in accordance with Article 49), arts. 7, 9, 16(1) and 27(3). While the U.S. is one of only two states that have failed to ratify the CRC, 192 states have, and its provisions are considered customary international law and are applied as such in U.S. courts.

¹²⁹ *Ibid.* Fifty-five percent of all those in state prison and 63 percent of those in federal prison had minor children. Christopher J. Mumola, *Incarcerated Parents and their Children* (BJS, August 2000), available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>, accessed on October 18, 2004; Petersilia, *When Prisoners Come Home*, p. 43.

unseen victims of the prison boom and war on drugs[.]”¹³⁰ and, hence, the unseen victims of exclusionary housing policies.

- ◆ Women may be forced to consider returning to an abuser to avoid homelessness, where they are particularly vulnerable to rape and violent crime on the streets. Many women, along with other struggling individuals, find themselves having to exchange sex for protection, money, or a place to stay.

No Home, No Family

A community activist in Pittsburgh told Human Rights Watch about a twenty-six-year-old African American woman who had spent time in prison for several felony drug convictions. When she was released, she worked closely with Children and Youth Services (CYS) to plan for her children’s return. She applied for public housing through both the city and the county PHAs but was denied because of her felony record.

She was working at a Wal-Mart in North Versailles, about an hour-and-a-half bus ride from where she was staying in Pittsburgh. She would take two buses to get to work, and two to come back. She went to [recovery] meetings at night. She worked hard, she was a domestic violence survivor, she’d been really beat up, incarcerated . . . She couldn’t find a place [to live] and they terminated her parental rights. CYS was saying, ‘these kids can’t just hang out there [waiting]’ . . . We all cried together, it was so sad. She had hope, we all had hope.¹³¹

- ◆ People who are inadequately housed, especially those living on the streets or in homeless shelters, are at a higher risk for communicable diseases such as HIV and tuberculosis.¹³² Living in conditions that are unsanitary, without cooking facilities or refrigeration, or not knowing where the night will be spent make it extremely difficult to manage a regimen of treatment for chronic diseases such as diabetes, tuberculosis, and asthma. Existing mental health conditions are exacerbated by the stress of rejection and housing instability, and depression is common.

¹³⁰ Petersilia, *When Prisoners Come Home*, p. 43. See also Human Rights Watch, *Collateral Casualties: Children of Incarcerated Drug Offenders in New York* (New York: Human Rights Watch, June 2002).

¹³¹ Interview with Ronell Guy-Curtis, January 29, 2004.

¹³² Angela Aidala and Jay Cross, *Housing and HIV: Drug and Sex Risk Behaviors*, report available at the Center for Applied Public Health, Mailman School of Public Health, Columbia University.

- ◆ Struggling with addiction in even the most ideal circumstances is difficult. But many treatment professionals argue that without stable housing, relapse is almost certain.¹³³

- ◆ Homelessness itself is a predictor for recidivism, particularly for the commission of minor offenses, as people are forced to, as some have put it, “live private lives in public places.”¹³⁴ For example, most cities and towns in the United States do not have public restrooms, and relieving oneself in a park or a side street is considered a criminal offense.

Recidivism becomes a self-fulfilling prophecy when offenders are released from incarceration with scant survival options. As one substance abuse treatment provider explained, exclusionary policies need to be changed “not just because it’s the humane thing to do, but because it’s the smart, public safety thing to do.”¹³⁵

¹³³ Herman Joseph and John Langrod, “The Homeless,” in *Substance Abuse: The Comprehensive Textbook* (forthcoming 2004).

¹³⁴ Interview with Kevin Lindamood, November 21, 2003.

¹³⁵ Human Rights Watch interview with Chris Retan, executive director, Aletheia House, Birmingham, Alabama, December 11, 2003.

VII. Exclusions Based on Local Policies

Using the authority given to them by HUD, PHAs have adopted a variety of definitions, graphs, and matrices to guide staff evaluating applicants with criminal records. All too often, however, the criteria they have adopted are unduly broad, failing to provide any guidance on how to determine when ex-offenders or people with arrest records pose a risk to other tenants and when they do not, and which crimes warrant particular scrutiny. In addition, the periods of time during which applicants with criminal records are excluded are often unreasonably long. The impact of existing criteria is enhanced because most PHAs do not conduct an individualized assessment or consider evidence of rehabilitation or mitigation before rejecting an applicant. They have, in effect, adopted misguided “zero tolerance” policies that arbitrarily exclude needy applicants from public housing.

Arrests as Basis for Exclusion

In the United States, everyone is presumed innocent of a criminal offense unless guilt is established in a court of law. Nevertheless, HUD guidelines allow PHAs to reject applicants based solely on arrest records even if the charges were ultimately dropped, and many do just that.¹³⁶

In our small random sample, nearly all of the PHA policies we reviewed give housing officials the authority to reject applicants simply on the basis of arrests.¹³⁷ As best we could determine, the justification for using arrest records is that “where there’s smoke, there’s fire.” One official at the Pittsburgh Housing Authority reasoned it is a well-known fact that when charges are dropped, it does not mean that the person arrested was not guilty, because, he explained, “[w]itnesses fail to show [and] judges won’t continue [cases] forever.”¹³⁸

Some PHA officials do acknowledge that relying on arrest records as the determinant of housing eligibility is overly punitive. “Arrests have much less weight,” she told us. “If authorities fail to prosecute, [denying them housing] seems pretty draconian to me. I

¹³⁶ HUD, *Public Housing Occupancy Handbook*, Chapter 4: Suitability for Tenancy, 4-1(b)(10), p. 4-3.

¹³⁷ A report by the Legal Action Center shows that over half of the largest PHAs in each state deny applicants on the basis of arrest records that do not lead to conviction. Legal Action Center, “What’s the Law,” in *After Prison: Roadblocks to Re-Entry*. Some PHAs, however, placed applications on hold pending the resolution of criminal charges. Human Rights Watch interview with Bernie Jay Meyers, executive director, Williamsport Housing Authority, Williamsport, Pennsylvania, December 1, 2003.

¹³⁸ Human Rights Watch interview with Anthony Williams, director of housing occupancy, Housing Authority of the City of Pittsburgh, Pittsburgh, Pennsylvania, January 27, 2004.

give it weight only if [there are] so many arrests, and a conviction; it seems likely that they have a problem. Otherwise, I don't pay attention."¹³⁹

Certainly there are cases where the nature and number of arrests may suggest reason for concern, but arrest information should not trigger an automatic denial. It would be reasonable, however, for PHAs to consider multiple arrests as one of the factors taken into consideration in an individualized evaluation of an application.

One Mother's Struggle for Housing

P.C. is a forty-one-year-old African American woman living in Pittsburgh with her nine-year-old son. She was arrested for a child abuse charge which was subsequently dropped, but she was evicted from her public housing apartment as a result of the arrest. She lived with relatives after her eviction but could not afford her share of the rent, so she and her son moved in with her son's grandfather. Ms. C. re-applied for public housing, and she was denied in September 2002 because she was told she owed back rent for the apartment from which she was originally evicted. Ms. C. borrowed money and found assistance from a community-based organization to help her pay the \$839 she owed. But after she paid, she was notified in March 2003 that her application was denied because of her criminal background.

I was just totally gone. I couldn't function. I couldn't think. I cried. First, I done paid the money, then they deny me again. I just told myself, I could fight it or just let it go. I prayed on it and I decided I'd file the grievance.

Ms. C.'s son suffers from mental health disorders, and although she says her son is what keeps her going through this process, the effect of their denial has affected him as well.

My baby . . . gets real frustrated. He just keeps seein' me fight and fight. The other day I told him I had a grievance hearing for housing, and he was jumpin' all up and down, and he was very excited. He asked me to go to the grievance hearing, "I wanna go with you and I hope we'll get housing!" . . . After we left out, he was crying and he said, "you paid the money, why is they doin' this to you?"

When they asked me at the hearing, "Is you planning on going out there and getting' in any more trouble?" He said "My mommy is a good mommy. She don't do nothing wrong. She don't drink, she don't do no crack, nothing" They asked me, "Tell me what would keep you from getting' in trouble?" And I said, "I don't drink anymore, I went through anger management classes."

[My son] asked me today, "leave the keys so I can see when the letter from housing comes." I think he's real bitter now because he sees me fighting all the time. He says, "Mommy, call the news. Don't be

¹³⁹ Human Rights Watch interview with Carol Coley, hearing officer, Housing Authority of Portland, Portland, Oregon, August 1, 2003.

ashamed. I'll go on TV with you. I'll be with you. Let's pray for a house, pray for things to get better." That's what's pushing me. . . . This has to be stopped. I could see if I had murder charges, but I wouldn't do anything to hurt nobody. This gots to stop. My baby's getting' bitterer and bitterer and worse and worse. But he thanks his grandfather for letting us stay here.

Ms. C.'s son's grandfather has problems of his own, however, and Pennsylvania Children and Youth Services told her that if she did not find another place to live, they would place her son in foster care. When Human Rights Watch visited the house, the child's grandfather was sitting on the couch with a half-empty bottle of whiskey.

He drinks, he smokes weed, he's an alcoholic. He has women here that do crack. My baby can't see that. He has people in here that rob him. If I don't get a place soon, they're gonna take my baby. He gets violent when he's drunk. They told me if I don't get a place, they'll take him. He [her son] would try to kill hisself if they take him.

At the time she spoke with Human Rights Watch, Ms. C. was only working part time because she was taking her son back and forth to a clinic. "I tries to do the best I can," she said. Ms. C. is paid \$8 an hour working as a housekeeper at Children's Hospital, where she passed a child abuse history clearance before being offered the job. "Children's Hospital, they gave me a chance."

Ms. C. received a decision from the Housing Authority of the City of Pittsburgh in February 2004. She and her son were approved for housing.¹⁴⁰

Minor, Non-Violent Offenses

PHAs have adopted exclusionary policies that deny eligibility to applicants with even the most minor criminal backgrounds. Just about any offense will do, even if it bears scant relation to the likelihood the applicant will be a good tenant.¹⁴¹

Some PHAs exclude applicants guilty of minor misdemeanor offenses and even of infractions that do not even rise to the level of a misdemeanor. One PHA official in rural South Carolina told Human Rights Watch: "Most of the people denied are denied for shoplifting charges, not paying for video rentals."¹⁴²

¹⁴⁰ Human Rights Watch interview with P.C., Pittsburgh, Pennsylvania, January 31, 2004.

¹⁴¹ See John J. Ammann, "Criminal Records of the Poor and Their Effects on Eligibility for Affordable Housing," *Journal of Affordable Housing*, Vol. 9, No. 3, Spring 2000. Ammann provides several case studies of low-income people unable to obtain housing assistance because of outstanding warrants for such offenses as public transit violations.

¹⁴² Human Rights Watch interview with Laurie Meadows, public housing manager, Newberry Housing Authority, Lawrence, South Carolina, December 16, 2003.

Many of the women that Human Rights Watch spoke with had been denied because they had been charged with passing “bad checks”—paying for merchandise with personal checks when they did not have money in their bank accounts to cover the cost. Their rejections were not based on being poor credit risks but on the fact that they had criminal records.

A Pittsburgh social worker told Human Rights Watch about one twenty-nine-year-old African American woman with two children who had applied for housing through the Allegheny County Housing Authority and was denied because of a retail theft charge three or four years prior to her application.

She was the most peaceful person. She had stolen some chapstick, some small things from a downtown drug store. She lost custody of her children right around the time of the denial because she had no stable housing. . . . I can see where some people do have a problem, but you can’t make those assumptions. We had not one bit of a problem with her. She’s not a threat to others.¹⁴³

Pittsburgh, Pennsylvania housing officials insisted to Human Rights Watch that they would be justified even in excluding jaywalkers and shoplifters. When Human Rights Watch asked how shoplifting posed a threat to existing public housing tenants, the director of housing occupancy said a shoplifter should not be admitted into a housing development because he would teach children his “craft,” e.g. how to “stuff bags of potato chips into his jacket.” He added:

This is a threat to the community; people who can influence the community, sit there on the stoop and teach kids how to commit crime. . . . There is a greater propensity for crime in public housing that won’t happen in other communities. If you are a habitual shoplifter, that shoplifting can lead to anything else that seems to be prevalent in public housing.¹⁴⁴

The logic in these explanations is questionable, especially where the relationship between the offense and responsible tenancy is remote. Moreover, they suggest an underlying

¹⁴³ Human Rights Watch interview with Renee D’Ippolito, case manager supervisor, Bethlehem Haven, Pittsburgh, Pennsylvania, January 30, 2004.

¹⁴⁴ Human Rights Watch interview with an official from the Housing Authority of the City of Pittsburgh, Pittsburgh, Pennsylvania, January 27, 2004.

punitive bias rather than a genuine public safety concern. For example, another Pittsburgh housing official told Human Rights Watch: “People have to understand that there are consequences to their actions.”¹⁴⁵

New York City Housing Authority (NYCHA) policy allows housing officials to deny an applicant housing for a period of two years following such violations as disorderly conduct and “turnstile jumping” (riding the subway without paying the fare). NYCHA officials, however, told Human Rights Watch that PHA staff evaluating the application would look at the totality of the information contained in the application. While public intoxication (a violation) and disorderly conduct, depending on the circumstances, may justify exclusion, fare evasion alone may not. NYCHA’s Deputy General Counsel reasoned that a series of such violations could, however, indicate a future risk: “If you constantly evade [paying the fare], you perhaps will not take lease obligations seriously.”¹⁴⁶

The American Bar Association (ABA) and the U.S. Equal Employment Opportunities Commission (EEOC) have both recommended that to the extent prior offenses are used to impose collateral sanctions and what the ABA calls “discretionary disqualifications,” the disqualification should be “particularly related to the offense[.]”¹⁴⁷ Similarly, the EEOC provided useful guidance to employers regarding the use of arrest records to screen prospective employees, and it is instructive by way of comparison with PHA practice. The EEOC advises employers to examine whether there is a “business necessity” for excluding those with arrest records in much the same way Human Rights Watch urges PHAs to examine whether there is a valid public safety reason for excluding those with criminal records:

The question addressed in this policy guidance is “to what extent may arrest records be used in making employment decisions?” The Commission concludes that since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment. However, conduct which indicates unsuitability for a particular position is a basis for exclusion. Where it appears that the

¹⁴⁵ Ibid.

¹⁴⁶ Human Rights Watch interview with Henry Shoenfeld, deputy general counsel for civil litigation, New York City Housing Authority (NYCHA), New York, New York, May 25, 2004. See, e.g., *Faison v. New York City Housing Authority*, Order of N.Y. Co. Supreme Court, June 1, 2000 (Goodman, J.), reversed by 283 A.D.2d 353, 354, 726 N.Y.S.2d 23, 24 (1st Dep’t 2001).

¹⁴⁷ ABA Standards.

applicant or employee engaged in the conduct for which he was arrested and the conduct is job related and relatively recent, exclusion is justified.¹⁴⁸

The Consequences of Forging a Check

S.W. was denied housing from the Pittsburgh Housing Authority after she was charged with a felony offense. S.W. says she lent \$200 to a friend who did not pay her back, and after repeated attempts to get her friend to pay her back, S.W. took one of her friend's checks and forged her signature. S.W. paid the money back after she was arrested, but charges were still pending against her when she applied for public housing, and she was rejected.

She referred herself to Project Pindua,¹⁴⁹ a social services agency in Pittsburgh because she said she needed help. "We don't get walk-ins," said Christina Batesmore, case manager with the project, "[so] it shows a great deal of initiative, someone looking for help." S.W. had lived with her grandmother for most of her life, because her mother had lost custody of her children due to her own problems with drugs and alcohol. S.W.'s uncle and his wife took over the house and forced S.W. to move out when she lost her grandmother to cancer. "They wouldn't even let me stay there until housing came through." She moved in with her boyfriend, but told Human Rights Watch, "I need a place of my own because he does drugs. I'm not trying to stay with that."

When she spoke with Human Rights Watch, S.W. was crying and felt there was no hope for the upcoming hearing that she requested to challenge the denial:

I'm tryin', but I don't think this stuff has anything to do with [housing]. I have no idea why they would deny me, unless they think I'm gonna do it again, and I'm not. . . . I never stole when I was coming up, I don't know why I did this, but I learned my lesson.

A high school graduate, S.W. had aspired to return to school to study to be a Certified Nurse's Aid, but admitted it would be difficult, if not impossible, if she didn't have a stable place to live.¹⁵⁰

¹⁴⁸ Equal Employment Opportunities Commission Notice, "Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," N-91 5.061 9/7/90, available online at: <http://www.hirecheck.com/downloads/pdf/ComplianceAssistance/EEOCNOFRAME.pdf>, accessed on June 7, 2004 (EEOC Notice).

¹⁴⁹ "Pindua" is a Swahili verb meaning to change direction, or turn around.

¹⁵⁰ Human Rights Watch interviews with S.W. and Christina Batesmore, Project Pindua, Mon Yough Community Services, Pittsburgh, Pennsylvania, January 28, 2004.

Charges against S.W. were dropped to a misdemeanor, she pled guilty, and with the help of her case manager at Project Pindua, S.W. succeeded in her appeal of the housing denial. She is currently waiting for housing.¹⁵¹

Excluding People with Criminal Records for Excessive Periods of Time

In addition to determining what sort of conduct is a sufficient basis for exclusion, PHAs also determine, for different categories of offense, the “exclusion period”—the length of time applicants must have been crime free following such offenses before their housing applications can be accepted.

The exclusion periods appear to have been arbitrarily chosen, and are frequently excessively long. PHA officials could rarely provide us with an explanation for the particular length of any exclusion period nor could we discern any empirical explanation for the great variance in exclusion periods across the country; the differences appear simply to reflect philosophical and policy perspectives. The chart below offers a sense of the variance in exclusion periods and, more importantly, the remarkable length of some of them.

In New York City, for example, a person convicted of misdemeanor possession of marijuana and sentenced to six months probation would be ineligible for housing for five years. In Sarasota, Florida, a single drug misdemeanor renders a person ineligible for public housing for four years. In Pittsburgh, Pennsylvania, someone convicted of a violent felony can be ineligible for life—regardless of how exemplary the years following his crime had been. And applicants who have prior offenses in Austin, Texas—no matter how minor—are excluded by the city housing authority for seven years, and by the county housing authority for ten.

¹⁵¹ Human Rights Watch telephone interview with Sheila Fauntleroy, Project Pindua, Mon Yough Community Services, Pittsburgh, Pennsylvania, April 16, 2004.

Discretionary Exclusion Periods					
	Arrest	Violation	Misdemeanor	Felony	Serious/ Violent Felony§
Pittsburgh, PA					
HA City of Pittsburgh	indefinite †	indefinite	4 years ‡	7 years ‡	≤lifetime ¥
Allegheny County HA	DNC	DNC	5 years	5 years	lifetime
Austin, TX					
HA City of Austin	indefinite †	indefinite †	7 years	5-7 yrs	lifetime
Travis County HA	indefinite †	indefinite †	10 years	20 years	20 years
Other PHAs					
HA County of LA	indefinite †	indefinite †	3 years	3 years	3 years
Sarasota, FL HA	≤ 2 = 3 years	indefinite †	4 years	10 years	20 years
New York City HA*	DNC	2 years	3-4 years	5 years	6 years

DNC Does not consider.

§ PHAs define “serious felony” differently, and include offenses such as murder, arson, kidnapping, domestic violence, aggravated assault, drugs, and child abuse in addition to the federally-mandated sex and methamphetamine offenses.

† PHAs can consider applicant’s conduct regardless of when it occurred; the exclusion period is indefinite in duration.

‡ Each misdemeanor nets a four year exclusion; hence, two misdemeanors renders an applicant ineligible for eight years; three would mean an applicant would not be eligible for twelve years from the date of completion of the last misdemeanor. Likewise with felonies: two felonies would render an applicant ineligible for fourteen years, and so on.

¥ HACP officials told Human Rights Watch that applicants with the most serious offenses had to have approval from a Criminal Activities Review Board (CARB) before being deemed eligible. They implied that it would be very difficult for someone with certain offenses to ever pass CARB review.

For drug-related offenses.

* In New York, exclusion periods begin upon completion of a sentence. For example, a person would be ineligible for housing for two years following completion of a sentence of one-year probation for a misdemeanor offense, which could mean that a person is actually ineligible for housing for three years following the commission of a misdemeanor.

Kelli Dunn Howard, an attorney with Texas RioGrande Legal Aid (TRLA) in Austin, told Human Rights Watch about a twenty-four-year-old African American woman who applied for public housing for herself, her eighty-year-old father, and the four children she cares for—two of her own and two of her sister’s, who is currently serving time in prison. In addition to caring for the children, the client attends college and does volunteer work.

The city housing authority denied her application in January 2004 because of simple assault and marijuana possession charges from six-and-a-half years prior to her application, offenses committed when she was eighteen. The client had pled guilty to both offenses, received probation, and then the charges were dismissed. Howard told Human Rights Watch that her client said, “If it were just me, I could afford the rent because I’m working, but I can’t if I’m taking care of all these people.”¹⁵²

Whose Problem Is It?

A woman who won a high-profile grant of executive clemency from President Clinton in 2000 was also turned away from public housing. Dorothy Gaines, a forty-five-year-old African American woman from Alabama with three children, had been convicted of a drug offense and was serving a nineteen year sentence at the time of her pardon. She and her boyfriend at the time of her conviction were involved with a group of people who were selling drugs. When members of the group were arrested, they testified against Gaines, whose only alleged link to drug activity was a one-time delivery of three small bags of crack cocaine to a corner dealer. Gaines received a sentence of twenty years to life, while ranking members of the group received sentences as low as five years for testifying against her.

Gaines served six years in prison before being released by Clinton, and when she returned to her community, jobless, without a place to live, and owning only the dress she was wearing when she was released, she turned to public housing for assistance. She was denied based on her prior record. “I gave them the paper where I had been released by President Clinton, but they didn’t care,” she said. Gaines said she had done enough fighting, she did not want to fight the housing authority. She has struggled since her release to pay the rent on her house in Mobile, Alabama and keep her family together.

When I called and told them [the Housing Authority] who I was, she said, “I don’t care about none of that.” I said, “What am I supposed to do about housing?” She told me, “That’s your problem, not mine.” She told me it didn’t matter to her. No drug offenders, regardless. It’s the same way with apartments around here. I’ve called places on the phone and then they give you the criteria, and because I have a felony, I don’t qualify.”¹⁵³

¹⁵² Human Rights Watch interview with Kelli Dunn Howard, staff attorney, Texas RioGrande Legal Aid, Austin, Texas, February 11, 2004.

¹⁵³ Human Rights Watch telephone interview with Dorothy Gaines, March 30, 2004; See also, Chuck Armsbury, Sr., The November Coalition, “Dorothy Gaines, Guilt by Association,” available online at:

Not all PHAs arbitrarily set long periods of exclusion. Some housing officials recognize the absurdity of thinking that someone who has been arrest-free for a long period of time could be deemed a risk because of a remote criminal offense. “We had one man apply,” said a PHA official in rural South Carolina, “he had an assault charge for domestic violence in 1983. There’s no reason not to house this person. If he had an ongoing problem, he would have a record. I mean, we’re talking twenty years now. He’s in his early fifties now.”¹⁵⁴ Another housing official told Human Rights Watch:

You have to impose rules in a fair way. . . . The felonies, the remoteness of the crime has to be taken into consideration. If it’s one or two years ago, you wonder. If it’s five or six, you shouldn’t even consider it.¹⁵⁵

Paying the Price

A social worker in Pittsburgh, Pennsylvania told Human Rights Watch about B., an African American woman in her fifties who sought public housing, when she became disabled after a period of rehabilitation and stability.

She was on the street for twenty-five years. She had six kids, five are now incarcerated, one for life. For twenty-five years she battled drug addiction. . . . Crack, methamphetamine, alcohol, everything, the whole spectrum. . . . What treatment was available to her at that time [twenty-five years ago]? She ran the streets, married her husband and they were both shortly thereafter incarcerated. After the last five years of her own incarceration [for felony fraud], she was back to the streets. She was passing by a picnic for Alpha House, a drug treatment facility, in the park, and when they explained to her what Alpha House was, at first she laughed and made fun of them. But then she walked in the door and they took her. It was amazing because they always have a waiting list, but it was fate, it was her time. She spent two years in the program, she did de-tox, rehab, and then a step-down program. . . . Within six months, she was employed full time as a social service provider, she was engaged to be married, she graduated from school and was supporting her own housing. Two months later, she broke her ankle, and she had no medical leave from her new job. She applied for public housing, but both the city and the county housing authorities rejected her, and she chose not to appeal. We reaccepted her back into our transitional program, she got better, went back to work full time, and applied for public housing again. She was rejected again recently. What the hell else does this woman have to do? Because she’s proved that she can do it. She did screw up, she paid enough of a price to make up for what she did, and she’s been doing everything she can. She’s done nothing but try to erase the twenty-five years of havoc she wreaked. She’ll do anything to make sure no one else goes down that path. She’s open and honest about her past, and now she’s the biggest advocate we’ve had. . . . She’s watched five of her kids go down the same road, and she pays the price for it every day.¹⁵⁶

<http://www.november.org/thewall/cases/gaines-d/gaines-d.html>, accessed on July 6, 2004; “Clinton Grants Pardon to 59,” *Miami Herald*, December 23, 2000.

¹⁵⁴ Interview with Laurie Meadows, December 16, 2003.

¹⁵⁵ Interview with Bernie Jay Meyers, December 1, 2003.

¹⁵⁶ Human Rights Watch interview with Adrienne Wolnoha, Community Human Services Corporation, Pittsburgh, Pennsylvania, January 29, 2004.

Lack of Individualized Review

HUD guidelines provide that: “A criminal record should not automatically exclude an applicant from consideration. The PHA should determine whether the person would be a suitable tenant.”¹⁵⁷ When PHAs receive what HUD calls “unfavorable information” about an applicant, HUD advises them to “consider the possibility of more favorable future conduct,”¹⁵⁸ and evaluate criminal background information on a “case-by-case basis” taking into consideration both the seriousness and remoteness of the criminal activity.¹⁵⁹ HUD suggests that PHAs consider such mitigating circumstances as a record of rehabilitation as indicated by a report from parole officer or a social worker, or participation in a drug or alcohol treatment program.¹⁶⁰

Despite these recommendations, PHAs typically automatically exclude anyone with a criminal record that falls into one of their designated categories and exclusionary periods without any individualized assessment.¹⁶¹ They exercise their discretion in only one direction—to deny eligibility.

Rudy Vazmina, executive director of the Sarasota Housing Authority in Florida, explained his understanding of the discretion PHAs have to consider mitigating circumstances. “We can have strict liability. We can also use discretion to look at the totality of the circumstances.”¹⁶² Under no obligation to consider mitigation then, many PHAs have adopted “strict liability” exclusionary policies.

Jimmie Lacey, the director of public housing for the Housing Authority of the Birmingham District (HABD) told Human Rights Watch: “Our goal is to screen people *in*, not screen people out. It’s to our advantage to get residents in.”¹⁶³ But what we found by speaking with people who had dealt with HABD was quite different. “If you’ve ever had much worse than a parking or a speeding ticket, they’ll keep you out. It’s a blanket policy,” explained Kenneth Lay, managing attorney of Legal Services of Metro Birmingham.

¹⁵⁷ HUD, *Public Housing Occupancy Handbook*, Directive No. 7465.1 Rev.-2, Chapter 4, 4-3(b)(11).

¹⁵⁸ *Ibid.*, Chapter 4, 4-3(a).

¹⁵⁹ HUD, “One Strike and You’re Out” Policy.

¹⁶⁰ HUD, *Public Housing Occupancy Handbook*, Chapter 4, 4-3(b)(1)(a) & (b).

¹⁶¹ *Ibid.*, Chapter 4, 4-3(b)(11).

¹⁶² Human Rights Watch interview with Rudy Vazmina, executive director, Sarasota Housing Authority, Sarasota, Florida, March 20, 2003.

¹⁶³ Human Rights Watch interview with Jimmie Lacey, director of housing management, HABD, Birmingham, Alabama, December 10, 2003.

They do nothing if we don't sue them. . . . Their policies are, whatever they can do [to keep people out], they will do. They make no exceptions. . . . They say, well, if we exercise discretion, someone will charge us with discrimination. . . . We generally don't win. They stick by their policy.¹⁶⁴

A grant of clemency is designed to “forgive[e] a person the criminal liability of his acts,”¹⁶⁵ but PHAs are not required to consider grants of clemency in evaluating public housing applications. “The governor gave me clemency,” said Elaine Bartlett. Nevertheless, after serving sixteen years in prison at the time of her parole, she was told she could not request a larger apartment for her family, because she had a felony conviction. The New York PHA manager reportedly told her: “You’re not even supposed to be here. Be thankful you’re here and be quiet.”¹⁶⁶

Transitional housing providers who try to assist their clients in obtaining permanent housing have witnessed firsthand the refusal of some PHAs to accept applications without any assessment of rehabilitation or the actual risks posed.

“[C.] was on the waiting list for six months,” a legal service provider from Pittsburgh, Pennsylvania told Human Rights Watch about a client who had been denied:

She was perfect for public housing. She had a small income . . . She was more devastated by the process than by the final answer, they kept asking her to come back and bring them this and bring them that. . . . She had drug possession charges in the past, and most recently, bad checks. . . . She was interviewed and denied, but we were surprised because we were working with housing trying to advocate for her, but it didn't help. . . . She was not a danger to anyone.¹⁶⁷

¹⁶⁴ Telephone interview with Kenneth Lay, December 12, 2003. The director of one of the largest shelters in Birmingham for homeless men claimed: “This housing authority is one of the worst housing authorities I’ve ever dealt with . . . they won’t bend their rules. In my experience, they don’t make exceptions.” Human Rights Watch interview with Steve Freeman, executive director, The Old Firehouse Shelter, Birmingham, Alabama, December 11, 2003.

¹⁶⁵ “Clemency” is a general term that encompasses pardon, amnesty, and commutation. Steven H. Gifis, *Barron’s Law Dictionary*, 3rd ed. (Hauppauge: Barron’s Educational Series, 1991). See, e.g., *Herrera v. Collins*, 506 U.S. 390, 412 (1993).

¹⁶⁶ Gonnerman, *Life on the Outside*, p. 232.

¹⁶⁷ Human Rights Watch interview with Doreen White, housing and employment specialist, Transitional Living Center, Pittsburgh, Pennsylvania, December 1, 2003.

“They add up the years and that’s it,” legal service providers said. “Efforts at rehabilitation are in their guidelines, but it doesn’t seem to matter.”¹⁶⁸

What’s the Use in Appealing?

S.C., a forty-year-old African American woman living with HIV in New York City, lost her apartment and everything she owned in a fire. She received some assistance from the Red Cross but was advised to apply for public housing. Her application was prioritized due to the fire, and she was interviewed for housing within days.

They asked me if I’d ever been convicted of a crime, and I figured, I shouldn’t lie, so I said yes. Then they asked me questions about drug abuse, and I couldn’t understand what any of it had to do with why I needed housing.

The PHA told Ms. C. that she would have to get a Certificate of Disposition from the court and letters of support from various agencies. She got the certificate, a letter of recommendation from her children’s foster care agency, letters from her doctor, psychiatrist, the Fire Marshall, Red Cross, and the Brooklyn AIDS Task Force. “I did everything that they asked me to do.” Two weeks after she turned over the documents, she received a denial letter.

After she was denied, Ms. C. told Human Rights Watch:

They said I could appeal, but once they told me no, and I had just run around after a fire and went through hell to get all those letters, I said to myself, “What I’m gonna appeal for? I’m gonna bring the same stuff back again.” So I didn’t put in for an appeal ... I might as well be getting high. Why did you make me go to my children’s agency if you knew you were gonna deny me? I knew in the back of my mind that they deny people. I thought maybe they’d accept me because I had all these people advocating for me and all these letters, and they still said no.”¹⁶⁹

An individualized review of an application typically occurs, if at all, during a hearing challenging a rejection. Indeed it seems that PHAs may practice a “reject first, ask questions later” approach to applicants. For example, according to local legal service providers, the Austin, Texas housing authority uses a “shotgun approach. They reject everybody,” and then it is up to the applicant to request a hearing. The housing authority, according to TRLA staff, wants to “see how bad they want it.”¹⁷⁰ An attorney

¹⁶⁸ Human Rights Watch interview with Meghan Tighe, staff attorney, Neighborhood Legal Services, Pittsburgh, Pennsylvania, January 27, 2004.

¹⁶⁹ Human Rights Watch interview with S.C., New York, New York, November 3, 2003.

¹⁷⁰ Human Rights Watch interview with Virginia Rojo Holland, paralegal, Texas RioGrande Legal Aid, February 11, 2004. At the Housing Authority of the City of Pittsburgh, for example, all applications are initially denied if the criminal background check reveals prior criminal activity, and the applicant is given an opportunity to appeal.

for Neighborhood Legal Services in Pittsburgh explained: “The city housing authority, I think, sees the grievance hearing as their exercise of discretion. Allowing them [applicants] to have one satisfies the requirement.”¹⁷¹

Similarly, a legal service provider in Portland told Human Rights Watch that the position of the Housing Authority of Portland was that they would “be strict on the first cut, and then the appeals officer can look at mitigation.”¹⁷² The Oregon Law Center urged the PHA to include some consideration of mitigation in the “first cut,” but it was unable to persuade the housing authority to change its practice. “Why should all these people have to go to the hearing when most of them are going to get in if they ask for a hearing?”¹⁷³ Indeed, our research suggests that a high proportion of those who seek a hearing after a rejection will in fact be granted admission. But the burden is on the applicant to seek review of the denial, and to be able to negotiate the appeal process simply to receive the individualized consideration that HUD guidelines already encourage.

Despite the plain language of HUD guidelines urging careful exercise of discretion to make individual housing application decisions, housing officials across the country shared the sense that they had little such discretion, and many painted a picture of HUD officials peering over their shoulders as they made decisions about whose applications to approve. “There is a growing realization that everyone needs somewhere to go, but we’re so limited by what we can and cannot do by federal regulations,” one PHA official told Human Rights Watch.¹⁷⁴ “We don’t have much policy leeway,”¹⁷⁵ another official said. “We’re stuck with HUD regulations,” said yet another housing official in Pennsylvania:

One PHA official said: “For the sake of integrity, We don’t believe we should have that discretion.” Another added: “We wanted to objectify a very subjective process, so we believe a hearing officer should look at it [because] we have family and friends of employees coming into the office. . . . They can appeal it if they like.” Human Rights Watch interviews with Suman Jaswal and Anthony Williams, Housing Authority of the City of Pittsburgh, Pittsburgh, Pennsylvania, January 27, 2004. The Cuyahoga Metropolitan Housing Authority (CMHA) denies applicants who had convictions more than three years prior to the application, and does an individualized determination only if applicants ask for a hearing. Human Rights Watch interview with Duane Browder, vice chairman, Board of Commissioners, CMHA, Cleveland, Ohio, May 8, 2003.

¹⁷¹ Human Rights Watch interview with a lawyer from Neighborhood Legal Services, Pittsburgh, Pennsylvania, January 27, 2004.

¹⁷² Human Rights Watch interview with Mickey Ryan, Oregon Law Center, Portland, Oregon, August 7, 2003.

¹⁷³ Ibid.

¹⁷⁴ Human Rights Watch interview with Anthony E. Woods, executive director, Greene County Housing Authority, Eutaw, Alabama, December 12, 2003.

¹⁷⁵ Interview with Esther Keosababian, February 6, 2004.

I don't like a fixed rule of ineligibility, I don't think that's fair. . . . You can't predict what may or may not happen. . . . The federal government makes it very awkward. It's expensive [for us], and there are privacy concerns [for the applicants]. . . . If you paid your dues, it stays with you. It's kind of strange. You're denied the privilege of housing, or the right to apply for it. It's not a fair process.¹⁷⁶

When pressed to explain how HUD restricted their discretion, housing officials could do no more than make vague references to the law or to HUD oversight. They were not able to give us any specific examples or show us any documents from HUD raising questions about, or even indicating familiarity with their specific admissions policies or criteria.

Indeed, during the research for this report, we found no evidence that HUD makes an effort to ascertain how PHAs exercise their discretion in the admissions process. Human Rights Watch made numerous efforts to hold meetings with HUD officials to discuss their review of PHA policies, among other matters. HUD officials consistently refused to meet with us.

On March 17, 2004, Human Rights Watch submitted a list of written questions to HUD concerning specific PHA practices and policies we had uncovered during our research that appeared to be inconsistent with federal policies. In a written response, the department's deputy assistant secretary in the Office of Public Housing and Voucher Programs refused to address the specific examples we had raised. He explained:

HUD's obligation in its oversight responsibilities extends to requiring that PHAs follow all applicable federal laws, HUD regulations, and all applicable state and local codes and laws. As to compliance with all applicable laws and regulation, PHAs exercise their own discretion in the day-to-day management of PHAs. It is the stated policy of HUD not to micromanage competent and successful PHAs as to program administration and decision-making. . . . Only where a PHA fails to comply with all applicable laws, usually in extreme circumstances, will HUD undertake the day-to-day management decisions of a PHA. It is only in this rare situation, where HUD is acting as the landlord, and substituting its own judgment for that of the PHA, that HUD would

¹⁷⁶ Interview with Bernie Jay Meyers, December 1, 2003.

have actual knowledge of the specifics regarding the exercise of PHA discretion, absent a complaint made directly to HUD.¹⁷⁷

In fact, Human Rights Watch reviewed HUD's annual scoring of PHA performance and found that only one point out of a possible one hundred was related to a PHA's "one strike" policy. HUD officials speaking off the record and many local PHA officials told Human Rights Watch that HUD never reviewed the contents of a PHA's policy, but rather simply checked to ensure that it had one. Auditors reportedly never examine the content of the policies. "Our lenient policies don't impact our HUD evaluations," one housing official told Human Rights Watch. "You just need to have a policy, really, that's all they look for." Despite the apparent lack of HUD scrutiny, however, PHAs consistently maintained to Human Rights Watch that they had adopted strict exclusionary policies because of HUD oversight.

Challenging Automatic Exclusionary Criteria

Many legal service providers told Human Rights Watch that they did not deal with public housing admissions cases. Some offices, however, have been very active in challenging local PHA policies. While legal service offices commonly challenge PHA practices on behalf of individual clients, at least two legal service organizations have sought class-wide relief for applicants denied under blanket policies.¹⁷⁸ Both cases were resolved, with relief to individual plaintiffs and PHA adoption of more carefully tailored admissions criteria.

A consent order entered following a challenge brought by the Atlanta Legal Aid Society is the most sweeping relief we found.¹⁷⁹ The unpublished consent decree requires the PHA to limit their review of criminal convictions to those obtained within five years of the application, consider only convictions and not arrests, and to take into consideration

¹⁷⁷ Letter to Human Rights Watch from William O. Russell, III, deputy assistant secretary, Office of Public Housing and Voucher Programs, HUD, April 5, 2004.

¹⁷⁸ Legal service agencies that receive funding from the federal government are not permitted to file class action lawsuits to obtain relief for a group of applicants. Federal law states: "None of the funds appropriated . . . to the Legal Services Corporation (LSC) may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit." Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 50 (1996) (codified at 29 U.S.C. 2996e(d)(5)). This restriction has been re-imposed in each subsequent year's LSC budget allocation. "Recipients are prohibited from initiating or participating in any class action." 45 C.F.R. § 1617.3 (2004). The Committee on Economic, Social and Cultural Rights has suggested that "[i]n some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness." Committee on Economic, Social, and Cultural Rights, General Comment No. 4, para. 17.

¹⁷⁹ Consent decree in *Bonner v. Housing Authority of Atlanta, Georgia*, No. 1:94-CV-376-MHS (N.D. Ga. October 11, 1995).

evidence of rehabilitation. Legal Aid attorneys elsewhere in Georgia have used the order to pressure other PHAs to amend their policies accordingly.¹⁸⁰

Attorneys at the Homeless Persons Representation Project (HPRP) in Baltimore undertook a lengthy process of pressuring the PHA to revise its zero-tolerance blanket policies. Threatened with a federal lawsuit similar to the Atlanta case, the PHA recently adopted revised guidelines and attorneys continue to monitor the PHA's adherence to the new policy.¹⁸¹

There are very few published decisions on individual admissions cases. A challenge brought by Pine Tree Legal Services in Maine, however, resulted in a thoughtful decision by the Maine Superior Court.¹⁸² The local PHA had adopted a policy excluding anyone with a criminal record for violent activity at any time in the past. Ruling on a challenge by an applicant who had been convicted of a sex offense fifteen years prior to his application, the court found that the housing authority never considered the time that had passed since his conviction. The court rejected the PHA's claim that admissions are entirely discretionary and that the "housing authority is free to establish standards which may be more stringent than those promulgated by HUD."¹⁸³ The court reasoned:

The HUD regulations do not place an unreasonable burden upon the housing authority by requiring that it undertake an inquiry into the reasonableness of the time which has passed since the date of the acts. Such inquiry would presumably include looking into the circumstances of the conviction, what has transpired since the conviction, and the amount of time which has passed since the conviction. There is no

¹⁸⁰ Human Rights Watch telephone interview with Dennis Goldstein, attorney, Atlanta Legal Aid Society, June 1, 2004.

¹⁸¹ Human Rights Watch e-mail correspondence with Carolyn Johnson, staff attorney, Homeless Person's Representation Project, Baltimore, Maryland, to Human Rights Watch, May 21, 2004; Complaint on file with Human Rights Watch. Baltimore Housing Authority adopted a chart developed by the HPRP to guide staff in making admissions decisions.

¹⁸² *Ouellette v. Housing Authority of the City of Old Town*, Docket No. AP-03-17, 2004 Me. Super. LEXIS 60 (March 12, 2004). Human Rights Watch asked a HUD spokesperson to comment on how, absent a lawsuit like the one brought on behalf of Ouellette, HUD would become aware of PHA policies and practices that are in conflict with federal law and HUD guidelines. She responded that HUD would not be aware unless an applicant brought an issue to the agency's attention. "It's about making applicants more aware of their rights," she said, "I don't know who it would be [who would do that], its not our responsibility. . . It's about making ex-offenders more aware of their rights. I don't know how I can respond to that, the policy is there and what HUD's intent is [is clear], an applicant can go to the legal services." Human Rights Watch telephone interview with HUD spokesperson Donna White, May 21, 2004. When asked how applicants would know their rights if they did not have access to an attorney, she responded: "I really don't know."

¹⁸³ *Ouellette*, *3-4. Because the plaintiff was convicted of the sex offense prior to the establishment of the state's sex offender registry, he was not required to register and therefore was not subject to the federal ban.

bright-line standard for a reasonable amount of time. By accepting a zero-tolerance policy regarding convicted individuals, the Respondents divert from the clear intent of the policy reflected in the HUD regulations. The regulations unambiguously mandate a consideration of whether a reasonable time has passed since the conviction (thus presumably rendering the applicant non-dangerous to other residents). In the absence of such a consideration and finding, the Respondent has circumvented this necessary analysis.¹⁸⁴

¹⁸⁴ *Ouellette*, *4-5.

VIII. Legislatively Mandated Categories of Exclusion from Public Housing

While federal law gives PHAs discretion in most instances to determine who is suitable for public housing, it expressly prohibits PHAs from providing housing assistance to three categories of offenders—those believed to be using drugs, those required to register as “sex offenders,” and those convicted of manufacturing methamphetamine on public housing premises. People in the latter two categories are excluded for life, regardless of the number of years they have spent without committing another offense.

Denials Based on Evidence of Drug Use

PHAs may not admit anyone they reasonably believe is currently using illegal drugs.¹⁸⁵ Federal law and HUD regulations specifically authorize PHA officials to ask applicants about their drug use histories and, after receiving consent from the applicants, obtain otherwise confidential records from their treatment providers.¹⁸⁶ PHAs can admit applicants with a history of drug use, including recent use, if they are able to show sufficient rehabilitation.

Human Rights Watch recognizes the unique problems that have arisen in many low income communities, particularly in public housing developments, from the illegal drug trade. Public housing tenants themselves have struggled against the violence and harassment that is part and parcel of the illegal drug trade, and indeed, housing exclusionary policies have their roots in tenants’ efforts.

There is no doubt that certain harms—to individuals, families, and communities—can, in some cases, attend illegal drug use. But contrary to popular assumption, drug use does not necessarily entail violence, crime (except that inherent in the buying and possession of drugs themselves), or even serious harm. Most drug users do not even develop a dependency on drugs. In fact, “there are ample data supporting a conclusion that . . . most drug use is transient, noncompulsive, and innocuous.”¹⁸⁷

¹⁸⁵ 42 U.S.C. § 13661(b), see also 24 C.F.R. §§. 982.553(a), 960.204(a).

¹⁸⁶ 42 U.S.C. § 1437n(e)(1). One federal circuit court rejected a challenge to provisions of the federal law that allow PHAs to ask applicants about their history of drug and alcohol use and obtain records from substance abuse treatment programs. *Campbell v. Minneapolis Public Housing Authority*, 168 F.3d 1069 (8th Cir. 1999).

¹⁸⁷ Norbert Gilmore, “Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements,” 12 *The Journal of Contemporary Health Law and Policy*, 412 (Spring 1996).

Often people confuse the prevalence of drug use among those charged with violent and property crimes to mean that those who use drugs are more likely to engage in such crime. To the contrary, most drug offenders appear to be otherwise law-abiding individuals.¹⁸⁸ In fact, the vast majority do not commit violent or property crimes at all.¹⁸⁹

Federal housing law, consistent with federal drug policy, considers all drug use to be drug abuse. U.S. Department of Health and Human Services statistics reveal that only a small percentage of those who use drugs become heavy drug abusers or addicts. For example, of the 3.7 million Americans who have used heroin, only 3 percent used it in the last month.¹⁹⁰ Although nearly thirty-five million Americans twelve years or older have used cocaine in their lifetime, only 0.6 percent of the entire U.S. population (i.e., less than 2 million people) are considered to have abused the drug or developed a dependency.¹⁹¹ As a leading critic of drug laws has pointed out, “So much of the media attention has focused on the relatively small percentage of cocaine users who become addicted that the popular perception of how most people use cocaine has become badly distorted.”¹⁹²

Because drug use is illegal and highly stigmatized, most people become aware of it only when it wreaks havoc—when someone overdoses, commits a crime, or when a life falls spectacularly apart. The only other drug users most people are aware of (besides

¹⁸⁸A high percentage of persons convicted of criminal conduct use drugs, but there is no evidence suggesting most drug users commit non-drug offenses. See, generally, U.S. Department of Justice, *Drugs, Crime, and the Justice System*, (Washington, D.C.: U.S. Department of Justice, December 1992); New York City Criminal Justice Agency, *Summary Final Report: Changing Patterns of Drug Abuse and Criminality Among Crack Cocaine Users*, (New York: New York City Criminal Justice Agency, January 1990). Mario De La Rosa, et. al., eds., *Drugs and Violence: Causes, Correlates, and Consequences*, (Washington, D.C.: National Institute on Drug Abuse, U.S. Department of Health and Human Services, 1990); Thomas Mieczkowski, ed., *Drugs, Crime and Social Policy: Research, Issues and Concerns* (Boston: Allyn and Bacon, 1992). Drug law critics argue that a certain amount of drug-related crime is in fact caused by the drug prohibition policies and that alternative drug sanction mechanisms would reduce drug-related crime; e.g., Ethan Nadelmann, “Drug Prohibition in the United States: Costs, Consequences, and Alternatives,” 248 *Science* (September 1, 1989).

¹⁸⁹ See Bruce L. Benson et al., *Independent Policy Report: Illicit Drugs and Crime* (Oakland: The Independent Institute, 1996), available online at: http://www.independent.org/tii/content/pubs/policyrep/p_bensonipr.html, accessed on July 6, 2004. Benson and his co-authors cite a 1992 BJS Report, which found that drug offenders are far more likely to recidivate for a drug offense than for a violent or property offense (citing Patrick A. Langan and Mark Cunniff, “Recidivism of Felons on Probation, 1986-89” (BJS: Special Reports, 1992).

¹⁹⁰ Substance Abuse and Mental Health Services Administration, *2003 National Survey on Drug Use & Health*, (Rockville: U.S. Department of Health and Human Services, 2004), tables A.1 and A.2, available online at: <http://www.oas.samhsa.gov/p0000014.htm#NHSDA>, accessed on September 22, 2004.

¹⁹¹ *Ibid.*, table A.1 (rates of cocaine use), table A.6 (rates of dependence and abuse).

¹⁹² Nadelmann, “Drug Prohibition in the United States: Costs, Consequences, and Alternatives,” p. 939, 944. See also Douglas N. Husak, “The Nature and Justifiability of Nonconsummate Offenses,” 37 *Arizona Law Review* 151 (Spring 1995).

politicians, radio talk-show hosts, and nominees for high level positions like Supreme Court justice) are former users who seek to impress upon their audiences the importance of recovery by emphasizing a litany of horrors. The public is rarely exposed to and the media pays little attention to people whose drug use is uneventful and transient.¹⁹³

There is a common assumption that drug users are more likely than not to bring with them a whole passel of problems—attracting other drug users and dealers who will jeopardize peace, quiet, and safety; resorting to stealing; or harassing neighbors in some way, for example, by appearing in front of children comatose and obviously drugged.¹⁹⁴ This fear is based on what statisticians call a sampling error or a built-in bias, the result of conclusions drawn from the most extreme examples, which, not surprisingly, are the examples most frequently presented by the media.¹⁹⁵ Perhaps more telling, though, is that over 110 million Americans have used illicit drugs during the course of their lives.¹⁹⁶ If it were true that the above-enumerated harms attended all drug use, the United States would be in a state of constant chaos.

Human Rights Watch asked one building manager from a private SRO hotel in Manhattan if he knew if any of his tenants used drugs.¹⁹⁷ “Oh yeah, a lot of them do,” he told us, “But so do people in that building and that building and that building over there,” he said, pointing to the many private apartment buildings up and down the street. When we asked him if they caused problems, he said, “There are always people who create problems. They bother other neighbors, they play music loud, they don’t pay their rent.” But, he explained, this was everyone, not just drug users. “A lot of people

¹⁹³ Research shows that, among drug users, those who do not seek drug treatment have fewer interpersonal and social problems than those who do. Research among these individuals shows that recovery occurs in the “natural progression” of heroin dependence. See Jason S. Luty, “Social Problems, Psychological Well-Being, and Childhood Parenting Experiences in a Community Sample of Heroin Addicts in Central London,” *Substance Use & Misuse*, vol. 38, no. 2 (2003), p. 209.

¹⁹⁴ Generalizations about the harm caused by drugs should not be derived from atypical scenarios. See Douglas Husak, “Desert, Proportionality, and the Seriousness of Drug Offences,” in Andrew Ashworth and Martin Wasik, eds, *Fundamentals of Sentencing Theory* (Oxford: Clarendon Press, 1998), p. 187-219.

¹⁹⁵ For example, a plan to estimate rates of “hardcore” drug use commissioned by the Office of National Drug Control Policy very explicitly relies on an examination of the extremes:

These efforts rely upon models of the rate at which people who use drugs make contact with various elements of the criminal justice, drug treatment, and health care systems. The models are predicated on the belief that *observed* numbers of “institutional contacts”—and by this we mean numbers of arrests, drug treatment admissions, and stays at homeless shelters—can tell us something about *unobserved* drug use activity.

Ronald Simeone et al., *A Plan for Estimating the Number of “Hardcore” Drug Users in the United States* (Abt Associates, April 21, 1997), p. 1.

¹⁹⁶ *2003 National Survey on Drug Use & Health*, table 1.28A.

¹⁹⁷ Many of those who were housed in this particular SRO had either been found ineligible for public housing or had chosen not to apply because they had criminal records.

who use, they're addicts, and they don't bother nobody. They get their drugs and they use them in their rooms."¹⁹⁸

It may be difficult to tell the difference between an applicant who uses illegal drugs without causing problems for those around him and one who will ultimately pose a risk. But there are objective criteria that PHAs can look to in order to determine whether someone would pose a risk: first and foremost, the absence of any past offenses besides the possession of drugs. PHAs could, in addition, look to additional evidence like character references, proof of employment, or enrollment in job training. Under current law and practice, when applicants challenge denials in administrative proceedings (whatever the basis of denial), administrative law judges already consider this type of information.

Though federal law requires a PHA to deny admission to applicants who it reasonably believes are currently using drugs, denial on this basis alone is rare. In practice, the issue of current drug use typically arises during the application process either when an applicant's criminal background suggests past involvement with drugs (a drug possession charge), or when the applicants themselves seek to use evidence of drug rehabilitation to show that they are unlikely to commit another type of offense (such as petty theft or prostitution). In such cases, absent sufficient evidence of rehabilitation, PHAs will presume that the applicant is a "current user" and will deny their application.

Human Rights Watch understands the need to ensure that those drug users likely to disrupt the safety of a community are not housed in traditional public housing developments. Instead of simply excluding all current drug users, however, PHAs should be permitted to assess the nature and effects of a person's drug use instead of making blanket assumptions about the character of all drug users. At the same time, HUD should begin to develop alternative housing for those excluded to ensure that they are not relegated to homelessness.¹⁹⁹

¹⁹⁸ Human Rights Watch interview with a building manager, who wished to remain anonymous, at an SRO hotel in Manhattan, New York, November 4, 2003.

¹⁹⁹ Researchers in Australia, for example, have concluded that the prevalence of drugs in public housing is an indication that public housing itself may be inappropriate for some of those in need of housing assistance, and that alternative models must be developed. Judith Bessant et al., *Heroin users, housing and social participation: attacking social exclusion through better housing* (Australian Housing and Urban Research Institute, June 2002), p. 23, available online at: http://www.ahuri.edu.au/attachments/30056_final_heroinusers.pdf, accessed on October 22, 2004.

“Sex Offenders”

*If our national attitude is one of fear, which it is, when you foster an attitude of fear, everybody begins to buy into that fear. You become afraid of everything. . . . This is fear mongering at a national level [and] one of the biggest targets is sex offenders.*²⁰⁰

—Fred Butler, executive director, Community Action Network

In an effort to exclude “dangerous sex offenders” from regular public housing, federal law prohibits anyone subject to state sex offense registries²⁰¹ from admission to public housing.²⁰² A lifetime exclusion from public housing may sound reasonable in terms of protecting children from violent, repeat sexual predators, but not everyone who has committed a sex offense poses a danger to children or others, much less a lifelong danger.

State sex offender registries are not limited to predatory child molesters and violent serial rapists. Some of the over 450,000 people currently listed in state sex offender registries²⁰³ are young men who had sexual relationships with girlfriends no more than a few years younger than them. Some are women convicted of conspiracy to commit

²⁰⁰ Human Rights Watch interview with Fred Butler, executive director, Community Action Network, Austin, Texas, February 12, 2004.

²⁰¹ The federal statute known as Megan’s Law established the nation’s vast state-by-state sex offense registration and community notification system. Act of May 17, 1996, P.L. 104-145, § 1, 110 Stat. 1345, amending 42 USCS § 14071(d). Information about each state’s sex offender registry can be found by accessing any individual state database and looking for links to others, for example, see New York State’s database, available online at: <http://criminaljustice.state.ny.us/nsor/links.htm>, accessed on April 1, 2004.

²⁰² See 42 USCS § 13663 (2004) explicitly purports to deny dangerous sex offenders, but in fact, requires PHAs to deny eligibility to anyone listed on a state sex offender registry, a number of whom cannot be considered dangerous, but are guilty of offenses that were non-violent or consensual. In addition, neither the statute nor state sex offense registry laws allow for any independent determination of whether a registered sex offender is dangerous or not. See, e.g., *Connecticut Dep’t of Public Safety v. Doe*, 538 U.S. 1160 (2003); *Archdiocesan Housing Authority v. Demmings*, 2001 Wash. App. LEXIS 2276 (Wa. Ct. App 2001). In 1999, the local PHA found that three of its public housing residents were convicted sex offenders. Because it interpreted federal law to mean that sex offenders were ineligible for housing assistance, the PHA sought to evict Mr. Demmings, a convicted sex offender who had been living without incident in the development since 1996 and was compliant with his treatment plan. Demmings argued both that he posed no risk to other tenants, and that he suffered from a documented mental illness. While the court expressed sympathy and “applaud[ed] his successful rehabilitation,” *Ibid.*, *3-4, it affirmed Demmings’ eviction nonetheless. The court concluded its opinion by noting: “The rule is harsh as to all sex offenders who increasingly struggle to find housing upon their release. . . . The rule is, however, reasonable.” *Ibid.*, *9.

²⁰³ At the end of 2001, according to BJS, about 386,000 people convicted of sex offenses were registered in forty-nine states and the District of Columbia, up from 277,000 in 1998. U.S. Department of Justice, BJS, *BJS Fact Sheet: Summary of State Sex Offender Registries, 2001* (March 2002), available online at: <http://www.ojp.usdoj.gov/bjs/abstract/ssor01.htm>, accessed on July 6, 2004. Some advocates put the number of those subject to state sex offender registries at closer to 500,000. L. Arthur M. Parrish, *Commentary: Megans’ Laws: Accomplishing its purpose?* [sic], October 30, 2003, available online at: <http://www.geocities.com/eadvocate/issues/commentary-consequences.html>, accessed on September 16, 2004.

sexual abuse against a child for failing to protect a child from sexual abuse by a boyfriend, husband, or other male family member. People subject to lifetime sex offender registration requirements also include those whose offenses consisted of indecent exposure or lewd displays, often related to a substance abuse or mental health diagnosis or homelessness. For example, relieving oneself in public can—and many times does, in the case of homeless people and the mentally ill—result in a charge of indecent exposure.

Helen Varty, executive director of the Capital Area Homeless Coalition in Austin, Texas told Human Rights Watch:

Sex offenders are the hardest. Most of them take a plea, they are mentally ill or developmentally disabled, and they exposed themselves. From now on, they can't live anywhere. I mean, they get these offenses for pissing off the porch. Most sex offenders that took plea bargains; they say, "that's the only choice I had." They end up on the streets.²⁰⁴

In many states, the most dangerous, violent sexual predators are incarcerated for long periods of time, some for the rest of their lives. In addition to prison sentences, about a third of all states have provisions for the civil commitment of sex offenders.²⁰⁵ But many sex offenders will ultimately be released from confinement, and they must—and do—live somewhere.

After a local sheriff spent months searching for a landlord willing to rent to a registered sex offender with a mental health diagnosis, Linn County, Oregon spent \$45 to purchase his new home: a camping tent with an army surplus cot. "Transitional housing" for Bruce Scott Erbs was a tent in a yard behind the jail with a tin can for a toilet.²⁰⁶ Erbs

²⁰⁴ Human Rights Watch interview with Helen Varty, executive director, Capital Area Homeless Coalition, Austin, Texas, February 11, 2004.

²⁰⁵ According to Peter C. Pfaffenroth, "The Need for Coherence: States' Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*," 55 *Stanford L. Rev.* 2229, 2232 no. 22 (2003), sixteen states have civil commitment statutes for sex offenders. The states are: Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Dakota, South Carolina, Texas, Virginia, Washington, and Wisconsin. In his dissenting opinion in *Kansas v. Hendricks*, 521 U.S. 346 (1997), Justice Breyer made reference to seventeen states with civil commitment laws, seven of which were not cited by Pfaffenroth (Colorado, Connecticut, Nebraska, New Mexico, Oregon, Tennessee, and Utah). Statutes in these states provide for some lesser form of commitment-like pre-trial commitment or treatment upon release from prison. The U.S. Supreme Court has upheld the indefinite confinement of sex offenders. See, e.g., *Kansas v. Hendricks*, rejecting the theory that confining someone based on a determination of future dangerousness and mental abnormality constitutes double jeopardy, because the confinement is not punishment. See also, *Seling v. Young*, 531 U.S. 250 (2001).

²⁰⁶ Andrew Kramer, "Oregon Houses Paroled Sex Offender in Tent," *Associated Press*, August 4, 2003.

was moved to a \$155-a-week motel when he contracted pneumonia after a period of cold weather. Erbs said, "It's a lot better than the tent. . . . I'm staying out of trouble. I don't mean nobody no hurt. The deal that people can't change when they come outta prison is bogus. They can if they put their minds to it."²⁰⁷ Rory A. Woodell, another convicted sex offender who completed his prison sentence, was also housed in a tent outside of downtown Bellingham, Washington.²⁰⁸

A released sex offender in North Dakota was jailed by court order because he could not find a place to live. "There was really no place for him to stay," said the state's attorney, "the alternative was for him to sleep under the bridge."²⁰⁹

Restrictions on access to public housing and the increasing inability of sex offenders to find private housing anywhere, regardless of their income, mean that many will wind up in shelters, in tents, or living on the street. Neither federal, state, nor local governments have acknowledged their obligation to ensure that sex offenders, no less than any other U.S. resident, have access to safe, decent and stable housing.

Mike Alvidres of the Skid Row Housing Trust in Los Angeles noted:

Anyone who's been in jail is problematic, these guys add to the mix of problems. But I don't know where you go. Is that what we want? To drive people underground? . . . I'm not sure from a big picture perspective that it makes any sense. Where will sex offenders live? Obviously you don't want them to live near kids, but I'm not sure it makes sense to create more desperation in people.²¹⁰

²⁰⁷ "Sex Offender Kept in Tent Gets Pneumonia," *Associated Press*, November 17, 2003.

²⁰⁸ "Sex Offender Living in Tent," *Bellingham Herald*, August 8, 2003.

²⁰⁹ "Sex Offender Jailed While Searching for Home, Job," *Associated Press*, January 25, 2004.

²¹⁰ Human Rights Watch interview with Michael Alvidres, supportive housing managing director, Skid Row Housing Trust Property Management Company, Los Angeles, California, February 4, 2004. Some turn to crime in desperation. For example, a registered sex offender in Wisconsin held up a bank after being evicted and resorting to living in a tent in the park. Dan Wilson, "Robbery spurred by lack of shelter," *Post-Crescent (WI)*, August 27, 2004.

Shamed to Death

Kaye Fohn, a social worker with the Salvation Army in Austin Texas, told Human Rights Watch about a seventy-year-old man who had applied for housing assistance while staying at the Salvation Army rehabilitation program. He was denied because he had committed a sex offense ten years earlier.

He was not a risk. He inappropriately touched a child when he used to be a raging alcoholic. He [was] clean 12 years. He was in jail, and now he's subject to a lifetime registration. He was here [at the Salvation Army] for two years. . . . It was virtually impossible to place him. . . . He was very ashamed, he carried that shame with him until the day he died. . . . Who's to say who's a risk? But I can tell you that I've had my grandchildren here, and he would get up and leave the room. Did it make me uneasy? Not at all.

We've had some sex offenders here where I would have felt that threat. . . . They have to have a place to live. I don't know how anybody can make that determination—will somebody reoffend?

No one should have to live on the streets. . . . His health was failing and nursing homes would not take him, it was horrible. . . . I tried no less than ten places. . . . He ended up going into a horrible facility where he did not receive the care that a patient in a nursing home should get.

Did these conditions lead to his death? Absolutely. That man gave up. He had nobody. There was no place else for this individual to go. I will go to my grave thinking that him going into that nursing home led to his death. The man I checked in one late day in August was not the same man I saw in December. It was phenomenal. He stopped eating, drinking; he was willing himself to death.²¹¹

Methamphetamine Manufacturers

In 1999, Congress passed the last categorical ban on public housing assistance, a lifetime exclusion from public housing for anyone convicted of manufacturing or producing methamphetamine on the premises of public housing.²¹²

Methamphetamine—known by its street names “speed,” “ice,” “crank,” and sometimes called “the poor man’s cocaine”—is an illegal drug. It is manufactured largely in make-shift chemical laboratories by combining components of some over-the-counter cold remedies with other chemicals.²¹³ Manufacturing the drug produces explosive gas and toxins. The inherent volatility of the process combined with the clandestine nature of its

²¹¹ Human Rights Watch interview with Kaye Fohn, Salvation Army, Austin, Texas, February 11, 2004.

²¹² Amendment No. 3207 to Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, 144 Cong. Rec. S 8330, 8365-66, amending Section 16 of the United States Housing Act of 1937 (42 U.S.C. § 1437n), July 16, 1998.

²¹³ Additional information about methamphetamine, including a time line of the drug’s history, is available online at: <http://www.erowid.org/chemicals/meth/>, accessed on June 1, 2004.

production, whereby those operating “meth labs” often do so in hidden spaces without adequate ventilation, make production of the drug uniquely dangerous.

The co-sponsors of the new mandatory exclusion—Senator Kit Bond and then-Senator John Ashcroft—cited the “raging crisis” of the rise in methamphetamine use, and the dangers associated with manufacturing the drug. Senators Bond and Ashcroft sought to send a blunt message: “If you want to turn your taxpayer-subsidized residence into a meth lab, the only public housing you will be eligible for in the future is the penitentiary.”²¹⁴ Neither of the Senators nor anyone else in Congress offered any justification for the lifetime length of the ban. A fifty-year-old whose methamphetamine offense was thirty years ago would still be prohibited from public housing no matter how virtuous and exemplary his subsequent life.

Since the sharp rise in methamphetamine production and concomitant increase in criminal penalties is a fairly recent phenomenon, PHAs have yet to see those convicted of methamphetamine manufacture applying for public housing. As one PHA official noted, “they are most likely still in jail.” But interviews with PHA officials nonetheless suggest that the law will have an impact even broader than that mandated by its express language. Several officials from different PHAs explained to Human Rights Watch that they understood the law to require them to deny housing assistance to those convicted of mere possession of the drug. PHAs also deny people charged as conspirators because they were present in a home where methamphetamine was being made.²¹⁵ Housing officials in Los Angeles told us that they would deny anyone convicted of manufacture of the drug regardless of whether it was on federally-assisted housing property or not, because they could not tell from conviction records where the offense took place.²¹⁶

²¹⁴ John Ashcroft, introducing the amendment, *Congressional Record*, 105th Cong. vol. 144, pt. 8366.

²¹⁵ Human Rights Watch interview with S.L., Marillac House, Salt Lake City, Utah, October 1, 2003. S.L. told Human Rights Watch that she had been living with an abusive partner who was manufacturing methamphetamine, and, because she was present at the time, she was charged with the same offense. She was subsequently denied housing.

²¹⁶ Human Rights Watch meeting with staff of the Housing Authority of the City of Los Angeles, Los Angeles, California, February 3, 2004.

IX. Screening People Out: “Felons Need Not Apply”

*If you’ve got the big ‘F,’ it’s hard to move forward.*²¹⁷

—Sheila Fauntleroy, Project Pindua, Mon Yough Community Services

Many people in need of housing assistance do not apply because they have criminal records. Although there is no way to quantify this assertion, our research indicates that many eligible applicants, or those who would certainly be eligible if PHAs rightfully gave individual consideration to each application, do not apply. Some do not know they are eligible despite having a criminal record, others are misled into believing that they are not, and still others are turned away at the applications desk by PHA employees who do not understand the exclusionary policies.

In every city Human Rights Watch visited to conduct research for this report, social service providers, prison officials, probation and parole officers, homeless service providers, housing advocates, and even people with criminal records and their advocates told us that it was “common knowledge” that felons, especially drug offenders, were automatically ineligible for public housing. Many of those providing support and services to people with criminal records were not aware of the policies of their local PHAs. They based the information they had on rumors, past experiences with applicants who had been denied, and very rudimentary and infrequent contact with staff from local PHAs. As a result, an overwhelming majority of the homeless people with criminal records we spoke with had not even considered public housing as an option.

“They’re not even applying because they know they’re not going to get it,” a Baltimore parole agent told Human Rights Watch.²¹⁸ A homeless woman in Birmingham echoed this thought: “A lot of people don’t apply because they know they got a felony and they’re not going to get public housing.”²¹⁹

Some of those seeking assistance were turned away at applications offices, or discouraged from applying by PHA staff. “I asked for an application for Section 8,” a young man with a felony conviction in New York told us, “They asked me if I had a

²¹⁷ Human Rights Watch Interview with Sheila Fauntleroy, Project Pindua, Mon Yough Community Services, Pittsburgh, Pennsylvania, January 28, 2004.

²¹⁸ Interview with Jaqueline Hawkins, November 18, 2003.

²¹⁹ Human Rights Watch interview with P.D.P., Church of the Reconciler, Birmingham, Alabama, December 11, 2003.

felony. I said, ‘yes.’ They said I wasn’t eligible because of the felony. They said, ‘Well, then, this application isn’t for you.’”²²⁰

One commentator called officials who discourage those who might be eligible from applying “welfare cheats.” “They are not people who receive welfare illicitly,” David Shipler explains,

The more damaging welfare cheats are the caseworkers and other officials who contrive to discourage or reject perfectly eligible families. These are the people who ask a working poor mother a few perfunctory questions at the reception desk, then illegally refuse to give her an application form . . . It is a clever tactic, say the lawyers, because they cannot intervene on behalf of a client who has not applied.²²¹

Social service providers often actively discourage their own clients from applying for public housing, sometimes because they misunderstand the policies of the local PHA, and sometimes because they do not want to set their clients up for failure. A case manager in Pennsylvania explained her reluctance to send clients to apply for public housing: “I’m not sure if I should tell residents to apply if they have a felony record, if it’s worth the hassle because it’s just such a set-up, even if there is an appeal. . . . I just don’t encourage them.”²²² A transitional housing provider in Birmingham echoed her concern. “Once someone tells you they’re not accepting ex-felons,” he explained, it seems “unkind” to refer clients to a service they are unlikely to get.²²³

²²⁰ Human Rights Watch interview with E.B., twenty-four-year-old Latino man in New York. Even when they chose to apply, most of those with criminal records we spoke with had little hope that their applications would be approved. As one woman who had been convicted of a felony seven years prior to her application told us:

I’ve never had a record since then [in the last seven years]. I was eighteen at the time this happened. A friend of a friend who lives in public housing told me that I can’t get housing because of my record. She asked a lady at CMHA [Cuyahoga Metropolitan Housing Authority] for me and the lady said you can’t get housing. The housing authority didn’t send me a rejection letter. I called and asked about my application. They said someone will get back to me, but they didn’t. I said forget it because I already heard you can’t get in. I was just trying to see if it was true.

Human Rights Watch interview with M.L., Cleveland, Ohio, May 5, 2003.

²²¹ Shipler, *The Working Poor: Invisible in America*, p. 229.

²²² Interview with Renee D’Ippolito, January 30, 2004.

²²³ Human Rights Watch telephone interview with Chris Retan, executive director, Aletheia House, Birmingham, Alabama, December 10, 2003.

The Screening Process

Federal law authorizes and encourages PHAs to screen out applicants based on criminal records, and PHAs have adopted a variety of methods for doing so. Many PHAs ask applicants when they apply about their past involvement with the criminal justice system,²²⁴ and then seek official criminal records from public or private sources.²²⁵

Other PHAs wait until an application comes to the top of a waiting list and a housing unit is available before conducting a criminal background screen, and several years may pass between the time a person applies and when the criminal background check is completed. Consequently, many applicants who will inevitably and ultimately face denial based on their criminal records languish on waiting lists, often completely unaware of which offenses could result in denial and what kinds of rehabilitation the PHA will ultimately require for admission.²²⁶ If PHAs told applicants up front both how PHA exclusionary policies would affect them and what kind of evidence of mitigation and rehabilitation they would need to become eligible, an applicant could use the intervening months, and often years, to gather evidence of rehabilitation.²²⁷

²²⁴ Human Rights Watch reviewed sample applications from over twenty-five different housing authorities; some included questions about the applicant's arrest history, others asked specifically about an applicant's past convictions.

²²⁵ Although federal law authorizes law enforcement agencies to release information to PHAs, it does not require them to do so. As a result, some PHAs have developed relationships with law enforcement or state criminal record repositories; others seek information from companies that sell criminal background information. Federal law does not limit how far back into an applicant's life criminal background checks can extend, and many PHAs receive information about a person's entire criminal history, even though there are only two types of offenses that carry lifetime exclusions. California PHAs are a notable exception, because state law prevents them from obtaining information about criminal convictions that occurred ten years prior to the application, and in some cases, those that occurred more than five years prior. Law enforcement agencies are permitted to release to housing authorities information about convictions involving controlled substances or alcoholic beverages within five years. California Penal Code § 11105.03(b)(4). Section 11105.03 limits the information a law enforcement agency can provide that "relates to a conviction for a serious felony . . . involves a violation of a protective order . . . , or a conviction for any felony offense that involves controlled substances or alcoholic beverages, or any felony offense that involves any activity related to controlled substances or alcoholic beverages, or a conviction for any offense that involves domestic violence." § 11105.03(b)(1). The statute prohibits the release of arrest information where the arrest did not result in conviction. § 11105.03(b)(2). The statute further provides: "If a housing authority obtains summary criminal history information for the purpose of screening a prospective participant pursuant to this section, it shall review and evaluate that information in the context of other available information and shall not evaluate the person's suitability as a prospective participant based solely on his or her past criminal history." California Penal Code § 11105.03(c).

²²⁶ In its *Public Housing Handbook*, HUD recognized applicants' interests in finding out sooner, rather than later, that they may be ineligible, but noted that a PHA that waits until an applicant comes to the top of the waiting list before conducting an assessment "avoids the time and expense involved in evaluating applicants who will drop from the waiting list before their names can be reached." Chapter 4-1(b)(5), page 4-3.

²²⁷ The New York City Housing Authority (NYCHA) provides applicants it denies with information about what kinds of evidence they would need to show to overcome a finding of ineligibility. Unfortunately, NYCHA provides this information at the end of the process, after an applicant has likely spent years on a waiting list. But in fact, most PHAs do not tell applicants anything at all about what kinds of evidence they would need to show.

The Cost of a Criminal Background Check

PHAs are not permitted to pass the cost of a criminal background check along to an applicant for public housing.²²⁸ HUD has no affirmative responsibility, however, to ensure that this does not happen, and has no process for regularly reviewing the actions of PHAs. HUD officials told Human Rights Watch they rely on applicants and legal service providers to notify them of PHA practices that violate the law.²²⁹ But most applicants have no idea what their PHAs can and cannot do, and legal service providers in some areas were unaware that the practice was in violation of the law.

Applicants for housing in Lycoming County in Pennsylvania, for example, are reportedly charged \$75 for a criminal background check.²³⁰ The Austin Housing Authority requires applicants to obtain their own criminal histories from the Texas Department of Public Safety by paying a fee of \$15. Applicants who choose to follow through with the application process can then present their receipt to the housing authority to receive a cash refund. When Human Rights Watch asked HUD to comment on whether Austin's practice of shifting the initial cost to the applicant was consistent with federal law, an agency spokesperson declined to respond, because a complaint had not been brought to HUD's attention.²³¹

The costs associated with a criminal background check go beyond simply obtaining criminal records. Applicants who dispute the veracity of a PHA's criminal background check bear the burden of providing additional records. And in cases where applicants are called on to show mitigation or rehabilitation, to the extent that those records entail a cost to reproduce, applicants bear that cost.

²²⁸ 24 CFR § 982.553 (d)(3) (Section 8); 24 CFR § 960.204 (d) (public housing).

²²⁹ See also the section on "Challenging Automatic Exclusionary Criteria" in Chapter VII of this report; Human Rights Watch telephone interview with Donna White, HUD spokesperson, May 21, 2004. Until HUD directed the Baltimore Housing Authority (BHA) to halt the practice in 1997, BHA required all applicants for public housing to purchase copies of their own criminal histories to provide to the housing authority, without notifying the applicants that they would be summarily denied eligibility for assistance if their histories included any arrests. BHA's practice of denying anyone with a criminal history was so broad that applicants were denied assistance for any arrests—even those where the charges were ultimately dismissed.

²³⁰ Human Rights Watch interview with Danna Rich-Collins, officer manager/paralegal, North Penn Legal Services, Williamsport, Pennsylvania, December 1, 2003; Human Rights Watch interview with S.L., Sojourner Truth Ministries soup kitchen December 2, 2003. Officials at the Lycoming County Housing Authority failed to respond to repeated requests for information.

²³¹ Letter to Human Rights Watch from William O. Russell, III, deputy assistant secretary, Office of Public Housing and Voucher Programs, HUD, April 5, 2004.

Less than Reliable Criminal Background Information

When PHAs seek to acquire criminal background information, they utilize a patchwork of sources—from informal phone calls to the sheriff down the road and paying for information from commercial vendors to accessing state repositories or the National Crime Information Center (NCIC) database for comprehensive criminal histories.²³²

Commercial vendors—companies which collect and sell individual background data—are quickly growing enterprises, but critics explain they are unreliable.²³³ Lawyers in Texas told Human Rights Watch that the Travis County Housing Authority pays \$200 a year for unlimited criminal background “hits” from a commercial vendor, which they claim is “horribly unreliable. . . . It doesn’t list everybody, but incomplete can be dangerous. It’s sloppy, but it cuts both ways.”²³⁴

PHA officials told us about a recent applicant who had been erroneously rejected because of inaccurate information provided by a commercial vendor:

One girl, she had convictions on her record for prostitution and drugs, selling crack cocaine in Columbia, South Carolina five years ago. I denied her, she called saying, “I don’t have any drug charges.” We told

²³² HUD, “Table II-6: The Sources Of Information For Criminal Background Checks, By Program Size,” *The Uses of Discretionary Authority in the Tenant-Based Section 8 Program: A Baseline Inventory of Issues, Policy, and Practice* (November 2000), p. 15.

²³³ See, e.g., HUD, “Table II-6: The Sources of Information For Criminal Background Checks, By Program Size,” *The Uses of Discretionary Authority in the Tenant-Based Section 8 Program: A Baseline Inventory of Issues, Policy, and Practice* (November 2000), p. 15. Commercial vendors often use a system of “name-plus-identifier,” matching the names and one other piece of personal information, such as a social security number or birth date. Commercial vendors that make information available on their websites include a “disclaimer” putting the user on notice that they cannot guarantee the accuracy of the records. A study by the National Task Force on Interstate Identification Index Name Check Efficacy, however, found that in a sample of over eighty-two thousand people, 4,562 (5.5 percent) were inaccurately found to have criminal records. National Consortium for Justice Information and Statistics (SEARCH), *Interstate Identification Name Check Efficacy Report to the Attorney General* (1999), p. 3.

²³⁴ Human Rights Watch interview with Nelson Mock, staff attorney, Texas RioGrande Legal Aid, February 11, 2004.

her: “put it in writing, ‘that’s not me.’” We had to go call [the state criminal records repository] because there was no social security number, it just hits on a name and date of birth. It was a common name, same date of birth, and it turns out it wasn’t her.²³⁵

Even official law enforcement records contain some errors. One study found that 87 percent of criminal record after prosecution (“rap”) sheets included at least one error.²³⁶

PHAs recognize that criminal justice records are sometimes inaccurate, and they have different ways of dealing with inaccuracies—from allowing applicants to view their records before housing officials see them,²³⁷ to confirming any negative information by requiring applicants to submit fingerprints.²³⁸ But most PHAs simply rely on applicants to challenge their denials at informal hearings. This is not an effective way to ensure that applicants are treated fairly, because, as described in the section “Lack of Individualized Review” in Chapter VII of this report, applicants have difficulty availing themselves of their right to challenge denials.

The Cost of Making a Mistake on a Housing Application

Applicants may unwittingly, or out of fear that they will be denied, provide erroneous or incomplete information on their initial housing applications. Providing false or inaccurate information on an application for public housing almost always leads to a

²³⁵ Interview with Laurie Meadows, December 16, 2003.

²³⁶ Legal Action Center, *Study of Rap Sheet Accuracy and Recommendations to Improve Criminal Justice Recordkeeping*, (1995). The study found that 41 percent of all records contained two or more errors, including missing disposition information, unsealed cases, unrecorded warrants that had been vacated, split arrest events, and inaccurately recorded disposition information.

²³⁷ Applicants at the Birmingham Housing Authority get their criminal background checks done themselves in the same building as the PHA, and after reviewing their rap sheet, they can decide for themselves whether to continue with the application process. This approach gives applicants a chance to correct any errors before the PHA sees their rap sheets, and to engage in additional rehabilitation prior to continuing with the application, but it places those with open cases at risk. A Birmingham housing official told Human Rights Watch:

The criminal background check is done in the building, they take it to the office and they [the police] run it. They can decide not to give it to us. . . . If someone comes in with an outstanding warrant, they will go to jail. They are arrested right out of the office.

Approximately 30 people a month are arrested when they go to get their backgrounds checked. Even for parking tickets. That’s the most common.

Interview with Jimmie Lacey, December 10, 2003. Applicants who have been arrested from the housing authority office also include people who have third degree misdemeanor check charges and theft of property charges, “misdemeanor stuff,” Lacey explained. “We had one today, she owed \$127 in fines, and she had some arrest warrant from ten years ago. It was an assault, a domestic violence situation where she and her batterer were arrested.” Ibid.

²³⁸ See *Allen v. Muriello*, 217 F. 3d 517 (7th Cir. Ill. 2000).

denial of eligibility.²³⁹ Indeed, PHA officials themselves told us that a one of the leading reasons for denial is providing “false” information on an application.

Many applicants perceive that the cost of lying justifies the need to lie if they will ultimately be denied because of prior arrests or convictions. One advocate explained: “Why do they lie? Because they know they will be denied; that you will be homeless, and this is an opportunity to get some help that you definitely need. The risk is minor.”²⁴⁰ But Human Rights Watch also spoke with many people who were unable to understand or articulate their own criminal histories.

Because criminal background checks conducted by PHAs reach so far into the past, many applicants are accused of lying on their applications when they fail to remember the details of prior cases, or worse, when a case was dismissed but the applicant is unable to prove it. An attorney in Baltimore told Human Rights Watch that the housing authority “would go ten, twenty years back. [A] *nol pro*s²⁴¹ twenty years ago. They [applicants] didn’t remember what happened. The housing authority would try to make it look like they were lying.”²⁴²

²³⁹ Some PHAs explicitly warn applicants against providing false or incomplete information on the initial application. For example, the form used by the Housing Authority of the County of Los Angeles (HACoLA) states:

A criminal conviction alone may not necessarily result in the denial of assistance. Other factors such as disclosure on the application for housing assistance, completion of rehabilitative treatment, type and longevity of the conviction may also be taken into consideration. *An applicant who fails to provide complete and accurate information as requested may be denied assistance.*

See also HACoLA Section 8 Administrative Plan, § 2.6.s

²⁴⁰ Human Rights Watch interview with Susan Burton, executive director, A New Way of Life, Los Angeles, California, February 5, 2004. In at least one instance, however, the PHA took action to prosecute an applicant who had not fully disclosed his background to the agency in federal court. *U.S. v. Westover*, 2002 U.S. Dist. LEXIS 19714 (D. Kansas). The Topeka Housing Authority brought Verel Tracy Westover Sr. to federal district court where he was charged with making a material and false statement on his application for public housing. The application Westover completed asked: “Have you ever been convicted of a FELONY, serious MISDEMEANOR or for DRUGS?” Westover responded “yes” on the application, disclosing a 1998 conviction for writing bad checks, but did not mention felony convictions he had in 1984. A subsequent criminal background check done by the THA revealed information about the fourteen-year-old convictions. Westover’s attorney told Human Rights Watch that his client, now serving a year and a day in federal prison, is a senior citizen who had just undergone bypass surgery and was residing in an elderly hospice at the time he was sentenced. He explained his client’s response on his application as the result of confusion rather than an intention to misrepresent his record. Westover “had a six-inch record that an attorney would have a hard time understanding.” Human Rights Watch telephone interview with Ronald E. Wurtz, assistant federal defender, Office of the Federal Public Defender, Topeka, Kansas, January 16, 2004.

²⁴¹ “*Nolle prosequi*” is a Latin term for “unwilling to prosecute,” or the prosecution’s abandonment of a charging document. *Barron’s Law Dictionary*, 3rd ed., p. 320.

²⁴² Human Rights Watch interview with Carolyn Johnson, staff attorney, Homeless Persons Representation Project, Baltimore, Maryland, November 17, 2003.

There are certain legal outcomes of criminal proceedings that applicants may not understand—either because they lack the ability to understand them or because the outcomes themselves are unclear. An individual arrested for a drug offense and diverted to an alternative to incarceration program (ATI), for example, completes the program and is told by a judge that her record is “clean.” Relying on that information, the applicant answers “no” when asked if she has ever been arrested or convicted. Because dispositions in ATI cases are often confusing, and because completion is not always reported to agencies that manage criminal background data, the information received by a PHA very likely will show the arrest or conviction, and the applicant will then be considered to have misrepresented the information or lied, and hence, denied assistance.

PHAs allow applicants they consider to have misrepresented criminal history information to explain why the information they provided did not match the information retrieved by the PHA through the criminal background check process. PHA officials, however, told us that they did not consider an applicant’s failure to understand a criminal disposition a valid excuse.

“A Criminal for the Rest of My Life?”

H.G., a fifty-seven-year-old African American woman, was denied housing by a private low-income housing provider²⁴³ for a conviction she did not know was on her record.

“It was very depressing,” said H.G.’s caseworker. “It was a shock to her. It is having an effect on her health. I saw her decline. She didn’t know where to go or what to do. It set some things in motion right after. She got pneumonia, and she was in pretty bad shape. She’s recuperating now. It really did knock her for a loop.”²⁴⁴

H.G. understood very little about what she was charged with and less about the ultimate disposition of the case. With the assistance of a social worker, she attempted to obtain information about her criminal record. She produced a document from the Pennsylvania State police that, she explained, showed that she was never convicted of any offense. H.G. could not understand the letter, however, which only stated that her request for information was under review.²⁴⁵

²⁴³ H.G. had applied for housing through Allegheny Housing Rehabilitation Corporation (AHRCO), a housing agency that operates with a combination of public and private funding and whose admission policy is governed by HUD regulations. Human Rights Watch telephone interview with John Ponds, vice president, AHRCO, April 20, 2004.

²⁴⁴ Human Rights Watch interview with Kathy Hupner, case manager, Debra House, Pittsburgh, Pennsylvania, January 28, 2004.

²⁴⁵ Pennsylvania State Police, Pennsylvania Access to Criminal History (PATCH) Response for Criminal Record Check, March 11, 2002, on file with Human Rights Watch.

H.G. told Human Rights Watch that she and her brother got into a fight after her mother's death in 1990. The police were called, she was taken to the hospital, and her brother was taken to jail. She joined her brother in jail after being treated for her injuries. She explained:

We both spent the night in jail. I didn't press charges, but I paid the fine for both of us. I don't know what you'd even call it, it wasn't bail. . . . It was \$250 for both of us. Nobody ever called me a criminal. . . . I don't know who got a fine. I never asked. He got community service.²⁴⁶

With the help of social workers at a transitional housing program for women, H.G. wrote to AHRCO explaining the incident which led to her arrest, and asking them to reverse their denial. She received a form letter rejecting her request for reconsideration in response.²⁴⁷ H.G. wrote a final letter to AHRCO asking for a second chance. H.G.'s letter reads:

Would you please reconsider my application for housing. I am 57 and living at the Debra House. My year at the Debra House expires on 10-16-03. I need to find permanent housing. . . . I am now working at BVEV, Inc. (Black Vietnam Era Veterans, Inc.) in Pittsburgh and I have not had any other incidents since this one in April of 1990. We are all human and make mistakes. Please give me a chance to prove I am a worthy person.²⁴⁸

Despite her caseworker's advocacy on behalf of H.G. with AHRCO, H.G. was ultimately denied. "I don't think they've been fair. They're not looking at references. Our letters got no attention or response."²⁴⁹ H.G.'s caseworker urged her to apply for housing through other agencies, but was not hopeful. "I had no idea I was a criminal," H.G. lamented, "I'm going to be a criminal for the rest of my life?"²⁵⁰

²⁴⁶ Human Rights Watch interview with H.G., Debra House, Pittsburgh, Pennsylvania, January 28, 2004.

²⁴⁷ Letter to H.G. from Ms. Bey, AHRCO Management Division, September 24, 2003. The letter stated: "The principal reason(s) for this adverse action: Other: unsatisfactory criminal report."

²⁴⁸ Letter to Mr. Washington, AHRCO, October 9, 2003 from H.G., on file with Human Rights Watch.

²⁴⁹ Human Rights Watch interview with Kathy Hupner, case manager, Debra House, Pittsburgh, Pennsylvania, January 28, 2004.

²⁵⁰ Human Rights Watch interview with H.G., Debra House, Pittsburgh, Pennsylvania, January 29, 2004.

X. Arbitrary Denials and Discrimination

To recognize that adequate housing is a right means that people cannot be deprived of the opportunity for adequate housing for reasons that are merely arbitrary or discriminatory. In international law, discrimination in the recognition and protection of rights is strictly prohibited, and limitations on the right to housing are permitted only if they are embodied in law, compatible with the nature of the right, and for the purpose of promoting “the general welfare in a democratic society.”²⁵¹ Current U.S. exclusionary criteria for public housing fail these tests.

Arbitrary Exclusions

Public safety and the housing rights of others are legitimate grounds for restricting certain applicants from public housing. However, current exclusionary policies rely on such broad-brush criteria that they are only tenuously, if at all, connected to the goal of public safety. The result: many wind up unreasonably deprived of their best chance for housing, as well as for realizing the many other rights that flow from having a stable address.

The requirement in international human rights law that restrictions on rights be justified in light of specific interests “in a democratic society” entails that such limitations be strictly necessary, proportional, of limited duration, and subject to review.²⁵² Legislative mandatory lifetime denial of public housing is neither necessary nor the least restrictive means to protect the safety of other public housing tenants. Where exclusion from public housing results in homelessness or permanent separation from one’s family, the case can be made that the actual damage to individuals or society is disproportional to any speculative gain in public safety. Furthermore, lifetime denials of housing are plainly not limited in duration.

It is likely that, in establishing the exclusionary policies discussed in this report, Congress was far more interested in sending a message of disapproval about specific crimes than

²⁵¹ ICESCR, art. 2.2, 4.

²⁵² This is a principle of interpretation that applies to restrictions clauses, common to both the ICCPR and the ICESCR, and is grounded in the jurisprudence of the European Court of Human Rights. See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Arlington: N.P. Engel, 1993), p. 378-79; Committee on Economic, Social, and Cultural Rights, General Comment No. 14, on “The right to the highest attainable standard of health,” August 11, 2000, art. 12, para. 28. The Committee, analyzing the limitations clause of the ICESCR in the context of the right to health, noted that when a government seeks to impose limitations on the right to health on grounds of national security or the preservation of public order, its aims must be legitimate and “strictly necessary for the promotion of the general welfare in a democratic society.”

in establishing reasonable protections for tenant safety. In any event, Congress provided no public safety justification for imposing lifetime exclusions, rather than permitting a case-by-case consideration of the risks potentially posed by any individual applicant.

Many PHA policies fail to establish a reasonable basis for excluding applicants. As discussed above, many PHA policies utilize exclusionary criteria that bear no discernible relationship to tenant safety and that establish unduly lengthy periods of time between the offense and eligibility. For example, Austin's seven-year exclusion for everyone convicted of drug sales is not reasonable by virtue of the fact that an argument can be made that one person who sold drugs seven years ago might be a danger today to tenants.

Our review of PHA policies suggests that PHAs have made little effort to ensure housing applicants are not needlessly rejected. Rather, the policies seem to reflect, at best, a scant regard for the housing rights of applicants, and at worst, a purely punitive approach to people with criminal records.

Discrimination

International human rights law unequivocally affirms the equality of all persons before the law and prohibits governments from discriminating in policy or practice “on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²⁵³

Not all distinctions made by governments, however, constitute impermissible discrimination. The Human Rights Committee has observed that “not every differentiation in treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”²⁵⁴

²⁵³ ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, article 26. The Committee on Economic, Social, and Cultural Rights has also specifically noted the prohibition against discrimination in the context of housing rights: “individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with Article 2(2) of the Covenant, not be subject to any form of discrimination.” Committee on Economic, Social, and Cultural Rights, General Comment No. 4, para. 6.

²⁵⁴ Human Rights Committee, General Comment No. 18, “Nondiscrimination,” 37th Sess., 1989, para. 13.

Housing laws and policies that have a racially disparate impact, but are not reasonably designed to achieve a legitimate state purpose, violate the international human right to be free from discrimination. The laws need not reflect a racially discriminatory purpose.

Under state and federal constitutional law, racial disparities that arise from public housing policies are constitutional as long as they are not undertaken with discriminatory intent or purpose.²⁵⁵ But unlike U.S. law, international human rights law does not require discriminatory intent. The International Convention on the Elimination of All Forms of Racial Discrimination (CERD or “the Convention”), to which the United States is a party, prohibits laws or policies which have “an unjustifiable disparate impact” on racial and ethnic minorities.²⁵⁶ The Convention specifically requires states parties to eliminate unjustifiable laws or practices that may be facially race-neutral, but that have the “purpose or effect” of restricting rights on the basis of race.²⁵⁷ It proscribes race-neutral practices curtailing fundamental rights that unnecessarily create statistically significant racial disparities even in the absence of racial animus.²⁵⁸

Data on the racial composition of people denied because of criminal records are not available.²⁵⁹ Nevertheless it is likely that criminal record exclusions from public housing have a significant racially disparate impact.²⁶⁰

²⁵⁵ See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); see also *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir 1999) (applying Burdine’s requirement of intent to discrimination in public housing).

²⁵⁶ UN Committee on the Elimination of Racial Discrimination, General Comment No. 14, para. 2. In its concluding observations on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) in the U.S. in 2001, the Committee on the Elimination of Racial Discrimination stated:

While noting the numerous laws, institutions and measures designed to eradicate racial discrimination affecting the equal enjoyment of economic, social and cultural rights, the Committee is concerned about persistent [racial] disparities in the enjoyment of, in particular, the right to adequate housing, equal opportunities for education and employment, and access to public and private health care.

A/56/18/380-407, August 14, 2001, 398.

²⁵⁷ CERD, para. 1, art. 1.

²⁵⁸ See CERD, General Recommendation XIV(42), on art. 1, para. 1 of the Convention, U.N. GAOR, 48th Sess., Supp. No. 18, at 176, U.N. Doc. A/48/18 (1993). See also, Theodor Meron, “The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination,” 79 *The American Journal of International Law*, 283, 287-88 (1985).

²⁵⁹ HUD does not require PHAs to maintain statistics on those who were denied, much less on the race of those denied, and we did not find any PHA that did maintain such statistics.

²⁶⁰ U.S. courts have indeed acknowledged the obvious fact that criminal records screening has a disparate impact on racial and ethnic minorities. See, e.g., *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1295 (8th Cir. 1975). The United States EEOC has also noted:

The FBI’s Uniform Crime Reporting Program reported that in 1987, 29.5 percent of all arrests were of Blacks. The U.S. Census reported that Blacks comprised 11.7 percent of the national population in 1980 and projected that the figure would reach 12.2 percent in

Racial and ethnic minorities are disproportionately represented among the impoverished of the United States: in 2002, 24.1 percent of blacks and 21.8 percent of Hispanics were below the poverty line.²⁶¹ As a result, minorities are more likely than whites to need housing assistance and, indeed, racial and ethnic minorities constitute 70 percent of those who currently reside in conventional public housing.²⁶²

As illustrated below, African Americans are also disproportionately represented among those who have criminal records, and as such are much more likely to be rejected for public housing on this basis. As noted above, criminal record exclusionary criteria used by PHAs are in and of themselves overbroad and therefore unreasonable as a means of promoting public safety. If exclusionary policies have a significant racially disparate impact, and such an impact cannot be justified on public safety grounds, then the policies would contravene the provisions of CERD.

1987. Since the national percentage of arrests for Blacks is more than twice the percentage of their representation in the population (whether considering the 1980 figures or the 1987 projections), the . . . presumption of adverse impact, at least nationally, is still valid.

EEOC Notice.

²⁶¹ U.S. Census Bureau, *Poverty in the United States: 2002*, table 1, p. 2. Note: the number for "black" refers to the category of which is "black alone"—those who self-identified as black and not as any other race (e.g. black and Asian). The number for "blacks alone and in combination" is 23.9. The number for Hispanics refers to Hispanics of any race. A report from the Institute on Race and Poverty also shows that rates of poverty among racial and ethnic minorities is three times as high as those of whites. *Racism and Metropolitan Dynamics: The Civil Rights Challenge of the 21st Century* (April 2002), available online at: <http://www1.umn.edu/irp/publications/racismandmetroynamics.pdf>, accessed on October 21, 2004.

²⁶² HUD, *Resident Characteristics Report* (March 31, 2004), available online at: <http://pic.hud.gov/pic/RCRPublic/rcrmain.asp>, accessed on April 8, 2004. Seventy percent of all residents in conventional public housing are African American, American Indian, Asian, or Hispanic.

Racial Disparities in the Criminal Justice System

Racial disparities among those arrested, sentenced, and incarcerated for criminal offenses in the United States are immense:

- ◆ According to the Federal Bureau of Investigation, nearly 27 percent of all those who were arrested in the U.S. were African American, despite the fact that they constitute approximately 12 percent of the U.S. population.²⁶³
- ◆ African Americans constituted roughly 44 percent of those convicted of felonies by state courts.²⁶⁴
- ◆ African Americans and Hispanics constitute nearly 63 percent of all those incarcerated in local jails and state and federal prisons.²⁶⁵
- ◆ African Americans constitute 23 percent of those serving state probationary sentences,²⁶⁶ and 41 percent of those on federal or state parole.²⁶⁷ Of federal offenders under supervision, half were racial and ethnic minorities.²⁶⁸
- ◆ By the end of 2001, of the nearly 5.6 million people who had ever served time in prison, nearly as many were black as were white, and an estimated 17.7 percent were Hispanics.²⁶⁹
- ◆ Racial and ethnic minorities account for fully two-thirds of those returning each year from prisons and jails.²⁷⁰

²⁶³ "By race, 70.7 percent [6,923,390] of arrestees in 2002 were white, 26.9 percent [2,633,632] were black, and the remainders were of other races." Federal Bureau of Investigation, *Uniform Crime Reports, Crimes in the United States, 2002*, available online at: http://www.fbi.gov/ucr/cius_02/pdf/4sectionfour.pdf, accessed on April 8, 2004. Note: data used in this report did not distinguish between white and Hispanic arrestees.

²⁶⁴ Matthew R. Durose and Patrick A. Lanagan, Ph.D., *State Court Sentencing of Convicted Felons, 2000* (BJS, June 2003), table 2.1, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf00.pdf>, accessed on April 8, 2004.

²⁶⁵ Paige M. Harrison and Jennifer C. Karberg, *Prison and Jail Inmates at Midyear 2003* (BJS, May 2004, rev. July 13, 2004), table 13, p. 11, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>, accessed on July 20, 2004. Blacks constituted 43 percent of the total, while those of Hispanic origin constituted 19 percent.

²⁶⁶ BJS Statisticians, *Correctional Populations in the United States, 1998* (BJS, September 2002), table 3.8, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9803.pdf>, accessed on April 8, 2004.

²⁶⁷ *Ibid.*, table 6.7, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9806.pdf>, accessed on October 21, 2004.

²⁶⁸ BJS, *Compendium of Federal Justice Statistics 2001* (November, 2003), table 7.2, p. 93, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs01.pdf>, accessed on October 23, 2004. As of September 30, 2001, 32 percent of federal offenders under supervision were African American, and 17.9 percent were Hispanic.

²⁶⁹ Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001* (BJS, August 2003), p. 1, available online at: <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>, accessed on July 6, 2004.

²⁷⁰ Petersilia, *When Prisoners Come Home*, p. 26.

Data from individual states is even more striking:

- ◆ Only 7 percent of the state's population, African Americans account for 20 percent of all felony arrest and 31 percent of the prison population in California.²⁷¹
- ◆ Over 90 percent of those serving time for a drug offense in New York are African American or Latino.²⁷²
- ◆ Although only one-quarter of the state's residents, African Americans make up 77 percent of Maryland's state prisoners. Since 1990, nine out of every ten inmates entering state facilities has been African American.²⁷³
- ◆ African Americans in New Jersey are thirteen times more likely to be incarcerated than whites, giving the state the dubious distinction of leading the nation in racially disparate incarcerations. Eighty-one percent of all people in New Jersey prisons are black or Latino; they comprise only 27 percent of the general population.²⁷⁴

²⁷¹ Center on Juvenile and Criminal Justice, *Texas Tough?: An Analysis of Incarceration and Crime Trends in the Lone Star State* (2002) (CJCJ Report), citing Christopher Davis, Richard Estes, and Vincent Schiraldi, *Three Strikes: The New Apartheid* (San Francisco: Center on Juvenile and Criminal Justice, 1996). The report is available online at: <http://www.cjcj.org/pubs/texas/texas.html>, accessed on April 8, 2004.

²⁷² CJCJ Report, citing Robert Gangi, Vincent Schiraldi, and Jason Ziedenberg, *New York State of Mind: Higher Education vs. Prison Funding in the Empire State, 1988-1998* (Washington, D.C.: The Justice Policy Institute, December 1998).

²⁷³ CJCJ Report, citing Vincent Schiraldi, *Is Maryland's System of Higher Education Suffering Because of Prison Expenditures?* (Washington DC: Justice Policy Institute, March 1998).

²⁷⁴ FAMM Gram, vol. 14, issue 1 (Spring 2004), p. 6, citing The Sentencing Project, "State Rates of Incarceration by Race" (2004), available online at: <http://www.sentencingproject.org/pdfs/racialdisparity.pdf>, accessed on October 21, 2004.

XI. Limited Right to Redress

Federal law gives applicants for public housing the “opportunity to dispute the accuracy and relevance of” any criminal record a PHA relies on to deny the applicant eligibility for housing assistance.²⁷⁵ Most, but not all, PHAs allow applicants to do this through administrative proceedings that contain most of the safeguards essential to a fair hearing. Hearings are extremely important because they are typically the only time PHAs consider information beyond the criminal record itself, such as evidence of rehabilitation. Indeed, in many places, there is a strong likelihood that the initial denial will be overturned after officials have considered such evidence, a fact which underscores the arbitrariness of the initial denial. Nevertheless, many applicants are deterred from challenging their rejections.²⁷⁶ And those who are barred under mandatory federal exclusionary statutes can only dispute the accuracy of the records used to deny them; they do not have a chance to argue they are rehabilitated.²⁷⁷

Lack of Representation

*If you have representation, you have a good chance of winning. If you don't, forget it.*²⁷⁸

—Virginia Rojo Holland, paralegal, Texas RioGrande Legal Aid

Applicants challenging public housing denials are entitled to bring someone to assist them, whether a lawyer or non-legal advocate such as a case manager, to any meeting or administrative proceeding. Many housing authorities and legal service attorneys we spoke with acknowledged that when an applicant appears at a hearing with a

²⁷⁵ 42 U.S.C. § 1437d(q)(2).

²⁷⁶ We asked each PHA official we met with for statistics on how many of those denied due to criminal records actually appeal and how many prevail after administrative hearings. None of the seventeen PHAs that we visited kept such records. The NYCHA did provide Human Rights Watch with the number of people who, after the PHA had found them ineligible for any reason, had requested a hearing. While Human Rights Watch found that the notices NYCHA provides to those it deems ineligible provide far better information about how to challenge a denial than those provided by most all other PHAs, information provided by NYCHA suggests that less than 50 percent of all those denied eligibility for any reason requested hearings. Letter to Human Rights Watch from Sherry Shuh, deputy general manager for policy, planning and management analysis, New York City Housing Authority, June 17, 2004, and Human Rights Watch e-mail correspondence with Jill Berry, executive assistant to the deputy general manager for policy, planning and management analysis, New York City Housing Authority, June 28, 2004. One PHA suggested that a significant “drop off” occurs in the application process as roughly 60 percent request hearings, 60 percent of those who request hearings show up at those hearings, and rejections are upheld between 30 and 40 percent of the time. Human Rights Watch interview with Housing Authority of the City of Austin staff, Austin, Texas, February 12, 2004. Housing officials told us that significant additional staff resources would be required if every applicant who was denied appealed.

²⁷⁷ See *Archdiocesan Housing Authority v. Demmings*, 2001 Wash. App. LEXIS 2276 (Wa. Ct. App 2001) and discussion in footnote 202.

²⁷⁸ Interview with Virginia Rojo Holland, February 11, 2004.

representative, they are often able to overcome a denial of eligibility. “If you are there with a case manager or advocate,” said one housing official in Portland, “you will usually get into housing.”²⁷⁹ Unfortunately, such advocates are not always available. “If a case manager goes to an appeal hearing with them,” one service provider with a non-profit group in Portland told Human Rights Watch, “they are more successful. But we don’t have that many case managers because of budget cuts, so people do fall through the cracks.”²⁸⁰

Applicants accompanied by a lawyer stand the best chances of prevailing.²⁸¹ An attorney in Baltimore told Human Rights Watch: “We never lost a hearing;”²⁸² a paralegal in Austin agreed: “I can’t think of a case that we’ve lost.”²⁸³ However, those who appear, without an attorney, even with evidence of rehabilitation, do not fare as well.

It is extremely difficult for public housing applicants to secure legal representation. Almost by definition, applicants for housing assistance lack the funds to hire private attorneys, and neither federal nor state laws give them a right to legal representation free of charge. Moreover, many legal service organizations that provide free legal services to the poor do not prioritize admissions cases. Those that do are, like all legal services organizations, so overwhelmed by the demand for their services that applicants may not be able to receive assistance—and some applicants we spoke to indicated they did not even know how to reach a legal services attorney.

Outreach to housing applicants is difficult even when an organization wants to reach them because of the transient nature of their lives and the fact that many are homeless. Kenneth Lay, the managing attorney at Legal Services of Metro Birmingham said, “We don’t see many admissions cases. I don’t think they know we can help with that. We’ve tried through community outreach to get to people but we’re only reaching current tenants. I don’t know how we could reach them, other than requiring the housing authority to notify them.”²⁸⁴

²⁷⁹ Human Rights Watch interview with Rachel Duke, social services coordinator, Housing Authority of Portland, Portland, Oregon, June 24, 2003.

²⁸⁰ Human Rights Watch interview with Renata Wilson, interim employment/housing supervisor, Portland Impact, Portland, Oregon, May 26, 2003.

²⁸¹ Most of the denial notices sent to applicants state that they can bring a representative along with them to an informal hearing, but Human Rights Watch only found one that included the name or number of the local legal service agency.

²⁸² Interview with Carolyn Johnson, November 17, 2003.

²⁸³ Interview with Virginia Rojo Holland, February 11, 2004.

²⁸⁴ Telephone interview with Kenneth Lay, December 12, 2003.

And as one lawyer told us, one of the reasons legal service organizations may not prioritize cases where applicants are denied because of criminal records is because they get no “political mileage by trying to help this population”:

We don't deal directly with this issue . . . but if you ask me, its because of the type of population this is A lot of the work is driven by the funding that we're able to get. There hasn't been much of an outcry, they're at the bottom of the totem pole. . . . From my experience, it's much easier to get funding when you're talking about families or children. We just can't get anyone on board. We don't have the funding to tackle these kinds of issues.²⁸⁵

In the rural areas we visited, legal representation was even more scarce. Housing officials in two rural areas of South Carolina told us that they had never seen an applicant represented by an attorney, and the legal services office closest to Greene County in Alabama had no recollection of representing anyone in an applications case with the local PHA in recent years.²⁸⁶

Legal service organizations and public interest attorneys that reach out specifically to find applicants denied housing because of criminal records, as well as agencies that focus on public housing issues, report having more than just occasional experience with helping rejected applicants. The Homeless Persons Representation Project (HPRP) in Baltimore has focused a great deal of attention on applicant denials, mainly because of the office's location and individual attorney interest in such cases. Carolyn Johnson, a staff attorney with the project explained why:

Because we are in the same building [as the housing authority] people would just find their way to our office. Housing authority staff would say: “Go down to the second floor [the offices of the HPRP] if you're that angry.” We started seeing a lot of people getting denied in 1997 when I was a law student and so we [the law students] started doing the hearings.²⁸⁷

²⁸⁵ Human Rights Watch telephone interview with Clemente Franco, executive director, Inner City Law Center, Los Angeles, California, January 7, 2004.

²⁸⁶ Human Rights Watch telephone interview with Willie Mae Jones, managing attorney, Tuscaloosa Legal Services, Tuscaloosa, Alabama, February 10, 2004.

²⁸⁷ Interview with Carolyn Johnson, November 17, 2003.

Texas RioGrande Legal Aid's (TRLA) Austin office is one of the few offices that has the luxury of specializing and has taken a focused interest in challenging public housing denials. Most attorneys are not taking public housing admissions cases "because they don't have the experience,"²⁸⁸ one TRLA attorney told us. "They don't realize they're winnable cases."²⁸⁹

Many legal service agencies restrict the kinds of admissions cases they will take to only those denied in violation of a PHA's own policy, or those who can clearly show significant rehabilitation.

"Most are slam dunk," said one paralegal in Austin, but others are less clear, and she said that they "absolutely would not" take a case of someone with a recent drug conviction or a case pending, "because we know the policy!"²⁹⁰ Attorneys at TRLA said that they knew what a hearing officer needs to see to approve an application, but that they themselves exercise "discretion" in how they take cases. "It really depends on the facts," said an attorney in the Austin office. "If a client comes in and says, 'I'm homeless and I have four kids, but these are the reasons you should take my case,' then of course we'll consider it."²⁹¹ Those with less sympathetic cases, or single adults without children, may have a more difficult time securing representation even in those areas where the local legal services office takes admissions cases.

Some legal service agencies are able to press local housing authorities to exercise discretion in considering an applicant's rehabilitation or re-open cases where the PHA rejected an unrepresented applicant. But few are able to address PHA policies or practices that affect entire classes of clients. Because federal legislation prevents legal service agencies that receive federal funding from the Legal Services Corporation (LSC) from engaging in class action litigation,²⁹² the most an LSC-funded legal service provider can do is bring challenges on behalf of individual clients and conduct outreach to applicants who may be affected by the same practices.

²⁸⁸ Interview with Nelson H. Mock, February 11, 2004.

²⁸⁹ Interview with Kelli Dunn Howard, February 11, 2004.

²⁹⁰ Interview with Virginia Rojo-Holland, February 11, 2004.

²⁹¹ Interview with Nelson H. Mock, February 11, 2004.

²⁹² See footnote 178 for a more in-depth discussion of class action litigation issues.

Lack of Information from PHAs

Many applicants who were denied because of their criminal records told Human Rights Watch that they either received no information from the PHA telling them that they could challenge their denials, or they were actively misled by PHA staff.

Some applicants simply do not have the wherewithal to understand the process on their own. “[The denial letter] just said that I could appeal it, but I didn’t know how,” one young mother in rural Pennsylvania told us. She called her local legal services office after she, her husband, and her infant son had been denied because of her husband’s felony theft record from 2000, and she was told that they could not help her file an appeal.²⁹³ Living apart from her husband now and struggling to pay the rent on her own, she said:

I don’t really consider us much of a family. Whenever we can see each other, we try to see each other. Neither of us drive and he lives about 45 minutes away. It is stressful . . . because I feel like I’m taking care of a kid by myself. I am young . . . and I don’t have anyone to help me. I am hoping that if either myself or my husband gets a job, we can get our own apartment.²⁹⁴

With no work history, no GED, and a husband now living on the streets, the chances of reuniting her family, however, seem slim.

Federal law requires that PHAs notify applicants why they were rejected, and provide them with a copy of the record upon which the denial was based.²⁹⁵ Yet PHAs do not always comply with these requirements.

In many places, applicants had little to no idea why they had been denied. Many PHAs provide applicants with form letters notifying them that they have been denied, but fail to specify the reasons why. “If the person has a criminal history,” a housing administrator in Florida told Human Rights Watch, “and falls within the [PHA’s] criteria for denial, they usually get a standard rejection letter. It states that the person has been rejected because they have a criminal history. It doesn’t say what type of crime was the

²⁹³ Human Rights Watch telephone interview with K.S., Lycoming County, Pennsylvania, February 20, 2004.

²⁹⁴ *Ibid.*

²⁹⁵ 24 CFR 982.553(d)(1) (§ 8); 24 CFR 960.204(c) (public housing).

reason for the rejection.”²⁹⁶ Letters to Baltimore applicants, for example, contain this standard reason for denial: “Engagement in drug-related or violent crime and/or other criminal activity which may adversely affect the health, safety, or right to peaceful enjoyment of other residents.”²⁹⁷

Many housing providers recognized that the process available to challenge denials itself actually deters applicants from appealing. Others, in an effort to ameliorate the effects of blanket policies and, after seeing that many applicants who were denied failed to request appeals, have revised their letters to make them more “friendly.”²⁹⁸ At least one PHA recently revised its letters of rejection to explain to applicants why they had been denied. “How can you mount a defense without knowing the crimes you’re being rejected for?” asked a hearing officer.²⁹⁹

Inadequate Time to Appeal

Under PHA policies, an applicant who has been rejected must appeal within a set period of time, typically ten days from the date of the denial, or their application will be terminated. For many applicants, ten days is an impossible deadline to meet. Every advocate for the homeless that we spoke to pointed to the problem that homeless applicants have receiving notices from PHAs. Without a permanent, fixed address, homeless people cannot receive mail regularly.³⁰⁰

Many PHAs allow an applicant to appeal a denial after the deadline has passed if they can show “good cause” for the delay.³⁰¹ But PHAs do not consider problems with receiving mail “good cause.” They insist it is up to the applicants to make sure the PHAs have a way to be in contact with them. While it is certainly reasonable for a housing authority to require a way of contacting an applicant, there is no need for

²⁹⁶ Human Rights Watch interview with Julie Boyle, executive assistant, Sarasota Housing Authority, Sarasota, Florida, July 21, 2003.

²⁹⁷ Sample denial letter from the Housing Authority of Baltimore City, on file with Human Rights Watch.

²⁹⁸ Human Rights Watch interview with Rachel Duke, social services coordinator, Housing Authority of Portland, Portland, Oregon, June 24, 2003.

²⁹⁹ Telephone interview with Carol Coley, August 1, 2003.

³⁰⁰ Where do homeless people get their mail? In some large cities, like New York, the post office allows those who are homeless to receive mail at the post office through “general delivery.” In many places, this option is not available. If they are fortunate, a social service agency, a church, or a relative may allow them to use a mailing address.

³⁰¹ Generally an applicant must show an emergency (which often requires a medical note or proof of hospitalization), or sufficient proof that he or she did not receive mail (which requires certification from a post office).

deadlines that prejudice the homeless. A somewhat longer appeal period would not unduly disrupt PHA operations.

Indeed some housing officials have recognized the unique difficulties of the homeless in the appeal process.³⁰² Administrators at Garden Terrace, a HUD-funded SRO in Austin, Texas, adopted a policy allowing applicants to challenge denials at any time. When asked whether this was an administrative burden for the staff, they said it was not. Program administrators simply keep the application on file and wait for applicants to bring in evidence of rehabilitation. “The faster you bring it in,” the Assistant Manager said, “the faster you’ll get housing.”³⁰³

Giving Up

People who continually face obstacles and rejections in many facets of their lives because of their criminal histories may simply give up and choose not to pursue an appeal. “They get to the part where it says you can be denied for housing for a felony conviction, drug offense . . . they shut down at that point,” said Anthony Barber, a reentry advocate in Texas. “There’s no reason to keep reading on for appeals. . . . You’ve been told for . . . years that if you’ve been convicted of a felony, you’ve lost your rights. That’s branded into their subconscious, that they haven’t the rights.”³⁰⁴

“It’s going to come back and slap me in the face,” one applicant who had been denied told Human Rights Watch, “so why should I go through the bother—it’s a waste of time.”³⁰⁵

Sheila Fauntleroy, a social worker in Pittsburgh, told Human Rights Watch about a twenty-eight-year-old African American woman with six children who was denied housing. After being released from prison on several drug possession charges, she regained custody of her children and applied for assistance. Denied by both the city and the county PHAs, she chose not to appeal. Instead, she works two jobs and pays \$500 a month in rent for a three bedroom apartment on a \$6-7 per hour wage as a nurse’s aid.

³⁰² The Cuyahoga Metropolitan Housing Authority has begun to work with homeless service providers to ensure that homeless applicants with criminal records receive notices of rejection by mailing them to the service provider’s address. The Salt Lake City County Housing Authority has also begun to consider how to handle homeless applicants who do not receive notice in time to appeal.

³⁰³ Human Rights Watch interview with Theresa Mather, assistant manager, Garden Terrace, Austin, Texas, February 12, 2004.

³⁰⁴ Interview with Anthony Barber, February 10, 2004.

³⁰⁵ Human Rights Watch interview with C.W., an African-American man at an overnight shelter in Baltimore, Maryland, November 20, 2003. Mr. W. is living with HIV and Hepatitis C.

“She didn’t even want to fight,” Fauntleroy explained, “she’s fighting a lot of other issues as it is. It would just be another one. Her main objective was to find housing. They told her straight up that if they have a felony offense, they aren’t eligible for anything[.]” Without medical coverage for herself, and juggling both of her jobs and her responsibilities as a single parent, her ability to maintain the apartment on her own was precarious at best. “Regardless of what she had done,” Fauntleroy said, “her children shouldn’t have been penalized. . . . She’s trying to do the best she can.”³⁰⁶

Too Many Denials

A homeless mother who had a drug charge that was over fifteen years old at the time of her application for housing spoke with Human Rights Watch at a soup kitchen in Baltimore:

*They denied me . . . They said I had a criminal background. . . . I didn’t do any time, I spent one year on a stat [a period of time where the court file remains open, but charges are dismissed if no further arrests occur]. They told me I could get a hearing, but I didn’t want to bother. What good would it have done? . . . I got three kids—one boy, two girls. . . . I’m homeless now. I just keep moving around living here and there.*³⁰⁷

Some applicants give up on more than just their housing applications when they are denied. Almost without exception, people with criminal records who were turned away from public housing described the depression that followed each rejection they received—from housing providers, welfare agencies, and potential employers. The despair that some begin to feel after repeated rejections is sometimes too much for them to bear.

C.L., an ex-offender who was living on the streets in Salt Lake City, Utah told Human Rights Watch:

Either I am going to end up back in prison, or I’m going to end up dead, or killing myself—I’ve thought about suicide several times—or I end up corroding away living on the streets, and going back to drugs or going back to crime and doing whatever I have to do to have any kind of satisfaction I guess on a daily basis.³⁰⁸

³⁰⁶ Interview with Sheila Fauntleroy, January 28, 2004.

³⁰⁷ Human Rights Watch interview with E. G., an African-American woman in a soup kitchen in Baltimore, Maryland, November 20, 2003.

³⁰⁸ Human Rights Watch interview with C.L., a forty-year-old African-American homeless man, Pioneer Park, Salt Lake City, Utah, September 28, 2003.

Too Little, Too Late

The director of a transitional housing program for women in New York City told Human Rights Watch about one woman she worked with for over a year challenging a public housing denial.

This woman was in her thirties, African American. Her father was a drug addict and her mother left them. She started taking drugs when she was sixteen. She did a mandatory minimum sentence on a drug charge, and when she got out, I started working with her [at the Women's Prison Association]. She was doing everything she was supposed to do. She had obtained full-time employment. She had a hard time with housing. She'd been denied twice. That's all she talked about, trying to get her kids back. She couldn't afford a place of her own. She had three girls and was making \$14 an hour. She became very depressed. Her record was long, [drug possession and sale] charges, child neglect . . . robbery, repeatedly, all related to her drug addiction. At that time, she'd been out of jail a few years, she had completed two treatment programs and was following up with aftercare. At one point, after appealing her denial twice, she just said, "I'm tired of this," and she just let go. She took an overdose of pills and heroin and took her own life. She got a letter saying that she was approved after her last appeal a week after she died.³⁰⁹

An Ineffective Process

The administrative appeal process at many PHAs consists of an informal hearing before a housing official serving as an Administrative Law Judge (ALJ). If the applicant is not represented by a lawyer or other advocate, the hearing can be *pro forma*, with the ALJ refusing to consider any evidence of mitigation or rehabilitation and simply rubberstamping the initial decision.

Failure to Consider Mitigation or Rehabilitation

Federal law suggests that beyond taking into consideration the nature, severity, and remoteness of an applicant's past offenses, PHAs may also consider evidence of rehabilitation that would indicate the applicant no longer poses a threat. As already noted, most PHAs do not consider such evidence except, if at all, when an applicant appeals an initial finding of ineligibility.

Most housing officials told Human Rights Watch that they would allow someone with a criminal history into housing, if the applicant could show documented evidence of rehabilitation. Housing officials expressed universal concern that without adequate

³⁰⁹ Human Rights Watch interview with Ruth Joyner, case manager, Providence House, Brooklyn, New York, January 15, 2004.

documentation, they could be held liable for future illegal acts of tenants with criminal records. A policy analyst for a national public housing group explained, “PHAs don’t want to stand in the middle of that field [even though] the chance [of being sued] is like getting struck by lightning.”³¹⁰ In fact, Human Rights Watch identified only one reported court case dealing with whether a PHA could be held liable for the actions of a third party. In this case, a family member sought damages from the Birmingham Housing Authority after a tenant was shot and killed during a gunfight between drug dealers on housing authority premises. Alabama’s Supreme Court held that the PHA was not liable, even though it knew there was a problem with crime and that drug sales were occurring on the premises.³¹¹

Unfortunately, because consideration of rehabilitation is not mandatory under federal law or HUD regulations, some PHAs feel free to ignore, or pay only nominal attention to, an applicant’s efforts to rehabilitate.³¹²

Attorneys at Neighborhood Legal Services (NLS) in Pittsburgh, Pennsylvania told Human Rights Watch about a mother of two who was denied because of several convictions for minor offenses. Although she ultimately prevailed on appeal in state court, the case illustrates the refusal of PHAs to exercise the discretion they have.

The mother had one domestic violence charge, which resulted from an incident between her and her husband. They were both arrested, and he convinced her to plead guilty so that she could return home to care for their children. Her husband pled not guilty, and the charges were ultimately dismissed against him.

³¹⁰ Human Rights Watch interview with Christine Siksa, policy analyst, acting director of the Legislative and Program Division, National Association of Housing and Redevelopment Officials (NAHRO), Washington, D.C., October 29, 2003.

³¹¹ *Dailey v. Housing Authority for the Birmingham District*, 639 So.2d 1343 (Ala. 1994).

³¹² See, e.g., *Spady v. Mt. Vernon Housing Authority*, 41 A.D. 2d 762 (N.Y. 2nd Dep’t 1973). The court in *Spady* held that the decision to deny the applicant was neither arbitrary nor capricious and had a rational basis, despite the testimony of social workers, substance abuse treatment providers, a personal physician, parole officer, and former employer that the applicant had been “rehabilitated.” The dissent in *Spady* noted, however, that:

The State has spent countless millions of dollars to combat drug addiction and it is the policy of the State to treat drug addiction as a disease by comprehensive programs of treatment. . . . Petitioner . . . is successfully undergoing treatment and shows no signs of regression. . . . To deprive him of public housing accommodations now is yet another unfortunate revolution in the “revolving door” of drug addiction [citations omitted]. [The housing authority’s decision] is wholly without rational basis, at complete variance with the State’s public policy of treating narcotic addiction as a disease, and contrary to the nature and purpose of public housing.

Ibid. p. 766.

She appealed her denial with the assistance of NLS attorneys. “We had excellent evidence, but we lost at the hearing,” Amy Carpenter explained,

The hearing officer didn’t think he had discretion. We had a substance abuse counselor come in and testify that this woman had become a poster child. She was quite impressive in the changes she’d made and was continuing in her recovery. She was even employed by a Section 8 landlord! He came in and testified, “She handles my books, she’d be a good member of the community, I rely on her,” etc. etc. We had two or three witnesses, it was very impressive. . . . The hearing officer was sympathetic, but his supervisor denied it and we lost. We filed a statutory appeal and the decision was reversed. I thought we were going to win at the grievance. He [the hearing officer] was almost apologetic about it.³¹³

The same group of attorneys described another recent case of an African American woman who was over sixty and was denied because she pled guilty to three different offenses in 2000. One attorney told Human Rights Watch:

She’s been in programs to deal with alcoholism and depression. She’s in rehab, doing everything she’s supposed to do. There had been no further arrests. We had a recent appeal, and the housing authority wouldn’t even consider the case. She was a threat to nobody, she’d done so much work. A caseworker from Western Psych [Western Psychiatric Institute and Clinic at the University of Pittsburgh Medical Center] testified. They [housing officials] said she wasn’t eligible until 2008. We filed an appeal in the Court of Common Pleas, and the judge who heard the case knew the housing authority had the discretion to deny her, and he said, “Can’t you make some kind of a deal?” The attorney for the housing authority said absolutely not. They said they don’t have to.³¹⁴

³¹³ Human Rights Watch interview with Amy Carpenter, staff attorney, Neighborhood Legal Services, Pittsburgh, Pennsylvania, January 27, 2004. While NLS attorneys said the applicant could have put together evidence on her own behalf at the hearing, they said that “She never would have been able to do a statutory appeal.” Human Rights Watch interview with Peggy Fried, staff attorney, Neighborhood Legal Services, Pittsburgh, Pennsylvania, January 27, 2004.

³¹⁴ She was not, ultimately, approved for housing. Interview with Meghan Tighe, January 27, 2004.

Paralegals in a small town in Pennsylvania told Human Rights Watch about a client who had been denied based on a series of arrests six years prior to his application for housing.³¹⁵ Pittsburgh housing officials disregarded the fact that the forty-eight year-old man had never once been prosecuted for a criminal offense. The PHA relied solely on the applicant's remote arrest record and refused to conduct any semblance of an individualized evaluation of the applicant's character or the circumstances surrounding his arrests.³¹⁶

After an attorney intervened on the applicant's behalf, threatening to contact HUD and file suit against the PHA, the housing authority reversed its initial decision and issued the applicant a housing voucher. By that time, however, the applicant had secured housing elsewhere. "They got what they wanted," the paralegal working on the case said, "They didn't want him in there."³¹⁷

As discussed above, where an applicant's record suggests prior drug use, PHAs may require evidence of rehabilitation. Absent such evidence, or depending on its nature, PHAs in effect presume that the applicant is a "current user." Because there is no standard definition of what constitutes "current" drug use, PHAs require applicants to produce evidence that they have been enrolled in treatment for at least six months, and often much longer. Some PHAs require applicants to provide otherwise confidential information from treatment providers such as toxicology reports and progress notes. PHAs frequently deny admission to drug users who are currently in treatment, those who have relapsed, and those who have not been drug-free for long enough periods of time.

Human Rights Watch reviewed written decisions issued by ALJs and found cases where it was apparent that ALJs did not give sufficient weight to substance abuse rehabilitation documentation.

³¹⁵ Human Rights Watch interview with Linda Milton, paralegal, North Penn Legal Services, Williamsport, Pennsylvania, December 1, 2003.

³¹⁶ After Linda Milton, a paralegal with North Penn Legal Services, told the ALJ that her client had never been prosecuted, the hearing officer scheduled the case for another hearing to give Milton time to obtain documentation. But after Milton received documentation back from the courts in Philadelphia, she was told not to bother bringing the information in—the PHA had already made its decision. "After speaking with you this morning," read the fax sheet cover Milton received from the PHA's Deputy Executive Director, "I realized that I would be causing you to spend unnecessary time in further meetings on this matter, so please find attached my decision on the matter of Mr. [C.A.]" Facsimile transmission to Milton from Shawn McMillin, Lycoming County Housing, dated March 19, 2001, on file with Human Rights Watch. At least one state court has found such automatic exclusion practices to be contrary to federal law and HUD guidelines. See *Ouellette v. Housing Authority of the City of Old Town*, Docket No. AP-03-17, 2004 Me. Super. LEXIS 60 (March 12, 2004), which is discussed in more depth in footnote 182.

³¹⁷ Interview with Linda Milton, December 1, 2003.

For example, a hearing officer in New York affirmed the denial of an applicant whose last criminal conviction was eight years prior to her application for housing. In her defense, the applicant brought her enrollment in substance abuse treatment to the attention of the housing authority. At her hearing, she produced four letters documenting her rehabilitation, including proof that she had been receiving methadone maintenance treatment for six months at the time of the hearing. The ALJ, however, was not convinced that she had been sufficiently rehabilitated—assuming that because she was still in the methadone program, she had not completed treatment. (“Methadone maintenance,” as its name indicates, is a maintenance program, and many people are maintained on the medication for years, some for the rest of their lives. Hence, patients do not graduate from the program like other forms of substance abuse treatment). As a result, the ALJ ignored all of evidence of rehabilitation and reasoned incorrectly that:

Ms. [R] has acknowledged that she has a drug addiction problem yet she has not been able to successfully complete a rehabilitation program. . . . Ms. [R] did not present any documentation or evidence to show how her life has changed or improved since the time of the felony and misdemeanor charges listed in the Basis of Ineligibility.³¹⁸

No Opportunity to Challenge a Denial

Perhaps because federal law does not grant an applicant the right to challenge a denial, but only to challenge the veracity and relevance of records upon which denials are based, some PHAs deny hearing rights altogether.

A public official with the Housing Authority of the City of Austin (HACA) confirmed to Human Rights Watch that tenants who had been evicted from public housing under “one strike” policies and then applied for public housing before three years had passed would be denied, and they would not be entitled to an informal hearing to challenge that denial.³¹⁹

Indeed, lawyers with TRLA in Austin recounted to Human Rights Watch the case of two young women who had been minors in families that had been evicted from public housing. When they later applied for housing for themselves and their children, HACA

³¹⁸ NYCHA, Report of Informal Hearing Held, December 1, 2003, in the case of E.K., on file with Human Rights Watch. E.K. had been denied because of his partner, Ms. R’s criminal record.

³¹⁹ Human Rights Watch interview with James Hargrove, executive director, Housing Authority of the City of Austin, Austin, Texas, February 12, 2004. Human Rights Watch sought to clarify with HUD whether, in fact, this practice was consistent with federal law, but HUD declined to respond.

officials said they would not even consider the applications, nor would they allow a challenge to that decision. The applications were reinstated only because TLRA lawyers threatened to sue, and ultimately, as HACA's director told Human Rights Watch, "Fuchs [TRLA's director] got involved."³²⁰ Both women were eventually found eligible for housing.

Access to the Courts

Applicants who are denied admission to public housing following an informal hearing may appeal such determinations to the courts. Notices of a denial sent to applicants, however, generally do not inform them either of their right to appeal to a court or that they should contact an attorney to assist them in filing such an appeal.³²¹

Needless to say, it is difficult to bring an appeal *pro se*, i.e., without a lawyer, and as discussed above, housing applicants do not have ready access to attorneys. Although no statistics are available, we were told by PHA officials and housing advocates that very few applicants file court appeals of housing denials, and indeed, a Human Rights Watch search identified fewer than ten published decisions nationwide on such cases since 1996.

Furthermore, the standard is very high for judicial review of administrative decisions. In order to reverse a finding of ineligibility, a court must find a decision arbitrary or capricious, and generally, if an administrative law judge provides any reason whatsoever for a denial of eligibility, especially where the ALJ weighs the PHA justification against the applicant's evidence, a court will refuse to substitute its own judgment and reverse the denial.³²²

No Record on Appeal

Applicants are further disadvantaged because, almost without exception, hearings are not tape recorded or transcribed.³²³ As a result, there is no record on which to base an appeal. Without an accurate and complete record, a court may not even be able to

³²⁰ Ibid. HACA confirmed that its policies had not changed as a result, and while they would not comment on a hypothetical case, they implied that an applicant in a similar situation would be denied.

³²¹ The NYCHA is one of the few PHAs that actually advises denied applicants of their appellate rights. Letters to applicants denying eligibility following administrative hearing, on file with Human Rights.

³²² See, e.g., *Faison v. New York City Housing Authority*, 283 A.D.2d 353, 726 N.Y.S.2d 23 (1st Dep't 2001).

³²³ One lawyer told Human Rights Watch that attorneys in her office tape record hearings themselves. Human Rights Watch interview with an attorney at the National Legal Aid & Defender Association conference, Los Angeles, California, July 22, 2004.

determine the factors on which the hearing judge based the decision.³²⁴ This also hampers the ability of attorneys to evaluate the strength of applicants' cases. In addition, many PHAs utilize one form letter for initial denials and another for their hearing decisions. "I don't know what they based their decisions on," one attorney told Human Rights Watch, "because people would just receive form letters, you won or you lost."³²⁵

³²⁴ See, e.g., *Campbell v. Minneapolis Public Housing Authority*, 168 F.3d 1069, 1076 (8th Cir. 1999), where the court noted:

Regrettably, we do not have before us all of the evidence the MPHA considered: [the treatment records] upon which the MPHA apparently relied were not included in the record on appeal, nor can we find those records in the original District Court file. . . . Given the incompleteness of the record the parties have provided to us (and, apparently to the District Court as well), we are unable to engage in meaningful review of the MPHA's denial of [the] application.

³²⁵ Interview with Carolyn Johnson, November 17, 2003.

XII. Conclusion

*Housing is a linchpin that everything else hangs on in your life—who you associate with, where your kids go to school, whether you can keep a job. If you don't have housing, that all falls apart.*³²⁶

—Katherine Stark, executive director, Austin Tenant's Council

Policies that arbitrarily exclude people from public housing do not advance public safety—they undermine it. Denying housing to those with the fewest options threatens the health and safety of people with criminal records and, indeed, the safety of entire communities.

Exclusionary policies may seem an appropriate way to distribute scarce public housing resources, and because criminal offenders are not a powerful political constituency locally or nationally, these policies are not subject to political challenge. But the right to housing should not be conditioned on public appeal or political power.

With increasing numbers of people—now in the hundreds of thousands each year—returning to their communities after periods of incarceration, federal, state, and local governments are finally beginning to support reentry programs. But even the most well-designed reentry programs will fail unless political leaders and the public acknowledge the collateral consequences that follow a criminal record and dismantle the barriers to reentry that have been erected by law and policy. Chief among these, as documented in this report, are the barriers to housing.

The United States must address the drastic shortage of affordable housing, particularly in public housing. Ultimately, adequate solutions must be devised to ensure that those rightfully excluded have safe and affordable alternatives. As a first step, it is critical that the United States eliminate the profound unfairness in the allocation of existing units, exemplified by unreasonable criminal record exclusions.

³²⁶ Interview with Katherine Stark, February 12, 2004.