

REQUEST FOR CRIMINAL BACKGROUND CHECK

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Criminal Background Checks as a Tool for Discrimination



GREATER NEW ORLEANS
**FAIR HOUSING
ACTION CENTER**

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I. FOREWORD

This audit is deeply personal to us. There is the obvious reason—that we, as a city, state, and nation, live with a criminal justice system that is more likely to pursue and convict people of color. Because of the structural inequities present in the criminal justice system, people of color are more likely to have criminal records and to suffer the collateral consequences of such records, including lack of access to housing.

But the disproportionate impact of criminal background screening on African American renters is not what this investigation sought to measure.

Our office receives countless calls from renters who have finally found a home, only to be turned down because of criminal histories that should have been permissible under the providers' stated criminal background policy.

Ms. Smith,* for instance, is an African American client who paid seventy dollars for a background check when she finally found the perfect home. She had been told over the phone that the apartment complex did not allow felony convictions. After viewing the apartment and submitting an application, she was shocked to be denied because of her daughter's misdemeanor. According to the leasing agent with whom Ms. Smith spoke when she viewed the apartment, their policy only applied to felonies.

Client stories like this led us to wonder if and how often criminal background checks are being used as tools for discrimination—not just

* Named changed to protect privacy.

the overwhelming discriminatory effects of a system that penalizes people of color at a rate far above whites—but whether background checks are being used as a pretext for differential treatment, selectively applied to keep people of color out.

The following audit of the New Orleans area rental market explores these issues. Although the findings may be troubling, they can also be impetus for change.

II. EXECUTIVE SUMMARY

The overrepresentation of African Americans among incarcerated individuals is often cited as evidence of bias throughout the criminal justice system, from initial point of contact with police through sentencing. In Louisiana, African Americans make up 32% of the total population, yet African Americans account for a full 66% of the prison population.

Across the country, arrest rates are 2.5 times higher for African Americans than for whites, and pre-trial detention rates for African Americans are 5.2 times the rate of white defendants.¹ Statistics confirm that African Americans and Hispanics are severely impacted by initial decisions to incarcerate or grant pre-trial release, as well as by the subsequent length of sentence at conviction.²

¹ Hartney, Christopher and Vuong, Linh. Prepared for the National Council on Crime and Delinquency. *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System*. March, 2009. Based on State Court Processing Statistics (SCPS) data on the 75 largest counties in the U.S., which represent 38% of the U.S. population as a whole.

² Spohn, Cassia and DeLone, Miriam. *When Does Race Matter? An Analysis of the Conditions Under Which Race Affects Sentence Severity*. *Sociology of Crime, Law, and Deviance*, Vol. 2, 2000: 3-37.

From the astounding percentage of people of color sentenced to life without parole in Louisiana for nonviolent property crimes (91.4%),³ to increased prosecutorial discretion for lesser crimes that negatively impacts people of color, the inequities embedded in the American criminal justice system are systemic and ongoing.

Why does that matter in a housing report?

This investigation shows that involvement in the criminal justice system for people of color has continuing effects on access to housing that undoubtedly do not end once a “debt to society” has been paid. The purpose of this audit was to investigate the rate at which housing providers treated prospective applicants with criminal backgrounds differently on the basis of the applicants’ race. People of color in Louisiana may be more likely to have criminal backgrounds, based at least in part on any of the factors above, and it is well known that a conviction is a barrier to many things, including housing. But beyond the disparate impact of convictions themselves—the unequal rate at which convictions may bar people of color from housing—are housing providers applying their criminal background screening policies across races equally?

This investigation revealed two things:

- 1) Criminal background screening policies are used as tools for discrimination; and
- 2) Discretionary policies are more likely to keep people of color out.

GNOFHAC conducted 50 paired tests of housing providers in the greater New Orleans area in which mystery shoppers—one white and

³ Of Louisiana prisoners serving life without parole for nonviolent offenses, 91.4% are African American. American Civil Liberties Union (ACLU). *Unequal Under the Law: Racial Profiling in Louisiana*. 2008.

one African American—posed as prospective tenants and inquired about apartment availability and applicable criminal background policies. Testers were matched to ensure equivalent income, career paths, family type, and rental history. All variables were held constant except for race.

Of the 50 paired tests conducted, **African American testers with criminal backgrounds experienced differential treatment on 25 occasions, or 50% of the time.** In addition to a 50% overall rate of differential treatment, African American testers were often faced with multiple instances of discrimination during a single housing transaction. Within the 50 paired tests showing discrimination, there were 54 separate instances of differential treatment.

In addition, the investigation revealed that **of the housing providers tested, 42% discriminated on the basis of race in the way they explained or applied their criminal background screening policies.** In these instances, discrimination generally fell into four broad categories: quoting more lenient policies to white testers, providing different levels of customer service to testers based on race, encouraging or discouraging the rental transaction depending on the testers' race, and making exceptions to rental policies for white prospective tenants but not for African American prospective tenants.

Further, discretionary policies—or policies that evaluated prospective tenants on a “case by case” basis—consistently favored white tenants. The investigation revealed that **when policies were discretionary, case-by-case, or unclear, African Americans experienced unfavorable differential treatment 55% of the time.**

Testing also captured discrimination on the basis of race unrelated to the application of criminal background screening policies, including differences in terms and conditions of rental, refusal to rent properties, and steering.

Unfortunately, in New Orleans, not only do overwhelmingly high incarceration rates create difficulties for families seeking stable housing, but criminal background screening policies are also applied unequally to keep out people of color. Testing showed that providers consistently treated white testers as people deserving of a second chance, while African Americans were not afforded that same leniency. These findings have profound implications for everyone in our city and require fast-acting remedies ranging from aggressive enforcement of fair housing laws to thoughtful policy interventions by local elected officials to ensure a level playing field for everyone seeking a place to call home.

III. ABOUT GNOFHAC

Mission

The Greater New Orleans Fair Housing Action Center (GNOFHAC) is a private, non-profit civil rights organization established in 1995 to eradicate housing discrimination in the greater New Orleans area through education, investigation, and enforcement activities. GNOFHAC promotes equal opportunity in all housing transactions, including rental, sales, lending, and insurance. GNOFHAC is dedicated to fighting housing discrimination not only because it is illegal, but also because it is a divisive force that perpetuates poverty, segregation, ignorance, fear, and hatred.

History

Since its inception, GNOFHAC has built an impressive record of advocating for the fair housing rights of New Orleans consumers through enforcement, policy advocacy, education and outreach, and homeownership protection:

Enforcement

GNOFHAC enforcement staff conduct fair housing investigations and provide legal representation to individuals who experience housing discrimination. GNOFHAC enforcement staff also routinely conduct testing of the greater New Orleans housing market in order to understand discriminatory trends and identify systemic discrimination. The organization regularly files enforcement actions against individuals and entities engaging in discriminatory practices.

Since Hurricane Katrina, GNOFHAC has served more than 1,000 individuals and assisted in the recovery of \$5.43 million in monetary relief as a result of its enforcement actions. GNOFHAC has also negotiated numerous settlements and consent decrees requiring housing providers or local government entities to comply with fair housing laws.

Since Hurricane Katrina, GNOFHAC has led the way in filing high-impact, innovative litigation, including multi-year litigation against St. Bernard Parish to rescind exclusionary zoning ordinances such as the “blood relative only” law; litigation against the State of Louisiana’s Road Home program for discriminatory formulas that awarded smaller rebuilding grants to African American homeowners; and a settlement with Wells Fargo that is bringing \$1.4 million to Baton Rouge communities of color.

Policy Advocacy

GNOFHAC pursues legislative and regulatory policy solutions at the local, state and federal levels to advance the spirit and promise of the Fair Housing Act. GNOFHAC leadership and staff have provided testimony before the U.S. Congress, the Louisiana State Legislature, and local bodies such as the New Orleans City Council. GNOFHAC's overall advocacy objectives include policies to end housing discrimination, promote desegregated living patterns, and expand housing mobility and opportunity in all neighborhoods.

Recent successes include the historic passage of a Louisiana law to prohibit housing discrimination against survivors of domestic violence; a citywide zoning amendment that creates a clear process for people with disabilities to fully enjoy, access, or modify dwellings in New Orleans; and the introduction of reforms to increase the availability, health, and safety of New Orleans area rental housing.

Homeownership Protection

In April 2006, GNOFHAC launched the Hurricane Relief Project, since renamed the Homeownership Protection Project (HOP). HOP was designed to provide assistance to homeowners affected by Hurricanes Katrina and Rita. Since its inception, HOP staff have worked to protect homeownership and help residents recover and rebuild in hurricane-impacted areas of Southern Louisiana and Mississippi by providing counseling, guidance, and technical assistance with recovery programs.

In 2007, GNOFHAC became a HUD-certified housing counseling agency. Since then, HOP efforts have saved thousands of homeowners from foreclosure, and have helped many more receive fair compensation from insurance companies and government recovery programs for hurricane losses. Through careful analysis of client files, HOP staff discovered large racial disparities in the amount of

Road Home funding awarded to homeowners. This analysis spurred GNOFHAC's successful 2008 Road Home lawsuit against HUD and the State of Louisiana over the discriminatory grant formula. The work of HOP has now shifted primarily to foreclosure prevention for homeowners struggling to retain their homes.

Education & Outreach

GNOFHAC trains over a thousand people each year about their fair housing rights and obligations through first time homebuyer classes, the annual *Fit For King* conference, and talks with students, neighborhood associations, local officials, housing providers, and volunteers. The Center has conducted numerous statewide and local media campaigns to inform consumers and housing professionals of their fair housing rights and responsibilities.

GNOFHAC's original children's book, The Fair Housing Five & the Haunted House, was designed to initiate conversations between parents, caregivers, teachers, and children about housing discrimination, systemic inequality, and the important role that we all have in ending both. Through collaboration with children, parents, educators, and other community stakeholders, GNOFHAC staff designed accompanying workshops and curriculum that are now used to teach children across the nation about fair housing and civil rights.

IV. OVERVIEW OF FAIR HOUSING LAW

Title VIII of the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act, was passed on April 11, 1968. The Fair Housing Act as amended in 1988,⁴ the Civil Rights Act of 1866,⁵ and several Supreme

⁴ 42 U.S.C. § 3601, et seq.

⁵ 42 U.S.C. § 1981, 1982.

Court decisions provide the legal foundation for the fair housing movement. These laws prohibit discrimination in housing and provide protection for consumers seeking to rent or buy a home, secure a mortgage loan, or purchase homeowner's insurance.

The Civil Rights Act of 1866 gave black citizens the same rights as white citizens to inherit, sell, lease, hold, and convey real land and personal property. In *Jones v. Alfred H. Mayer*,⁶ the Supreme Court reaffirmed the validity of the Civil Rights Act and held that Congress could regulate the sale of private property in order to prevent race discrimination.

The Fair Housing Act expanded protections for consumers by prohibiting discrimination on the basis of race, color, religion, sex, disability, family status,⁷ and national origin. These bases of protection are commonly referred to as "protected classes."

The Fair Housing Act enumerates a number of actions and practices that are illegal when discriminatory against a member of a protected class. For instance, the Fair Housing Act makes it illegal to:

- Refuse to sell or rent a property to a person because of membership in a protected class;
- Discriminate in the terms, conditions, or privileges of sale or rental because of membership in a protected class;
- Advertise or make any statement that indicates a preference, limitation, or discrimination because of membership in a protected class;

⁶ 392 U.S. 409 (1968).

⁷ Families in which one or more children under 18 live with a parent, guardian or designee. "Familial status" includes pregnancy.

- Misrepresent the availability of housing because of a person's membership in a protected class;
- Engage in blockbusting by telling a homogeneous group in a community that others like them are leaving because a group of people representing a protected class is moving into the neighborhood;
- Engage in steering by directing renters or buyers to a certain neighborhood or area of a development because of their protected class status;
- Refuse to make housing accessible for people with disabilities, including by prohibiting tenants with disabilities from making alterations to a property or by refusing reasonable changes to rules or policies that may make housing inaccessible;
- Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of a fair housing right, or coerce, intimidate, threaten, or interfere with any person who has aided or encouraged any other person in the exercise or enjoyment of a fair housing right.

In 2015, the Supreme Court upheld a key legal theory that is essential to fighting housing discrimination and persistent patterns of segregation. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Court reaffirmed the long-held standard of disparate impact and held that the Fair Housing Act prohibits not only intentional discrimination, but also practices that have discriminatory effects on protected classes.⁸

In addition to federal protections against housing discrimination, Louisiana's state fair housing law, the Louisiana Equal Housing

⁸ 135 S. Ct. 2507 (2015)

Opportunity Act⁹, is substantially equivalent to the Fair Housing Act and allows the Louisiana Department of Justice to investigate complaints of discrimination and file enforcement actions when appropriate. The City of New Orleans' Human Relations Law¹⁰ provides protections for the same protected classes enumerated under the Fair Housing Act, as well as for five additional classes: creed, gender identification, age, marital status, and sexual orientation.

V. METHODOLOGY

a. Testing and Investigation

From July to August 2015, the Greater New Orleans Fair Housing Action Center (GNOFHAC) used testers to audit housing complexes, small landlords, and management companies to determine how criminal background screening policies are explained and applied, and whether any exceptions are made on the basis of race. In total, 50 paired tests were performed.

Testers are persons trained to pose as apartment seekers. Paired testers are matched to ensure they have equivalent income, career paths, family type, and rental history. For this audit, testers were also assigned similar misdemeanor or felony convictions. All variables were held constant except for race, the variable being tested.

In *Havens v. Coleman*,¹¹ the Supreme Court recognized "testing" as a valid tool for investigating claims of housing discrimination. The Court held that testers who experience housing discrimination during the course of an investigation have standing to assert claims under the Fair

⁹ La. R.S. 51:2601, *et seq.*

¹⁰ Chapter 86 of the Code of the City of New Orleans.

¹¹ 455 U.S. 363 (1982)

Housing Act. Further, fair housing centers, such as GNOFHAC, can assert fair housing claims when discriminatory actions impair a center's activities. Both the U.S. Department of Justice and the Department of Housing and Urban Development use testing to conduct investigations of housing discrimination.

The methodology relies on legal concepts of fair housing law and testing. It is not a statistical report.

b. Training

All testers received standardized training from GNOFHAC. The training included both classroom and field training. Testers were taught to be objective fact-finders and to report, but not interpret, the results of their tests.

c. Site Selection

The 50 paired tests were conducted in person at sites located in Orleans Parish and the East Bank of Jefferson Parish. Testing sites were selected randomly based upon stated availability of advertised units. Advertisements were chosen from staff knowledge of larger apartment complexes in the greater New Orleans area and from online sources, including Craigslist.org, the Renter's Guide, and Google searches.

d. Survey Component

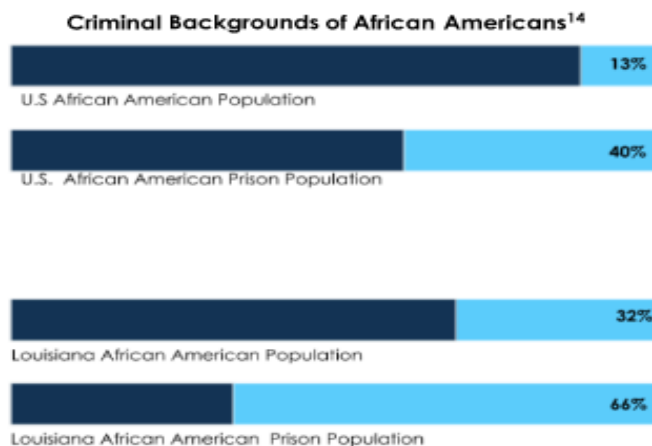
GNOFHAC partnered with the Justice and Accountability Center (JAC) to contact a pool of 42 clients who had worked with JAC to expunge their criminal records because of the obstacles criminal records present to employment, housing, and other areas of life. Of the pool of 42 prospective interviewees, 12 clients agreed to a short phone interview.

VI. COLLATERAL CONSEQUENCES OF CRIMINAL BACKGROUNDS

a. Increased Likelihood of Having a Criminal Background Based on Race

Louisiana has the highest incarceration rate in the United States¹² and New Orleans is the most incarcerated jurisdiction in the country.¹³

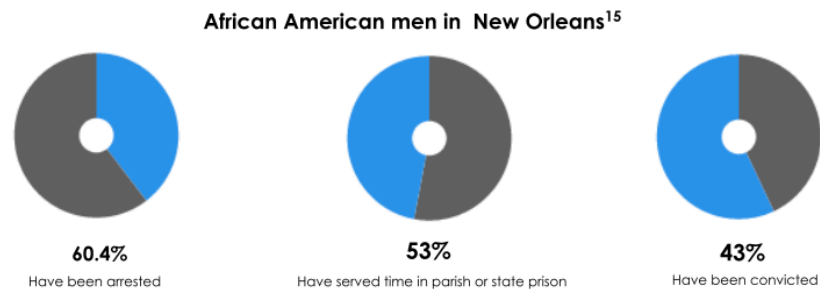
The overrepresentation of African Americans among incarcerated individuals is cited as evidence of bias in the criminal justice system from initial point of contact with police through sentencing. While African Americans make up 13% of the U.S. population, African Americans make up 40% of the prison population nationwide. In Louisiana, African Americans make up 32% of the total population, while a full 66% of the prison population is African American.



¹² Bureau of Justice Statistics, U.S. Department of Justice. September 2014.

¹³ Judge Johnson, Calvin; Laisne, Mathilde; Wool, Jon. *Criminal Justice: Changing Course on Incarceration*. The Data Center. July 2015.

The majority of African American men living in New Orleans have been arrested and even served time, while less than half of African American men living in New Orleans have ever been convicted of a crime.



From arrest through sentencing, racial bias manifests itself in every aspect of the criminal justice system. Racial profiling often influences the initial point of contact with law enforcement. Profiling occurs when police or security guards stop, search, detain, or arrest individuals because of the color of their skin, or subject individuals to special scrutiny because of the way they look. Racial profiling may or may not be intentional; perceptions by law enforcement of who “looks suspicious” or who looks like they are “likely to commit a crime” are often based on subconscious biases.¹⁴

Overall, African Americans in the U.S. are arrested at a rate that is 2.5 times higher than the arrest rates for whites.¹⁵ In Louisiana, statistics pointing to the overrepresentation of African Americans at these initial points of contact with law enforcement are either unavailable or unreliable because Louisiana police departments are not required to track, report, or aggregate racial arrest data.¹⁶ However, subtle

¹⁴ American Civil Liberties Union (ACLU). *Unequal Under the Law: Racial Profiling in Louisiana*, 2008.

¹⁵ Hartney and Vuong.

¹⁶ American Civil Liberties Union (ACLU). *Unequal Under the Law: Racial Profiling in Louisiana*, 2008.

perceptions that people of color are criminals often fuel racial profiling, which frequently serves as the first point of contact to the criminal justice system.

Racial bias in the criminal justice system persists long after the initial arrest. For example, African Americans are incarcerated before trial at 5.2 times the rate—and Hispanics at 2.6 times the rate—of white defendants.¹⁷

Further, African American and Latino defendants also experience discriminatory sentencing outcomes.¹⁸ African Americans are convicted at 4.3 times, and sentenced to incarceration at 4.4 times, the rate of white defendants accused of similar crimes. Hispanics are convicted at 2.1 times, and sentenced to prison at 2.4 times, the rate of whites.¹⁹ From the astounding percentage of people of color sentenced to life without parole in Louisiana for nonviolent property crimes (91.4%),²⁰ to increased prosecutorial discretion for lesser crimes that negatively impacts people of color, the inequities embedded in the American criminal justice system are systemic and ongoing.

This investigation shows that the effects of involvement in the criminal justice system for people of color undoubtedly do not end once a “debt to society” is paid.

b. Collateral Consequences

Convictions have far-reaching collateral consequences that can outlast any prison sentence, period of probation, or fee payment. The

¹⁷ Hartney and Vuong.

¹⁸ Tansal, Kurshar. Prepared for The Sentencing Project. *Racial Disparity in Sentencing: A Review of the Literature*, January 2005.

¹⁹ Hartney and Vuong.

²⁰ See note 3.

application of criminal background check screening policies on prospective renters is just one of these consequences.

Often, collateral consequences intersect to completely bar individuals from participating in (or re-entering) many aspects of society.

Examples of collateral consequences include prohibitions or negative effects on the following:

- Employment after a conviction (including losing a job based on conviction or employment licenses in certain fields)
- Unemployment benefits
- Eligibility to work with children
- Voting or serving on a jury
- Owning a gun
- Receiving Medicaid
- Receiving Social Security
- Receiving veteran's benefits
- Receiving food stamps
- Being a prospective adoptive or foster parent
- Marriage (conviction may serve as grounds for immediate divorce)
- Parental rights (conviction may involuntarily end rights)
- Student financial aid
- Permanent residence status for visa-holders (nearly all felony convictions result in deportation)
- Public or assisted housing
- Ability to *visit* family in public or assisted housing
- Future treatment in criminal justice system

Many of these consequences intersect with one another to completely bar individuals from achieving stable, productive lives. More than one Justice and Accountability Center client reported that they could not

access decent housing because their criminal records prevented them from finding work. More than one client also reported having faced homelessness—either living in a shelter or staying with family or friends—as a result of those consequences.

VII. FINDINGS

The purpose of this audit was to investigate the rate at which housing providers treated prospective applicants with criminal backgrounds differently based on the applicants' race. GNOFHAC staff have found that among clients and the broader community, criminal backgrounds often bar prospective tenants from housing and that housing providers require background checks more often of African Americans than whites.

This investigation revealed two things:

- 1) Criminal background screening policies are used as tools for discrimination; and
- 2) Discretionary policies are more likely to keep people of color out.

a. Overall

Of the 50 paired tests conducted, African American testers experienced differential treatment in **25 tests, or 50% of the time**. In addition to the 50% overall rate of differential treatment, African American testers sometimes faced multiple forms of discrimination during a single housing transaction. Within the 25 tests showing differential treatment, there were 54 separate instances of differential treatment.

Of the properties tested, **42% engaged in discrimination related to the application of criminal background screening policies.** In these instances, the discrimination generally fell into four broad categories: quoting more lenient policies to white testers, providing different levels of customer service based on testers' race; encouraging or discouraging the rental transaction depending on the testers' race, and making exceptions to rental policies for white testers but not for African American testers.

Testing revealed that agents often provided inconsistent information about background policies, and that white testers were much more likely to be quoted more lenient policies. Further, discretionary policies—or policies that evaluated prospective tenants on a “case by case” basis—consistently favored white testers.

Testing also captured discrimination on the basis of race unrelated to the application of criminal background screening policies, including differences in terms and conditions of rental, refusing to rent properties, and steering to other locations.

Overall, African American testers posing as prospective tenants with criminal backgrounds experienced differential treatment 50% of the time.

VIII. Examples of Differential Treatment

a. Inconsistent Background Policy Information: (13 times or 26%)

Agents provided inconsistent information to testers about housing providers' criminal background policies on 17 separate occasions. When different policies were quoted, **white testers were informed of more lenient background policies 13 out of 17 times (76%).**

Examples of unequal policy information included quoting different lengths of time that applicants had to be crime-free before they could apply, and informing white testers that only applicants with felonies would be denied while telling African American testers that certain misdemeanors, such as for drugs or battery, might disqualify them as well.

One white tester with a misdemeanor was encouraged to apply after being told that the background policy only excluded felonies. But when the African American tester mentioned her similar misdemeanor conviction to the same leasing agent, the tester was told that the misdemeanor would result in a denial.

When agents provide inaccurate or inconsistent information about a housing provider's criminal background policy, prospective tenants may be deterred from applying for housing that they might otherwise be qualified to rent. When different policies were quoted during this investigation, the more lenient policies were quoted to white testers more than three times as often as those quoted to African American testers.

“We’re very forgiving....a lot of things are explained by wrong place wrong time”

“We all do things in college we’re not proud of”

“We can waive the background check fee”

b. Coaching and Going the Extra Mile (14 times or 28%)

Testing evidence demonstrated that white testers received significantly better customer service during the housing transaction **14 times, or 28%** of the time. Much of this discrimination occurred when housing providers took extra steps to guide white testers as to where they could apply for more lenient criminal background policies or how to better navigate the application process. For example, one agent offered the white tester, but not the African American tester, guidance on appealing a negative criminal background decision. Other agents coached white testers about how to obtain definitive answers regarding their eligibility before submitting completed applications and application fees.

Leasing agents were also more likely to take the initiative to call upper management to obtain firm determinations for white testers about their eligibility under applicable criminal background policies. Agents offered to take this extra step for white testers, but not for their African American counterparts, on seven separate occasions. Two agents specifically stated that they would check on the policy so the testers would not waste money applying for units for which they were ineligible.

Providing full and accurate information about applicable criminal background policies allows prospective tenants to make meaningful decisions about whether to apply for housing. The Fair Housing Act prohibits housing providers from applying different application procedures on the basis of race. Testing showed that agents were more likely to provide white testers with information to accurately assess their eligibility, thus allowing them to avoid a futile application process and unnecessary application fees.

“I’ll call you back because I don’t want you to waste 35 dollars.”

c. Encouraging vs. Discouraging Statements (13 times or 26%)

Comments made by housing providers can be very influential in the rental process. Comments can either support or obstruct a rental transaction by influencing a prospective tenant’s decision to apply for housing.

Testing captured nine (9) instances in which encouraging comments were made to white testers but not to their African American counterparts, and four (4) comments that directly discouraged African American but not white testers. Examples included telling African American testers that their applications would probably be denied, downplaying white testers’ charges, encouraging white testers to apply despite their criminal backgrounds, and informing white testers about the possibility of their charges not showing up on the background check (even though the charges had already been disclosed to the agent).

One agent who was unsure of the company's background screening policy told the African American tester that she was "pretty sure it would be declined" and emphasized that the tester would lose the application fee if denied. That same agent told the similarly situated white tester that the misdemeanor probably would not show up in the background check and that the agent would "do [her] best" to assist the tester through the application process.

Another agent downplayed the white tester's charge, noting that the misdemeanor was "not that big of a deal," and encouraged the tester to fill out an application, stating that she would get the tester approved.

It is unlawful to manipulate the racial makeup of a complex or community through encouraging or discouraging comments. All of these comments negatively influenced African Americans and positively influenced whites.

"It happens when you're young. Do you want to apply now?"

d. Exceptions to Policy (3 times or 6%)

Testing revealed that housing providers made exceptions to their established criminal background policies to benefit white testers on three (3) occasions. Exceptions included allowing criminal convictions that were otherwise prohibited by established policies and waiving background check requirements or fees for white testers but not for African Americans.

In one test, the white tester received a follow-up call from the leasing agent advising that they would not charge an application fee, nor conduct a background check, if the white tester decided to apply. On the same call, the agent simultaneously offered the white tester a reduction in the rental rate. No such calls or offers were extended to the African American tester.

The Fair Housing Act prohibits housing providers from requiring different qualification criteria or procedures, including those for criminal histories, of prospective tenants because of their race.

“You served time for that? We all make mistakes”

e. Differential Application of Discretionary and Ambiguous Policies

There were 29 tests in which housing providers indicated some level of ambiguity in the parameters of the housing providers' criminal background screening policies—either because of lack of training or because the individual policies were unclear or discretionary.

Discretionary policies included those described by agents as measuring each applicant on a “case by case” basis, either during the initial determination of whether to run a background check, or in the later determination of whether to exclude a person based on his or her criminal history.

For example, one agent indicated that the property's occupancy rate determined whether or not they would run a background check. Another indicated that the decision of whether or not to run a background check on an applicant would be made based on their gut. “If it's scary, we'll be scared and if it's not, we won't.”

Instances of ambiguous policies included those in which agents were unable to clearly define the policy, or indicated a need to confer with upper management. Policy language surrounding criminal background checks in these instances could be described as ambiguous, intentionally undefined, and ripe for arbitrary interpretation. Some agents had difficulty defining their policies even when they were reading directly from the text.

While discretionary and ambiguous policies may be intended to benefit some people (e.g. victims of domestic violence) in the application process, they also open the possibility of policies being applied differently to different groups. **Overall, when policies were unclear or discretionary, African Americans experienced differential treatment 55% of the time.** It is the inequality of the policy application that is of concern.

“I still have to have that feeling. And if I have that I'll do the background”

“If it's scary we'll be scared and if it's not, we won't”

“I want you to move in right away, I have a feeling about you”

f. Racial Discrimination Unrelated to Criminal Background Policies

While GNOFHAC endeavored to study the way in which housing providers apply criminal background screening policies, testing

additionally captured racial discrimination unrelated to the application of the criminal background policies. Racial discrimination occurred in three different forms:

1. Difference in Terms and Conditions (4 times or 8%)

Testing captured four (4) instances in which housing providers presented white testers with better deals than those offered to their African American counterparts. Offers for lower rent or lower deposit amounts are common examples.

2. Refusal to Rent (3 times or 6%)

African American testers were denied the ability to rent on three (3) occasions. Housing providers either refused to provide information necessary for the tester to apply, or refused to make property available for viewing. During two tests, agents coupled their refusal to rent with discouraging comments that dissuaded the African American tester from applying. The same agents encouraged the white testers to apply, while downplaying their criminal charges.

3. Steering (4 times or 12%)

Steering is a practice used by housing providers to guide specific people or groups to or away from a certain location. Steering is an insidious practice that perpetuates and sustains housing segregation. Audit testing showed that on four (4) occasions, African Americans were steered to less desirable communities than the ones they were visiting. Housing providers also informed white testers of areas to avoid, places where they should rent, and offered advice on finding rentable units in the most desirable neighborhoods.

“These are all decent areas they keep riff raff out”

g. Other Differential Treatment

In addition to the prohibited discrimination under applicable fair housing laws documented above, testing captured other instances of differential treatment.

1. Commiserating and Downplaying Charges

Agents were over twice as likely to empathize with white testers about their criminal histories and to make comments indicating that they would be more likely to give white testers the benefit of the doubt than African Americans.

For example, agents made comments to white testers such as “everyone has a past” and “we all do things in college that we’re not proud of.” Some agents told white testers about their own “misspent youth,” and hinted at having criminal histories themselves. One agent revealed to the white tester that he had the same charge on his record.

Agents were also more likely to downplay white testers’ charges. One agent commented that a misdemeanor drug possession charge is “not that big of a deal.” Another agent indicated that some drugs are not dangerous and should be legalized.

Overall, nine (9) agents commiserated with white testers or downplayed their charges, while only four (4) agents commiserated with the African American testers.

2. Racial Stereotyping

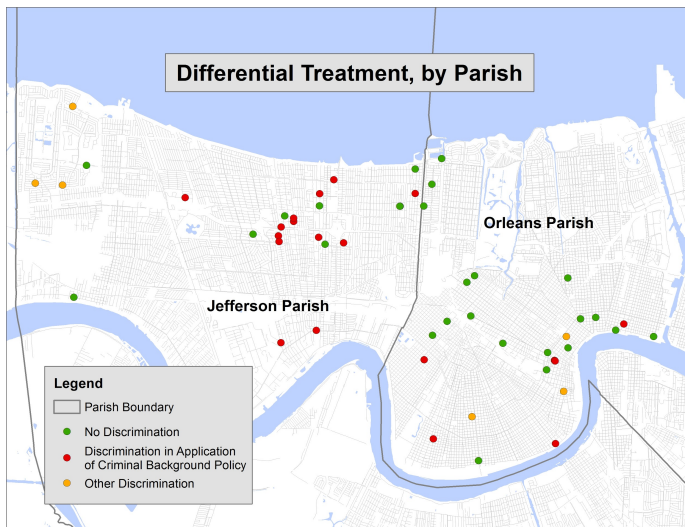
Two housing providers made statements that indicated racial stereotyping.

In one test, racially coded language was used to steer testers on the basis of race. In New Orleans, where the majority of Housing Choice Voucher (Section 8) holders are African American, the term “Section 8” is sometimes used as euphemism for poor African Americans. During testing, a housing provider indicated to the white tester, “[those places] are more lenient ... they take Section 8.”

In another test, an agent asked the African American tester, but not the white tester, whether he was a drug dealer. When the white tester informed the housing provider that he had a prior felony charge for cocaine possession. The agent advised that the charge was not an issue so long as “it wasn’t crack.”

h. Place-Based Discrimination

Of the 50 paired tests, 25 were conducted in Orleans Parish and 24 in Jefferson Parish, with one test involving site visits in both parishes. In New Orleans, 9 of the 25 tests (36%) resulted in discrimination. In Jefferson Parish, a full 16 of 24 tests (67%) resulted in discrimination.



IX. Real Life Consequences

Ms. Green** had rented a car just before Hurricane Katrina. She was going to return it when the mandatory evacuation was ordered, and she kept the vehicle to evacuate her family. Although Ms. Green had no previous criminal history, the Jefferson Parish District Attorney charged Ms. Green with felony auto theft. The conviction has been preventing her from accessing jobs and housing ever since. When she finally moved back to New Orleans, she applied for housing and was denied because of her record. The experience and fear of future denials has since discouraged her from applying for other apartments and for jobs. As a result, her only option has been to live with family.

Ms. Green is just one respondent from the survey conducted by GNOFHAC in partnership with the Justice and Accountability Center (JAC). All 42 of the JAC clients who were contacted to participate in the survey had expunged or attempted to expunge records because

* Name changed to protect privacy.

of the obstacles to employment, housing, and other collateral consequences.

Seventy-five percent of survey respondents reported having trouble finding decent housing and shared that their criminal records made the process even more difficult. Half of the respondents were staying in a homeless shelter or with family and friends when surveyed. In many cases, the respondents described the circular effect of their conviction posing a barrier to obtaining employment in order to pay rent, while the consequent lack of housing stability concurrently acted as a barrier to employment.

One prospective renter was turned down by housing providers twice before getting his record expunged. When asked how those denials had impacted his life, he responded, “Terrible, it was terrible—disability, anxiety, it's hard to believe, it made it all so much worse, deep depression....”

Another respondent reported suffering from anxiety and depression after housing denials from a conviction that was more than 20 years old.

A third respondent, who was African American, explained that even though he and his wife were working, they were turned down for a home in favor of a white tenant who was unemployed. The couple then bounced back and forth between their mothers' homes and suggested that the added stress of moving all the time and being doubled up with family likely contributed to the end of their marriage.

X. CONCLUSION

African Americans are much more likely to be convicted of crimes than white individuals and are therefore disproportionately affected by criminal background screening policies. The collateral consequences of a positive criminal history are well known and significant, ranging from difficulties in finding employment to being barred from safe and affordable housing.

The testing conducted for this audit revealed yet another collateral consequence specific to individuals of color: that criminal background screening policies were often applied unevenly depending on a prospective tenant's race and were sometimes used intentionally as excuses for engaging in discrimination. Further, housing providers that used discretionary "case-by-case" policies consistently favored white prospective tenants over African Americans. Testing showed that providers consistently treated white testers as people deserving of a second chance and access to housing, while African Americans were not afforded that same leniency.

XI. RECOMMENDATIONS

Swift and thoughtful policy interventions by elected and appointed officials are needed to ensure that criminal screening procedures no longer serve as tools of discrimination.

The New Orleans City Council

- 1. Right to Accurate Data: The New Orleans City Council and the Jefferson Parish Council should pass an ordinance that requires**

accuracy both in criminal records and in reports that are used as screening criteria for housing.

For example, if a housing provider thinks that it may deny a prospective tenant because of something in the applicant's criminal background, the housing provider would be required to provide:

- a. A written reason for the denial;
- b. A copy of the housing provider's criminal background policy;
- c. A copy of the report used as the basis for denial;
- d. A "Summary of Rights" for prospective tenants; and
- e. The name, address, and phone number of the company that supplied the criminal history or public records report

Such a local law would help to ensure accuracy in criminal background reports and greatly reduce the discretionary use of criminal background checks. It would also help consumers to be aware of any mistakes in their criminal background and help to hold third parties accountable for reporting misinformation. Similar protections are available federally to prospective employees under the Federal Fair Credit Reporting Act.

The Housing Authority of New Orleans (HANO)

2. Right to Uniform and Reasonable Policies: HANO should implement the criminal background policy it adopted in 2013.

Stable housing and family reunification are essential for the success of formerly incarcerated persons and those completing probation. HANO, which services 25% of all renters in the City of New Orleans, continues to apply a policy that denies housing to

people not only because of convictions, but also because of arrests. In 2013, after extensive input from the public, HANO approved a policy that called for an immediate end to denials simply because of arrest. The 2013 policy also suggests clear screening guidelines for criminal convictions, including a limited look-back period. As of the writing of this report, HANO has failed to implement the 2013 policy, and continues to apply the broader policy that disproportionately impacts African Americans. Any policy solution that seeks to remediate systemic citywide patterns of discrimination must include the significant portion of the tenant population that is serviced by HANO.

3. Transparency and Consistency: Public housing developments and other project-based assistance should use uniform criminal background policies and make those policies publicly available.

HANO should mandate that HUD-funded operators of public housing and other project-based assistance make their criminal background policies both uniform and publicly available.

Currently, each public housing development and operator uses its own background policy and screening criteria. These policies are not publicly available, and this lack of transparency means that neither prospective tenants nor advocates know who might qualify for rentals.

A uniform policy that is posted to each development's website and is also available via hard copy at on-site management offices would greatly contribute to transparency and fairness while helping to combat housing discrimination.

The U.S. Department of Housing and Urban Development (HUD)

4. Enhanced Federal Guidelines: HUD should issue regulations to provide clear guidance on criminal background policies to public housing agencies.

Currently, HUD grants broad discretionary authority to public housing agencies to set admission and termination policies for the public housing and housing choice voucher programs. Although the Obama Administration, recognizing the role that housing stability plays in reducing recidivism, has asked public housing agencies to consider a more “balanced approach” for ex-offenders, it has not issued clear guidance requiring public housing agencies to do so.

XII. Appendix

Model Criminal Background Policy

[HOUSING PROVIDER] aims to be as inclusive as possible in providing housing to local residents, and to provide everyone with a fair chance to acquire housing. Accordingly, [HOUSING PROVIDER] adheres to the following guidelines when evaluating potential residents. A copy of this policy shall be provided to all applicants.

Advertisements, Applications, and Interviews

[HOUSING PROVIDER] will not use advertisements or applications that state or imply that anyone with a criminal record will not be considered for the rental or lease of property.

[HOUSING PROVIDER] will not inquire about a potential resident's criminal record on the application or in initial interviews. It may, however, share this policy with applicants and inform them that a background check for certain criminal convictions may be considered as part of the application process.

Individualized Determinations

[HOUSING PROVIDER] recognizes that an individual's criminal record does not necessarily mean that he or she will pose a threat to the health and safety of current residents. Accordingly, [HOUSING PROVIDER] will evaluate each applicant on an individual basis, and consider various factors in determining whether or not to accept an applicant, including but not limited to, evidence of rehabilitation, the length of time since the crime was committed, and the nature of the offense.

Crimes Considered

In order to ensure that this policy only considers convictions that have a direct and specific negative bearing on the safety of persons or property, [HOUSING PROVIDER] will only consider:

- All felony convictions, except first-time drug possession convictions, and only when sentencing occurred within the past five years.
- Only misdemeanor convictions involving domestic abuse, stalking, or firearm/weapons possession, and when sentencing occurred within the past three years.

[HOUSING PROVIDER] will not consider or base adverse housing actions on any of the following:

- An arrest not leading to a conviction, unless it is currently under investigation or at trial.
- Participation in a diversion or deferral of judgment program.
- A dismissed, expunged, voided, or invalidated conviction.
- A conviction or other determination in the juvenile justice system.

Rehabilitation

All evidence of rehabilitation shall be considered, including but not limited to, the following:

- Gainful employment;
- Enrollment in drug or alcohol treatment programs;
- Participation in mental health counseling;
- Participation in anger management programs;
- Enrollment in education and/or job training;
- Demonstrated financial accountability;
- Involvement of family, friends or community groups in support network;

- Age at the time of conviction;
- Other mitigating factors offered voluntarily, such as explanation of the precedent coercive conditions, intimate physical or emotional abuse, or untreated substance abuse or mental illness that contributed to the conviction.

Adverse Housing Action

Should [HOUSING PROVIDER] intend to take any adverse action, including, but not limited to, eviction, failing or refusing to rent or lease a property to any individual, or failing or refusing to add a household member to an existing lease, due to an individual's conviction within the past three years, [HOUSING PROVIDER] will take the following steps:

- Notify the applicant in writing of the prospective adverse action;
- Give the applicant a copy of any conviction history;
- Specifically indicate the item(s) forming the basis for the prospective adverse action;
- Provide the applicant with the opportunity to respond and delay any adverse action in order to reconsider in light of evidence submitted by the applicant.