

Unhoused Reentering Elders: Addressing Statutory, Regulatory, and Discretionary Barriers to Federal Housing Assistance for Seniors with Criminal Records

MELISSA A. HAMMER*

TABLE OF CONTENTS

I. INTRODUCTION	362
II. STATUTORY AND REGULATORY BACKGROUND: HOUSING OPTIONS FOR SENIORS	365
A. <i>Public Housing</i>	367
B. <i>Multifamily Housing Programs</i>	371
1. <i>Section 202 Supportive Housing for the Elderly Program</i>	372
2. <i>Section 231 Rental Housing for the Elderly Program</i>	374
3. <i>Section 232 Loan Program</i>	375
III. PRIMARY AND SECONDARY BARRIERS TO ACCESSING HOUSING ASSISTANCE.....	376
A. <i>Primary Barriers</i>	376
B. <i>Secondary Barriers</i>	377
IV. REFORMS	378
A. <i>Reforming Statutory and Regulatory Language</i>	379
1. <i>Statutory Reform</i>	379
2. <i>Regulatory Reform</i>	381
B. <i>Expanding HUD Guidance</i>	382
C. <i>Creating a New HUD Housing Program</i>	383
D. <i>Change Through Litigation</i>	384
E. <i>Recommendations for Future Research</i>	385
V. CONCLUSION.....	386

* J.D. Candidate, 2023, The Ohio State University Moritz College of Law; Executive Articles Editor, 2022–2023, *Ohio State Law Journal*. This Note is dedicated to Dolfinette Martin, whose experience inspired my research, and everyone else who has struggled to find safe housing after incarceration. Special thanks to Elly Kugler for introducing me to this topic and the *Ohio State Law Journal* team, especially Managing Editor Addison Schroeder, for helping to prepare this Note for publication. All errors are my own.

I. INTRODUCTION

After twenty-two years of incarceration, William Morton was released from Fishkill Correctional Facility in New York at the age of sixty-six.¹ While incarcerated, he found support through a network of helpful friends, professionals, and experts.² However, he did not have family ties who could help with his transition out of incarceration.³ For the two years prior to his release, William worked with the Osborne Association's Elderly Reentry Initiative (ERI), which connected him to resources to aid his transition out of prison.⁴

William planned to live in short-term housing at HHC/Bellevue Hospital Sober Living Homes until he could find more stable, long-term housing.⁵ Even with the support of the ERI, he still did not have access to stable, long-term housing upon reentry.⁶ Most formerly incarcerated seniors must navigate the reentry process without the support of programs like the ERI.⁷ In fact, "finding safe, secure, age-appropriate, affordable housing is next to impossible for recently released older people" because long-term incarceration often results in "general lack of social connectedness and fractured family ties."⁸

These challenges are likely to impact even more people in the near future because the population of seniors in prison is growing faster than the population of people in prison generally.⁹ The number of people in state and federal prisons

¹ *William Morton Comes Home*, OSBORNE ASS'N (Mar. 15, 2019), <https://www.osborneny.org/stay-informed/william-morton-comes-home> [https://perma.cc/Y5K4-6P76].

² *Id.* In fact, Morton "built a network of support" while he was incarcerated. *Id.*

³ *Id.* ("He has not had contact with his adoptive parents for decades, nor does he have any siblings or children that could help ease his transition.").

⁴ *Id.*

⁵ *See id.*

⁶ *See id.*

⁷ Throughout this Note, I use "people-first" language, using terms like "formerly incarcerated people" and "people with criminal records" instead of terms like "offender," "felon," and "convict." This approach "is designed to promote precision and accuracy and to convey the humanity of people who are routinely dehumanized by the media and society." Akiba Solomon, *What Words We Use—and Avoid—When Covering People and Incarceration*, MARSHALL PROJECT (Apr. 12, 2021), <https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration> [https://perma.cc/5L3J-4SKN].

⁸ ELIZABETH GAYNES, TANYA KRUPAT, DAVID GEORGE & COLIN BERNATZKY, OSBORNE ASS'N, *THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION* 32 (May 2018), https://www.osborneny.org/assets/files/Osborne_HighCostsofLowRisk.pdf [https://perma.cc/N74A-HT8H].

⁹ HUM. RTS. WATCH, *OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES* 6 (Jan. 2012), https://www.hrw.org/sites/default/files/reports/usprisons0112_brochure_web.pdf [https://perma.cc/B65G-WRP2]. I use the terms seniors, older people, aging people, elders, and some variations of those terms interchangeably throughout this Note. The specific age these terms refer to varies based on the context. Within prison-related

age fifty-five or older increased 282%, nearly quadrupling, between 1995 and 2010.¹⁰ Over the same time period, the number of all people in state and federal prisons increased 42%, growing by less than half.¹¹ In fact, as of 2010, there were 124,400 incarcerated people in state and federal prisons aged fifty-five or older, and the number of incarcerated people in this age group continues to grow.¹² By 2030, it is projected that the population of people in state and federal prisons age fifty-five and older will be over 400,000, which would be a 4,400% increase over the past fifty years.¹³

As the population of people age fifty-five and older in prison is increasing, advocacy to release seniors from incarceration is also growing.¹⁴ Prisons are “poorly equipped to house an aging population” and there are “serious financial

research, “there has been an overwhelming consensus among correctional experts and criminologists [including the National Institute of Corrections] that 50 years of age is the appropriate point marking when a prisoner becomes ‘aging’ or ‘elderly’” because of stresses and unhealthy conditions prior to and during incarceration that age people who are incarcerated more rapidly than their chronological age indicates. INIMAI CHETTIAR, WILL BUNTING & GEOFF SCHOTTER, ACLU, AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 1 (June 2012), https://www.aclu.org/files/assets/elderlyprisonreport_20210613_1.pdf [<https://perma.cc/3D7V-KU24>]. Other research focuses on the population of incarcerated people age fifty-five and older. *See, e.g.*, E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUST., NCJ NO. 248766, AGING OF THE STATE PRISON POPULATION, 1993–2013, at 1 (May 2016), <https://bjs.ojp.gov/content/pub/pdf/aspp9313.pdf> [<https://perma.cc/3S76-XPBM>]. In the context of the Department of Housing and Urban Development (HUD) housing assistance, a person must be sixty-two years old to fit within the definition of “elderly,” which establishes eligibility for public housing that gives preference to elderly applicants and multifamily housing programs that provide assistance to elderly applicants. *See* 42 U.S.C. § 1437a(b)(3)(D); 12 U.S.C. § 1701q(k)(1) (both defining “elderly” as a person who is sixty-two years of age or more).

¹⁰CTR. FOR JUST. AT COLUMBIA UNIV., AGING IN PRISON: REDUCING ELDER INCARCERATION AND PROMOTING PUBLIC SAFETY 3–4 (Nov. 2015), <https://www.issueab.org/resources/22902/22902.pdf> [<https://perma.cc/74KH-RVMZ>]. Two factors are cited for the increase in the elderly prison population: “(1) a greater proportion of prisoners were sentenced to, and serving longer periods in state prison, predominantly for violent offenses, and (2) admissions of older persons increased.” CARSON & SABOL, *supra* note 9, at 1. This indicates both that people are aging in prison due to longer sentences and are entering or reentering the criminal justice system at older ages. *Id.* at 12.

¹¹CTR. FOR JUST. AT COLUMBIA UNIV., *supra* note 10, at 3.

¹²*Id.*

¹³CHETTIAR, BUNTING & SCHOTTER, *supra* note 9, at 5.

¹⁴KIDEUK KIM & BRYCE PETERSON, URB. INST., AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM, at vi (Aug. 2014), <https://www.urban.org/sites/default/files/publication/33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF> [<https://perma.cc/N6ZV-ULLA>] (“[T]he population of older prisoners has grown markedly in recent years and is projected to have a steeper growth curve in the near future.”); *see, e.g.*, CHETTIAR, BUNTING & SCHOTTER, *supra* note 9, at 53 (recommending that Congress expand federal aging prisoner release).

implications” involved, since it is “estimated that the United States spends at least \$16 billion annually on incarcerating elderly people.”¹⁵ Even though it is costly to maintain care for incarcerated seniors, arrest rates indicate that aging people pose little to no risk to society, as just over 2% of people released at or after age fifty are arrested again and almost 0% of people released at or after age sixty-five are arrested again.¹⁶ Compassionate release programs, which exist on the federal level and in forty-nine states and the District of Columbia, allow early release or parole for elderly or ill incarcerated people.¹⁷ Continued advocacy for expansion and improvement to these programs may lead an increased number of currently incarcerated seniors to be released over the next few decades, increasing the number of older people who will face challenges with reentry after returning from incarceration.

Housing policies that exclude people with criminal records “constitute one of the most significant barriers to reentry.”¹⁸ While some research articulates the barriers to housing faced by people with criminal records generally,¹⁹ there has not been much research on the barriers faced by seniors with criminal records in particular. This Note aims to help fill this gap in the literature in preparation for the projected increased levels of seniors with criminal records who will require housing and housing assistance in the near future.

Part II of this Note describes two categories of housing options available to seniors, Public Housing and Multifamily Housing Programs, with a focus on three multifamily programs: (1) the Section 202 Supportive Housing for the Elderly Program, (2) the Section 231 Rental Housing for the Elderly Program, and (3) the Section 232 Loan Program.²⁰ Part II also details these programs’ statutory and regulatory requirements that ultimately prevent seniors with

¹⁵ CTR. FOR JUST. AT COLUMBIA UNIV., *supra* note 10, at VIII–IX; *see also* HUM. RTS. WATCH, *supra* note 9, at 6–7 (describing the difficulty and cost that prisons face to provide sufficient medical care to older incarcerated people who are more likely than younger incarcerated people to have chronic, disabling, and terminal illnesses).

¹⁶ CTR. FOR JUST. AT COLUMBIA UNIV., *supra* note 10, at IX.

¹⁷ MARY PRICE, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM), EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 6–8 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [<https://perma.cc/Z7FL-TWQV>] (advocating for improvements to state compassionate release policies and programs and noting that few states actually name their programs that allow for early release “compassionate release”).

¹⁸ Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 552 (2005) (describing how people leaving prison and jail have “dire housing needs” and can end up homeless when publicly supported housing options exclude them because of their criminal records).

¹⁹ *See, e.g.*, MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT’L CTR. ON POVERTY L., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 2–3 (Feb. 2015), <https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf> [<https://perma.cc/6BC7-PB57>].

²⁰ *See infra* Part II.

criminal records from accessing housing assistance through the programs.²¹ Part III analyzes the problems associated with the barriers to housing, including the primary barriers caused by mandatory bans on housing access and secondary barriers caused by the discretion afforded to Public Housing Agencies and the Department of Housing and Urban Development (HUD) grantees.²² Part IV offers recommendations to improve access to housing for seniors with criminal records, which include changing statutory and regulatory language, expanding HUD guidance, establishing a new HUD housing program, achieving change through litigation, and invitations for future research.²³ Finally, this Note briefly concludes.²⁴

II. STATUTORY AND REGULATORY BACKGROUND: HOUSING OPTIONS FOR SENIORS

There are three categories of assistance that serve low-income renters under HUD programs: public housing, privately owned project-based housing, and tenant-based assistance.²⁵ All of these programs reduce the cost of housing for individuals and families with low-incomes.²⁶ They are governed by federal guidelines that limit the amount of money people with low-incomes must pay toward housing to a percentage of their total income, which is less than the full market cost for housing.²⁷

The first category—public housing—is a project-based subsidy for publicly owned housing, which means households only receive assistance when they live in a particular housing project that is owned by a local public housing agency (PHA).²⁸ Similarly, the second category—privately owned project-based

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ See *infra* Part V.

²⁵ *Picture of Subsidized Households*, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/assthsg.html> [<https://perma.cc/6VTD-Y9G6>].

²⁶ Marah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, CITYSCAPE, no. 3, 2013, at 37, 38.

²⁷ *Id.* at 38 n.2 (stating that federal guidelines “require households to contribute no more than 30 percent of their income toward housing”).

²⁸ *Picture of Subsidized Households*, *supra* note 25. PHAs are defined as “[a]ny state, county, municipality or other governmental entity or public body, or agency or instrumentality of these entities that is authorized to engage or assist in the development or operation of low-income housing under the U.S. Housing Act of 1937. PHAs generally own and manage public housing properties.” *Public Housing Agency (PHA)*, AFFORDABLE HOUS. ONLINE, <https://affordablehousingonline.com/glossary/Public-Housing-Agency-PHA> [<https://perma.cc/7KMT-WE3G>]. PHAs are generally city-, county-, or state-based organizations, including New York City Housing Authority, Cuyahoga Metropolitan Housing Authority (serving residents of Cuyahoga County, Ohio), and Louisiana Housing Authority. *PHA Contact Information*, U.S. DEP'T OF HOUS. & URB. DEV., <https://www.hud.gov/>

housing, which falls under a collection of programs referred to as Multifamily Housing Programs—provides assistance for rental housing at a particular location.²⁹ Multifamily Housing Programs are different from PHA-owned public housing because they are owned by private landlords who receive housing subsidies through contracts with HUD.³⁰ Unlike both public housing and Multifamily Housing Programs, the third category of housing assistance—tenant-based assistance—allows households receiving the assistance to move locations and bring their subsidy with them to their new rental.³¹ Tenant-based assistance began as the Section 8 Program and is now the Housing Choice Voucher Program.³²

Even though seniors can access housing through a variety of programs, this Note focuses on housing options that are specifically tailored to seniors through HUD programs.³³ This Note focuses on HUD programs because the statutes that

program_offices/public_indian_housing/pha/contacts [https://perma.cc/78R9-LYZP]. The New York City Housing Authority (NYCHA), for example, serves over 535,686 residents living within 335 public housing developments through the public housing program. N.Y.C. HOUS. AUTH., NYCHA 2022 FACT SHEET 1 (Apr. 2022), https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA_Fact_Sheet_2022.pdf [https://perma.cc/PVK4-JH9Q]. NYCHA's largest public housing development is the Queensbridge (North and South) Houses with 3,147 apartments. *Id.* at 2.

²⁹ *Picture of Subsidized Households*, *supra* note 25. These privately owned properties “receive HUD project-based assistance through its Section 8 rental assistance program; Section 202 Housing for Low-income Elderly; or Section 811 Housing for Persons with Disabilities programs.” *Multifamily Housing Property Search*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/hsgrent/mfhpropertysearch [https://perma.cc/F4ZP-8WMS]. Examples of private project-based housing properties in Columbus, OH include Spruce Bough Homes (with 112 assisted units), Park Place (with 82 assisted units), and Alliance One (with 54 assisted units). *Id.* (searching ZIP code 43205).

³⁰ *Picture of Subsidized Households*, *supra* note 25.

³¹ *Id.* Housing choice vouchers allow program participants “to find their own housing, including single-family homes, townhouses and apartments.” *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [https://perma.cc/TX7V-MB23]. Instead of paying the landlord’s market rent price completely themselves, the program participants typically “must pay 30% of [their] monthly adjusted gross income for rent and utilities” and the local PHA pays a subsidy directly to the landlord to make up the difference between rent charged and the amount paid by the participants. *Id.* If the unit rent exceeds a payment standard established by the PHA in “the amount generally needed to rent a moderately-priced dwelling unit in the local housing market,” participants must pay the extra amount, up to 40% of their adjusted monthly income. *Id.*

³² *Picture of Subsidized Households*, *supra* note 25.

³³ Other, non-elderly specific, housing assistance options that are available to elderly people include the Housing Choice Voucher Program and state or local assistance programs. In fact, a 2010 report noted “[a]pproximately 17 percent of the 1.9 million vouchers currently in use are being utilized by senior citizens,” which indicates that elderly people can and do access housing assistance outside of the programs discussed in this Note. M. WILLIAM SERMONS & MEGHAN HENRY, HOMELESSNESS RSCH. INST., DEMOGRAPHICS OF HOMELESSNESS

enable HUD programs to exist were created with the goal of providing housing assistance to the most vulnerable populations who would otherwise struggle to live in safe and affordable housing.³⁴ Seniors like William Morton who have criminal records and are reentering society following a period of incarceration are just the people these programs aim to serve.³⁵

Part A of this second Part discusses public housing since PHAs can choose to give preference to elderly applicants. Part B discusses three Multifamily Housing Programs that serve the elderly: (1) the Section 202 Supportive Housing for the Elderly Program, (2) the Section 231 Rental Housing for the Elderly Program, and (3) the Section 232 Loan Program.

A. Public Housing

The statutory and regulatory background of public housing that serves older persons also prevents elderly people with criminal records from accessing housing. Public housing is defined as “dwelling units in a mixed finance project that are assisted by a public housing agency with capital or operating assistance.”³⁶ Local PHAs operate this federally subsidized housing by providing units to low-income persons, who are people earning at or below 80% of the area’s median income.³⁷ The United States Housing Act of 1937 created the public housing program, which requires that PHAs create an agency plan to set eligibility, selection, and admissions policies.³⁸ Eligibility policies could

SERIES: THE RISING ELDERLY POPULATION 6 (Apr. 2010), <http://endhomelessness.org/wp-content/uploads/2010/04/rising-homelessness-population.pdf> [<https://perma.cc/528X-BCQ2>]. Beyond that, 49% of Project-based Section 8 units are occupied by elderly householders and 58% of Section 515 Rural Rental Housing Program units are allocated to seniors. *Id.*

³⁴For example, the National Housing Act makes multiple references to providing services to economically vulnerable people and the elderly. *See, e.g.*, 12 U.S.C. § 1701x(g)(4)(A) (“The Director of Housing Counseling shall develop, implement, and conduct national public service multimedia campaigns designed to make . . . *elderly persons* . . . *low-income persons*, minorities, and *other potentially vulnerable consumers* aware that it is advisable . . . to obtain homeownership counseling.” (emphasis added)); *id.* § 1701x note (Financial Education and Counseling at (b)(1)) (“The Secretary of the Treasury . . . shall make grants to eligible organizations to enable such organizations to provide a range of financial education and counseling services to prospective homebuyers or *economically vulnerable individuals and families*.” (emphasis added)).

³⁵*See supra* notes 1–13 and accompanying text (describing the context and particular challenges faced by seniors with criminal records, indicating that they are a vulnerable group who would benefit from receiving federal housing assistance).

³⁶42 U.S.C. § 1437a(b)(1).

³⁷*Id.* § 1437a(b)(2).

³⁸*Id.* § 1437c-1(d)(3). The United States Housing Act is understood to have a twofold purpose: “(1) to establish a program of federal aid to local agencies engaged in providing decent, safe, and sanitary housing for lower income families, while at the same time (2) vesting maximum responsibility in the administration of housing programs with local public housing authorities.” *Rivera v. Reading Hous. Auth.*, 819 F. Supp. 1323, 1329 (E.D. Pa. 1993), *aff’d sub nom.*

include designating the property specifically for elderly families, which would create an elderly designation status for the entire property or for units within the property.³⁹

Some PHAs give preference to elderly applicants by adopting and implementing “selection preferences for developments designated exclusively for elderly [people],” subject to HUD requirements.⁴⁰ More specifically, PHAs can have selection preferences to admit people who are at least sixty-two years old.⁴¹ To designate a project for occupancy by elderly people, a PHA must have a HUD-approved allocation plan that identifies the PHA’s designation to make housing for elderly families and the reasons the buildings or units were selected for that designation.⁴² Although HUD does not capture a public housing property’s designation status as part of its data, a 2015 Health Impact Assessment of HUD’s Designated Housing Rule estimated that 91% of designated public housing units are for seniors-only.⁴³ Additionally, the Impact Assessment found that PHA policies can lead to the existence of properties that predominantly house seniors and estimated that 122,024 units operated by PHAs without an active designated housing plan were senior-only.⁴⁴ Therefore, seniors seeking housing assistance following reentry from jail or prison might consider public housing options.

Rodriguez v. Reading Hous. Auth., 8 F.3d 961, 961 (3d Cir. 1993). Additionally, even though this Note focuses on admissions policies that seniors with criminal records experience when applying for housing assistance, tenant termination and eviction policies provide another related set of statutory and regulatory requirements that could impact this population. *See, e.g.*, 42 U.S.C. § 1437d(k) (describing grievance procedures “concerning an eviction or termination of tenancy that involves any activity that threatens the health, safety, or right to peaceful enjoyment of the premises of other tenants or employees of the public housing agency or any violent or drug-related criminal activity on or off such premises, or any activity resulting in a felony conviction”).

³⁹ 42 U.S.C. § 1437c-1(d)(9).

⁴⁰ 24 C.F.R. § 960.206(a)(3) (2021) (PHAs are granted the ability to establish “selection preferences for developments designated exclusively for elderly [people]”).

⁴¹ *Id.* § 960.206(b)(5) (“The PHA may adopt a preference for admission of single persons who are age 62 or older.”).

⁴² *Id.* §§ 945.201(a), 945.203(c)(1). In general, HUD requires indirect and front-line costs to programs to be documented in a cost allocation plan. U.S. DEP’T OF HOUS. & URB. DEV., PHA FINANCIAL REPORTING TRAINING: PUBLIC HOUSING 27 (Spring/Summer 2019), https://www.hud.gov/sites/dfiles/PIH/documents/Session_1_Intro_to_Fin_%20Mgmt_2019.pdf [<https://perma.cc/844R-R8RT>]. These plans must be supported using cost drivers such as payroll costs, number of units in the program, and the tenant case load. *Id.*

⁴³ HEALTH IMPACT PROJECT, CONNECTING PUBLIC HOUSING AND HEALTH: A HEALTH IMPACT ASSESSMENT OF HUD’S DESIGNATED HOUSING RULE 7 (June 2015), <https://www.pewtrusts.org/~media/assets/2015/06/connecting-public-housing-and-health.pdf> [<https://perma.cc/XL7P-MMMM>].

⁴⁴ *Id.* at 20 (“PHA preference or occupancy policies may result in properties that are predominately senior.”). In this Impact Assessment, senior-only properties are defined as those with “[r]esidents who are predominantly (at least 75 percent of residents) seniors or near-elderly (ages 51 and older).” *Id.* at 28.

All PHAs, including those that designate senior-only housing, implement tenant selection policies, which include requiring criminal background checks to screen otherwise eligible applicants for criminal records before making a final admissions decision.⁴⁵ Under the United States Housing Act of 1937, PHAs are required to permanently prohibit anyone who has received a conviction for manufacturing or producing methamphetamine on public housing premises from living in public housing.⁴⁶ This requirement does not allow for any discretion,⁴⁷ which means any senior convicted of producing methamphetamine in public housing has no ability to access public housing because of this law.

The Quality Housing and Work Responsibility Act of 1998 provides additional restrictions that PHAs must implement when considering tenant applicants for public housing.⁴⁸ First, it requires prohibiting individuals who must register as a sex offender for life under a State registration program from admission to public housing.⁴⁹ Second, it gives public housing authorities the authority to deny admission to a criminal offender who:

is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees [based on the determination of the PHA].⁵⁰

Once the “reasonable period” expires, the applicant must submit “evidence sufficient (as the Secretary shall by regulation provide) to ensure that the [criminal offender has] not engaged in any criminal activity during such reasonable period” to the PHA before gaining admission into public housing.⁵¹

⁴⁵ 42 U.S.C. § 13663(b).

⁴⁶ *Id.* § 1437n(f)(1) (PHAs are required to “permanently prohibit occupancy in any public housing dwelling unit by . . . any person who has been convicted of manufacturing or otherwise producing methamphetamine on the premises in violation of any Federal or State law”).

⁴⁷ *Id.*

⁴⁸ 42 U.S.C. § 13663.

⁴⁹ *Id.* § 13663(a) (There is a mandatory prohibition on “any individual who is subject to a lifetime registration requirement under a State sex offender registration program”).

⁵⁰ *Id.* § 13661(c).

⁵¹ *Id.* § 13661(c)(2). Neither the statute nor any HUD guidance defines an explicit “reasonable period,” so PHAs are left to define what is a reasonable time period on their own. Elayne Weiss, *Housing Access for People with Criminal Records*, in NAT’L LOW INCOME HOUS. COAL., ADVOCATES’ GUIDE 2017, at 6–22 (2017), https://nlihc.org/sites/default/files/2017_Advocates-Guide.pdf [<https://perma.cc/2J6J-HDQE>] (“Although HUD expects housing providers to define a ‘reasonable time’ in their admissions, some neglect to do so or leave it open ended, and, as a result, discourage people with criminal records from applying. Others impose lifetime bans or use overly long lookback periods for particular crimes.”). Some

The Quality Housing and Work Responsibility Act of 1998 also limits access to public housing for people evicted from federally assisted housing because of drug related criminal activity.⁵² Under the statute, an applicant is ineligible for housing for three years following an eviction from federally assisted housing because of drug-related criminal activity, “unless the evicted tenant successfully completes a rehabilitation program approved by the public housing agency.”⁵³

Beyond these statutory restrictions, there are also regulations that restrict access to housing for seniors with criminal records.⁵⁴ Regulations give PHAs the responsibility to screen “family behavior and suitability for tenancy,” which includes denying applicants with histories of criminal activity.⁵⁵ Additionally, the PHA *may* choose to continue to prohibit admission for a longer period of time than a statute requires.⁵⁶ PHAs also have discretion to consider “the time, nature, and extent of the applicant’s conduct (including the seriousness of the offense)” and “factors which might indicate a reasonable probability of favorable future conduct” when the applicant has a criminal record.⁵⁷

Regulations require the same restrictions that the statutes require for permanent denial of admission for applicants who were convicted of methamphetamine production, are subject to a lifetime sex offender registration requirement, or were evicted within three years from federally assisted housing for drug-related criminal activity.⁵⁸ The PHA “may” admit applicants evicted for drug-related activity if the applicants “successfully completed a supervised drug rehabilitation program approved by the PHA” or if “the circumstances leading to the eviction no longer exist,” though it is not required to admit them.⁵⁹

scholarship argues that no time period is reasonable and PHAs should not be allowed to inquire about a person’s criminal history. *See, e.g.*, Ashley De La Garza, Comment, *The Never-Ending Grasp of the Prison Walls: Banning the Box on Housing Applications*, 22 SCHOLAR 409, 413 (2020) (advocating for “Banning the Box” on housing applications so previously incarcerated people “receive a fair opportunity at housing”).

⁵² 42 U.S.C. § 13661(a). The restriction occurs even though a person who gets evicted from their place of residence for drug related criminal activity does not necessarily have a criminal record. *See id.*

⁵³ *Id.*

⁵⁴ *See, e.g.*, 24 C.F.R. § 960.203 (2021).

⁵⁵ *Id.* § 960.203(c). More specifically, applicants who have a “history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants” are rejected from public housing. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* § 960.203(d). Examples of factors that can indicate a possibility of favorable future conduct include evidence of rehabilitation and evidence of participation, or willingness to participate, in social service programs. *Id.* In practice, requiring evidence of rehabilitation and program participation can impose a further barrier to housing access.

⁵⁸ *Id.* § 960.204(a).

⁵⁹ *Id.*

Under regulations, PHAs are required to deny applicants admission to public housing for two additional reasons that are not included in the statutes.⁶⁰ First, PHAs must deny the applicants who the PHA determines are “currently engaging in illegal use of a drug” or who the PHA “has reasonable cause to believe that [the applicant’s] illegal use or pattern of illegal use of a drug may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.”⁶¹ Second, PHAs must prohibit admission to applicants who PHAs determine, with reasonable cause, “abuse or [exhibit a] pattern of abuse of alcohol [that] may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents.”⁶² Both of these regulations allow PHAs to exercise discretion in their determinations of prohibiting seniors from admission to public housing.

To summarize, the statutes and regulations that are intended to help low-income elderly people access housing opportunities actually create barriers for a subset of that population—seniors with criminal records. Seniors who have been convicted of manufacturing methamphetamine in public housing, seniors who must register as a sex offender for life, and seniors who engaged in certain criminal activity within a “reasonable period” of time are all restricted from accessing public housing because of these statutes and regulations.⁶³ Seniors who PHAs have reasonable cause to believe are currently illegally using a drug or who might threaten the safety of other residents because of alcohol abuse may also be restricted from accessing public housing based on regulations, though PHAs have discretion in these cases.⁶⁴

B. Multifamily Housing Programs

Like with public housing, the statutory and regulatory background of Multifamily Housing Programs that serve the elderly prevent older persons with criminal records from accessing housing assistance. Multifamily Housing Programs involve privately owned, project-based housing.⁶⁵ HUD’s Multifamily Housing Programs are managed by the Federal Housing Administration (FHA).⁶⁶ This form of housing assistance includes a collection of programs that each provide rental housing owned by private landlords to tenants who pay a subsidized rental rate supported by subsidies that pay the difference between the tenant’s rate and the total rental costs.⁶⁷ The private

⁶⁰ See *supra* notes 46–48.

⁶¹ 24 C.F.R. § 960.204(a)(2) (2021).

⁶² *Id.* § 960.204(b).

⁶³ See *supra* notes 46–51 and accompanying text.

⁶⁴ See *supra* notes 60–62 and accompanying text.

⁶⁵ *Picture of Subsidized Households*, *supra* note 25.

⁶⁶ *Id.*

⁶⁷ *Id.*

landlords and project owners are required to follow many of the same or similar statutory and regulatory requirements that PHAs must follow when selecting public housing tenants, as described in Part II.A.⁶⁸ Statutes and regulations also give the private owners discretion to create tenant selection criteria that excludes applicants with criminal records, though the applicable statutes and regulations vary by program.⁶⁹ The three programs discussed here are the (1) Section 202 Supportive Housing for the Elderly Program, (2) Section 231 Rental Housing for the Elderly Program, and (3) Section 232 Loan Program, all of which restrict elders with criminal records from accessing housing assistance.⁷⁰

1. *Section 202 Supportive Housing for the Elderly Program*

The Section 202 Supportive Housing for the Elderly Program provides housing and supportive services to people aged sixty-two or older with income at or below 50% of the area median income.⁷¹ More specifically, it provides capital advances to sponsors that finance the development of housing to expand “the supply of affordable housing with supportive services for the elderly.”⁷² Seniors benefit from these supportive services, which include cooking, cleaning, and transportation, while also having the opportunity to live independently.⁷³

An example of a program authorized under Section 202b of the Housing Act of 1959, as amended by the Section 202 Supportive Housing for the Elderly Act of 2010, is the Assisted Living Conversion Program (ALCP).⁷⁴ The ALCP provides private nonprofit owners of eligible developments with a grant to convert some or all of the dwelling units in the project into an Assisted Living

⁶⁸ See, e.g., 12 U.S.C. § 1701q(i)(1) (statute requiring owners to adopt written tenant selection procedures for tenants in Section 202 supportive housing programs); 24 C.F.R. § 891.410 (2021) (regulation requiring owners to adopt written tenant selection procedures for tenants in Section 202 supportive housing programs).

⁶⁹ See, e.g., 42 U.S.C. § 13661(c).

⁷⁰ *Section 202 Supportive Housing for the Elderly Program*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/mfinfo/section202ptl [<https://perma.cc/72K6-MBC3>]. Other Multifamily Housing Programs include Section 811’s Supportive Housing for Persons with Disabilities Program, Section 207’s Manufactured Home Parks Programs, and the Congregate Housing Services Program (CHSP). *Descriptions of Multifamily Programs*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/progdesc [<https://perma.cc/NA2K-PB5Q>]. As mentioned, this Note only considers three programs that specifically serve elderly people, even if elderly people may choose to receive housing assistance through other Multifamily Housing Programs: the Section 202 Supportive Housing for the Elderly Program, Section 231 Rental Housing for the Elderly Program, and Section 232 Loan Program.

⁷¹ *Section 202 Supportive Housing for the Elderly Program*, *supra* note 70.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Assisted Living Conversion Program (ALCP)*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/progdesc/alcp [<https://perma.cc/4CME-3N9W>].

Facility or Service-Enriched Housing.⁷⁵ Assisted Living Facilities are “designed to accommodate frail elderly and people with disabilities who can live independently but need assistance with activities of daily living.”⁷⁶ These facilities must offer services to meet tenant needs, including personal care, transportation, meals, and housekeeping.⁷⁷ Service-Enriched Housing is “designed to accommodate frail elderly persons or elderly persons with service needs” who are living independently.⁷⁸ Residents of Service-Enriched Housing also need assistance and receive “services typically provided in a licensed assisted living facility, such as healthcare-related services.”⁷⁹ These services must be available to residents “through a licensed or certified third party service provider.”⁸⁰

The Housing Act of 1959 requires owners of these Section 202 supportive housing programs, including the ALCP, to “adopt written tenant selection procedures” that improve “housing opportunities for very low-income elderly persons” and are “reasonably related to program eligibility and an applicant’s ability to perform the obligations of the lease.”⁸¹ The statute also requires the tenant selection procedures to “comply with subtitle C of title VI of the Housing and Community Development Act of 1992,” which gives the Secretary of HUD the authority to establish “reasonable criteria for occupancy in federally assisted housing.”⁸²

The regulations about the admission of tenants under the Section 202 Supportive Housing for the Elderly Program include the same owner requirements as the statute’s requirements: the owner must adopt written tenant selection procedures that improve “housing opportunities for very low-income elderly persons” and the selection procedures must be “reasonably related to program eligibility and an applicant’s ability to perform the obligations of the lease.”⁸³

Even though the statute and regulations for the Section 202 Program do not specify selection criteria involving an applicant’s criminal record, the owners of these programs are also bound by the language in the Quality Housing and Work Responsibility Act of 1998.⁸⁴ Programs assisted under Section 202, including the Supportive Housing for the Elderly Program and the ALCP, are included in

⁷⁵ *Id.* Both Assisted Living Facilities and Service-Enriched Housing provide supportive services for their elderly residents. *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Assisted Living Conversion Program (ALCP)*, *supra* note 74.

⁸¹ 12 U.S.C. § 1701q(i).

⁸² *Id.*; 42 U.S.C. §§ 13601–13603, 13603(a)(1).

⁸³ 24 C.F.R. § 891.410(a) (2021).

⁸⁴ 42 U.S.C. § 13664(a)(2)(D).

the statutory definition of “federally assisted housing,” and that statute applies to all federally assisted housing.⁸⁵

Therefore, seniors who must register as a sex offender for life, seniors who engaged in certain criminal activity within a “reasonable period” of time, and seniors who were evicted from federally assisted housing for drug-related criminal activity are restricted from accessing housing assistance under the Section 202 Program.⁸⁶

2. Section 231 Rental Housing for the Elderly Program

The Section 231 program was “designed to increase the supply of rental housing specifically for the use and occupancy of elderly persons.”⁸⁷ To achieve that goal, the program insures lenders against loans on mortgages to support the construction and substantial rehabilitation of multifamily rental housing for people aged sixty-two or older.⁸⁸ HUD-approved private, profit-motivated developers and non-profit sponsors are eligible to receive this FHA mortgage insurance and elderly persons are eligible to occupy units in a project whose mortgage is insured under the program.⁸⁹

Section 231 of the National Housing Act, as added by the Housing Act of 1959, authorizes the Section 231 program.⁹⁰ The statute describes the mortgage requirements established for the program, including dollar limitations, replacement costs, interest rates, and coverage details.⁹¹ There is no language about tenant selection requirements, though there is language that the mortgagor’s “methods of operation” may be regulated or restricted by the Secretary of HUD, which could include tenant selection.⁹² Regulations for the Section 231 program also focus on mortgages and mortgagors without including language about tenant selection.⁹³ Even the general FHA program regulations,

⁸⁵ See *id.* § 13664(a)(2).

⁸⁶ *Id.* §§ 13661(a), 13661(c), 13663(a). If an applicant for a Section 202 program was evicted from federally assisted housing for drug-related activity, the owner has discretion to accept the applicant if they successfully completed a rehabilitation program. *Id.* § 13662(b).

⁸⁷ *Mortgage Insurance for Rental Housing for the Elderly: Section 231*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/progdesc/progsec231 [<https://perma.cc/Z52L-3MY9>]. Even though this program could be used to insure projects, developers have opted to use Section 221(d)(4) to insure projects in recent years and few projects have been insured under Section 231. *Id.* In Fiscal Year 2022, HUD only insured six projects with 904 units under the Section 231 program. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* In addition to elderly persons, persons with disabilities are also eligible to occupy apartments in projects that are insured by the Section 231 Program. *Id.*

⁹⁰ *Id.*; see National Housing Act § 231, 12 U.S.C. § 1715v (added by Housing Act of 1959, Pub. L. No. 86-372, § 201, 73 Stat. 654, 665–67).

⁹¹ 12 U.S.C. § 1715v(c).

⁹² *Id.*

⁹³ See 24 C.F.R. 231.2 (2021).

which apply to the Section 231 program, do not mention any requirements for tenant selection criteria.⁹⁴ Since the statutes and regulations do not specify any requirements or restrictions for tenant selection, there are no additional statutory or regulatory restrictions that impact seniors with criminal records applying for housing provided by the Section 231 program beyond those that apply to all federally assisted housing.

3. Section 232 Loan Program

The Section 232 Loan Program is administered by the Office of Multifamily Housing Development and provides mortgage insurance for residential care facilities including nursing homes, assisted-living facilities, and board and care homes.⁹⁵ Investors, builders, developers, public entities, and private nonprofit corporations and associations are eligible to receive the FHA mortgage insurance available under this program.⁹⁶ Residents who require “skill nursing, custodial care, and assistance with activities of daily living are eligible to live in the facilities insured under this program,” which could include seniors but is not restricted to seniors.⁹⁷

Section 232 of the National Housing Act, as added by the Housing Act of 1959, authorizes the Section 232 Loan Program.⁹⁸ Like the Section 231 program’s authorizing statute, the Section 232 program’s authorizing statute does not mention tenant selection criteria.⁹⁹ Instead, it provides details about the Secretary of HUD’s authority to insure mortgages for different types of residential care facilities.¹⁰⁰ Additionally, the only relevant regulations related to admitting tenants are those that apply to all federally assisted housing.¹⁰¹ Therefore, seniors with criminal records are unable to access federally assisted housing under the Section 232 program if they must register as a sex offender for life, were engaged in certain criminal activity within a “reasonable period” of time, or were evicted from federally assisted housing for drug-related criminal activity.¹⁰²

⁹⁴ *See id.*

⁹⁵ *Mortgage Insurance for Nursing Homes, Intermediate Care, Board & Care and Assisted-Living Facilities: Section 232 and Section 232/223(F)*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/housing/mfh/progdesc/procsec232_223f [<https://perma.cc/6RDK-GZGU>].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*; see National Housing Act § 232, 12 U.S.C. § 1715w (added by Housing Act of 1959, Pub. L. No. 86-372, § 115, 73 Stat. 654, 663–64).

⁹⁹ *See* 12 U.S.C. § 1715w.

¹⁰⁰ *Id.*

¹⁰¹ *See supra* Part II.A.

¹⁰² 42 U.S.C. §§ 13661(a), 13661(c), 13663(a).

III. PRIMARY AND SECONDARY BARRIERS TO ACCESSING HOUSING ASSISTANCE

Part III classifies the elements of the program statutes and regulations discussed in Part II as either primary or secondary barriers to accessing federal housing assistance. Neither the statutes nor the regulations require the restrictions that PHAs and Multifamily project owners implement through tenant selection criteria that prevent seniors with criminal records from accessing the housing assistance they need. Additionally, the barriers conflict with the statutory and regulatory goal of providing housing assistance to the most vulnerable low-income populations, which include seniors with criminal records.

A. Primary Barriers

Primary barriers are mandatory prohibitions to accessing federally assisted housing that are directly established in statutes and regulations. As discussed in Part II, PHAs and Multifamily project owners must implement a lifetime ban on admission to their housing for people who have been convicted of manufacturing methamphetamine on the premises of federally assisted housing and people who are required to register as sex offenders for life under a State sex offender registration program.¹⁰³ These two very specific conditions prohibiting access to federally assisted housing do not allow for any discretion on the part of PHAs or other HUD grantees who serve as project owners.¹⁰⁴ Therefore, seniors with a conviction for manufacturing methamphetamine or lifelong members of a sex offender registry are necessarily bound by these restrictions.¹⁰⁵ Only Congress has the power to remove these bans by repealing the statutes that require them. Unless and until those statutes are repealed, seniors who meet these conditions are unable to access public housing or participate in Multifamily Housing Programs.

These primary barriers are incompatible with the statutory and regulatory goals to provide housing assistance to the most vulnerable low-income populations.¹⁰⁶

¹⁰³ 42 U.S.C. §§ 1437n(f)(1), 13663(a). For regulations establishing restrictions on individuals who have been convicted of manufacturing methamphetamine on the premises of federally assisted housing, see 24 C.F.R. § 960.204 (2021), and 24 C.F.R. § 982.553 (2021). For regulations establishing restrictions on individuals who are required to register as sex offenders for life under a state sex offender registration program, see 24 C.F.R. § 960.204 (2021), and 24 C.F.R. § 982.553 (2021).

¹⁰⁴ See 42 U.S.C. §§ 1437n(f)(1), 13663(a).

¹⁰⁵ *Id.* § 1437n(f)(1).

¹⁰⁶ See *supra* note 34 (describing the National Housing Act's aim to serve vulnerable populations who would benefit from access to housing assistance and support like the elderly and low-income individuals).

B. Secondary Barriers

While the list of primary barriers—the mandatory prohibitions on housing assistance access—is short, the list of secondary barriers—the prohibitions on housing assistance access that stem from the discretion afforded to PHAs or project owners—is long. Some language in the statutes and regulations described in Part II allows PHAs and project owners to consider applicants’ particular circumstances instead of automatically denying them in certain situations.¹⁰⁷ For example, PHAs and project owners *must* establish tenant selection standards that prohibit admitting a tenant who was evicted or whose household member was evicted from federally assisted housing in the last three years for drug-related criminal activity.¹⁰⁸ However, the owners *may* consider making an exception if the owners determine that the evicted household member who engaged in drug-related criminal activity has successfully completed a supervised drug rehabilitation program or that the circumstances leading to eviction no longer exist.¹⁰⁹ There is no requirement that owners consider making this exception, leaving them with tremendous discretion to reject the applicant if they so choose.

Additionally, PHAs and project owners have the discretion to create even more severe restrictions than statutes and regulations require, which limits access to housing for seniors with criminal records.¹¹⁰ To understand how these discretionary policies create barriers for people with criminal records who seek public housing, Curtis, Garlington, and Schottenfeld analyzed admissions and continued occupancy policy documents for individual PHAs all around the country.¹¹¹ They found common themes in the policy documents and categorized the restrictions established by PHAs into four categories: “(1) bans for drug-related activities, (2) bans for alcohol or nonviolent criminal activity, (3) bans for violent crimes, and (4) bans for other reasons.”¹¹²

Within the categories about bans for drug-related and alcohol or nonviolent criminal activity, a majority of PHAs mention a ban without specifying a length of time for the ban.¹¹³ This suggests discretion is used to ban or accept applicants on a case-by-case basis after considering the individual’s circumstance.¹¹⁴ Bans for housing applicants who committed violent crimes are more likely to have a

¹⁰⁷ See *supra* Part II.

¹⁰⁸ 42 U.S.C. § 13661(a).

¹⁰⁹ *Id.* § 13661(a), (b); 24 C.F.R. § 982.553(a) (2021).

¹¹⁰ Curtis, Garlington & Schottenfeld, *supra* note 26, at 38. Even though this research did not consider the barriers faced by seniors with criminal records specifically, the PHA bans would still apply to seniors seeking public housing assistance and serve as barriers to seniors with criminal records, which makes it relevant to this discussion.

¹¹¹ *Id.* at 41.

¹¹² *Id.* at 42–43.

¹¹³ *Id.* at 43–47.

¹¹⁴ *Id.*

specified length of time, though even these bans can be unspecified or fall within the three- to five-year range, which “suggests that these restrictions are meant to supplement the existing criminal legal framework by adding enforcement power to less well-defined behaviors.”¹¹⁵ When PHAs do not specify lengths of time for the bans or otherwise provide that an applicant may be banned from assisted housing for committing certain offenses, the final admissions decision may be left “up to an individual PHA worker.”¹¹⁶

When PHA staff or owners of Multifamily Housing Programs have such broad discretionary power to apply restrictions to housing, there is both danger and opportunity. Owners “are encouraged to consider individual or mitigating circumstances when making eviction and denial decisions,”¹¹⁷ which could increase the opportunity for seniors with criminal records to access federal housing assistance. However, “[l]imited research suggests that PHAs have responded to these [opportunities to exercise discretion] by creating more extensive bans than required” by screening out applicants with “alcohol, drug, and criminal behaviors outside federal requirements.”¹¹⁸

Though these extensive bans are valid within the language of the statute, they are incompatible with the statutory and regulatory goal to provide housing assistance to the most vulnerable low-income populations.¹¹⁹

IV. REFORMS

There are several avenues for reform to expand access to housing for seniors with criminal records: (A) statutory and regulatory language can be changed to explicitly create protections for seniors with criminal records, which would eliminate the current primary and secondary barriers preventing seniors with criminal records from accessing housing assistance; (B) HUD can expand its guidance to encourage housing providers to use their discretion to accept seniors with criminal records under the current statutory and regulatory framework; (C) HUD can create a new housing program that requires PHAs and Multifamily project owners to provide housing for seniors with criminal records, specifically under the Section 202 Program; (D) attorneys can drive change through litigation related to the Fair Housing Act; or (E) future research can analyze

¹¹⁵ *Id.* at 44–46. For example, eighteen PHAs have a three- to five-year ban for a person who was engaged in an unspecified violent “activity” while sixteen other PHAs have no length of time specified for a person who was engaged in the same act. *Id.* at 46. Similarly, ten PHAs have a three- to five-year ban for a person who was engaged in property violence or vandalism while eighteen PHAs have no specified ban length for a person who was engaged in the same act. *Id.*

¹¹⁶ Curtis, Garlington & Schottenfeld, *supra* note 26, at 38.

¹¹⁷ *Id.* at 40.

¹¹⁸ *Id.*

¹¹⁹ See *supra* note 34 and accompanying text (describing the National Housing Act’s aim to serve vulnerable populations who would benefit from access to housing assistance and support like the elderly and low-income individuals).

tertiary barriers that seniors with criminal records face when seeking housing assistance and study additional housing options seniors with criminal records could access. If any or all of these reforms are implemented, access to housing for all individuals with criminal records can be improved, with a special focus on improving access for seniors.

A. Reforming Statutory and Regulatory Language

The most drastic and impactful reform would involve changing the statutory and regulatory language to remove or limit the discretion that PHAs and Multifamily project owners have to make prohibitory tenant selection criteria based on seniors' criminal records.

As a caveat, even though either legislative or regulatory reform would best ensure that seniors with criminal records get access to federal housing assistance by completely removing the primary and secondary barriers that currently exist, they are also the least practicable reforms. First, both legislative and regulatory reforms involve time-intensive processes that can be inefficient, difficult, and politically challenging.¹²⁰ Second, although legislative and regulatory reform would solve the problem of unhoused elders with criminal records most directly, those reforms are not necessary to arrive at the outcome of increased access to housing assistance. As Parts IV.B, C, and D will show, alternative reforms can lead to most of the same outcomes as these statutory and regulatory reforms without the need to change the underlying law.

1. Statutory Reform

To improve access to housing assistance for seniors with criminal records, statutory language can either be changed to remove the mandatory prohibitions and discretion that PHAs and Multifamily project owners currently have to set tenant selection criteria, or to limit the exercise of discretion when they are considering elderly applicants with criminal records. Currently, the statutory language requires the permanent prohibition of people convicted of methamphetamine manufacturing in public housing, people required to register as sex offenders for life, and people evicted from federally assisted housing for drug-related criminal activity within the past three years (with some exceptions for drug-related evictions).¹²¹ To remove these permanent prohibitions, the language establishing these prohibitions in the United States Housing Act of 1937 and the Quality Housing and Work Responsibility Act of 1998 must be removed.¹²²

¹²⁰ See, e.g., VALERIE HEITSHUSEN, CONG. RSCH. SERV., 96-548, *THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION* 3-4 (2019) (discussing the time-intensive processes of filibusters and cloture in the Senate).

¹²¹ See *supra* notes 45-53 and accompanying text.

¹²² See *supra* notes 45-53 and accompanying text.

While, in theory, statutory language could also be changed to completely remove the discretion from PHAs and Multifamily project owners to determine how criminal records are considered in their tenant selection processes or to require them to admit seniors with criminal records, that is unlikely to happen in practice. Removing discretion from PHAs and Multifamily project owners in this way may raise concerns about eliminating the autonomy they have to determine who gets the opportunity to live in their properties. Even the United States Housing Act has the aim of balancing rights of potential tenants with rights of the PHAs and Multifamily project owners to have a say in who receives an opportunity to live in their properties.¹²³ PHAs and Multifamily project owners should be able to set admissions criteria that allow them to balance competing needs of serving the people who most need access to housing assistance and ensuring that their properties are seen as safe, welcoming places for all of their tenants.¹²⁴ Removing discretion would break with the Act's purpose and be an unlikely action for Congress to take.

Adding statutory language that is less extreme than a complete removal of discretion and more limited to removing discretion in the narrow context of considering elderly applicants with criminal records is a more reasonable congressional reform. For example, an amendment to the United States Housing Act could carve out a special protection for seniors with criminal records, such that the general discretion for property owners to select their tenants is preserved while a specific vulnerable community is exempted from being prohibited from accessing assistance.¹²⁵ Even though this less extreme change to the statutory language would still allow PHAs and Multifamily project owners to exercise their discretion when selecting tenants, this updated statute would offer greater access to housing assistance than seniors with criminal records currently have. As discussed above, further downsides to this approach are the long process of making legislative change and general political gridlock that may prevent a potential statutory edit from becoming an effective, implementable reform. Still, statutory change is a meaningful reform option despite these downsides.

¹²³ See *supra* note 38 (discussing the twofold purpose of the United States Housing Act). As a reminder, one of the Act's purposes is to vest "maximum responsibility in the administration of housing programs with local public housing authorities." *Rivera v. Reading Hous. Auth.*, 819 F. Supp. 1323, 1329 (E.D. Pa. 1993), *aff'd sub nom. Rodriguez v. Reading Hous. Auth.*, 8 F.3d 961 (3d Cir. 1993). While it is possible for Congress to change the legislation and reduce the responsibility that PHAs have in administering their programs, that would completely change the Act's purpose. Therefore, even though it is within Congress's power to make this change, it is unlikely to happen in practice absent some need to reject the Act's original purpose.

¹²⁴ *Rivera*, 819 F. Supp. at 1329.

¹²⁵ Potential updated statutory language could be: "No public housing authority, Multifamily project owner, or other HUD grantee shall utilize criminal record screening for the purposes of screening and preventing seniors with criminal records from accessing federal housing assistance."

2. Regulatory Reform

Much like the suggested statutory reform, the language in regulations can be updated to either remove the discretion that PHAs and Multifamily project owners currently have to set tenant selection criteria or to limit the exercise of discretion when they are considering elderly applicants with criminal records to improve access to housing assistance for seniors with criminal records. Where the regulations overlap with the statutes, the same arguments for making the changes discussed in Part IV.A.1 apply.¹²⁶ Where regulations are stricter than the statutes, by requiring PHAs to deny housing to applicants illegally using drugs or abusing alcohol for example,¹²⁷ regulatory language preventing those regulations from applying to seniors with criminal records specifically can be implemented.¹²⁸

If the statutory and regulatory language is updated in a way that removes discretion from PHAs or Multifamily project owners to set their own tenant selection criteria or creates a narrow exception that does not allow for discretion in cases involving seniors with criminal records, those seniors are more likely to be able to access federal housing assistance than they are today.¹²⁹

¹²⁶ As a reminder, regulations create the same permanent prohibition of people convicted of methamphetamine manufacturing in public housing, people required to register as sex offenders for life, and people evicted from federally assisted housing for drug-related criminal activity within the past three years as statutes do. *See supra* note 58 and accompanying text.

¹²⁷ *See supra* notes 60–64 and accompanying text.

¹²⁸ Potential updated regulatory language, which largely aligns with the suggested statutory language articulated in note 125 could be: “No public housing authority, Multifamily project owner, or other HUD grantee shall utilize criminal record screening or consideration of drug and alcohol abuse for the purpose of preventing seniors with criminal records from accessing federal housing assistance.”

¹²⁹ With changes to statutes and regulations, it would be easier to advocate for and require more equitable tenant admissions policies. The National Housing Law Project (NHLP), for example, aims to help advocates seeking to “increase the likelihood that individuals with criminal records and/or who have been incarcerated obtain federally-assisted housing.” NAT’L HOUS. L. PROJECT, AN AFFORDABLE HOME ON REENTRY 102 (2018), <https://www.nhlp.org/wp-content/uploads/2018/08/Rentry-Manual-2018-FINALne.pdf> [<https://perma.cc/9MKR-P72B>]. NHLP suggests “[t]he emphasis of the advocacy should be on reasonable admission policies for the particular housing program and/or a set aside of units or admission priority for individuals with criminal records and their families.” *Id.* (footnote omitted). While the development of these improved admissions policies does not require statutory or regulatory change, language in statutes and regulations that requires PHAs and Multifamily project owners to establish admissions policies that allow seniors with criminal records to access housing assistance will guarantee that they actually do receive access.

B. *Expanding HUD Guidance*

Beyond the recommended statutory and regulatory reforms that would require PHAs and other owners of federally assisted housing projects to avoid screening out senior applicants for federal housing assistance who have criminal records, HUD guidance can support increasing this population's access to assistance. More specifically, to address the discretionary choices associated with admissions and support PHAs and project owners in exercising discretion to help increase access to federally assisted housing for seniors with criminal records, HUD can expand its most recent guidance on the use of criminal records by housing providers to include greater protections for seniors.¹³⁰

The current guidance on criminal record screening describes the discriminatory effect criminal record screening can have on protected groups, with a focus on the discriminatory impact on racial and ethnic minorities.¹³¹ It also encourages housing providers to consider "such factors as the type of the crime and the length of the time since conviction" when determining whether to accept an applicant for housing assistance.¹³² To better protect seniors with criminal records, the guidance can be expanded to include encouragement for housing providers to consider the older age of the elderly applicants with criminal records and use their discretion to allow these seniors to access housing assistance.

Guidance that directs PHAs and Multifamily project owners to show greater consideration for seniors with criminal records instead of automatically screening them out of the opportunity to access housing assistance would help seniors seeking housing assistance. Under this updated guidance, PHAs and Multifamily project owners can implement their own plans to increase access to housing for seniors with criminal records. For example, they can partner with those who work with individuals with criminal records, such as correctional staff, public defenders, and community organizations that are working to reintegrate people with criminal records, to produce admission policies that allow for those individuals to access federally assisted housing.¹³³ Successful partnerships between PHAs and service providers have already been implemented in cities around the United States.¹³⁴ This is the kind of activity

¹³⁰ See U.S. DEP'T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1, 8–10 (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [<https://perma.cc/A2V6-ZF6B>].

¹³¹ *Id.* at 8–10.

¹³² *Id.* at 10.

¹³³ Community partnerships between service providers and property owners are discussed in greater detail in NAT'L HOUS. L. PROJECT, *supra* note 129, at 110–12.

¹³⁴ Cities (and other places) that have innovative partnerships between PHAs and service providers include Baltimore, Maryland; Oakland, California; Philadelphia, Pennsylvania;

that would be encouraged and be more likely to happen under HUD's expanded guidance.

The National Housing Law Project has also discovered particular PHA policies that increase access to housing for seniors with criminal records including:

- Individualized review of each applicant.
- Required consideration of mitigating circumstances and/or rehabilitation.
- Limit review of an applicant's criminal history to certain convictions and no arrests.
- Restrict inquiry into criminal history to a fixed period of time such as one or three years prior to the time of admission and/or make distinctions as to the time period depending upon the seriousness of the prior criminal activity. and
- Exclude any categorical bans aside from what is required by federal law.¹³⁵

Policies like these have a greater chance of being implemented when they are encouraged by HUD guidance.

Updating HUD guidance is the most achievable reform but also the least likely to maximize the necessary improvements to ensure seniors with criminal records can access federally assisted housing. It is the most achievable because it takes less time and uses fewer political resources than statutory changes, regulatory changes, or the creation of a new housing program. It can have a wider impact than litigation, which makes change more incrementally. On the other hand, much of HUD's guidance related to potential tenant evaluations and admissions criteria is advisory instead of mandatory.¹³⁶ This means that PHAs and Multifamily project owners might not actually be incentivized to make these changes and will instead continue to use harmful and unnecessary screening policies as they stick to the status quo.

C. Creating a New HUD Housing Program

Instead of only offering guidance, which may or may not be followed by PHAs or Multifamily project owners, HUD could also create a new housing program that specifically provides assistance to seniors with criminal records. Depending on where the new program's enabling authority comes from, a new program may not be subject to the same statutory and regulatory restrictions that

Los Angeles, California; New York City, New York; Chicago, Illinois; New Haven, Connecticut; Alaska; King County, Washington; Minneapolis, Minnesota; and Lawrence-Douglas County, Kansas. *Id.* at 112–15.

¹³⁵ *Id.* at 115 (footnotes omitted). Cities with PHAs that have implemented these policies include New Orleans, Louisiana; Cleveland, Ohio; and Somerville, Massachusetts. *Id.* at 115–16.

¹³⁶ WEISS, *supra* note 51, at 22.

current programs face, which could allow a way around the statutory and regulatory restrictions that limit access to federally assisted housing for seniors with criminal records.

A new program would also provide incentives to develop housing for seniors with criminal records because it would be accompanied with funding that PHAs and Multifamily project owners could use to create housing for the purpose of serving that population. This new program could be implemented under the existing Section 202 Program, which means it would still be subject to the existing statutes and regulations that Multifamily Housing Programs are subject to.¹³⁷ Even still, by incentivizing developers to create housing that is intended to serve the population of seniors with criminal records specifically, opportunities for members of this population to access housing will increase.

D. Change Through Litigation

As described in Part IV.B, HUD has issued guidance detailing the potential discriminatory impact that prohibiting people with criminal records from accessing housing assistance might have.¹³⁸ The Fair Housing Act prohibits discrimination on the basis of race, among other classes, from impacting a person's opportunity to access housing. Since racial disparities in incarceration, sentencing, and the collateral consequences associated with criminal records disproportionately impact people of color, cases alleging violations of the Fair Housing Act may be filed when seniors of color with criminal records are denied housing.¹³⁹ Change through litigation has been successful in the past and provides an incremental, individualized opportunity for reform.¹⁴⁰

¹³⁷ See *supra* Part II.B.1 for a discussion of the Section 202 Supportive Housing for the Elderly Program, which is a Multifamily Housing Program that provides capital advances to sponsors that finance the development of housing, thus providing a carrot for potential housing owners to be incentivized to create new housing opportunities for the purpose of serving seniors with criminal records.

¹³⁸ See *supra* Part IV.B for a discussion of HUD's guidance relating to using criminal records as a screening tool for housing applicants.

¹³⁹ *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> [<https://perma.cc/P4TD-H37L>] ("Although African Americans and Latinos comprise 29% of the U.S. population, they make up 57% of the U.S. prison population."). Thirty-three percent of African American men in the United States have a felony conviction on their record compared to only 8% of all U.S. adults who have a felony conviction. *Id.*

¹⁴⁰ NAT'L HOUS. L. PROJECT, *supra* note 129, at 117–19. ("When admission policies are overly restrictive and efforts to bring about administrative change are unsuccessful, litigation on behalf of clients may be advisable. Individual plaintiffs and groups or classes of plaintiffs have been successful."). Cities that have effectively utilized litigation as a means of reform include Atlanta, Georgia; New York City, New York; Old Town, Maine; and Washington, D.C. *Id.* at 117–19.

E. Recommendations for Future Research

Even though this Note focuses on the primary and secondary barriers that seniors with criminal records face when attempting to access housing assistance, there are also tertiary barriers that should be studied in future research. Tertiary barriers include those that are caused by more systemic challenges involving reentry for seniors and housing selection policies that act as barriers in addition to the barriers directly resulting from having a criminal record. These additional barriers could include bans based on credit score requirements, occupancy limits, intergenerational housing restrictions, and the definition of homelessness.¹⁴¹

Future research should also examine the housing options that are used by seniors but are not specifically tailored to the elderly. This includes the Housing Choice Vouchers Program (formerly Section 8), Project-Based Section 8 housing, and the Section 515 Rural Rental Housing Program.¹⁴² Beyond federal programs, there are also state and local housing assistance programs that provide housing assistance to seniors that can be studied.¹⁴³ The scope of future research could also expand beyond determining the access barriers faced by seniors with criminal records themselves. More should be learned about the barriers faced by seniors' family members with criminal records and the role that senior housing might play in contributing to or reducing those barriers.

¹⁴¹ See generally Sarina Trangle, *Credit Scores Yet Another Obstacle in the Quest for Affordable Housing*, CITY & STATE N.Y. (Feb. 19, 2016), <https://www.cityandstateny.com/politics/2016/02/credit-scores-yet-another-obstacle-in-the-quest-for-affordable-housing/180332/> [<https://perma.cc/HP97-X4DY>]; *Letter to the Editor: Occupancy Limitations for Rental Properties*, FIRSTTUESDAY J. (Feb. 26, 2019), <https://journal.firsttuesday.us/letter-to-the-editor-occupancy-limitations-for-rental-properties/66820/> [<https://perma.cc/7TUT-6Q46>]; OFF. OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., INTERGENERATIONAL HOUSING NEEDS AND HUD PROGRAM OPTIONS: REPORT TO CONGRESS (2008), <https://www.huduser.gov/portal/Publications/pdf/intergenerational.pdf> [<https://perma.cc/U4MW-HX6A>] ("With respect to the Section 202 and 811 programs, use of these programs to serve intergenerational families poses challenges. Among these challenges are the limited availability of two-or-more bedroom units within the existing stock of Sections 202 and 881 housing. Efficiency or one-bedroom units typically available under these two housing programs are disqualified for use for intergenerational families under the LEGACY Act." (footnote omitted)); NAT'L ALL. TO END HOMELESSNESS, CHANGES IN THE HUD DEFINITION OF "HOMELESS" (2012), <http://endhomelessness.org/wp-content/uploads/2012/01/changes-in-hud-definition-homeless.pdf> [<https://perma.cc/3JFQ-ZMHH>].

¹⁴² An April 2010 report describes that 17% of Section 8 Housing Choice Vouchers are used by senior citizens, 49% of Project-Based Section 8 units are occupied by elderly householders, and 58% of Section 515 Rural Rental Housing Program units are allocated to seniors. SERMONS & HENRY, *supra* note 33, at 6.

¹⁴³ *Id.* at 5.

V. CONCLUSION

As more seniors like William Morton are released from incarceration, they will need to find somewhere safe and affordable to live.¹⁴⁴ They may apply for federal housing assistance, though they may also find that their applications are rejected because of their criminal records.¹⁴⁵ Despite limited research in this area, it is clear that statutes and regulations unnecessarily create barriers that prevent seniors with criminal records from accessing federally assisted housing.¹⁴⁶ Statutes and regulations for public housing and Multifamily Housing Programs that serve seniors include two blanket bans for people convicted of manufacturing methamphetamine in federally assisted housing and people who are required to register as a sex offender for life.¹⁴⁷ Beyond those prohibitions, most barriers faced by seniors with criminal records result from the discretion taken by PHAs and Multifamily project owners who create and implement tenant selection policies.¹⁴⁸ Since the current discretion “exclude[s] a wide swath of people with criminal records without any reasonable basis to believe they may actually pose a risk,” changes must be made to ensure seniors can access the housing they need following a period of incarceration.¹⁴⁹

There are several avenues of reform to improve access to federally assisted housing for seniors with criminal records that align with the aims of the statutes that grant authority to establish federal housing assistance.¹⁵⁰ First, the language of statutes and regulations can be changed to remove or reduce the discretion PHAs and Multifamily project owners have to prevent seniors with criminal records from receiving assistance.¹⁵¹ Second, HUD can issue updated guidance to discourage the discretion from leading to high rates of automatic rejection for seniors with criminal records.¹⁵² Third, HUD could make a stronger impact by implementing a new program under Section 202 that provides assistance to seniors with criminal records specifically.¹⁵³ Fourth, advocates and attorneys can make change through litigation by bringing claims under the Fair Housing

¹⁴⁴ See *supra* Part I.

¹⁴⁵ See *supra* Part I.

¹⁴⁶ See *supra* Part II.

¹⁴⁷ See *supra* Part II.

¹⁴⁸ See *supra* Part II.

¹⁴⁹ CORINNE CAREY, HUM. RTS. WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 3 (Nov. 2004), <https://www.hrw.org/sites/default/files/reports/usa1104.pdf> [<https://perma.cc/SZ6Y-PR4P>].

¹⁵⁰ The key statutes that grant authority for the creation of federal housing assistance that have the possibility to assist seniors with criminal records are the United States Housing Act, Quality Housing and Work Responsibility Act, Supportive Housing for the Elderly Act, and National Housing Act. See *supra* Part II.

¹⁵¹ See *supra* Part IV.A.

¹⁵² See *supra* Part IV.B.

¹⁵³ See *supra* Part IV.C.

Act based on this issue's racially discriminatory impact.¹⁵⁴ Fifth, future research can expose, and offer recommendations to address, tertiary barriers to accessing federal housing assistance and examine opportunities to address this problem through housing options that are not specifically targeted to the elderly.¹⁵⁵

Seniors with criminal records will likely face a growing need to access federally assisted housing in the near future.¹⁵⁶ The current statutory, regulatory, and discretionary framework for PHAs and Multifamily project owners unnecessarily limits the opportunities for this vulnerable population to receive assistance. Reforms suggested in this Note can increase access to housing assistance, which will help seniors live safe and healthy housed lives after returning from incarceration. This is what William Morton and all seniors with criminal records deserve.

¹⁵⁴ See *supra* Part IV.D.

¹⁵⁵ See *supra* Part IV.E.

¹⁵⁶ See *supra* notes 9–17 and accompanying text.