Economic Impact Statement
Office of Legislative Oversight

BILL 49-20 — Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings

SUMMARY

The Office of Legislative Oversight (OLO) expects Bill 49-20 to provide a modest, targeted benefit to a small number of formerly homeless individuals who, in the process of seeking housing, are the victims of discrimination that is or may be the result of past arrests or convictions. OLO expects that the impact of Bill 49-20 would be a modest increase in costs for a broad set of housing providers who might incur costs related to changes to processes, training materials, or training curricula.

BACKGROUND

Bill 49-20 was introduced on December 8, 2020. The purpose of bill 49-20 is to mitigate housing discrimination and other impediments to permanent housing for certain individuals with past histories of arrests and convictions. Specifically, the bill would:

- prohibit a landlord from raising a stated rent in certain circumstances;
- require a rental application to contain certain information about record checks conducted by a housing provider;
- prohibit certain inquiries regarding criminal histories in rental housing applications;
- prohibit consideration of certain arrests and convictions in rental housing decisions; and
- generally amend the law regarding discrimination in housing and landlord-tenant affairs.[1]

A criminal record, or history of encounters with law enforcement and the judicial process, can present challenges to individuals and their households during the search for housing. The universe of affected individuals includes not only those who were convicted and incarcerated, but also those who were convicted and not incarcerated, those who pled guilty or nolo contendere to misdemeanor offenses, and those who were arrested but were not subsequently convicted.

The U.S. Department of Housing and Urban Development summarized the problem in the 2016 guidance from the Office of the General Counsel on the application of Fair Housing Act standards to the use of criminal records by providers of housing[2]:

> "When individuals are released from prisons and jails, their ability to access safe, secure and affordable housing is critical to their successful reentry to society. Yet many formerly incarcerated individuals who were convicted but not incarcerated, encounter significant barriers to securing housing, including public and other federally subsidized housing because of their criminal history. In some cases, even individuals who were arrested but not convicted face difficulty in securing housing based on their prior arrest."

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[1] Montgomery County Council, Bill 49-20, Human Rights and Civil Liberties – Discrimination in Rental Housing – Fair Criminal History and Credit Screenings, Introduced on December 8, 2020, Montgomery County, Maryland.

[2] U.S. Department of Housing and Urban Development, *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,* April 4, 2016.

The scale of the problem is difficult to quantify using federal data.[3] That said, the number of individuals who could potentially be affected by discrimination based on arrest or conviction records is substantial.

- By some estimates, more than one-half of all Americans has had at least one family member incarcerated.[4]
- In 2016, 91 million Americans (roughly two-fifths of the adult population of the United States) were included in the Interstate Identification Index, the Federal Bureau of Investigation (FBI) database used to determine whether someone has a criminal record. The number of individual offenders in the Maryland database of criminal history was more than 1.6 million in 2016, or more than a quarter of the total population of the State.[5]

A recent New York University Brennan Center study resulted in new estimates of some of the affected sub-populations: 7.7 million formerly imprisoned individuals nationwide; 12.1 million with felony convictions who were not sentenced to imprisonment; and 46.8 million convicted of misdemeanors.[6]

For many of these individuals, the existence of such records limits economic opportunities and negatively affects outcomes throughout their lives. For example, according to the Brennan Center's study:

- The impact of having been imprisoned is a 52% reduction in earnings;
- The impact of a previous felony conviction that did not result in imprisonment is a 22% reduction in earnings; and
- The impact of a previous misdemeanor conviction is a 16% reduction in earnings.

While these outcomes relate to earnings from employment, rather than the economic effects of housing discrimination, they illustrate the magnitude of the economic challenges facing individuals whose histories include past encounters with the criminal justice system.

Past studies of housing discrimination have generally focused on racial discrimination and have more commonly examined the for-sale market rather than the for-rent market. Many such studies illustrate that minorities are steered towards predominantly minority neighborhoods. Authors of one recent study[7] outlined the potential effects of such steering:

> *"If housing market discrimination constrains a household's choice set during a search, then discriminatory behavior will impact the likelihood that minority households locate in disadvantaged neighborhoods. A large body of evidence suggests that such constraints could impact labor market outcomes, educational attainment, criminal activity, physical safety and environmental health."*

The research is less clear on whether such steering occurs in the rental market, or whether the same dynamic is at play when the discrimination is primarily based on arrest or conviction rather than on race. Given that minorities are disproportionately affected by encounters with the judicial system, and that the negative outcomes associated with housing discrimination stem from a constrained set of location choices, the statement is probably also true for those who

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[3] See, e.g., Dr. Nicholas Eberstadt, "*America's Invisible Felon Population: A Blind Spot in US National Statistics,* Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data, 2019.

[4] FWD.us, *Every Second: The Impact of the Incarceration Crisis on America's Families*, 2019, https://everysecond.fwd.us/downloads/EverySecond.FWD.us.pdf.

[5] Becki Goggins and Dennis DeBacco. *Survey of State Criminal History Information Systems: A Criminal Justice Information Policy Report, 2016*. U.S. Department of Justice, Bureau of Justice Statistics, February 2018, Table 20, https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf

[6] Terry-Ann Craigie, Ames Grawert, and Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings.* Brennan Center for Justice at New York University School of Law, 2020.

[7] Peter Christensen and Christopher Timmins, *"Sorting or Steering: Experimental Evidence on the Economic Effects of Housing Discrimination,"* Working Paper 24826, National Bureau of Economic Research, October 2019.

have difficulty finding rental housing as a result of discrimination based on a history of arrests or convictions. The housing choices for such individuals are more likely to be in locations that are generally farther from jobs, not served by high quality schools, and that are less safe and less healthy than the housing options that would be available to a similar individual without a criminal background or history.

Bill 49-20 would prohibit a landlord from conducting a criminal record or background check of a prospective tenant until after a conditional offer of housing has been made to the prospective tenant. The bill would also prohibit inquiring into - or making decisions about - whether to rent to an individual based on a history that includes certain arrests or misdemeanors. Specifically, a landlord would not inquire into or consider whether the applicant has been arrested for a matter that did not result in conviction, or whether an applicant has an arrest record or a conviction record or has been accused of violations of several specific provisions of Maryland law.

METHODOLOGIES, ASSUMPTIONS, AND UNCERTAINTIES

OLO did not use any methodologies in this analysis. OLO assumes that the universe of County residents who have records of previous encounters with law enforcement or the judicial system is relatively large and consistent with the best available national statistics. OLO further assumes that a significant number of homeless individuals have previously been arrested or convicted of crimes. OLO cannot make any assumptions regarding the number of County or regional residents who have been arrested for or convicted of the specific Maryland crimes identified in Bill 49-20.

Uncertainties largely stem from the fact that there is so little information available regarding the number of individuals with arrest and conviction records, the geographic and socio-economic characteristics of those individuals, how frequently those individuals encounter housing discrimination generally, and how frequently housing discrimination is primarily based on arrest and conviction records rather than other characteristics (such as race, credit history, etc.).

Dr. Nicholas Eberstadt, author of *Men Without Work: America's Invisible Crisis,* provided insights regarding this "blind spot in U.S. National Statistics" in his 2019 testimony[8] to the Joint Economic Committee:

> *"What do we know about this huge contingent of people? Almost nothing. Age, sex, ethnicity, living arrangement, family situation, income, educational profile, health status, and all the rest of the data the US federal statistical system collects for our national population cannot be cross-referenced by arrest status..."*

For those with past felony or misdemeanor convictions, the impact on economic outcomes is even larger than it is for those with only arrest records. However, as with arrest records, the quality of the data has been a barrier to developing a better understanding of the problems faced by this population.

Furthermore, even the most current and relevant studies lack the granularity that would be necessary to estimate or quantify the potential impacts of local legislation. For example, while the 2016 *Survey of State Criminal History Information Systems* included the number of records in Maryland's database, those records relate to Maryland criminal records and not Maryland residency.

This legislation, in contrast, affects the population of potential Montgomery County renters, and many of the provisions in the legislation relate to violations of specific Maryland laws. Of course, even many of the renters with criminal records or histories may have been arrested for or convicted of violating the laws of other states, rather than simply the laws of

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[8] Dr. Nicholas Eberstadt, *America's Invisible Felon Population: A Blind Spot in US National Statistics*. Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data, 2019.

Maryland. Similarly, many of those who have previously encountered Maryland's judicial system may in fact reside in other States.

There is also overlap between the provisions of Bill 49-20 and existing laws. State and Federal law prohibit housing discrimination against members of a protected class.[9] This overlap makes it difficult to estimate the effect on economic outcomes for affected individuals, and difficult to estimate the effect of the legislation on the practices and policies of real estate providers.[10]

An additional source of uncertainty is the degree to which the "ban the box" approach will affect outcomes. It remains unclear whether the "ban the box" approach will result in improved outcomes for the intended beneficiaries of such laws rather than merely changing the policies and practices of housing providers.[11]

VARIABLES

The following variables could affect the economic impacts of the proposed legislation:

- The number of housing providers who reside in the County;
- Profit margins for housing providers who reside in the County;

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[9] See 42 U.S.C. §3601 *et seq.* and Maryland Code Annotated §20-702 *et seq.*

[10] The overlap is illustrated by the existing guidance from HUD regarding the application of the Fair Housing Act to the use of arrest and conviction records in housing. The U.S. Fair Housing Act prohibits housing discrimination in the sale, rental, or financing of dwellings and in other housing related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.[10] A decision not to rent to an individual on the basis of a past arrest or conviction may constitute a violation of the Fair Housing Act under certain circumstances. The following steps are involved in analyzing whether a policy or practice violates the Fair Housing Act:

- Step #1: In evaluating whether a housing provider is using criminal history in a manner that violates the Act, the first step is for the plaintiff to prove that the policy has a discriminatory effect. This burden is satisfied by proving that the practice actually or predictably results in a disparate impact on a group of persons because of their race or national origin.
- Step #2: Subsequently, the burden shifts to the housing provider to prove that the policy is necessary to achieve a substantial, legitimate, nondiscriminatory interest of the provider. To prove this, the housing provider must not only provide evidence proving that such an interest exists but must also show that the challenged policy actually achieves that interest.
- Step #3: Finally, if a housing provider is able to prove that its criminal history policy or practice is necessary to achieve its substantial, legitimate, nondiscriminatory interest, then the burden shifts back to the plaintiff who must show that such interest could be served by a different practice that has a less discriminatory effect.

Furthermore, housing discrimination against protected classes is also prohibited under Maryland law. Article ** of the Maryland Annotated Code makes it illegal to discriminate on the bases of race, color, religion, marital status, physical or mental disability, national origin, sex, or familial status. The Maryland Commission on Human Relations investigates and conciliates some housing discrimination complaints, while the Real Estate Commission enforces other relevant provisions of Maryland law.

[11] It is not yet clear to what extent "ban the box" laws positively affect economic outcomes. See, e.g., Christina Plerhoples Stacy and Mychal Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, Urban Institute, 2017. Plerhoples and Cohen conclude that while "ban the box" laws do increase callback rates for job applicants with arrest or conviction records, they do not increase the rate at which those individuals are hired. The authors summarize the research thusly: "[R]ecent research has concluded that ban the box also reduces the likelihood that employers call back or hire young black and Latino men…These findings suggest that when information about a person's criminal history is not present, employers may make hiring decisions based on their perception of the likelihood that the applicant has a criminal history. Racism, harmful stereotypes, and disparities in contact with the justice system may heavily skew perceptions against young men of color."

- The costs to business organizations associated with changing business processes and training materials for real estate professionals in order to ensure future compliance with the law;
- The cost of economic disruptions caused by being denied rental housing due to discrimination;
- The universe of re-housing options available to homeless individuals in the County; and
- The extent to which arrest and conviction records are used as a pretext, rather than as a basis, for making decisions regarding whether to rent to a particular applicant.

IMPACTS

WORKFORCE ▪ TAXATION POLICY ▪ PROPERTY VALUES ▪ INCOMES ▪ OPERATING COSTS ▪ PRIVATE SECTOR CAPITAL INVESTMENT ▪ ECONOMIC DEVELOPMENT ▪ COMPETITIVENESS

Businesses, Non-Profits, Other Private Organization

OLO believes that Bill 49-20 will have a small, negative economic impact on some private organizations in the County in the form of additional costs and changes to processes.[12] Rental housing managers, leasing agents, and landlords will need to modify some lease forms and business practices. It is also possible that the legislation will generate a need for some changes to continuing education curricula or training program literature for housing providers. The costs associated with those potential outcomes is modest and would be near-term in nature.

Housing providers currently face tort liability in certain circumstances when the criminal behavior of residents imperils other residents and may be subject to legal risks associated with potential tort liability if their property is deemed a public nuisance or danger to the neighborhood. To the extent that such liability exists, the costs associated with that liability would be of an ongoing nature. This legislation, and any resulting change to the practices of housing providers regarding criminal background checks, *may* result in additional legal risk for housing providers. State legislation could clarify the circumstances under which an aggrieved or injured party could bring a cause of action against a landlord who is making a good faith effort to balance their duty to their residents and their obligation to comply with local law.

Residents

OLO is not able to quantify the economic impact on individuals for several reasons. It is not possible to quantify the incidence or prevalence of discriminatory pre-leasing practices, nor is it possible to quantify the extent to which a change in local law would reduce the frequency at which discriminatory practices occur. Furthermore, in the absence of research that separates the effects of housing discrimination from other forms of discrimination, it is not possible to estimate the potential long-term cost to individuals that is associated with being the victim of housing discrimination. As such, OLO cannot quantify the extent to which the prohibitions in Bill 49-20 will mitigate the negative economic outcomes associated with these specific discriminatory practices.

That said, OLO believes that the legislation will have a positive, targeted impact on the economic well-being of a small number of individuals or households. The magnitude of that impact could be substantial for the limited universe of individuals who otherwise might have been subjected to housing discrimination based on a history that includes past arrests or convictions.

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[12] For the Council's priority indicators, see Montgomery County Council, Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments, Enacted on July 30, 2019, Montgomery County, Maryland, 3.

While it is not possible to accurately estimate how many County residents are potentially affected, the Brennan Center study provides a basis for some order-of-magnitude illustrations. That study found that 7.7 million living Americans had been imprisoned, 12.1 million had been convicted of felonies but not imprisoned, and 46.8 million had been convicted of misdemeanors. If those individuals were distributed proportionately on the basis of population, the Montgomery County figures would be roughly:

- 25,000 formerly imprisoned individuals
- 39,000 individuals with felony convictions who have not been imprisoned
- 150,000 individuals with misdemeanor convictions

Together, those groups would constitute 20% of the County's population. The bill's sponsors intend for the legislation to specifically address the challenges faced by homeless individuals. According to the most recent "point-in-time" count, the homeless population of the County in 2019 was 647 individuals (including 441 individuals and an additional 206 people who belong to 61 family units).[13] While it is not clear what percentage of those individuals have previously been arrested or convicted, it is safe to assume that the number is high.[14]

It is difficult to provide an accurate estimate of the portion of those individuals who might be the subject of housing discrimination of any kind during a year, though recent experience indicates that a relatively small number of such cases are reported to the Office of Human Rights.[15]

QUESTIONS FOR CONSIDERATION

OLO recommends clarifying whether the Office of Human Rights needs additional legislative authority to investigate claims of housing discrimination on the basis of arrest or conviction records, or whether the Office simply needs new screening criteria for determining whether such claims fall within their existing jurisdiction, or new policies related to pursuing cases of housing discrimination on the basis of arrest or conviction records when the victim is a member of a protected class.

WORKS CITED

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Eberstadt, Dr. Nicholas. *America's Invisible Felon Population: A Blind Spot in US National Statistics*. Statement before the Joint Economic Committee on the Economic Impacts of the 2020 Census and Business Uses of Federal Data. 2019.

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[13] Montgomery County's point-in-time survey is conducted annually. The most recent point-in-time survey for which data is available was conducted on January 23, 2019. For more information see https://www.montgomerycountymd.gov/homelessness/numbers.html

[14] For example, in 2011, the Men's Shelter of Charlotte (North Carolina) surveyed its clients in an effort to ascertain to what extent those clients had previously experienced arrests and convictions. In that survey, 75 of 96 men surveyed responded that they had been arrested at least once (78.1%). Forty respondents had spent time in either State or Federal prison.
http://www.mensshelterofcharlotte.org/wp-content/uploads/2014/01/Criminal_History_2011.pdf

[15] In response to our inquiry, the County's Office of Human Rights indicated that they have 44 current claims of housing discrimination of any kind against members of protected classes.

FWD.us. Every Second: The Impact of the Incarceration Crisis on America's Families. 2019. https://everysecond.fwd.us/downloads/EverySecond.FWD.us.pdf.

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CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent OLO's endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

Jacob Sesker, contractor for OLO, prepared this report with contributions from Stephen Roblin (OLO).