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## Tenant Screening Thirty Years Later: A Statutory Proposal To Protect Public Records

**ABSTRACT.** Most consumers learn about tenant-screening reports only when a landlord points to an item on such a report as the reason for rejecting an application and provides the tenant with a copy of that report as required by law. Legal scholars have criticized these reports for more than thirty years, however, observing that they are prone to error, open to abuse, and generally contrary to established public policies. This Note examines existing mechanisms used to regulate these reports and finds them inadequate, endorsing instead one state's approach of "choking" information flows by disclosing eviction records only when the landlord prevails in court. In a digital age in which personal information is easily aggregated, court records should not be a vehicle for automatic damage to an individual's renting prospects and reputation.

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## INTRODUCTION

*[W]ith the advent of the computerized consumer reporting industry, it has become possible [for landlords] to purchase a great deal of tenant information that would otherwise be too expensive or impractical to obtain.*<sup>1</sup>

The trend of gathering information about tenants, which began to raise eyebrows almost thirty years ago, has continued to grow in magnitude and concern.<sup>2</sup> Today, landlords regularly purchase “tenant-screening reports”<sup>3</sup> that chronicle landlord-tenant disputes<sup>4</sup> and court filings, often regardless of their outcomes.<sup>5</sup> Indeed, the tenant-screening industry has mushroomed in recent years. Informal estimates suggest that as many as 650 companies provide tenant-screening reports,<sup>6</sup> and a recent trend toward consolidation<sup>7</sup> means that

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1. Robert W. Benson & Raymond A. Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 LOY. L.A. L. REV. 301, 304 (1979).
  2. Legal scholars have described the mechanisms of tenant-screening reports, decried their effects, and proposed statutory solutions to deal with them. See, e.g., Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000); Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 SW. U. L. REV. 1077 (1995); Cheryl M. Sheinkopf, Comment, *Balancing Free Speech, Privacy and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 44 UCLA L. REV. 1567 (1997); Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239 (1987). The popular press also has criticized these reports. See, e.g., *infra* notes 7, 20.
  3. Though the phrases are often used interchangeably, I use “tenant-screening reports” for reports summarizing involvement in landlord-tenant disputes and eviction actions and “credit reports” for reports on consumers’ borrowing history and creditworthiness.
  4. Landlords can report this information directly, discussing anything from the timeliness of past rent payments to “past and current experience with the applicant.” FIRST ADVANTAGE SAFERENT, NATIONAL REGISTRYCHECK 4 (2006), available at [http://www.fadvsafere.com/products\\_services/ebrochures/ebrochure\\_registrycheck.pdf](http://www.fadvsafere.com/products_services/ebrochures/ebrochure_registrycheck.pdf). First Advantage SafeRent advertises that its database of landlord-tenant records, “the industry’s largest,” includes not only “past court actions” and “prior landlord inquiries” but also “landlord-reported history.” *Id.* at 3-4.
  5. Tenant-screening reports usually recite any eviction action filed, regardless of whether it is still pending or who prevailed. Yet a recent class action forced one of the nation’s largest tenant-screening agencies, First American Registry (FAR), to stipulate in a settlement that it would change several features of these reporting practices. *White v. First Am. Registry, Inc.*, No. 04 Civ. 1611, 2007 WL 703926 (S.D.N.Y. Mar. 7, 2007); see also *infra* note 75 and accompanying text.
  6. See Keat Foong, *Automation Takes Subjectivity Out of Tenant Selection Process*, MULTI-HOUSING NEWS, Sept. 2006, at 72, available at [http://www.multi-housingnews.com/multihousing/reports\\_analysis/feature\\_display.jsp?vnu\\_content\\_id=1003087265](http://www.multi-housingnews.com/multihousing/reports_analysis/feature_display.jsp?vnu_content_id=1003087265).

many of these companies provide reports with national scope. The ease with which these reports are obtained means that landlords increasingly rely on them at the first stage of their selection process to separate out potential bad apples. As one seller of these reports recently told the *New York Times*,

It is the policy of 99 percent of our [landlord] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is, because if their dispute has escalated to going to court, an owner will view them as a pain . . . .<sup>8</sup>

In an ideal world, tenant-screening reports would help landlords know which tenants are more likely to fall behind on their rent payments, commit waste, or irritate their neighbors.<sup>9</sup> With good intentions, both landlords and municipalities have looked to tenant-screening reports as a potential miracle cure both for the landlord's private fear of fair housing lawsuits (by providing an objective reason to deny an application)<sup>10</sup> and for society's public problems of crime and drug use.<sup>11</sup>

But the truth is that tenant-screening reports create at least as many problems as they solve. As I elaborate in Section I.B, these reports may contain errors, are open to abuse, and may even work against democratically endorsed public policies. Therefore, for reasons of both justice and economic efficiency, I

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7. See Leta Herman, *Landlords Take Tenant-Screening Beyond Credit Check*, L.A. TIMES, June 25, 2000, at K14 ("Reporting agencies that provide resident screening are consolidating across the nation . . .").
  8. Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES, Nov. 26, 2006, § 11 (Real Estate), at 1 (quoting Jake Harrington, founder of On-Site.com).
  9. To the extent that these reports accurately reflect tenant-worthiness, landlords rightly consider them a necessity when selecting tenants, and the reports are efficiency-enhancing from an economic standpoint. See Benson & Biering, *supra* note 1, at 302; see also Richard A. Posner, *An Economic Theory of Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 333 (Ferdinand David Schoeman ed., 1984); Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 174-76; Stauffer, *supra* note 2, at 270 & nn.141-42.
  10. See Foong, *supra* note 6.
  11. See, e.g., Brian Meyer, *Taking Aim at Problem Tenants, Landlords: Training Programs for Both Suggested*, BUFFALO NEWS (N.Y.), Dec. 26, 2006, at B1 ("[A city council member] thinks many neighborhoods would see improved conditions if problem landlords were required to attend sessions that focus on screening tenants, recognizing signs of drug activity and the eviction process."); Leonor Vivanco, *For Some, Apartments Mean Crime*, INLAND VALLEY DAILY BULL. (Ontario, Cal.), Oct. 9, 2006, at B1 ("City officials said a police-administered crime-free, multi-housing program to train apartment managers on tenant screening and evictions as well as design standards to reduce the possibility of crime is working.").

believe that there are items that these reports should and should not include. An actual eviction for nonpayment of rent would be a legitimate item, but an unmeritorious lawsuit brought by a landlord solely for “arm-twisting” would not.<sup>12</sup>

Errors in tenant-screening reports—the first problem noted above—arise from the practical limitations in the methods agencies use to compile their reports<sup>13</sup> as well as from a market that tolerates or even rewards inaccuracy in the direction of overinclusive reports. And even accurate reports can be misleading. For example, most eviction actions end in settlement,<sup>14</sup> yet judgment routinely enters in the landlord’s favor for procedural reasons,<sup>15</sup> meaning that a report might appear more negative than it should.<sup>16</sup> Furthermore, many court records are either unclear or simply incomplete with regard to the disposition of cases.<sup>17</sup>

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12. Legislatures routinely make such value judgments in other consumer reporting contexts. For example, federal law prohibits credit reports from mentioning a bankruptcy that is more than ten years old. See 15 U.S.C. § 1681c(a)(1) (2000). Indeed, these normative commitments are the most plausible legislative intent that can be inferred from recent amendments to California’s law prohibiting the dissemination of eviction records if the tenant prevails in court. See *infra* notes 118–119 and accompanying text.

13. See *infra* Subsection I.B.1.

14. See, e.g., Spector, *supra* note 2, at 185; see also *infra* note 45 and accompanying text.

15. See, e.g., Spector, *supra* note 2, at 185 (“A study in the District of Columbia reported that although most of the 69,000 [eviction] complaints filed in 1989 resulted in negotiated settlements prior to trial, courts routinely entered a judgment for the landlords.” (citing U.S. GEN. ACCOUNTING OFFICE, DISTRICT OF COLUMBIA: INFORMATION ON COURT-ORDERED TENANT EVICTIONS 14 (1990), available at <http://archive.gao.gov/d21t9/143093.pdf>)).

If a settlement does not work out, the landlord usually can evict her tenant more quickly if judgment already entered in the landlord’s favor under the stipulated agreement. See, e.g., Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385, 427 (1995) (describing how settlements typically work in Connecticut); SUPERIOR COURT, STATE OF CONN. JUDICIAL BRANCH, A LANDLORD’S GUIDE TO SUMMARY PROCESS (EVICTION) 8 (2004), <http://www.jud2.ct.gov/webforms/Publications/landlordguide.pdf>.

16. At least one state supreme court identified these “collateral” effects on rental prospects as sufficient cause to revisit an eviction case and reopen such a judgment. In *Housing Authority v. Lamothe*, 627 A.2d 367 (Conn. 1993), the court allowed a defendant who had stipulated to an eviction judgment (and had moved out) to reopen that judgment over an objection of mootness. The court held that allowing the judgment to stand would have “potentially prejudicial collateral consequences to the defendant”—in particular, it “could have [a] lasting negative impact upon her ability to be eligible for low income subsidized housing.” *Id.* at 371.

17. A Westlaw search of the “ud-all” and “ls-all” databases revealed that, while some court records provided plenty of information about disposition, others provided very little. These

Second, screening reports are open to abuse not only because they make the threat of an eviction action a stronger tool for disciplining tenants (because the action will be “reported”) but also because the item on the report is fundamentally a description of the landlord’s actions<sup>18</sup> (whether she filed an eviction) instead of the tenant’s actions.<sup>19</sup> Reports of such abuse are frequent in the media and in scholarship on tenant-screening reports.<sup>20</sup> The following “advisory” letter from a landlord to a tenant demonstrates the opportunity for abuse inherent in tenant-screening reports:

[W]e now subscribe to a service that records all filings on [eviction] actions. As this service is used by landlords, it will be impossible, in the future, to rent an apartment if you have been served a legal action. We are advising you of this, as the failure to pay your rent on time[] will result in your name being placed in the file, and you will be unable to secure any apartment in the future.<sup>21</sup>

While that threat might sound exaggerated, recent press accounts suggest that it is not. In New York City, vacancy rates are low (less than 1%) and landlords “can afford to be picky.”<sup>22</sup> A recent *New York Times* article stated that at least 20% of apartment applicants in Manhattan received a “reject” rating from a

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two databases represent “unlawful detainer” (eviction) filings for many states and lawsuit filings for many more states, although they are by no means complete even for the states included.

18. The fact that landlords can act unilaterally to blacklist a tenant distinguishes tenant-screening reports from other reports that seek to establish a person’s honesty or reputation, such as credit reports.
19. It does not appear that other kinds of landlord-tenant disputes, such as over housing conditions, are typically included on tenant-screening reports.
20. Tenant-screening reports effectively allow landlords to “blacklist” a tenant unilaterally. See, e.g., Benson & Biering, *supra* note 1, at 308 n.48, 309 n.57 (citing two examples of journalistic coverage in the late 1970s); Williams, *supra* note 2, at 1082 n.17 (collecting news articles about privacy and tenant-screening agencies or reporting practices); Stauffer, *supra* note 2, at 265-67; Dennis Hevesi, *When the Credit Check Is Only the Start*, N.Y. TIMES, Oct. 12, 2003, § 11 (Real Estate), at 1; Motoko Rich, *A Blacklist for Renters*, N.Y. TIMES, Apr. 8, 2004, at F1; Rogers, *supra* note 8 (“Renters are presumed litigious if they stopped paying rent to a slumlord or even if they acquired a court record by mistake.”); *CBS Evening News: Landlords Blacklist Former Tenants* (CBS television broadcast May 21, 2004) (“It happens more than you may know. The landlord threatens to evict you; you settle and stay. But the story doesn’t end there. When you decide to move, no one will take you as a new tenant.”).
21. Benson & Biering, *supra* note 1, at 301.
22. Rogers, *supra* note 8.

tenant-screening agency and, furthermore, that “a history of litigation against a prior landlord usually triggers automatic disqualification.”<sup>23</sup>

Finally, tenant-screening reports may be contrary to established public policy because, while many legislatures have passed laws to protect tenant rights during disputes with their landlord,<sup>24</sup> these reports punish a tenant who chooses to vindicate those rights in court. Legislatures also have regulated consumer reports to improve accuracy,<sup>25</sup> but those regulations alone do not prevent the misleading items that are swept up in overinclusive reports. And even if the tenant successfully invokes the protections granted by the legislature and wins the summary process action, her mere involvement in an eviction action might significantly diminish her future chances of finding housing.<sup>26</sup>

Three strategies have evolved to deal with the problems of tenant-screening reports and credit reports in general. The first strategy is to require that any disseminated information be accurate. Failing that, the second strategy is for legislatures simply to prohibit reporting agencies from disseminating certain types of information regardless of whether it is accurate. The third strategy—the least common but the one I ultimately endorse—is to restrict the release of government records to the reporting agencies in the first place.

Most legislatures regulating tenant-screening reports have focused on the first strategy of ensuring the accuracy of the information disseminated by reporting agencies. At the federal level, even though it focuses primarily on credit reports, the Fair Credit Reporting Act (FCRA) already provides mechanisms for tenants to correct errors,<sup>27</sup> including the right to be informed

23. *Id.*

24. For example, the Uniform Residential Landlord and Tenant Act recognizes an implied warranty of habitability and allows tenants involved in an eviction action to counterclaim if the premises are uninhabitable. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (URLTA) §§ 2.104, 4.105 (1974), <http://www.law.upenn.edu/bl/ulc/fnact99/1970s/urlta72.pdf>. According to the National Conference of Commissioners on Uniform State Laws, twenty-one states have adopted the URLTA. Unif. Law Comm’rs, A Few Facts About the Uniform Residential Landlord and Tenant Act, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-urlta.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urlta.asp) (last visited Mar. 13, 2007).

25. See *infra* Section II.A.

26. Relatively few good empirical studies exist on evictions, see *infra* note 39 and accompanying text, and even less research exists on the impact of tenant-screening reports, with no studies quantifying the effect of negative items on a tenant’s future rental prospects, see, e.g., HousingLink, Tenant Screening Agencies in the Twin Cities: An Overview of Tenant Screening Practices and Their Impact on Renters 41 (2004), [http://www.housinglink.org/adobe/reports/Tenant\\_Screening.pdf](http://www.housinglink.org/adobe/reports/Tenant_Screening.pdf) (recommending “a study to identify the type and extent of inaccuracies in tenant screening reports,” and noting that “it is likely that a study of this nature would have value beyond the Twin Cities”).

27. See 15 U.S.C. §§ 1681–1681x (2000 & Supp. IV 2004); see also *infra* Section II.A.

of decisions that rely on an adverse report, to obtain a copy of the report, to dispute items, and to add notes to their files.<sup>28</sup> Yet tenants usually do not learn of erroneous information in their tenant-screening reports until after they have been denied housing, limiting the usefulness of these measures.<sup>29</sup> Moreover, abuse remains a problem, and public policy goals are still frustrated.

States also have pursued the second strategy—prohibiting agencies from disseminating certain types of information. For example, California passed a law in the early 1980s prohibiting tenant-screening agencies from reporting on eviction actions unless the tenant lost in court.<sup>30</sup> But this approach forces states to strike a difficult balance between First Amendment values on the one hand and empowering tenants on the other.<sup>31</sup> The approach also may be ineffective; one tenant-screening agency announced its intent to circumvent the California law by not disseminating the prohibited information and instead simply opining that landlords should “reject this applicant.”<sup>32</sup>

This Note endorses the third strategy of having courts withhold information on eviction actions until the landlord prevails in court—an approach that has been used in California for more than fifteen years.<sup>33</sup> It has

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28. 15 U.S.C. §§ 1681c(f), 1681i, 1681j(b). As elaborated *infra* Part II, however, those rights are largely insufficient to meet the problems that tenant-screening reports create.

29. See, e.g., Richard Lee Colvin, *Court Limits Data in Eviction Cases That Firm Can Tell to Landlords*, L.A. TIMES (Valley ed.), May 31, 1989, § 2 (Metro), at 8 (“Her efforts were being thwarted, unbeknown[st] to her, by a report on file with a Van Nuys landlord information service . . .”).

30. See *infra* Subsection II.B.1.

31. A California appellate court ruled that the First Amendment’s free speech guarantees trumped other policy goals and held that this law was unconstitutional. See *infra* note 114 and accompanying text; see also Sheinkopf, *supra* note 2. But see David Pallack, *California Perspectives on Tenant-Screening Agencies*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 343, 343–45 (2005) (suggesting that recent changes in the California Supreme Court’s interpretation of commercial speech have altered the legal foundation for that holding and that the law, which has stayed on the books, is arguably once again constitutional).

32. Pallack, *supra* note 31, at 343 n.4 (emphasis omitted). Such an evaluation could be even more damaging when landlords rely exclusively on the tenant-screening reports. Some landlords do this because they believe that tenant-screening reports provide an objective basis on which to deny an application and avoid a fair housing lawsuit. The report’s score “tells us what to do and we do it. There is no discrimination as everyone is judged the same way . . .” Foong, *supra* note 6 (quoting Diana Pittro, executive vice president of RMK Management Corp.).

33. The California statute falls short in at least one respect: it only seals court records for sixty days after the initiation of the action (unless the tenant prevails within that period, in which case the records are permanently sealed). See *infra* notes 116–119 and accompanying text.



also been endorsed by a judge in that state<sup>34</sup> and suggested, in the abstract, by the Supreme Court.<sup>35</sup> But thus far the strategy has received little scholarly discussion,<sup>36</sup> and no other states have pursued this approach.

The strategy of limiting access to sensitive information would be more effective at curtailing abuse than an accuracy-based approach, while it poses fewer constitutional issues than does a censorship-based approach. Under this proposal, it would become logistically easier for tenant-screening agencies to document cases in which landlords prevailed than those in which tenants prevailed or the parties settled.<sup>37</sup> But courtrooms would remain open and their records available to the parties in eviction lawsuits, their designees, journalists, and others upon a showing of good cause.

Part I of this Note describes the real-life effects of tenant-screening reports and the abusive behavior they enable and engender. Part II discusses existing statutes that seek to regulate these reports. Part III outlines the proposed statutory strategy and offers reasons why such statutes would be theoretically justified under principles of efficiency, privacy, legislative discretion, and judicial discretion, as well as fairness and basic practical concerns. Part III also examines parallels in the criminal context (in which records are often expunged based on the outcome of the trial) and mounts a defense of outcome-based record disclosure against criticisms that it would violate the First Amendment or principles of open government.

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34. See *U.D. Registry v. State*, 40 Cal. Rptr. 2d 228, 232 (Ct. App. 1995) (“If the state is concerned about dissemination of this [eviction record] information, it has the power to control its initial release.”); see also *infra* notes 114-115 and accompanying text.

35. See *infra* notes 169-173 and accompanying text.

36. The little scholarship to consider the possibility of sealing court eviction records concludes that “[i]n some federal districts, a statute banning access to civil court records, such as unlawful detainer [i.e., eviction] records, would violate the First Amendment.” Sheinkopf, *supra* note 2, at 1603. Putting aside the question of whether Cheryl Sheinkopf is correct about precedent in those circuits (she appears to have conflated access to civil *proceedings* with access to civil *records*, see *id.* at 1603 & n.165), she is incorrect that sealing records in certain types of cases “would violate the First Amendment,” *id.* at 1603. That rule would be inconsistent with the well-established practices of placing cases under seal and expunging court records when other values (e.g., privacy, public safety, or fairness) justify it. See, e.g., *infra* notes 155-158, 179-188 and accompanying text.

37. Of course, tenant-screening agencies still would be free to learn about and report on other eviction actions simply by communicating with landlords directly, but the added costs would likely deter that behavior. See *infra* notes 81-84 and accompanying text.

## I. EVICTIONS, TENANT SCREENING, AND THE PROBLEMS OF TENANT-SCREENING REPORTS

### A. *The Realities of Eviction*

Tenant-screening reports place great emphasis on past evictions, partly because they are intuitively significant to landlords and partly because evictions are easier to canvas than more detailed rental references. Though evictions have not been the subject of much empirical research, the rental housing market is dominated by low-income tenants,<sup>38</sup> and a few state and municipal studies have shown that evictions disproportionately affect the poor, women, and racial and ethnic minorities.<sup>39</sup> It stands to reason, then, that the nation's poor and marginalized populations also suffer the brunt of the harm caused by erroneous or abusive tenant-screening reports.<sup>40</sup> The effects of tenant-screening reports are all the more difficult to measure because eviction procedures themselves vary greatly from state to state.<sup>41</sup> Given the scarcity of empirical data, the following statistics draw almost exclusively from Connecticut, both because I have been able to obtain court records on evictions for this state and because New Haven evictions are among the best documented in the country.<sup>42</sup>

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38. For example, fully 25% of rented housing units are occupied by households living below the federal poverty level, and more than half of the occupants of rented housing earn less than twice the poverty level. See U.S. DEP'T OF HOUS. & URBAN DEV. & U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005, at 226 & tbl.4-12 (2006), available at <http://www.census.gov/prod/2006pubs/h150-05.pdf>.

39. See, e.g., Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 467-68 (2003), available at [http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd\\_1404\\_hartman.pdf](http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1404_hartman.pdf) (collecting data from numerous localized studies on eviction).

40. See *id.* at 461.

41. Simply identifying the court in which evictions are filed can be tricky. In Connecticut, for example, most but not all evictions are filed in a special "Housing Session" of the superior court that keeps all of its own records. See CONN. GEN. STAT. § 47a-70 (2007). Other states process evictions in the everyday municipal courts, and still others allow evictions with small dollar amounts to proceed in small claims court. See MARCIA STEWART ET AL., EVERY LANDLORD'S LEGAL GUIDE 396 (8th ed. 2006) (listing twenty states where landlords may file eviction actions in small claims court or its equivalent).

42. See, e.g., Gunn, *supra* note 15; Note, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973); Robert Daines, *Landlord-Tenant Litigation and the Impact of Free Legal Services* (1991) (unpublished manuscript, on file with author); Michael D. Gottesman, *End Game: Understanding the Bitter End of Evictions* (Dec. 20, 2006) (unpublished manuscript, on file with author).

Despite variation, eviction procedures in every state allow a landlord to recover possession of the subject premises on an accelerated timeline as compared with a normal civil case. For this reason, many eviction statutes are called “summary process” statutes, although in some states the actions are also known as “unlawful detainer” suits. Most evictions occur for nonpayment of rent,<sup>43</sup> but a landlord may seek a summary process remedy under other conditions, such as holdover (when the lease has terminated but the tenant remains on the premises), serious nuisance, and breach of lease provisions.<sup>44</sup>

Just as in other kinds of litigation, the majority of landlords and tenants end up settling their differences without a court decision. In Connecticut, “nearly all contested cases are successfully settled.”<sup>45</sup> (Of course, many are not even contested.) The rest are mostly dismissed or withdrawn. In Connecticut, judgments by default for failure to appear are the second most common disposition, occurring in about one-third of cases,<sup>46</sup> and they might be even more common in other states.<sup>47</sup> Defaults might be so frequent because tenants move out and choose to ignore the summons or because they pay up and agree

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43. See, e.g., Gunn, *supra* note 15, at 389, 397 tbl.7 (citing an unpublished study that found that 97% of eviction actions were brought for nonpayment of rent, and reporting new findings that nonpayment was alleged in 93% of cases in which the tenant was unrepresented and in 86% of cases in which the tenant was represented by a legal services organization).
  44. However, “[t]he fact that the landlord has a right to terminate under the terms of the lease and has elected to do so does not necessarily mean that he can avail himself of the summary process statute.” DAVID S. HILL, LANDLORD AND TENANT LAW IN A NUTSHELL 59 (4th ed. 2004).
  45. CITIZENS ADVISORY COUNCIL FOR HOUS. MATTERS, REPORT TO THE GENERAL ASSEMBLY 4 (2005), [http://www.ct.gov/ecd/lib/ecd/housing\\_reports/cac-2005\\_full\\_report.pdf](http://www.ct.gov/ecd/lib/ecd/housing_reports/cac-2005_full_report.pdf) (summarizing “at least five detailed reports” over the last twenty years that measured processing speed and outcomes in Connecticut housing cases).
  46. For example, a survey I conducted of cases brought in Connecticut’s specialized housing courts found that, in their initial disposition, 39% were settled, 33% were won by the landlord after the tenant failed to contest the matter (either by neglecting to file an appearance in the case or by failing to appear on her actual court date), 11% were withdrawn, 7% were dismissed or dormant, and 10% fell in other categories. See Rudy Kleysteuber, Repeat Play in Connecticut Evictions: A Quantitative and Qualitative Analysis 18-19 (Jan. 26, 2007) (unpublished manuscript, on file with author). The survey spanned a time period from when those courts began keeping their records electronically (ranging from March 1997 for the earliest adopter to June 2005 for the latest) through April 2006. Percentages were calculated out of 79,754 total docket entries (3603 of which had no disposition coded and were presumably still active). Other categories included judgment for the landlord, judgment for the landlord via default for the tenant’s failure to plead, transfer to another court, sua sponte dismissal, and execution issued at trial.
  47. See Hartman & Robinson, *supra* note 39, at 478 n.16 (collecting literature to show that nearly half of all defendants default in California, 42% in Chicago, 35% in Hartford, and 31% in Massachusetts).

with landlords to ignore the court filings. Stipulated settlement is the most common method of disposition, but these settlements usually enter as judgments for the landlord. Even though landlords received a judgment in their favor in more than 75% of all cases, they pursued that judgment to execution (actual removal of the tenant) less than one-third of the time.<sup>48</sup>

The fact that such a low percentage of cases ends in execution illustrates an important point: even though a judgment was entered in the landlord's favor, the dispute may have ended on amicable terms. Landlords often will file a summary process action to command the tenant's attention and effect a quick resolution. When the parties stipulate to a judgment in the landlord's favor, the landlord is entitled to a quick eviction if the tenant does not keep her word. The original dispute—whether about unpaid rent, damage or nuisance, or a simple lease violation—is therefore resolved to the landlord's satisfaction. This is why many landlords, such as housing authorities, file an eviction as soon as a rental payment is late, even if they have no expectation of seeing the eviction through: they simply want insurance in case the tenant's late payment is part of a larger problem. Once the tenant pays up (with a penalty, perhaps, for court filing fees), she could be reinstated as a tenant in good standing.

Indeed, perhaps so few cases end in eviction because landlords use the process (except when filing fees are too high) simply to apply more pressure on a tenant to pay her rent. The threat of eviction is thus “a way to up the ante to let the tenant know that [landlords] are serious,” although “[i]n most of those cases, [tenants] work out some agreement to begin paying.”<sup>49</sup>

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48. An execution is an order authorizing removal unless the tenant vacates before the marshal can come. Out of all the cases in my dataset, the status field for only 20.4% indicated that the case was “Disposed: Execution Issued.” See Kleysteuber, *supra* note 46. It appears that the “disposition” field is intended to capture the legal disposition of the case, while the “status” field is intended to capture the current state of the proceedings. Thus, while 0.2% of cases have a *disposition* of “Disposed: Execution Issued,” whereby the housing judge issued an execution as part of the judgment, 20.4% of all cases eventually reached a *status* of “Disposed: Execution Issued.”

In Connecticut, judgments entered in the landlord's favor usually are accompanied by an automatic five-day stay of execution, after which the landlord or her agent must appear personally in the clerk's office and obtain the execution order (as long as the tenant has not applied for an additional extension of time). SUPERIOR COURT, *supra* note 15, at 7-8.

49. Rebecca Webber, *Evictions*, GOTHAM GAZETTE (N.Y.), Nov. 12, 2001, <http://www.gothamgazette.com/iotw/affordhousing/doc1.shtml> (quoting Frank Ricci, director of governmental affairs for the Rent Stabilization Association of New York City).

### B. Tenant Screening and Its Problems

Although tenant-screening reports often take tenants by surprise, landlords—especially professional or experienced ones—are generally quite familiar with them<sup>50</sup>: “Many landlords find it essential to check a prospective tenant’s credit history with at least one credit reporting agency . . . .”<sup>51</sup>

In addition to the nationally known credit reporting agencies, scores of companies of varying sizes claim to cull local court records and build tenant-screening databases to offer a landlord insight into a tenant’s desirability.<sup>52</sup> Although some of these databases purport to contain positive payment history information for tenants who pay their rent on time,<sup>53</sup> these screening reports are widely recognized as vehicles for almost exclusively negative information about the person under investigation.<sup>54</sup> A typical tenant-screening report includes a standard credit report (with information about missed or late payments to creditors, money judgments, and bankruptcies, among other things), a criminal background check, and a listing of possible eviction actions against the individual (either local or national in scope).<sup>55</sup>

The largest of the tenant-screening report companies appears to be First Advantage SafeRent,<sup>56</sup> which now owns California’s U.D. Registry and other tenant-screening firms that once operated on a regional basis.<sup>57</sup> First Advantage has at least forty offices nationwide, and “[m]ore than 30,000 properties,

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50. The first chapter of a popular legal self-help guide for landlords, for example, is titled “Screening Tenants: Your Most Important Decision.” STEWART ET AL., *supra* note 41, at 5.

51. *Id.* at 17; see *supra* notes 3–9 and accompanying text.

52. For an outdated but extensive list of tenant-screening companies, see U.S. Pub. Interest Research Group, PIRG Identity Theft II: Return to the Consumer X-Files app. B (Sept. 1997), [http://www.pirg.org/reports/consumer/xfiles/app\\_b.htm](http://www.pirg.org/reports/consumer/xfiles/app_b.htm).

53. See *infra* note 81 for one example.

54. More than one state legislature has recognized this fact. See, e.g., LA. REV. STAT. ANN. § 9:3571.1.L (Supp. 2006) (exempting from certain “security freeze” requirements that apply to credit reports “[a]ny database or file which consists solely of any information adverse to the interests of the consumer, including . . . tenant screening”); see also KY. REV. STAT. ANN. § 367.364 (West Supp. 2006) (using virtually identical language).

55. See HousingLink, *supra* note 26, at 19.

56. See First Advantage SafeRent, <http://www.registry-saferent.com> (last visited Mar. 27, 2007). First Advantage Registry, as it also is known, was the subject of a class action lawsuit in New York. See *supra* note 5; *infra* notes 75–76 and accompanying text. Note that First Advantage SafeRent is only one of First Advantage’s divisions.

57. For a sense of how many tenant-screening firms First Advantage has acquired, see First Advantage SafeRent, Press Releases, [http://www.fadvsafarent.com/news/press\\_releases/index.php](http://www.fadvsafarent.com/news/press_releases/index.php) (last visited Mar. 27, 2007).

representing over 6 million apartment homes, count on Registry-SafeRent every day to help them attain the highest quality residents and maximize profitability.”<sup>58</sup> Its subsidiary U.D. Registry has been both a plaintiff in lawsuits to protect its method of producing tenant-screening reports<sup>59</sup> and a defendant in several lawsuits by individuals dissatisfied with their listings in the database.<sup>60</sup> The oldest of the tenant-screening companies appears to be Minnesota’s Rental Research Services, Inc.,<sup>61</sup> and it too has been the subject of a federal lawsuit.<sup>62</sup> Countless other tenant-screening services are listed on the Internet, although some or many of these services might merely resell reports obtained through a larger company like First Advantage.

Several law review articles have discussed these reports,<sup>63</sup> identifying many problems.<sup>64</sup> Some of the most salient concerns include error in the reports, abuse of the reporting system by landlords, and frustration of valid public policy objectives.<sup>65</sup> I discuss each of these in turn.

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58. First Advantage SafeRent, Press Release, Registry-SafeRent and the Houston Apartment Association’s Resident Credit Reporting Service Partner To Expand Screening Services (May 3, 2005), [http://www.fadvsafereent.com/news/press\\_releases/press\\_release\\_template.php?ID=1103](http://www.fadvsafereent.com/news/press_releases/press_release_template.php?ID=1103).

59. See, e.g., *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228 (Ct. App. 1995); see also Williams, *supra* note 2, at 1089 & nn.72-77, 1090 & nn.78-86; Sheinkopf, *supra* note 2, at 1572-77, 1589-90.

60. See, e.g., *Marino v. UDR*, No. CV-05-2268, 2006 WL 1687026 (E.D. Pa. June 14, 2006); *Schoendorf v. U.D. Registry, Inc.*, 118 Cal. Rptr. 2d 313 (Ct. App. 2002) (involving a challenge to, among other things, a reporting agency’s refusal to remove a listing of an eviction action that was retaliatory and that the landlord had settled by paying the tenant \$5000); *Cisneros v. U.D. Registry, Inc.*, 46 Cal. Rptr. 2d 233 (Ct. App. 1995). There is irony in the possible inference that companies merely involved in lawsuits are more likely to have engaged in abusive practices, given that my statutory proposal seeks to eliminate the same kind of inference on the part of landlords and tenant-screening agencies.

61. The company has been operating since 1969. Rental Research Servs., The Original Resident Screening Agency, [http://www.rentalresearch.com/resident\\_screening/about\\_us.htm](http://www.rentalresearch.com/resident_screening/about_us.htm) (last visited Mar. 15, 2007).

62. See *Wilson v. Rental Research Servs., Inc.*, 165 F.3d 642 (8th Cir.), *aff’d by an equally divided court*, 206 F.3d 810 (8th Cir. 2000) (en banc).

63. See, e.g., Benson & Biering, *supra* note 1; Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 787-89 (1994); Spector, *supra* note 2, at 181-86; Williams, *supra* note 2; Stauffer, *supra* note 2.

64. For a list of these problems, see, for example, Benson & Biering, *supra* note 1, at 307-12; and Stauffer, *supra* note 2, at 247-68.

65. The recent memorandum approving the settlement in *White v. First American Registry, Inc.*, described these problems succinctly:

As [tenant-screening agencies] doubtless well understand, risk averse landlords are all too willing to use defendants’ product as a blacklist, refusing to rent to

### 1. Errors and Misleading Information

Tenant-screening reports have two major information-related problems: errors (mismatching) and omitted or misleading information. Mismatching occurs because names are often used as the primary index for the eviction histories included in tenant-screening reports.<sup>66</sup> Common names only exacerbate the problem,<sup>67</sup> as in other contexts, such as federal immigration.<sup>68</sup>

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anyone whose name appears on it regardless of whether the existence of a litigation history in fact evidences characteristics that would make one an undesirable tenant. Thus, defendants have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless individuals. The problem is compounded by the fact that the information available to defendants from the New York City Housing Court ("NYCHC") is sketchy in the best of cases and inaccurate and incomplete in the worst. Any failure by defendants to ensure that the information they provide is complete, accurate, and fair heightens the concern—and there has been ample reason for heightened concern.

No. 04 Civ. 1611, 2007 WL 703926 (S.D.N.Y. Mar. 7, 2007) (footnote omitted). These concerns are also summarized *supra* notes 13-26 and accompanying text.

66. See, e.g., Richard Lee Colvin, *Suit Hinges on Tenant-Screening Service's Accuracy*, L.A. TIMES (Valley ed.), July 5, 1989, § 2 (Metro), at 8 ("[O]nly about 2% of landlord inquiries result in a positive link between a tenant and a past eviction case."); Willard Woods, *Legislature Considers Bills on Tenant-Screening*, STAR TRIB. (Minneapolis), Mar. 27, 1993, at 7H ("Sometimes, applicants with common names are mistaken by screening services for nonpaying tenants with the same name . . ."). Mismatches occur even with credit reports, for which items are supposed to be uniquely indexed by Social Security number. See Hevesi, *supra* note 20 (describing a judgment against TransUnion, a major credit reporting company). In a study focused entirely on tenant-screening reports, a Minnesota nonprofit interviewed many professionals "who work on behalf of tenants" and found that the "[p]resence of errors was the most common problem cited in the interviews." HousingLink, *supra* note 26, at 5. Furthermore, "[r]eports that contain information that doesn't belong to the tenant was the most frequently cited type of error. This type of error is a particular problem for people with common names." *Id.*
67. I conducted a separate empirical study on evictions in Connecticut, during the course of which I searched court records to identify repeat players. Using names to find repeat players led to misleading results: for example, over the last ten years, "Carmen Rivera" has been served with an eviction complaint in Connecticut at least fifty times. Inspecting individual eviction records shows that people sharing the same name are included together. See Kleysteuber, *supra* note 46. False negatives also can occur, as when salient facts such as criminal history are mistakenly omitted from a tenant-screening report. See Thomas v. Friends Rehab. Program, Inc., No. Civ.A.04-4288, 2005 WL 1625054, at \*1 (E.D. Pa. July 11, 2005) (detailing the factual claims of a tenant who alleged she was kidnapped, raped, and stabbed in her apartment complex by a neighbor whose tenant-screening report had erroneously omitted his "lengthy criminal history," which included violent crimes and sex crimes).

Tenant-screening agencies are thus forced to choose between, on the one hand, producing an overinclusive report that contains all the name matches for a person in a particular area and, on the other hand, filtering the data using other variables, resulting in a potentially underinclusive report that might omit important past evictions. Because tenant-screening agencies are not required to keep public records on complaints or corrections, it is impossible to know whether these kinds of errors turn up frequently. A recent study by a Minnesota nonprofit organization that surveyed social workers and other service providers identified “errors” as the most common complaint about tenant-screening reports.<sup>69</sup>

Tenant-screening agencies have been largely unwilling to disclose the steps they take to match names with court records.<sup>70</sup> Among those that have done so, there is no consensus on how to control for the problem of tenants with the same name—or, indeed, on whether there should be any control.<sup>71</sup> Two states have enacted statutes that recognize the mismatching problem and that encourage landlords to include uniquely identifying information in eviction complaints filed with the court: Minnesota asks tenant-screening services and courts to provide the tenant’s date of birth when available,<sup>72</sup> and Oregon states that “[t]he plaintiff may include, at the plaintiff’s option, the defendant’s Social Security number in the complaint for the purpose of accuracy in tenant screening information.”<sup>73</sup>

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68. Any kind of “blacklist” can be error-prone, especially if names are the primary index. For example, the federal government has had great trouble implementing an employment-screening system that tries to identify illegal immigrants using mismatches between I-9 forms, Social Security data, and Department of Homeland Security records. See Annie Decker, *Aligning Immigration and Workplace Law, One Step at a Time*, 115 YALE L.J. POCKET PART 120, 121-22 (2006), <http://www.thepocketpart.org/2006/05/decker.html> (“Although many no-match letters correctly highlight unauthorized work, inevitable glitches such as typos, name changes, and Spanish-surname confusions have caused high error rates.”).

69. See *supra* note 66.

70. See, e.g., E-mail from Renee Svec, Dir. for Corp. Mktg. & Commc’ns, First Advantage Corp., to author (Nov. 9, 2006, 10:59:24 EST) (on file with author) (citing a “need to focus their media efforts on industry trade publications”).

71. In HousingLink’s Minnesota study, tenant-screening agencies of varying size were interviewed about their reporting practices. The results were highly instructive: each service uses a different method to match names to evictions records, with varying degrees of exclusivity. “Rental Research, Inc., the largest agency in the study, uses eviction data from 45 states and provides a list of all of the names that come up during a search. They provide a disclaimer that it is a name match only.” HousingLink, *supra* note 26, at 21-22.

72. See *infra* note 107 and accompanying text.

73. OR. REV. STAT. ANN. § 105.123(2) (West 2005). This provision is somewhat toothless unless the landlord has the Social Security number from other sources. Furthermore, the statute



Although controlling for at least some kinds of errors should be possible, economic incentives exist against tenant-screening agencies' performing those checks. After all, tenants who know their rights, and especially tenants who defend their rights in court, probably will pose a higher potential cost to landlords than tenants who do not. Thus, landlords would prefer to pay for overinclusive, rather than underinclusive, reports.

The second major kind of defect in these reports—omitted or misleading information—can be the fault of either tenant-screening agencies or the original courthouses that provided the public record information in the first place.<sup>74</sup> Tenant-screening reports often mention a tenant's involvement in an eviction action without distinguishing among kinds of outcomes, such as a tenant's (1) being evicted; (2) prevailing against her landlord; (3) settling with a stipulated judgment in the landlord's favor; or (4) failing to appear in court but not being evicted.

In fact, a large class action lawsuit was brought against First Advantage for precisely this reason. After being denied an apartment, the plaintiff, Adam White, received a copy of his tenant-screening report, which stated that he had been involved in an eviction proceeding; instead of indicating a disposition, the record merely said "case filed."<sup>75</sup> The landlord had indeed "filed" an action after

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"does not require a tenant to have a Social Security number in order to enter into a rental agreement." *Id.*

74. See HousingLink, *supra* note 26, at 23 ("Overall, the [tenant-screening] agencies interviewed felt that they are very select about what they report and that their reports are accurate. At the same time, though, they expressed dissatisfaction with the quality and format of data from public records. One agency representative stated that he feels most of the weaknesses in tenant screening come from the data and that they are only as good as the data they receive.").
75. See First Amended Class Action Complaint app. at 1, *White v. First Am. Registry*, 230 F.R.D. 365 (S.D.N.Y. 2005) (No. 04 Civ. 1611). As mentioned *supra* note 5, the parties in this action recently agreed to a settlement that will significantly alter the way First American Registry, now First Advantage SafeRent, creates reports. According to one source, a draft of the settlement agreement included "major changes," such as the following:
  - Reports will include the actual disposition of all eviction cases;
  - Reports will highlight the absence of any activity for at least 12 months in eviction cases abandoned by landlords;
  - [First American Registry, Inc.] will expunge cases from its database that were found to be without merit or which were brought in error;
  - Reports will contain a prominent notice advising prospective landlords that the fact an eviction proceeding was brought does not represent an adverse disposition or that the tenant was evicted.

Posting of 23:07 EST, TenantNet Forum, Apr. 4, 2006, <http://tenant.net/phpBB2/viewtopic.php?p=3552#3552>; see also Declaration of Andrew P. Bell in Support of Joint Motion for Preliminary Approval of Settlement, Exhibit 1, *White*, 230 F.R.D. 365 (No. 04

White had withheld two months' rent because of a dispute, yet the action had been dismissed "the first time the eviction proceeding appeared on the court calendar," because the landlord failed to appear to prosecute the complaint.<sup>76</sup> Anecdotal evidence suggests that complaints of such misleading items have been and continue to be relatively commonplace.<sup>77</sup>

## 2. Abuse

In addition to containing mismatched or misleading information, tenant-screening reports can be a vehicle for abusing tenants. As noted above, landlords may threaten that tenants will be "unable to secure any apartment in the future."<sup>78</sup> Because appearing on a tenant report may be equivalent to being on a blacklist, "[a]fter learning that an eviction record may handicap his ability to locate new housing, the rational tenant will more seriously consider working with the landlord to avoid the eviction process."<sup>79</sup> Landlords can abuse their

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Civ. 1611), available at <http://www.tenantreportsettlement.com/settlement.pdf>. Yet the district judge found these changes to be inadequate and, in the words of one attorney for the plaintiffs, sent the litigants back to the discussion table to try to "see if we can revise certain provisions that provide stronger programmatic changes in the defendant's business practices." Posting of 07:43 EST, TenantNet Forum, June 24, 2006, <http://tenant.net/phpBB2/viewtopic.php?p=25009#25009> (quoting plaintiffs' attorney James B. Fishman); see also Telephone Interview with Seth R. Lesser, Partner, Locks Law Firm, in New York, N.Y. (Nov. 1, 2006).

It is unclear if the final agreement included any further provisions. However, in a memorandum opinion that accompanied his order approving the final settlement, the judge again expressed his discomfort.

I am troubled by this settlement. It leaves defendants' business model essentially intact. While there will be very modest improvements, the potential for abuse quite plainly remains. The fact that defendants are willing, indeed anxious, to engage in activities that are bound to harm innocent people is distressing. . . .

Nevertheless, substantial factors point in favor of approval. To begin with, I acknowledge that my discomfort stems in part from defendants' business model, which in and of itself is not unlawful, however distasteful and deserving of legislative attention it may be.

White v. First Am. Registry, Inc., No. 04 Civ. 1611, 2007 WL 703926, at \*2-3 (S.D.N.Y. Mar. 7, 2007).

76. First Amended Class Action Complaint, *supra* note 75, ¶ 31.

77. See David Frenznick, "Tenant Check" Lists the Undesirable—and the Innocent, L.A. TIMES, Apr. 13, 1982, pt. 1, at 3; see also *supra* note 66 (discussing the HousingLink study).

78. Benson & Biering, *supra* note 1, at 301.

79. Gerchick, *supra* note 63, at 789; see also *id.* (stating without critique that "[o]ne important means of avoiding the eviction process is for the landlord to . . . warn the tenant of the negative ramifications of losing an unlawful detainer lawsuit").

power to initiate an eviction action (and thus blacklist a tenant) to extort compliance or cooperation, or simply to avoid being taken to court on other grounds (such as a housing conditions complaint). Tenant-screening reports are similar to blacklists in that the landlord has unilateral control over whether a tenant will appear in a tenant-screening report, and this determination provides no due process.<sup>80</sup> Even if a tenant has done nothing wrong, once a landlord files for an eviction, that mark may appear on the report.

Landlords can also provide “opinions” about tenants.<sup>81</sup> Although the companies accused of collecting such information have denied this claim in court depositions, competitors have claimed that this voluntarily reported information includes descriptions of personal habits and other irrelevant information:

For years [U.D. Registry] used to report life-style information about tenants’ political affiliations, who comes and goes, stuff that has nothing to do with [tenants’] performance as tenants and payment of rent.<sup>82</sup>

Although some commentators have suggested that this practice is less common today,<sup>83</sup> a recent *New York Times* article noted that landlords can still, “at least through one company[,] . . . examine previous landlords’ assessments of a tenant’s habits: noisy? destructive? litigious? drug using?”<sup>84</sup>

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80. There is, of course, the ex post “due process” afforded by accuracy laws such as the Fair Credit Reporting Act, discussed *infra* note 90 and accompanying text, but there is nothing inaccurate about a landlord’s deciding arbitrarily to blacklist a tenant and then filing an eviction action to achieve that goal.

81. Rental Research Services has collected information on tenants for more than thirty-five years in its voluntary Residential Occupancy Performance Report (ROPR) database. In advertising its service, the company has noted that some “problem renters never make it to the eviction stage. By providing a resource for landlords and apartment complexes to file specific information on their residents, the ROPR database can help fill in the gaps for those problem renters who did not have an eviction filed against them.” Rental Research Servs., Inc., Instant Inquiry, [http://www.rentalresearch.com/resident\\_screening/resident\\_screening.htm](http://www.rentalresearch.com/resident_screening/resident_screening.htm) (last visited Mar. 27, 2007) (noting that the database also includes positive rental history to obviate the need for a reference check).

82. Colvin, *supra* note 66 (quoting Grady Robertson, president of U.D. Registry’s main competitor); see *id.* (“In court depositions, [principals at U.D. Registry] have denied that the firm ever gathered such information. But several industry sources said it was widely known that, at least in the past, the registry asked landlords for such information on tenants.”).

83. See, e.g., *id.*

84. Hevesi, *supra* note 20.

### 3. *Frustration of Legislative Objectives and Public Policy*

Tenant-screening reports also frustrate legislatively endorsed public policies in several ways. First, because of their susceptibility to error, they may distort the rental housing market,<sup>85</sup> the efficient operation of which is a frequent legislative concern. Tenants who are perfectly qualified to rent an apartment must pay higher rents and deposits or are pushed out of the rental housing market altogether simply because a tenant-screening report exaggerates their risk of falling behind on rent or other problems. This effect is exacerbated because those most likely to have an “innocent” eviction complaint on their report—such as poor tenants who fall behind on rent but catch themselves up and stave off eviction—are the least likely to have the skills or resources necessary to correct those entries or to pay the (unnecessary) risk premiums that will ensue.

Second, because tenant-screening reports function effectively as blacklists, they attach excessive stigma to involvement in the legal process and thus discourage tenants from vindicating the very rights that legislatures have gone to great pains to protect, and courts to enforce. Finally, unlike court records themselves, which courts can expunge or seal, duplicates in private databases culled from court records may live on immortal. Even worse, the copied records probably will not reflect subsequent reversal on appeal, dismissal, or sealing of the record.<sup>86</sup>

Indeed, landlords generally do not care who carries the blame in a landlord-tenant dispute but only whether a dispute occurred: “[T]hey would not rent to a prospective tenant who turns up in [a tenant-screening agency’s] files, regardless of what explanation the tenant gives.”<sup>87</sup> As one tenant noted, “activist” tenants are at particular risk of being blacklisted:

Landlords are surely not looking only for deadbeat tenants; a simple credit report would turn them up. . . . Does the tenant tend to question the landlord’s orders? That’s what the landlord wants to know. In our case, the landlord ordered us out, claiming I could not succeed my mother. I disputed that opinion, and it took the courts five years to decide who was right. But in searching for a new home, I found myself

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85. For an explication of this argument, see *infra* Subsection III.A.1.

86. Although the academic literature on tenant-screening reports does not discuss this problem, a recent article in the *New York Times* recognized it in the context of criminal record databases. See Adam Liptak, *Criminal Records Erased by Courts Live To Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1; see also *infra* note 97; *infra* note 188 and accompanying text.

87. Frenznick, *supra* note 77; see also Stauffer, *supra* note 2, at 245.

blacklisted for not vacating voluntarily to spare the landlord the burden of proving the case in court.<sup>88</sup>

## II. TWO STRATEGIES FOR REGULATING TENANT-SCREENING REPORTS: ENSURING ACCURACY AND LIMITING ACCESS

State and federal laws regulate reports concerning consumer “reputation” (such as tenant-screening reports) primarily by providing incentives for accuracy in reporting.<sup>89</sup> The approach, discussed in Section A, was originally developed for credit reporting but eventually extended to tenant-screening reports. A neglected alternative, which I argue is necessary to an effective regulatory scheme, is to restrict access to information that the state does not wish to have disseminated. This would allow governments to prevent abusive or misleading tenant-screening reports by sealing eviction actions by default and allowing public access to court records only when doing so promotes public policy objectives. That approach, which has been adopted only in California, is discussed in Section B.

### A. *The Standard Approach: Ensuring Accuracy*

With respect to tenant-screening reports, the accuracy-based approach has been most widely and effectively adopted at the federal level, with the Fair Credit Reporting Act<sup>90</sup> ensuring several crucial rights for tenants.<sup>91</sup> A tenant

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88. Vicki Richman, *Landlords Blacklist Activist Tenants*, SHELTERFORCE, July-Aug. 2002, at 19, 19, available at <http://www.nhi.org/online/issues/124/blacklist.html>.

89. A minor strand of all credit reporting regulation involves the “censorship” approach—limiting, for example, the dissemination of information about debts more than seven years old or about bankruptcies more than ten years old. See *supra* note 12; *infra* notes 111-115 and accompanying text.

90. 15 U.S.C. §§ 1681-1681x (2000 & Supp. IV 2004). For a good overview of the FCRA’s provisions, see Fed. Trade Comm’n, A Summary of Your Rights Under the Fair Credit Reporting Act, <http://www.ftc.gov/bcp/online/pubs/credit/fcrasummary.pdf> (last visited Mar. 27, 2007).

91. Scholars seemed to have thought previously that it was an open question whether the FCRA applied to tenant-screening reports. See Spector, *supra* note 2, at 180 (arguing that the FCRA fails to address whether a “consumer report” includes a tenancy report, and citing 15 U.S.C. § 1681(b)); Williams, *supra* note 2, at 1084-85 (describing judicial indecision over whether the landlord-tenant relationship falls under “consumer credit”); see also Benson & Biering, *supra* note 1, at 314-17; Stauffer, *supra* note 2, at 300-03 (discussing the applicability of the FCRA to tenant-screening reports). Some authors, however, have cited the California state case holding that the FCRA should apply to tenant-screening reports. See *Cisneros v. U.D.*

must be informed when information in a screening report was used to decline a rental application, charge a higher rent, or require a larger security deposit, and she must be informed of her rights under the FCRA.<sup>92</sup> For a limited period of time, tenants may receive a copy of the report for free, and they may dispute items that they claim are inaccurate.<sup>93</sup> Furthermore, screening agencies considered to operate on a “nationwide” basis under the Fair and Accurate Credit Transactions Act (FACTA) of 2003,<sup>94</sup> which amended the FCRA, are subject to additional requirements—in particular, they must provide each

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Registry, Inc., 46 Cal. Rptr. 2d 233 (Ct. App. 1995); cf. *Cotto v. Jenney*, 721 F. Supp. 5, 6 (D. Mass. 1989) (“[A]n examination of the purposes underlying the creation of the FCRA leads this Court to conclude that the report prepared by [defendant] on plaintiff Cotto was indeed a ‘consumer report.’”).

Today, it seems clear that the FCRA applies to tenant-screening reports. First, the amendments made by the Fair and Accurate Credit Transactions Act (FACTA) of 2003 explicitly extend regulation to “nationwide specialty consumer reporting agenc[ies],” which include any “consumer reporting agency that compiles and maintains files on consumers on a nationwide basis relating to . . . residential or tenant history.” Pub. L. No. 108-159, sec. 111, § 603(w), 117 Stat. 1952, 1955 (codified at 15 U.S.C. § 1681a(w)). The “nationwide” category is meant to sweep broadly. See 15 U.S.C. § 1681x; Prohibition Against Circumventing Treatment as a Nationwide Consumer Reporting Agency, 16 C.F.R. §§ 611.1-3 (2006). Second, even if a consumer reporting agency is not nationwide, guidelines published in 2001 by the Federal Trade Commission (which is charged with enforcing the FCRA under 15 U.S.C. § 1681g) instruct landlords on their obligations under the FCRA, presuming its application. See Press Release, Fed. Trade Comm’n, Federal Trade Commission Issues “Facts for Business” Guide on Complying with the Fair Credit Reporting Act (Jan. 15, 2002), <http://www.ftc.gov/opa/2002/01/fcraguide.htm>; Fed. Trade Comm’n, Using Consumer Reports: What Landlords Need To Know (Dec. 2001), <http://www.ftc.gov/bcp/conline/pubs/buspubs/landlord.htm>. Third, in 1990 the FTC published a statement of general policy that explicitly swept tenant-screening reports into the FCRA’s regulatory ambit. See Commentary on the Fair Credit Reporting Act, 55 Fed. Reg. 18,808, 18,810 (May 4, 1990). That statement is still in effect today. See Fair Credit Reporting Act, 16 C.F.R. pt. 600 app., § 603(d), para. 6(F) (2005). While the statement does not have the binding legal effect of a rule or regulation, courts look to it for guidance. See, e.g., *Cisneros*, 46 Cal. Rptr. 2d at 242.

For an independent assessment, see Anthony Rodriguez, *Tenant-Screening Agencies Under the Fair Credit Reporting Act*, 39 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 335 (2005).

92. The FTC has detailed examples of situations in which such notices are necessary, such as when landlords are “[r]equiring a larger deposit than might be required for another applicant; and [r]aising the rent to a higher amount than for another applicant.” Fed. Trade Comm’n, *supra* note 91.
93. *Id.*
94. 117 Stat. 1952. In particular, FACTA amended the FCRA definitions to include a new category of “specialty” consumer reporting agencies that includes tenant-screening agencies. Furthermore, the FTC has announced its intention that the “nationwide” label should not be easily circumvented. See *supra* note 91.

tenant upon request with a free copy of her report at least annually.<sup>95</sup> About five years ago the FTC conducted a compliance review of residential apartment owners in several major cities. The results “indicated substantial compliance,” although “some landlords were not totally aware of some of the details of the FCRA.”<sup>96</sup>

But even if the FCRA’s provisions were universally understood and followed, the Act would still fall short as a solution to the problems posed by tenant-screening reports. First, the FCRA’s approach is inefficient because errors are corrected on an *ex post*, item-by-item basis.<sup>97</sup> Tenant-screening agencies have little or no incentive to avoid accurate but misleading items because enforcement is rare and punitive damages are largely unavailable.<sup>98</sup> Furthermore, many tenants—especially poorer tenants—may lack the time, skills, documentation, or other resources needed to correct their files, suggesting that these tenant-screening reports would contain an above-optimal level of error, concentrated in the population that stands to suffer the most as a result.<sup>99</sup> Second, the accuracy remedy does nothing to solve the problem of

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95. They appear to be subject to all requirements that pertain to any “consumer reporting agency that compiles and maintains files on consumers on a nationwide basis,” such as Experian or Equifax. 15 U.S.C. § 1681a(p).

96. Press Release, Fed. Trade Comm’n, *supra* note 91.

97. An *ex ante* solution, however, would avoid errors at the source. For example, requiring a unique index such as a Social Security number or date of birth would avoid mismatched entries on reports. *See infra* note 107 and accompanying text. Recall also that when an error or misleading item enters public records it propagates immediately to screening agencies that are as hard to find as the errors are to correct. *See, e.g.,* Herman, *supra* note 7 (“With local agencies in every part of the country, it’s nearly impossible to review your records in every database in the nation. Even locally there may be five or more of these agencies keeping different sets of data, a credit reporting nightmare should a mistake turn up.”); *supra* note 86 and accompanying text.

98. The law also provides for civil suits for compensatory and punitive damages, 15 U.S.C. §§ 1681n–1681o, but actions to enforce the rights granted under the FCRA seem to be the exception rather than the rule, *see* Marino v. UDR, No. CV-05-2268, 2006 WL 1687026, at \*4 (E.D. Pa. June 14, 2006) (discussing the potential availability of statutory damages if a tenant-screening agency’s violations were found to be “willful,” but failing to reach that question after approving a settlement agreement); First Amended Class Action Complaint, *supra* note 75 (seeking punitive damages in a class action suit); *see also supra* notes 60, 62.

99. For example, the FTC recently published the results of a pilot study as a precursor to a nationwide study on the accuracy of credit reports, as required by 15 U.S.C. § 1681. *See* Fed. Trade Comm’n, Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2006), [http://www.ftc.gov/reports/FACTACT/FACT\\_Act\\_Report\\_2006.pdf](http://www.ftc.gov/reports/FACTACT/FACT_Act_Report_2006.pdf). Although the statistical significance of the pilot was very low—only thirty participants were solicited—two key themes emerged. First, even when material errors were found in credit reports, “only 1 out of the 3 people who alleged material errors subsequently [filed] a dispute.” *Id.* at 4. Second, “people who did not have Internet

abuse; a landlord can still strong-arm a tenant into submission simply by filing a (frivolous) lawsuit, branding someone a “problem tenant” without any evidence.

Even if flawed, the FCRA’s value should not be underestimated. Without it, tenants would be largely without recourse when trying to view and correct the reports that concern them. However, the government can address the problems of efficiency and abuse through additional regulations, as demonstrated by key state laws.

States have granted some rights to tenants over and above those guaranteed by federal law. Furthermore, because many tenant-screening agencies are highly localized (avoiding interstate commerce), federal law may not apply to some tenant-screening reports, meaning that state law might provide the only remedies available. But states do not have to provide any such protection. Indeed, New York entertained but rejected a proposal to consider tenant-screening agencies a type of “consumer reporting agency” under the state’s Fair Credit Reporting Practice Act.<sup>100</sup>

The two states to have adopted significant statutes regulating the tenant-screening industry are California and Minnesota,<sup>101</sup> and it may not be a coincidence that these states are also the birthplaces of two prominent tenant-screening agencies—U.D. Registry<sup>102</sup> and Rental Research Services.<sup>103</sup> California’s laws pursue various regulation strategies and are discussed below.

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access or experience may have been less willing to participate” in the study, *id.*, and Internet access may well be critical in obtaining, researching, and disputing a credit report.

100. See Williams, *supra* note 2, at 1085 n.41.

101. See CAL. CIV. CODE §§ 1785.10-.20 (West 1998 & Supp. 2007); CAL. CIV. PROC. CODE § 1161.2(a) (West Supp. 2007); Minnesota Tenant Reporting Act, MINN. STAT. ANN. §§ 504B.235, .241, .245 (West 2002); see also Spector, *supra* note 2, at 185 & n.225, 186 & nn.226-28; Williams, *supra* note 2, at 1086-90. Note that one important portion of the Minnesota statute, requiring courts to “indicate on the court file . . . the specific basis of the court’s decision,” was repealed in 1999. Spector, *supra* note 2, at 186 & n.228.

A fifty-state survey of laws pertaining to credit reports and court records was beyond the scope of this Note, but the literature on the subject has identified no other such laws. Minnesota is currently considering a law that would standardize reports so that tenants would only have to pay for one report within a specified period of time. H.R. 166, 2007 Leg., 85th Sess. (Minn. 2007), available at <http://wdoc.house.leg.state.mn.us/leg/LS85/HF0166.o.pdf>. States have enacted laws that involve tenant-screening reports but that do not regulate either the reports themselves or how tenant-screening agencies collect information from court records. See, e.g., OR. REV. STAT. § 90.295 (2005) (specifying how a landlord may collect and use a fee intended to pay for tenant-screening reports or services); WASH. REV. CODE ANN. § 59.18.257 (West 2004) (regulating what a landlord may charge a prospective tenant to run a tenant-screening report).

102. See *supra* notes 56-57, 59-60 and accompanying text.

103. See *supra* notes 61-62 and accompanying text.



Minnesota's protections are far less extensive than California's, but they also differ from the federally granted protections in a few interesting ways. Minnesota's first law, passed in 1989, provided accuracy-enhancing rights before the FTC interpreted the same grants to be protected by the FCRA in the tenant-screening context.<sup>104</sup> Under Minnesota's law, tenants could inspect the files of tenant-screening agencies, dispute the accuracy of items in the report, and insert a comment into the record if they could not resolve the discrepancy after an investigation.<sup>105</sup> The statute was amended in 1999,<sup>106</sup> however, to sweep even more broadly with respect to court records:

Whenever the court supplies information from a court file on an individual, in whatever form, the court shall include the full name and date of birth of the individual, if that is indicated on the court file or summary, and information on the outcome of the court proceeding, including the specific basis of the court's decision . . . when it becomes available.<sup>107</sup>

Requiring the court records to mention the defendant's date of birth significantly increases the likelihood that eviction actions will not be attributed mistakenly to other individuals sharing the same name. Mandating that the court records reflect the basis for decisions and that reports accurately reproduce that basis also prevents a problem that can otherwise be corrected after the fact under the FCRA and the California laws.

Minnesota also allows tenants who are sued in an abusive or frivolous eviction to clear their names: in an eviction action in which the tenant prevails, the court record may be expunged after the fact.<sup>108</sup> This provision is actually a hybrid of measures to enhance the "accuracy" of court records (by removing misleading items) and the access-limiting measures described in the following Section. But it falls somewhat short as well: unlike outcome-based record disclosure, expunction after the fact does not automatically clear a tenant's name. As with criminal expunctions, copies of the court records already exist in

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<sup>104.</sup> See *supra* note 91.

<sup>105.</sup> See An Act Relating to Community Development, ch. 328, art. 1, §§ 3-5, 1989 Minn. Laws 2350, 2360-62 (codified as amended at MINN. STAT. ANN. § 504B.241 subd. 2).

<sup>106.</sup> An Act Relating to Landlord and Tenant, ch. 199, art. 1, §§ 28-30, 1999 Minn. Laws 1078, 1094-96 (codified at MINN. STAT. ANN. § 504B.241 subd. 2).

<sup>107.</sup> MINN. STAT. ANN. § 504B.241 subd. 4.

<sup>108.</sup> See *id.* § 484.014; EDUCATION FOR JUSTICE, FACT SHEET H-27: EXPUNGING AN EVICTION CASE (2006), <http://www.lawhelpmn.org/documents/3981H-27%20Expunging%20Evictions.pdf>.

an unknown number of private databases, where records are hard to find and tedious to change.<sup>109</sup>

*B. The Better Approach: Limiting Access*

California was the first state to attempt an access-based solution to the tenant-screening report problem; indeed, it was the first state to attempt to regulate tenant-screening reports in any way whatsoever. The state passed two major laws related to tenant-screening reports. The first attempt took a censorship approach and forbade screening agencies from mentioning cases the tenant won. This law is interesting primarily because it illuminates that strategy's difficulties: a California court declared the law an unconstitutional restraint on free speech, although this ruling may no longer apply.<sup>110</sup>

Nine years later, however, a second law pursued for the first time an access-based strategy that made eviction records confidential until the tenant lost or until sixty days elapsed from filing without a victory for the tenant. The second law is still on the books, and it serves as a prototype for the scheme that I propose other states should follow.

*1. California's First Attempt: Censoring Unfair Items*

In 1982, the California legislature passed its first law to restrict the dissemination of information contained in public records about evictions. Specifically, the statute prohibited collecting and redistributing certain information from court records.<sup>111</sup> The statute prevented tenant-screening agencies from including "[u]nlawful detainer actions where the person against whom the action was filed was adjudged the prevailing party."<sup>112</sup>

Moreover, this provision was focused on protecting the poor, as the consumer credit report restrictions did not apply to reports sought in connection with "[t]he rental of a dwelling unit which exceeds one thousand

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109. See *supra* note 86 and accompanying text.

110. See Pallack, *supra* note 31.

111. Act of Sept. 16, 1982, sec. 4, § 1785.13(a)(4), 1982 Cal. Stat. 4062, 4064 (codified as amended at CAL. CIV. CODE § 1785.13(a)(4) (West 1998)); see also Colvin, *supra* note 66 ("Another dispute based on the [1982] legislation relates to what cases could be reported to landlords. . . . Assemblyman Richard Katz (D-Sylmar), who authored unsuccessful legislation . . . said it is unfair to allow [settled or withdrawn cases] to remain on a renter's record."). The statute's language is similar to that of a 1979 statutory proposal intended to protect tenants from abusive practices. See Benson & Biering, *supra* note 1, at 324-25.

112. Act of Sept. 16, 1982, sec. 4, § 1785.13(a)(4).

dollars (\$1,000) per month.”<sup>113</sup> Yet in 1995 the California Court of Appeals held this statute to be an unconstitutional First Amendment violation.<sup>114</sup> As an alternative, the court suggested to the California legislature the strategy that the legislature ultimately pursued: “If the state is concerned about dissemination of this information, it has the power to control its initial release.”<sup>115</sup>

## 2. *California’s Second Attempt: An Access-Based Approach*

In 1991, the California legislature passed a law that restricted the release of court records in eviction actions. This approach, which I call “outcome-based record disclosure,” limited access to eviction records to the parties themselves (or to others who met certain criteria) for thirty days after the filing of an eviction action.<sup>116</sup> This limited period of nondisclosure has since been extended to sixty days and provides permanent nondisclosure for tenants who prevail during that window.<sup>117</sup> Ironically, the originally stated legislative purpose behind this thirty-day confidentiality rule had nothing to do with protecting tenants from the negative effects of tenant-screening reports. Instead, this provision apparently was created because eviction defense lawyers were combing the eviction records to find potential clients and then soliciting them directly.<sup>118</sup> Recent amendments suggest, however, that legislators have changed

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113. *Id.* sec. 4, § 1785.13(b)(4). This exemption was added contemporaneously with the inclusion of tenant-screening reports in the credit report statute. Compare *id.*, with Consumer Credit Reporting Agencies Act, sec. 1, § 1785.13, 1975 Cal. Stat. 3369, 3371-72 (codified as amended at CAL. CIV. CODE §§ 1785.13). Although the statute does not account for inflation, the \$1000 statutory limit in 1982 would amount to \$2097.58 today, according to the CPI Inflation Calculator, Bureau of Labor Statistics, Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Mar. 27, 2007).

114. *U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228 (Ct. App. 1995).

115. *Id.* at 232. The court’s follow-up comment is even more compelling: “Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.” *Id.* (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989)).

116. Act of Oct. 13, 1991, ch. 1007, 1991 Cal. Stat. 4686 (codified as amended at CAL. CIV. PROC. CODE § 1161.2 (West Supp. 2007)).

117. *Id.* It is unclear why the statute effectively penalizes defendants who prevail but take longer than sixty days to do so.

118. The motive to protect tenants from the solicitations of unscrupulous eviction defense lawyers, rather than from screening reports, is clear not only from the preamble to the statute but also from its legislative history. See Act of Oct. 13, 1991, § 1; Williams, *supra* note 2, at 1133 n.453; cf. MODEL RULES OF PROF’L CONDUCT R. 7.3(a) (2003) (noting that, with certain exceptions, “[a] lawyer shall not . . . solicit professional employment from a

their views and that today the law's focus is on protecting tenants from screening reports. The current text requires the permanent sealing of records when tenants prevail quickly in eviction actions<sup>119</sup>—a measure that provides no appreciable relief from unscrupulous defense attorneys but that certainly helps protect tenants from abusive screening reports and landlords.

Tenant-screening agencies, including U.D. Registry, have pledged to fight laws that restrict access to court records, but two such challenges in the California courts have failed,<sup>120</sup> and further challenges promised more than two years ago<sup>121</sup> appear not to have materialized—possibly indicating the resiliency of this approach compared with the strategy of censorship.

### C. *Why Accuracy Isn't Enough*

To review, tenant-screening reports create various kinds of problems for tenants. The people most likely to be evicted will have the hardest time fixing the inevitable errors in their reports. The reports frustrate public policy by punishing tenants who know and stand by their legal rights, and they allow landlords to abuse tenants by branding them with an eviction action, whether or not the action is brought in good faith, and whether or not they ultimately resolve their differences out of court.

The substantive rights guaranteed by credit reporting laws such as the FCRA and Minnesota's tenant-screening law are indispensable, encouraging transparency in the credit reporting process and giving tenants a mechanism

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prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain").

119. The current code provides that:

(a) The clerk may allow access to limited civil case records filed under this chapter, including the court file, index, and register of actions, only as follows:

(1) To a party to the action, including a party's attorney.

[(2)-(4) To individuals with certain credentials or anyone else who obtains an order demonstrating "good cause."]

(5) To any other person 60 days after the complaint has been filed, unless a defendant prevails in the action within 60 days of the filing of the complaint, in which case the clerk may not allow access to any court records in the action, except as provided in paragraphs (1) to (4), inclusive.

CAL. CIV. PROC. CODE § 1161.2.

120. See *U.D. Registry, Inc. v. Mun. Court*, 57 Cal. Rptr. 2d 788, 790 (Ct. App. 1996); *U.D. Registry, Inc. v. Superior Court*, 46 Cal. Rptr. 2d 363, 365 (Ct. App. 1995).

121. See Rich, *supra* note 20 ("Last year a law was approved in California requiring housing courts to seal all eviction cases in which the tenant prevails. Mr. Saltz [founder and president of U.D. Registry] said he plans to sue the state this year to overturn the law, calling it unconstitutional.").

for finding and correcting errors.<sup>122</sup> However, such laws never will provide the practical, technical barrier against abuse offered by California's 1995 law providing for outcome-based record disclosure. More specifically, the FCRA and similar state laws do not focus on creating systematic, efficient incentives for accuracy and deterrents against abuse. These laws presume a market that is already functioning optimally, and they tweak it only to fix occasional errors. Pledging their allegiance to accuracy above all else, these laws do nothing to prevent screening reports from including unfair items, such as an eviction action filed against a tenant who ultimately prevailed in court.

My proposal reapplies the consumer protection instinct that motivates, for example, the FCRA's seven-year limit on reporting items<sup>123</sup> and California's 1982 law: by releasing information in a controlled and careful way, states can reinvestigate tenant resistance to evictions filed in bad faith, eliminate some abuse, and even push down error rates.

### III. A DEFENSE OF OUTCOME-BASED RESTRICTIONS

This Note argues that the best solution to the remaining problems of tenant-screening practices and reports is to restrict the release of information about summary process actions in the first place. At the heart of this proposal is a balance between two countervailing values in our democracy—privacy for individuals and openness in government. Layered into the debate between privacy and openness are other values, such as free speech and the First Amendment, practicality, economic and social efficiency, and normative commitments to fairness and due process.

I propose that a legislative package with the following provisions would strike the correct balance among these values in all fifty states:

- (1) Court *proceedings* in eviction cases remain open to the public by default;
- (2) *Records* of nondisposed cases are sealed to the general public, regardless of how long the cases remain without a disposition;

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122. For example, in addition to seeking to protect fairness and accuracy along the lines of the FCRA's congressional findings and statement of purpose, 15 U.S.C. § 1681(a) (2000 & Supp. IV 2004), the California legislature intended the Consumer Credit Reporting Agencies Act to meet "the needs of commerce . . . with regard to the confidentiality, accuracy, *relevancy*, and *proper* utilization of [credit reports]," CAL. CIV. CODE § 1785.1 (West 1998) (emphasis added).

123. 15 U.S.C. § 1681c(a). The congressional findings that preface the FCRA provide no justification for such limitations. See *id.* § 1681.

- (3) Court records are open to any party to the case, as well as to nonparties who can provide the names of the parties and the address of the subject premises;
- (4) Records also can be disclosed to any nonparty on a showing of “good cause,” which would attach presumptively to journalists and others doing bona fide research in the public interest;
- (5) Records remain sealed after a settlement that ends in the tenant’s voluntary departure or that allows the tenant to remain on the premises;
- (6) Records become public in any of the following circumstances: the tenant loses the case on the merits (whether or not the tenant wishes to appeal), the court issues an unstayed execution (eviction) order or the stay on an execution order expires, or the tenant loses the case for failure to appear or failure to plead;
- (7) Judicial opinions are open to the public immediately, regardless of whether judgment has entered or the court simply has ruled on a pretrial question.<sup>124</sup>

The most significant difference between my proposal and California’s existing law involves point (2), under which records of undisposed cases may remain sealed indefinitely. Under California’s current law, records of undisposed cases become public sixty days after filing.<sup>125</sup>

Another important caveat is that both journalists and parties seeking access to eviction records after a showing of “good cause” would have to aver that they would use the information contained therein only for research, and that they would not sell or allow the records to be sold for compensation or profit. This would be one step beyond the limitations already in place in California. The selection of which persons would be entitled to journalistic access to sealed records, however, would be left to judges to determine on a case-by-case basis.<sup>126</sup> If a nonprofit “newspaper” subsidized by landlords and called the

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124. If the tenant prevails, opinions should be released in a redacted form, using only the defendant’s initials.

125. See *supra* notes 116–117 and accompanying text.

126. Interestingly, California’s access-restricting law was applied unevenly by judges. Some courts granted the state’s most notorious tenant-screening agency, U.D. Registry, a blanket exemption from the law’s provisions. See Pallack, *supra* note 31, at 344 n.16. However, these judges’ willingness to grant that exemption may have been related to the law’s originally stated purpose, which was to thwart unscrupulous eviction defense lawyers and not tenant-screening agencies. See *supra* note 118 and accompanying text.

*Landlord Times* began “reporting” on every eviction, presumably most judges would look to the statute’s purpose and deny access to those records.

Recall that we have identified three problems with tenant-screening reports: error, abuse, and frustration of public policy. Unlike regulation focusing on accuracy, this proposal does little to fix reporting errors.<sup>127</sup> Instead, this proposal reduces abuse because the mere filing of an eviction no longer necessarily cuts against a tenant’s reputation, and it furthers public policy because tenants will be less afraid to avail themselves of their legal rights. Outcome-based record disclosure therefore complements approaches such as the FCRA’s.

Although legal scholars have considered the possibility of limiting access to eviction records before, they have not proposed the conditional, justice-driven disclosure endorsed here.<sup>128</sup> This Part turns to further possible arguments about the legislative scheme I have put forward. Sections A and B focus on theoretical concerns, including jurisprudential or doctrinal arguments for and against keeping eviction records sealed. Section C develops a practical example by drawing on a parallel to criminal law, a context in which many states condition the availability of court records on case outcomes.

#### *A. Reasons To Keep Eviction Records Private by Default*

Outcome-based record disclosure can prevent landlords from using tenant-screening reports to abuse tenants or to vitiate their statutory rights. However, several other arguments support the principle that it is both proper and entirely within the ambit of state legislatures to pass such a law. First, economic efficiency supports limiting disclosure to cases in which the tenant loses or abandons her defense. Although screening reports might lubricate the gears of

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127. I still would endorse independent adoption of approaches, such as Minnesota’s, that require filing parties to include (or add later) as much identifying information as possible, such as date of birth, Social Security number, or driver’s license number. See *supra* note 107 and accompanying text. My proposed statute might, however, provide a marginal reduction in the number of “false positive” (mismatch) errors simply because more lawsuits filed against the wrong address or wrong name would have time to be corrected before the record became public.

128. Robert Stauffer considered, in passing, the solution of “making court records of landlord-tenant suits unavailable to the public,” but he promptly abandoned it because “[s]uch a measure *might* itself, however, violate the First Amendment.” Stauffer, *supra* note 2, at 279 (emphasis added). Cheryl Sheinkopf briefly criticized the idea of banning access to public record information but ultimately concluded that enacting an outright ban would violate principles of open government, endorse paternalism, and decrease efficiency. See Sheinkopf, *supra* note 2, at 1602-07; see also *supra* note 36. Neither author, however, considered the less restrictive, conditional “ban” endorsed here.

commerce by providing more information to landlords, there is a limit to which information about tenants can be used to deny them housing; in any case, it appears that current reports provide “dirty” information, contaminated by data points that do not in fact indicate whether a tenant is likely to pay or to create problems. Second, common law principles of privacy support sealing certain landlord-tenant cases. Third, the democratically chosen public policies of state legislatures may justify sealing court records in various contexts, even if those policies—such as improving the market for rental housing—do not directly interact with the court system. Fourth, basic ideas of fairness and due process suggest that tenants should have an opportunity to prove their innocence *before* having their names added to blacklists.

### 1. *Efficiency*

One of the first objections raised by advocates of transparency and openness in court records is that “efficiency” demands that markets have access to information whenever possible. Economic theory usually encourages society to eliminate informational asymmetries, increasing efficiency for all sides. Richard Posner has provided a classic application of information asymmetry theory, stating that individuals’ interests in keeping past litigation secret is “akin to the concealment by sellers of defects in their products.”<sup>129</sup> He has even criticized an information-withholding strategy similar to that endorsed by this Note in his analysis of *Cox Broadcasting Corp. v. Cohn*,<sup>130</sup> in which the Supreme Court suggested that states, rather than journalists, should bear the burden of having to decide how to balance privacy and the public interest.<sup>131</sup> Posner argued that punishing the publication of sensitive material was a more efficient mechanism to protect victims than the Court’s ostensibly preferred strategy of withholding information by “conducting rape trials *in camera*.”<sup>132</sup> But secret trials are not the only way to keep sensitive information out of the public eye; this Note suggests the possibility of a middle path.

The classic response to the efficiency objection is simply to attack its premise and argue that efficiency is not the only value that courts or government should pursue. In the context of tenant-screening reports, values of efficiency are clearly in tension with access to affordable housing and the

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129. Posner, *supra* note 9, at 174; *see also* Sheinkopf, *supra* note 2, at 1606; Stauffer, *supra* note 2, at 270.

130. 420 U.S. 469 (1975).

131. *See infra* notes 169–170 and accompanying text.

132. Posner, *supra* note 9, at 208.



right to be rejected only based on proper motives: “By dealing with privacy in economic terms, Posner overvalues interests that are easily quantifiable and undervalues interests that are more intangible.”<sup>133</sup> Indeed, just as we already forbid landlords from denying housing because of membership in a protected class—even if membership were correlated with a decreased ability to pay rent—we similarly should prevent landlords from denying applications on the grounds that the tenant appears willing to demand repairs and respect.<sup>134</sup>

But the analysis need not stop there. Another response to the efficiency argument is that current landlord behavior actually may be inefficient from an economic standpoint.<sup>135</sup> Whether or not landlords behave as news reports suggest they do—treating tenant-screening reports like blacklists—is an empirical question that has not yet been answered. But, if true, that behavior might be inefficient because landlords are overreacting to an eviction action on a tenant’s record. Excess demand in the rental housing market, or strong risk aversion on the part of landlords, or an incomplete understanding of how evictions work (e.g., conflating a “filed” action with one in which the tenant was actually evicted) might all lead to the same problem: landlords might avoid tenants unnecessarily or demand unnecessarily high rents or deposits simply because they incorrectly evaluate the risk of nonpayment or future eviction that a particular tenant presents.

When they must evict tenants, landlords face a potentially huge cost. They must often absorb filing and sheriff’s service fees, as well the back rent itself if their tenants are judgment-proof. A 1973 study found that unpaid back rent, along with filing and service fees, cost landlords in New Haven anywhere from \$389 to \$749 per eviction,<sup>136</sup> or, adjusting for inflation, between \$1778 and \$3423 in 2006.<sup>137</sup> According to a 1993 empirical study, New Haven landlords usually lost around two-thirds of the total arrears owed by tenants after an eviction action (about \$1500 in 1993 dollars for unrepresented tenants, or

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133. Stauffer, *supra* note 2, at 270.

134. I fully concede that another way to “prevent” landlords from relying on such grounds would be simply to prohibit such reliance directly, as we do with suspect class discrimination. Yet it is obvious that once landlords are presented with such information they have a powerful economic incentive to deny housing to the tenant who is a possible “pain,” *see supra* note 8 and accompanying text, and to justify that decision on other grounds.

135. I am grateful to Fadi Hanna for bringing this point to my attention.

136. *See Note, supra* note 42, at 1500 n.22. The amount was slightly higher when tenants had legal representation.

137. The 2006 value of 1973 dollars was calculated using the CPI Inflation Calculator. *See Bureau of Labor Statistics, supra* note 113.

\$2092 in 2006 dollars).<sup>138</sup> Today, a typical landlord might spend more than \$500 out of pocket just on the removal itself: the landlord must pay for movers, a sheriff or marshal to observe the process, and the cost of changing the locks once the tenant's belongings have been removed.<sup>139</sup> In an attempt to avoid these costs, landlords thus turn to tenant-screening reports as a plausible proxy for the eviction risk that a particular tenant presents.

Two problems arise from this approach, however. First, empirically speaking, past evictions may be poorly correlated with whether a particular tenant will require eviction in the future.<sup>140</sup> But more importantly, even if a correlation exists in theory, it might be overshadowed by other case-by-case considerations—such as whether the tenant has had recent financial difficulty—to the point at which, on a practical level, past evictions become virtually useless as a proxy for potential evictions. Without transparent empirical studies to measure the accuracy of tenant-screening reports, it is impossible to know. Second, even if the landlord is right about the risk that a “bad apple” tenant presents, the tenant may be unable to afford the appropriate risk premium to compensate the landlord for that risk. As a result, risky tenants will be priced out of the market and put into situations in which they are more likely to fall behind on rent. Additionally, many states cap the maximum security deposit at one or two months' rent.<sup>141</sup> In other words, even if a landlord could be convinced to accept a risky tenant as long as she put forward a larger security deposit, state law might prohibit the landlord from charging an appropriately high deposit amount. Taken together, these constraints make it more difficult for the landlord to use the information in the tenant-screening report in any effective way other than to simply reject the tenant.

Efficiency therefore is better served by “purifying” the data in tenant-screening reports. Filtering out cases in which tenants were not found guilty by the courts (and thereby strengthening the stigma associated with an eviction) also would help landlords reject some tenants and accept others along lines that match society's normative commitments.

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138. Gunn, *supra* note 15, at 417 & tbl.21; see Bureau of Labor Statistics, *supra* note 113.

139. See Gottesman, *supra* note 42, at 30-31 fig.6.

140. See Gunn, *supra* note 15, at 389 (summarizing a conclusion by Robert Daines that many tenants in the housing courts are “repeat players,” but finding no empirical evidence demonstrating a causal link between prior and future evictions).

141. About half of the states have some sort of statutory maximum deposit amount. See STEWART ET AL., *supra* note 41, at 427-32. I am certainly *not* arguing that these laws are out of place; without them, excessively large deposits could be used to abuse tenants with the threat of forfeiture.

## 2. Privacy

Scholars have applied privacy theories to tenant-screening reports in useful ways. In particular, Robert Stauffer's 1987 note extensively discussed both the philosophical evaluations of the privacy interests at stake<sup>142</sup> (such as the dignitary harm that derives from the need to adjust one's behavior to accommodate computer records) and the ways in which constitutional, statutory, and common law privacy protections might limit the information available in screening reports.<sup>143</sup> Stauffer did not apply privacy theory to court records, mostly because he argued that the fact of the eviction itself should remain private and individuals thus should be prohibited from mentioning it.<sup>144</sup>

Privacy interests, however, have been emphasized in the context of court records by legal scholars<sup>145</sup> and by organs of various state judicial branches concerned about problems such as identity theft.<sup>146</sup> The balance of privacy rights and openness in public records has commanded attention in state courts for several years now, and states have varied significantly in the solutions they have adopted.<sup>147</sup> But even those who reject the notion of privacy in open court—arguing that “the law simply does not recognize any ‘right of privacy,’ constitutional or otherwise, with respect to a public trial, either in the trial itself or in the record of the trial”—should recognize the legitimacy of sealing court

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142. The privacy right that attaches to reputation is clearly the “informational” kind articulated by Samuel Warren and Louis Brandeis. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The right is not the decisional kind that protects the right to an abortion or to use contraceptives, or the exclusional kind that prevents government from compelling self-incriminating testimony or conducting unreasonable searches and seizures. See Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 758–61 (2005).

143. See Stauffer, *supra* note 2, at 250–53, 259, 282–303.

144. My proposal does not justify sealing court records pertaining to eviction on the ground that the fact of an eviction is inherently “private.”

145. See, e.g., Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464–67 (1991) (noting that the Supreme Court has recognized privacy interests both in the information produced during discovery and in other “intensely personal information” disclosed in the course of litigation).

146. For example, various states either have adopted or are in the process of considering new rules to limit access to court records—particularly electronic access. See, e.g., *Comments Invited on New Rules for Electronic Access to Court Records*, MONT. LAW., June–July 2006, at 31.

147. For a seminal report on this topic, see SUSAN M. JENNEN, NAT’L CTR. FOR STATE COURTS, *PRIVACY AND PUBLIC ACCESS TO ELECTRONIC COURT INFORMATION: A GUIDE TO POLICY DECISIONS FOR STATE COURTS* (1995), available at <http://ctl.ncsc.dni.us/publicaccess/legalwritings/ncsc1995pub/papa.htm>.

records, because “when the government cumulates and indexes information, . . . the Supreme Court has recognized that a person has a privacy interest to ensure that the public is not given unfettered access to government computer banks.”<sup>148</sup>

### 3. Legislative Priorities

Records also may be kept secret at the discretion of the state legislature. In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court stated that

[b]y placing the [court’s private] information in the public domain on official court records, *the State must be presumed to have concluded that the public interest was thereby being served*. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.<sup>149</sup>

By inverse reasoning, if a state legislature were to decide not to make court records public, it must have concluded that keeping court eviction records open was not required by the public interest.<sup>150</sup> Critics would be hard-pressed to present a jurisprudential reason why that information must remain in the public domain. For example, state legislatures may determine that privacy values take priority over public access to court records.<sup>151</sup> Or they may decide that an unrelated interest—such as combating the social problems of addiction to drugs or alcohol—justifies sealing court records in certain cases.<sup>152</sup>

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148. John P. Sellers, III, *Sealed with an Acquittal: When Not Guilty Means Never Having To Say You Were Tried*, 32 CAP. U. L. REV. 1, 18 (2003).

149. 420 U.S. 469, 495 (1975) (emphasis added). For a more robust discussion of the First Amendment values implicated in the disclosure of information in court records, and specifically those implicated by the truthful reporting of tenant-screening agencies, see Williams, *supra* note 2, at 1091–95. See generally Sheinkopf, *supra* note 2.

150. And legislatures indeed have come to this conclusion in many cases. Examples are cited in the Connecticut rules of courtroom procedure that are devoted to sealing court records or documents. See CONN. SUPERIOR COURT RULES § 11-20A, cmt. 2005, in OFFICIAL 2007 CONNECTICUT PRACTICE BOOK 70, 178 (2007) [hereinafter CONN. PRACTICE BOOK], available at <http://www.jud.state.ct.us/Publications/PracticeBook/PB1.pdf>.

151. For example, in Connecticut, the kinds of records that qualify for automatic nondisclosure reveal the legislature’s interest in privacy: taxpayer records, medical records, and psychiatric records. See *id.* § 11-20, cmt. 2005, in CONN. PRACTICE BOOK, *supra* note 150, at 176; *id.* § 11-20A, cmt. 2005, in CONN. PRACTICE BOOK, *supra* note 150, at 178.

152. Again, to take the example of Connecticut, court records related to pretrial alcohol education also may be sealed. CONN. GEN. STAT. § 54-56g(a) (2007).

Furthermore, legislatures can and have carved out exceptions for “blameworthy” individuals not entitled to the same protections as those who approach the court with clean hands. For example, under a Connecticut statute creating a “pretrial alcohol education system,” the court will not seal the record of a defendant charged with driving under the influence who has already participated in the program once in the last ten years, who has been convicted of vehicular manslaughter or assault while under the influence, or whose alcohol use caused “serious physical injury” to another person.<sup>153</sup> This approach signals the legislature’s intent to protect citizens from unnecessary reputational harm unless other values (of fairness or retribution, for example) overcome those independent normative commitments.<sup>154</sup>

Sometimes legislatures delegate the final balancing to courts, while making it clear that records can be protected when appropriate. The standard for sealing records or documents in Connecticut, for example, is that records can be sealed when an interest (such as privacy) outweighs the public’s interest in knowing. The standard for sealing records is essentially a balancing test, with certain blanket exemptions. Records may be sealed “only if the judicial authority concludes that such an order is necessary to preserve an interest which is determined to override the public’s interest in viewing such materials.”<sup>155</sup> Courts have discretion to determine what qualifies as an overriding interest, weighing, for example, individual justice concerns against economic ones, but this discretion is again limited by legislative priorities, given that the rule on sealing court records begins with the statement that documents filed in court will be made public “[e]xcept as otherwise provided by law.”<sup>156</sup> Note also that this standard resembles the one employed when considering a motion to close the courtroom to the public in civil cases<sup>157</sup> and in criminal cases.<sup>158</sup>

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153. *Id.*

154. Similarly, my proposal seeks to protect only those tenants who are not evicted and not those tenants who lose in a trial on the merits or by default.

155. CONN. SUPERIOR COURT RULES § 11-20A(c), in CONN. PRACTICE BOOK, *supra* note 150, at 176.

156. *Id.* § 11-20A(a), in CONN. PRACTICE BOOK, *supra* note 150, at 176.

157. *See id.* § 11-20, in CONN. PRACTICE BOOK, *supra* note 150, at 174.

158. *See id.* § 42-49, in CONN. PRACTICE BOOK, *supra* note 150, at 341, available at <http://www.jud.state.ct.us/Publications/PracticeBook/PB2.pdf>.

#### 4. *Fairness and Due Process*

Finally, it is a hallmark of blacklists that basic fairness and due process are not afforded to those whose names appear therein.<sup>159</sup> Tenant blacklists are no different because without mechanisms such as the one proposed here, landlords can decide unilaterally to blacklist tenants. Landlords can do so by voluntarily reporting negative information about their tenants or, worse yet, by “creating” negative information that has the veneer of objectivity by filing eviction actions. Although the FCRA entitles a tenant to a process to delete erroneous items from credit reports, it does not protect tenants from the arbitrary creation of such entries in the first place. Conditioning record disclosure on a finding of the tenant’s blameworthiness thus exports the due process values protected by the courts into the nonjudicial realm of tenant-screening reports.

#### *B. Reasons To Keep Eviction Records Public by Default*

Clearly, openness and transparency in the justice system advance many traditional values of democracy and free society. The benefits of conflict resolution “out in the open” have been called a “public good,”<sup>160</sup> and numerous scholars have questioned the appropriateness of private settlements that are adopted, at least in part, to shield one or both sides of the litigation from public scrutiny.<sup>161</sup> While these arguments are germane to any discussion that involves closing some aspect of the judicial system from public scrutiny, two aspects of my proposal should neutralize these concerns: first, I propose that only court

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159. See, e.g., Justin Florence, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2158-59 (2006) (“Once informed of their status, watchlisted [i.e., blacklisted] travelers have no opportunity for a hearing. . . . The [Transportation Security] Agency’s procedures specifically provide that the process ‘will not remove a name’ from the watchlist . . .”).

160. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622 (1995). The Supreme Court has articulated this view as well. See *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“What transpires in the court room is public property.”); see also David A. Schulz, *Rethinking Confidentiality and Access in Civil Litigation*, COMM. LAW., Fall 2005, at 24, 24, available at <http://www.abanet.org/forums/communication/comlawyer/2005/Fallo5.pdf> (“[The Sedona Guidelines] seek to . . . give fresh meaning to the notion that a ‘trial is a public event’ and ‘[w]hat transpires in the court room is public property.’” (second alteration in original) (quoting *Craig*, 331 U.S. at 374)).

161. See, e.g., Laurie Kratky Doré, *The Confidentiality Debate and the Push To Regulate Secrecy in Civil Litigation*, in ROSCOE POUND INST., OPEN COURTS WITH SEALED FILES: SECRECY’S IMPACT ON AMERICAN JUSTICE 9, 11 (2004); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

records, and not the courtroom proceedings themselves, be closed to the public; second, I provide an exception for journalists and others with a legitimate purpose to review those records.

In this Section, I address specific concerns with the implications of my proposal for openness and transparency.

### 1. First Amendment Doctrine and the Common Law

I begin with the simple observation that court *proceedings* should have a fundamentally different standard of openness and transparency applied to them than court *records*, which are significantly more administrative in nature. The public and press have long held a First Amendment right to attend court proceedings, but the Supreme Court has never held that the public has a constitutional right of access to a court's records in civil cases.<sup>162</sup> The Court held in a series of cases during the late 1970s and early 1980s that the First Amendment clearly protects the public's right of access to criminal proceedings.<sup>163</sup> As it recognized in *Richmond Newspapers, Inc. v. Virginia*, "the right to attend criminal trials is implicit in the guarantees of the First Amendment."<sup>164</sup> The Court declined to address whether civil cases also must be open to the public,<sup>165</sup> but several circuits have extended the right of access to civil court proceedings.<sup>166</sup>

While the public's right of access to civil court proceedings is not clearly specified in Supreme Court jurisprudence, the right of access to civil court

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162. See *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) ("There is not yet any definitive Supreme Court ruling on whether there is a constitutional right of access to court documents and, if so, the scope of such a right."); see also Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 87 & n.14 (2006) (quoting *McVeigh*, and mentioning two cases in the Sixth and Seventh Circuits that discuss a right of access to judicial records or court documents).

163. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))); see also John Gerhart, *Access to Court Proceedings and Records*, COMM. LAW., Summer 2000, at 11, 12, available at <http://www.abanet.org/forums/communication/comlawyer/summer00/gerhart.html>.

164. 448 U.S. 555, 580 (1980) (plurality opinion).

165. The Court nonetheless observed that "historically both civil and criminal trials have been presumptively open." *Id.* at 580 n.17.

166. By the year 2000, at least the Third, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits had suggested or endorsed a First Amendment right of public access to civil court proceedings. See Gerhart, *supra* note 163, at 16 nn.35, 67, 69.

records is even murkier. The few circuits finding that the presumption of a public right of access to court records in civil cases is of “constitutional magnitude” have also nevertheless recognized that compelling government interests might still overcome that presumption.<sup>167</sup>

As mentioned earlier,<sup>168</sup> the Court suggested in *Cox Broadcasting* that the onus for keeping certain information private should rest on the government, not on journalists:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.<sup>169</sup>

The Court also anticipated that constitutional issues might arise from a decision to keep court records private: “We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.”<sup>170</sup>

Subsequently, in *Nixon v. Warner Communications, Inc.*,<sup>171</sup> the Court did not explicitly answer the question of whether the First Amendment provides a right of access to judicial records. Instead, it acknowledged that the public conventionally had such a right, although it located the right of access in common law principles: “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”<sup>172</sup> The circuits have varied in their determinations of the

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167. See, e.g., Ronald D. May, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465, 1487 (1986) (describing how, after “avoid[ing] the constitutional question and focus[ing] on the common law right of access,” the Eleventh Circuit adopted a compelling interest test with a narrow tailoring requirement).

168. See *supra* note 130 and accompanying text.

169. 420 U.S. 469, 496 (1975).

170. *Id.* at 496 n.26. The Supreme Court has recognized in another context that not all kinds of access to court records are the same. In a 1989 case decided under the Freedom of Information Act, 5 U.S.C. § 552 (2000), the Court acknowledged “a vast difference between the public records that might be found after a diligent search of courthouse files . . . and a computerized summary located in a single clearinghouse of information,” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989).

171. 435 U.S. 589 (1978).

172. *Id.* at 598; see also Sudbeck, *supra* note 162, at 85-86.



strength of the common law right of access to court records and whether a First Amendment right of access to civil court records does indeed exist.<sup>173</sup>

This question of whether First Amendment or common law rights to attend criminal trials can be applied to the inspection of civil records remains unanswered.<sup>174</sup> I simply observe that either the First Amendment or common law traditions provide us with some access to court records, but that the particular structure of the statutory proposal here weakens the claimed public interest in the contents of those records. Specifically, disclosing records in an *outcome-dependent* way means that the evictions with real interest to the public—good-faith, meritorious actions—are ultimately unsealed.<sup>175</sup> Furthermore, because the proposal gives journalists unfettered access to court records, the initial nondisclosure thwarts only the commercial interests of landlords and tenant-screening agencies. Finally, releasing memoranda of judicial decisions to the public and keeping the courtrooms and proceedings open will preserve the values of transparency and popular supervision potentially located in the First Amendment.

## 2. Other Values

In *Richmond Newspapers*, the Supreme Court articulated some of the values inherent in the openness of criminal procedures, citing to Hale and Blackstone: openness “gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.”<sup>176</sup> Those benefits probably do not redound to the judiciary simply because its records are open to public inspection. Put simply, open proceedings keep proceedings fair, honest, and impartial because citizens are present inside the courtroom, physically

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173. Compare *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (“Simply showing that the information would harm the company’s reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records.”), with *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1339 (D.C. Cir. 1985) (Scalia, J.) (“To the extent a First Amendment right to post-judgment civil records exists, it does not exceed, for the reasons discussed earlier, the traditional common law right.”).

174. On circuit splits concerning rights of access to civil cases and judicial records, see Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739, 1758 (2006); and Melissa B. Coffey, Note, *Administrative Inconvenience and the Media’s Right To Copy Judicial Records*, 44 B.C. L. REV. 1263, 1272-84 (2003).

175. As a reminder, this presumes the normative commitments that I articulated *supra* note 12 and accompanying text.

176. 448 U.S. 555, 569 (1980) (plurality opinion).

watching how their fellow citizens are behaving. Participants in the justice system would not feel the same watchful presence of those who simply read the transcript or examine court records after the fact.

All of the benefits mentioned by Blackstone—ensuring fairness, discouraging perjury and misconduct, and dispelling impressions of bias—are desirable in eviction cases. Landlords and tenants also need to know what the law actually requires; they need to trust the courts to be fair; and at least some eviction cases can expose abusive landlords or tenants to public scrutiny. Similarly, the public's presence in the courtroom might make tenants and landlords better-behaved and perhaps more amenable to settlement. However, none of these values would be affected by sealing the court's records on evictions—at least not when sealing is limited to cases in which the tenant prevailed or the parties settled.

Indeed, other states have begun to rethink the level of openness in their court records more generally. While these states are often concerned with the availability of other personally identifying information, such as Social Security numbers, their arguments for the permissibility of sealing records are substantially the same as my own: it is acceptable to limit the disclosure of court records when the information contained therein “does nothing to shed light on the workings of the judiciary.”<sup>177</sup> One objection to this argument is that while Social Security numbers, birthdates, and other sensitive information may be incidental to the workings of the justice system, information such as the disposition of the case is essential if students of the judiciary are ever to “shed light” on its workings. That is why I would allow journalists and any other person on a showing of good cause to examine the court's summary process records.

A final value asserted in favor of protecting open records is antipaternalism: “[Restricting] access to public records for fear that disclosure will have adverse effects on those mentioned in the records is engaging in the sort of paternalism deplored by the Supreme Court in *Virginia State Board of Pharmacy*.”<sup>178</sup> There are two responses to this argument. First, literally speaking, it is not in fact “paternalistic” to level the informational playing field between landlords and tenants by making it harder for landlords to harm a tenant's reputation without justification or process. Paternalism involves diluting or removing a person's autonomy “for her own good,” while allowing a tenant to decide when court records concerning her are released to the public *enhances* tenant autonomy. Second, even if this protection is indeed paternalistic, there is

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177. Sudbeck, *supra* note 162, at 82.

178. Sheinkopf, *supra* note 2, at 1607 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

nothing wrong with paternalistic measures undertaken on behalf of populations that lack the skills and resources to defend themselves effectively—and those most affected by erroneous, misleading, or abusive eviction items almost certainly lack the resources to combat this problem on a wide scale.

### C. *Examples and Parallels*

Finally, the legality and feasibility of conditional disclosure of court records has already been demonstrated: consider not only the examples of legislative priority-making discussed in Subsection III.A.3 but also, in another context, the expunction of criminal records. Many states permit criminal defendants to “expunge” their criminal records if the crime was not too serious and the accused appears either innocent or rehabilitated. In criminal cases, the public’s interest in sunshine and transparency is heightened, but so too may be an innocent defendant’s interest in privacy and a rehabilitated convict’s interest in privacy or forgiveness. While the precise meaning of expunction varies by state, a generally consistent trend is that an expunged record erases all traces of the arrest, trial, and conviction (if applicable) from police and court records.<sup>179</sup> A person may even lie about whether she has ever been arrested or convicted of the crime in question.<sup>180</sup>

Two kinds of expunction are relevant here. The first is when criminal defendants acquitted of their charges are entitled to have their police and criminal records expunged and the court’s records of the case sealed—a form of outcome-dependent record closure. For example, an Ohio statute<sup>181</sup> turned what used to be an extraordinary case of expunction into an action “demanded as a matter of right.”<sup>182</sup> According to one summary:

Should the trial court determine that the applicant’s interests are paramount to those of the state to maintain its record, the court is to place all “official records” of the case under seal. “Official records” refers not only to the trial record, but also to all records and investigative reports possessed by law enforcement, as well as other governmental agencies. . . . In fact, law enforcement officials are

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179. For an elaboration on expunction, see Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057.

180. See *id.* at 1059 (“[M]ost states authorize offenders whose records have been expunged to respond negatively when questioned whether they have been convicted of a crime.”).

181. See OHIO REV. CODE ANN. §§ 2953.51–.61 (West 2006).

182. Sellers, *supra* note 148, at 3.

effectively “gagged” from further discussing the matter with any interested member of the public or the press . . . .<sup>183</sup>

Yet this particular approach to outcome-based record management is notable in part for its extreme cost. As critics of expunction have pointed out, the ex post purging of the court’s institutional memory is costly and often incomplete.<sup>184</sup> Instead of trying to put the cat back into the bag when the defendant is proven innocent, I propose releasing the information only when the tenant is found blameworthy.<sup>185</sup> The fact that some states are willing to pass expunction laws, however, only points more strongly to the conclusion that an individual’s interest in a clean record can justify the related administrative costs.

In the second kind of expunction, criminals can be convicted but allowed to expunge their records at some later date, usually based on a theory of forgiveness and rehabilitation. For example, in Oregon, “any defendant who has fully complied with and performed the sentence of the court” and whose crime fits certain criteria may apply for an order setting aside the conviction after three years have elapsed from the date of judgment.<sup>186</sup> Furthermore, if that motion is granted, “the court shall issue an order sealing the record of conviction and other official records in the case, including the records of arrest whether or not the arrest resulted in a further criminal proceeding.”<sup>187</sup> In other words, convicted criminals are granted a clean slate for relatively recent transgressions, yet in almost every state, an innocent tenant who prevails on the merits against her landlord is not entitled to a similarly clean slate.

Of course, it is important not to overstate the extent to which expunction allows a person to have a “clean slate” either before or after a conviction. Because records are only sealed ex post facto, the information may already be available from other sources. Expunction alone is insufficient to achieve

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183. *Id.* at 7 (footnotes omitted).

184. See Mayfield, *supra* note 179, at 1066-72.

185. For a discussion of the futility of efforts to restore both animals and genies to their respective enclosures, see Eric B. Easton, *Closing the Barn Door After the Genie Is out of the Bag: Recognizing a “Futility Principle” in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1 (1995). See also Daniel Lombard, Note, *Top Secret: A Constitutional Look at the Procedural Problems Inherent in Sealing Civil Court Documents*, 55 DEPAUL L. REV. 1067 (2006).

186. OR. REV. STAT. § 137.225(1)(a) (2005).

187. *Id.* § 137.225(3).

forgiveness and rehabilitation, because while court records may be expunged, private copies of court records remain unaffected.<sup>188</sup>

## CONCLUSION

Easier and more open access to public records is a trend that will and should continue as society and government grow more complex. Such disclosure is necessary not only to avoid corruption and provide the “sunshine” sought by freedom of information laws but also to increase reporting accuracy and economic efficiency. However, knowing too much also cuts against the values of individualism and justice that have kept our country’s economic engines strong. Pure economic interest cannot justify all information disclosures.

This Note’s proposal, therefore, walks this tightrope between public and private interests in the particularly important context of landlord-tenant disputes. Evictions are necessary, and their swift and fair adjudication should not be impeded by a fear that those who come before the court face undeserved harm to their reputation. Large, anonymous databases of eviction litigants need not be opened to public scrutiny until those litigants have received the due process to which they are entitled. In the end, outcome-dependent disclosure makes government look better as well. By keeping courtrooms open but some records closed, states can be sure that the individual reputations and privacy rights of their citizens are protected while the machinery of justice remains subject to public examination and supervision.

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188. See, e.g., Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1725-26 (2003) (“Moreover, far from being literally obliterated, ‘expunged’ records almost always remain available for use by law enforcement agencies and the courts, and in some states they may be accessible to other public agencies and even to private investigative services hired to perform criminal background checks for employers.”); Liptak, *supra* note 86.