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# Combating Tenant Blacklisting Based on Housing Court Records

## A Survey of Approaches

BY ESME CAMELLO AND NORA MAHLBERG

*“It is the policy of 99 percent of our 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>1</sup>*

*“Once the [eviction case] is served and filed, you will have a permanent record in housing court.... If you win sanctions against me and you can say you won in court[, d]o you think that will make any prospective landlords feel better about renting to you?”<sup>2</sup>*

As others have documented well, and as anyone who works with low-income tenants has likely observed, having a housing court “record”—a publicly accessible history of having sued or been sued by a landlord—can be a serious impediment to finding housing.<sup>3</sup> Tenant-screening bureaus collect housing court data and sell them to landlords; the

bureaus often make recommendations about a tenant based solely on the existence of a recent case, regardless of its underlying basis. The recent move by courts to put civil case records online has made the problem worse, creating a permanent record of a tenant’s court history that anyone can access at any time and enabling landlords to run quick, free searches and deny tenants housing based on the few (sometimes inaccurate or misleading) facts they find online.

Blacklisting impedes not only access to housing but also access to justice. If tenants cannot use the justice system to vindicate their rights because they are legitimately afraid that any court involvement will harm their ability to secure housing, then tenants’ rights are not fully enforceable.

Here we collect the strategies that advocates across the country have used

to mitigate the harm of public access to housing court records, and we update the literature with recent developments to give advocates inspiration and guidance in tackling this persistent problem.

### Removing Housing Case Records from Public View

The most effective way to prevent blacklisting is to shield housing cases from public view altogether. While public policy generally favors public access to court records, this presumption of access is not absolute.<sup>4</sup> Housing case records can be, and in some states are, sealed either automatically or on a case-by-case basis.<sup>5</sup>

**Automatic Sealing.** Many states bar public access to certain types of court records.<sup>6</sup> In a few places, advocates have successfully extended blanket protection to certain housing records, shielding them from public view without the need for individualized advocacy.

- In 2016 California enacted a law that effectively seals eviction case records

1 Teri Karush Rogers, *Only the Strongest Survive*, NEW YORK TIMES, Nov. 26, 2006 (quoting Jake Harrington, founder of On-Site.com).

2 Letter from landlord to tenant (Oct. 25, 2015) (in our files). Another landlord, through counsel, tried to persuade a tenant to vacate her home without a court order by dangling the threat of blacklisting over her head: “As [legal] action could have a negative effect on your ability to secure alternative housing, it would appear that your voluntarily vacating the premises could be most advantageous to you” (letter from landlord’s attorney to tenant (April 3, 2017) (in our files)).

3 See, e.g., Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 15, 19 (2015); Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant Screening Problems in Washington State*, 9 SEATTLE JOURNAL FOR SOCIAL JUSTICE 319, 336 (2010); Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE LAW JOURNAL 1344, 1347 (2007).

4 See *Nixon v. Warner Communications Incorporated*, 435 U.S. 589, 597–98 (1978).

5 We use “sealing” to mean restricting public access to court records or certain information in those records. This concept has different names and contours in different states. E.g., in Massachusetts civil case records are “impounded.” In the Minnesota and Illinois statutes cited here, the terms “sealed” and “expunged” are essentially synonymous (see 735 ILL. COMP. STAT. 5/9-121 [2017]; MINN. STAT. § 484.014 [2016]). The effectiveness of sealing an eviction file may also vary (see, e.g., NEV. R. SEALING & REDACTING CT. RECORDS 3(5)(c) (names of parties in sealed cases remain publicly available)).

6 See, e.g., Massachusetts Juvenile Court Standing Order 1-84: Juvenile Court Case Records and Reports. In some states online access to certain cases is restricted even if the cases themselves are not sealed (see, e.g., ARIZ. SUP. CT. R. 123).



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## Blacklisting impedes not only access to housing but also access to justice.

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at the point of filing. While the records remain accessible to parties, their attorneys, and certain other categories of people connected with the case or having “good cause” to review them, the records are unavailable to the general public—including prospective landlords and tenant-screening bureaus—unless the landlord prevails in the first 60 days or wins at trial after the 60-day mark. A court may also issue an order barring access to an otherwise available record if the parties so stipulate.<sup>7</sup>

- In Illinois, Minnesota, and California the records of certain postforeclosure evictions are automatically sealed.<sup>8</sup> The process for sealing is absent from these statutes, however, and implementation is inconsistent in at least some areas.<sup>9</sup>
- The New York City Housing Court limits online access to housing records, removes tenants’ names and addresses from the electronic data it sells to tenant-screening bureaus, and publishes only pending cases online. The records remain available at the courthouse, but the added work required to get them creates some measure of privacy by “practical obscurity.”<sup>10</sup>

7 CAL. CIV. PROC. CODE § 1161.2 [2017].

8 See CAL. CIV. PROC. CODE § 1161.2(a)(1)(G); 735 ILL. COMP. STAT. 5/9-121(c); MINN. STAT. § 484.014 subd. 3.

9 See Mary Ellen Podmolik, *Post-Foreclosure Evictions Haunt Some Renters*, CHICAGO TRIBUNE (June 15, 2014) (citing analysis by Lawyers’ Committee for Better Housing that only half of eligible cases had been sealed); but see Lawyers’ Committee for Better Housing, *Judge’s General Order Protects Renters’ Rights* (Feb. 18, 2015).

10 Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASHINGTON LAW REVIEW 307, 316 (2004). See Julie Satow, *On the List, and Not in a Good Way*, NEW YORK TIMES, Oct. 16, 2014.

- In Wisconsin dismissed cases are theoretically visible online for only two years, but local advocates report that this rule is not followed.<sup>11</sup>

These laws illustrate that there are good policy arguments for limiting access to records that have little predictive value to prospective landlords. Most records, moreover, would remain accessible for tenant screening even with a law such as California’s.<sup>12</sup> Nonetheless, limiting public access to court records automatically, rather than on an ad hoc, discretionary basis upon motion, can be difficult to achieve legislatively. Even where landlords can be persuaded that they need access to only certain eviction records to protect them against “bad tenants,” advocates for open government will fight for open access, citing the need to keep a watchful

jurisdictions the blanket sealing of eviction cases may simply be impossible.<sup>14</sup>

**Ad Hoc Discretionary Sealing.** In many states, civil litigants are permitted to move, on a case-by-case basis, to seal civil court records and remove them from public view absent a court order allowing access. Sealing is generally both discretionary and rare because of the strong public policy favoring public access to court records.<sup>15</sup> Sealing records on an ad hoc basis is therefore labor-intensive and, given the challenges inherent in overcoming the presumption of public access, difficult for self-represented tenants to accomplish unassisted.

In some states the burden of persuading a skeptical judiciary to seal housing court records is lessened by laws making explicit that sealing should be

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## The most effective way to prevent blacklisting is to shield housing cases from public view altogether.

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eye on the workings of the courts.<sup>13</sup> As the examples in this section show, however, legislative success in this area is possible in at least some jurisdictions. In other

considered, at least, in housing cases.

- In Illinois courts are expressly permitted to seal eviction court records upon motion by a tenant but only upon a showing that “the plaintiff’s action is sufficiently without a basis in fact or law, which may include a lack of jurisdiction, that placing the court file under seal is clearly in the interests of justice, and that those inter-

11 See WIS. SUP. CT. R. 72.01(9); Tenant Resource Center for Housing Justice in Wisconsin, CCAP: The Good, the Bad, and the Ugly (June 10, 2014).

12 E.g., in the Milwaukee Eviction Court Study, 48 percent of the tenants who appeared on the court date got their cases dismissed or settled, while 29 percent were ordered evicted, and many more defaulted (see Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AMERICAN JOURNAL OF SOCIOLOGY 88, 95, 101–2 (2012)). Data collected by Chicago Reader investigative reporter Maya Dukmasova (in our files) showed that 37 percent of cases were resolved, including by stipulated dismissal, in favor of tenants. Another study showed that about 32 percent of 2014 cases in the Boston Housing Court ended in a final judgment execution for the landlord (Project Hope et al., *Boston Housing Court Data Report 5* (Fall 2016)).

13 See, e.g., Jonathan M. Albano, *Public Access to Electronic Judicial Records*, BOSTON BAR JOURNAL (Oct. 21, 2015).

14 See, e.g., *Indigo Real Estate Services v. Rousey*, 215 P.3d 977, 980–81 (Wash. Ct. App. 2009).

15 See, e.g., IND. CODE § 5-14-3-5.5 (2017); OKLA. STAT. tit. 51 § 24A.30 [2017] (movant must show “compelling privacy interest exists which outweighs the public’s interest in the record”); IND. CT. R. ADMIN. R. 9(G)(4) (allowing sealing only in “extraordinary circumstances” and upon showing that public access “will create a significant risk of substantial harm to the requestor, other persons or the general public”); *Nixon*, 435 U.S. at 598.

ests are not outweighed by the public's interest in knowing about the record."<sup>16</sup>

- Minnesota has a nearly identical provision, and its legislature has been explicit that the courts retain their "inherent authority" to expunge eviction cases under common-law standards as well.<sup>17</sup>
- In Delaware a tenant may apply to the judge who presided over an eviction case for a discretionary order restricting *online* access to a court record upon a showing of "significant negative implications relating to an individual's ability to ... obtain or retain ... housing."<sup>18</sup> The records remain viewable at the courthouse and reportable by tenant-screening bureaus.

Even absent specific provisions referencing the harm that tenants, specifically, may face from the publication of their housing court records, tenants with lawyers in some states, such as Minnesota, have been able to persuade judges to seal their eviction records under more general common-law or statutory provisions permitting civil case records to be sealed where a litigant's privacy interests outweigh the public's interest in access.<sup>19</sup> In other states, however, such efforts have been shot down summarily.<sup>20</sup>

As the more widespread success in Minnesota has shown, a small number of

well-crafted, successful sealing petitions can educate the judiciary about the impact of eviction records on tenants' housing search and thereby ease the burden on future tenants seeking to get their cases sealed. Engaging in an initiative to develop the sealing case law in your jurisdiction may therefore be worth the effort. Advocates considering such an

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### Tenant-screening bureaus may report information about civil judgments only for seven years or until the statute of limitations has expired, whichever is later.

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approach can draw lessons and find persuasive authority in successful efforts across the country to limit access to criminal records despite the presumption of public access to court documents.<sup>21</sup>

### Regulating the Content of Tenant-Screening Reports

In many jurisdictions, landlords purchase reports from tenant-screening bureaus, which collect information from housing courts and aggregate it with other publicly available data about tenants and, in some cases, make concrete predictions about whether the subject will make a good tenant.<sup>22</sup> As access to online records has expanded, fewer landlords are relying on tenant-screening bureaus to get information about a prospective tenant's housing court record. Nonetheless, tenant-screening reports are still used and in some

jurisdictions are almost exclusively used.<sup>23</sup> The use of tenant-screening bureaus may in fact increase in the wake of a recent decision by the three major credit bureaus not to include the vast majority of civil judgments on a standard consumer credit report.<sup>24</sup> Regulating the content of tenant-screening reports is therefore still an important tool for advocates seeking

to encourage or enforce fairer rental decisions based on housing court records.

One advantage of landlords' using tenant-screening reports is that those reports, and tenant-screening bureaus themselves, are covered by the federal Fair Credit Reporting Act, a law targeted at ensuring the accuracy of credit reports and offering consumers, including tenants, the opportunity to correct errors.<sup>25</sup> But error correction under the Act has its limitations, and thus advocates in several jurisdictions have sought to go further to ensure accuracy in tenant-screening reports.

<sup>16</sup> 735 ILL. COMP. STAT. 5/9-121(b).

<sup>17</sup> MINN. STAT. §§ 484.014, 504B.345 subd. 1(c)(2). As noted above, some types of postforeclosure cases are automatically sealed in both Minnesota and Illinois.

<sup>18</sup> Delaware Administrative Office of the Courts, *Operating Procedures: Media Coverage, Public Access and Records Management* 3(b) (n.d.).

<sup>19</sup> See, e.g., LAWRENCE McDONOUGH, *RESIDENTIAL EVICTION DEFENSE AND TENANT CLAIMS IN MINNESOTA* § VIII.E.5 (16th ed. 2017). See also *Indigo Real Estate Services*, 215 P.3d at 979 (reversing denial of tenant's motion to redact name from eviction database after case voluntarily dismissed and remanding for consideration of whether request is "justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record").

<sup>20</sup> See, e.g., *Fairhaven Village Associates v. Choquette*, No. 16 CV 357 (Mass. Se. Hous. Ct. Sept. 12, 2016) ("no good cause for the impoundment of the entire case" in eviction brought based on disability-related behavior and ultimately dismissed voluntarily by landlord).

<sup>21</sup> See, e.g., *Commonwealth v. Pon*, 469 Mass. 296, 315 (2014) (both defendant and state have strong interest in "reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants").

<sup>22</sup> See New York State Bar Association, *LEGALEase: The Use of Tenant Screening Reports and Tenant Blacklisting* (June 2015).

<sup>23</sup> E.g., in the New York court system, free online records access to landlord-tenant cases is available only for currently calendared cases, and they remain online for only 14 days after the last appearance ([New York State Unified Court System, WebCivil Local—Frequently Asked Questions](#) (n.d.)). Tenant-screening bureaus therefore offer the only efficient access to a tenant's housing court history.

<sup>24</sup> Under the National Consumer Assistance Plan announced by Equifax, TransUnion, and Experian in response to pressure from a group of state attorneys general and the Consumer Financial Protection Bureau, civil judgments will be reported after July 1, 2017, only if the data furnisher includes a date of birth (see [Kevin McCoy, Consumer Credit Scores to Exclude Some Debts, Liens Starting July 1](#), USA TODAY (March 13, 2017); [National Consumer Assistance Plan, News About the National Consumer Assistance Plan](#) (June 9, 2016)). This new requirement makes reporting of eviction judgments on the agencies' credit reports unlikely and has given fodder to tenant-screening bureaus seeking to document a need for their own services (see, e.g., [Becky Bower, 3 Major Credit Bureaus Will Remove Most Tax Liens and Civil Judgments](#) (Sept. 13, 2016)).

<sup>25</sup> See 15 U.S.C. §§ 1681–1681x (2015).

**The Fair Credit Reporting Act.** Under the Fair Credit Reporting Act, a tenant-screening bureau must follow “reasonable procedures to assure maximum possible accuracy of the information” reported about a tenant, conduct a “reasonable reinvestigation” if information is disputed by a tenant, and inform the tenant of the results of the reinvestigation.<sup>26</sup> If a reinvestigation shows that the disputed information is inaccurate or unverifiable, the tenant-screening bureau must promptly delete that information from the tenant’s file and notify the furnisher of the information that the information has been modified or deleted from the file.<sup>27</sup> Tenant-screening bureaus may report information about civil judgments only for seven years or until the statute of limitations has expired, whichever is later.<sup>28</sup> A tenant-screening bureau must also supply information contained in a consumer’s report and the source of that information if it is requested by the consumer.<sup>29</sup> The Act gives a consumer a private right of action to enforce these provisions and permits the collection of attorney fees.<sup>30</sup>

The Fair Credit Reporting Act can be one useful tool for regulating the practices of tenant-screening bureaus and therefore their reports, and represented tenants have had moderate success in enforcing its provisions.<sup>31</sup> The Act places the onus on the tenant, however, to identify and challenge any errors, and trying to correct errors or receive more information under the Act can be confusing and time-consuming.<sup>32</sup>

26 15 U.S.C. §§ 1681e(b), 1681i.

27 *Id.*

28 *Id.* § 1681c.

29 *Id.* § 1681g.

30 *Id.* §§ 1681n, 1681o.

31 See, e.g., *Dennis v. BEH-1 Limited Liability Company*, 520 F.3d 1066 (9th Cir. 2008); *White v. First American Registry Incorporated*, 2007 WL 703926 (S.D.N.Y. March 7, 2007).

32 HousingLink, *Tenant Screening Agencies in the Twin Cities: An Overview of Tenant Screening Practices and Their Impact on Renters* 37 (Summer 2004).

Furthermore, a tenant must establish that the violation harmed the tenant.<sup>33</sup> Therefore, to challenge, say, a tenant-screening bureau’s procedure in obtaining information, a tenant must show that the deficiency in the tenant-screening bureau’s procedure caused the tenant actual harm.<sup>34</sup> Clearing this hurdle will largely depend on the landlord’s screening criteria and whether the rental outcome would have been different had the tenant-screening bureau not violated Fair Credit Reporting Act rules.<sup>35</sup> Aside from the difficulties in enforcing the law, the Act is primarily limited to correcting the accuracy of information. It does not require that tenant-screening reports include the basis for the eviction, any defenses raised (even successfully) by the tenant, whether any rent was abated, or any other information that would give a landlord a better understanding of what actually happened in a case and a better ability to assess a potential tenant fairly and accurately.

**Local Provisions Promoting Accuracy in Tenant-Screening Bureau Reports.** Given the Fair Credit Reporting Act’s limitations, advocates in some jurisdictions have pursued additional measures to improve the accuracy of tenant-screening reports. Some simply make error correction easier or more robust, but others aim to expand the information available to landlords to promote informed decision making based on a tenant’s actual rental history.

- In Minnesota a tenant-screening bureau must include a tenant’s full name and date of birth and both basis and outcome of any housing court

33 15 U.S.C. §§ 1681n(a)(1)(A), 1681o(a)(1) (allowing collection of “actual damages sustained by the consumer as a result of the failure” (emphasis added)).

34 See *Wenning v. On-Site Manager Incorporated*, No. 14 Civ. 9693 (S.D.N.Y. June 22, 2016).

35 See *id.*; but see *Dennis*, 520 F.3d 1066 (reversing summary judgment in part because plaintiff showed damages in that several lenders failed to extend plaintiff credit because of error).

proceeding whenever the bureau includes information from a court file and that information is available in the file.<sup>36</sup> Tenant-screening bureaus must also allow tenants to include in the tenant-screening report a 100-word explanation about any disputed piece of information.<sup>37</sup> If a tenant-screening bureau knows that a court file has been expunged, the bureau must delete information about that file from the report.<sup>38</sup>

- A court rule issued by the Supreme Court of Minnesota requires bulk purchasers of court records to replace out-of-date court information when they receive a new delivery of bulk data.<sup>39</sup>
- In Washington a court may issue an “order for limited dissemination” by tenant-screening bureaus of an eviction case where “the court finds that the plaintiff’s case was sufficiently without basis in fact or law [or that] the tenancy was reinstated” or for “other good cause.” Following such an order, a tenant-screening bureau must not include the case in its reports or use the case in scoring the tenant.<sup>40</sup> Because the statute does not require that a court find that the case was sufficiently without basis in fact or law before issuing an order, the standard is much lower than that in the Illinois and Minnesota statutes discussed above.<sup>41</sup>
- The Washington statute also creates an optional alternate system of reusable tenant-screening reports. The reports are prepared by a consumer reporting agency but are given to tenants so that tenants are aware of

36 MINN. STAT. § 504B.241 subd. 4.

37 *Id.* subd. 3.

38 *Id.* subd. 4.

39 MINN. R. PUB. ACCESS TO RECS. OF JUD. BRANCH 8, subd. 3(b).

40 WASH. REV. CODE § 59.18.367 (2016).

41 See, e.g., 735 ILL. COMP. STAT. 5/9-121(b); MINN. STAT. § 484.014 subd. 2.

## Several jurisdictions prohibit overzealous screening of tenants with criminal records, but few restrict landlords' use of tenants' housing court histories to make rental decisions.

the contents of the reports before the reports are submitted to landlords.<sup>42</sup> This facilitates the correction of errors before those errors impede a tenant's housing search. Before obtaining any information about the tenant, landlords are required to inform prospective tenants whether the landlords accept reusable tenant-screening reports.<sup>43</sup>

- In New York City landlords with more than five units must notify prospective tenants—before they apply for an apartment—of which tenant-screening bureau the landlord uses, if any, and how the applicant can contact the company to get a free copy of the report.<sup>44</sup> Under this rule, tenants can more easily identify and correct errors in the tenant-screening report before the errors become barriers to finding housing.
- A proposed ordinance that was introduced in the New York City Council in 2016 would require tenant-screening bureaus to include more comprehensive information about reported housing court cases, including the claims alleged in the petition, any answer filed or defenses asserted, and the most current status of the case.<sup>45</sup> If at the time of the report the case was resolved, the report would contain the outcome of the proceeding, including whether rent was reduced or abated by agreement or court order and

the amount of the reduction or abatement.<sup>46</sup> The ordinance would also require tenant-screening bureaus to register and be licensed by the city and would subject noncompliant tenant-screening bureaus to license revocation.<sup>47</sup> The ordinance was sent to the Consumer Affairs Committee upon being introduced.

### Correcting Errors in Court Databases.

With more landlords simply conducting their own tenant screening by reviewing court databases made available online for free as a government service, what has become increasingly imperative is for tenants to be able to correct errors in the case data that courts maintain.

Courts themselves have recognized the increased risk to privacy and economic well-being resulting from the online publication of court records.<sup>48</sup> Yet getting errors in court records corrected can be difficult. Information displayed online by state courts is not covered by the federal Fair Credit Reporting Act or, typically, by state “fair information practices” acts that entitle individuals to review and correct or comment on government agencies’ records about them.<sup>49</sup> Indeed, courts commonly disclaim

responsibility for inaccuracies in their systems, particularly online databases.<sup>50</sup> Some courts have published error-correction procedures and forms, but they are vague.

- Pennsylvania has a formal procedure, with a posted form and a review process; the clerk is supposed to take action or request more time within 30 days.<sup>51</sup> Other states require clerks to correct errors but specify no time frame or dispute resolution mechanism.<sup>52</sup>
- Advocates in Massachusetts created a self-help booklet to assist tenants in correcting errors after efforts to persuade the courts to include detailed, efficient procedures in their new rules on public access were unsuccessful.<sup>53</sup>

Advocates working with their court systems to establish error-correction procedures should work to ensure that “error” is defined broadly to include any information that misleads a prospective landlord about the nature of a tenant's case.<sup>54</sup>

## Regulating the Use of Housing Court Records in Rental Decisions

One way of curbing abusive screening practices without impinging on public access to court records is to restrict the use, rather than the dissemination, of housing court information.

**Direct Restrictions on the Use of Housing Court Records.** Several jurisdictions prohibit overzealous screening

42 WASH. REV. CODE §§ 59.18.030(3), 59.18.257. Reusable tenant-screening reports also greatly reduce the tenant's financial burden of applying for housing.

43 *Id.* § 59.18.257.

44 NEW YORK, N.Y., ADMIN. CODE §§ 20-807, 20-808 (2017).

45 See Licensing Tenant Screening Bureaus, Introduction 1250-2016 (N.Y.C. Council 2016).

46 *Id.*

47 *Id.*

48 See, e.g., Maryland Committee on Access to Court Records, Report of the Committee on Access to Court Records 12 [2002] (“Because electronic records have made extensive public distribution of information much easier and more likely ... the Court should adopt and implement a simple, convenient, and free process for the public to learn about and to correct errors.... The particular concern is that the subject of the inaccurate record would be deprived of employment or housing without ever knowing that the decision was based on erroneous information.”).

49 15 U.S.C. §§ 1681–1681x. See, e.g., IOWA CODE § 22.11 (2017); MASS. GEN. LAWS ch. 66A (2017).

50 See, e.g., Wisconsin Court System, Director of State Courts: Policy on Disclosure of Public Information over the Internet (n.d.).

51 See Request for Correction of an Electronic Case Record (n.d.).

52 See Wisconsin Court System, *supra* note 50.

53 Massachusetts Law Reform Institute, Error Correction Form (May 2017).

54 E.g., in Massachusetts “other good cause” evictions of Section 8 tenants may be coded as “cause” evictions, making tenants appear to be at fault for what is more likely a landlord's desire to renovate and increase the rent on a unit; the court does not perceive any “error” requiring correction.

of tenants with criminal records, but few restrict landlords' use of tenants' housing court histories to make rental decisions.<sup>55</sup> There are a few exceptions.

- In Oregon landlords are barred from considering a rental applicant's eviction court record if the action was dismissed before the submission of the application, judgment was entered in favor of the applicant before the submission of the application, or judgment was entered against the applicant five or more years before the application was submitted.<sup>56</sup>
- An even more expansive measure under consideration by the New York City Council would amend the New York City Human Rights Law to protect against the discrimination of those who have a current or past eviction court proceeding and who have satisfied the terms of the court order.<sup>57</sup>
- Regulating the use of housing court records in rental decisions will help tenants only if they know why they were denied housing. The Fair Credit Reporting Act requires that a landlord notify a rental applicant if the landlord takes adverse action based on information contained in a tenant-screening report.<sup>58</sup> Washington requires landlords to inform tenants of the reason (or reasons) they took adverse action, whether or not the reason stemmed from information in

a tenant-screening report.<sup>59</sup> Evidence indicates, however, that many landlords are not aware of these requirements and therefore do not comply with them.<sup>60</sup>

- In Washington landlords must share their screening criteria with tenants in advance. Like the New York City rule requiring larger landlords to give advance notice of their intent to purchase a tenant-screening report, the Washington

disparate impact on the same protected groups, in potential contravention of the Fair Housing Act and state equivalents.<sup>63</sup>

Recent guidance from the U.S. Department of Housing and Urban Development (HUD) on the application of fair housing laws to tenant screening based on criminal records offers a road map for a fair housing challenge to the indiscriminate use of housing court records to deny

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### **In most states, eviction litigation likely has a disparate impact on tenants of color and members of other protected classes, including women and people with disabilities.**

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law does not restrict landlords' reliance on tenants' court histories but does make applying for apartments more efficient and affordable by reducing unnecessary application and screening fees for unreachable apartments.<sup>61</sup>

**Fair Housing Challenges.** In the absence of Oregon-style legislation, tenants seeking to curb overreliance on housing court histories might look to fair housing laws. In most states, eviction litigation likely has a disparate impact on tenants of color and members of other protected classes, including women and people with disabilities.<sup>62</sup> Screening practices that use housing court records likely have a

tenants access to housing.<sup>64</sup> Under the Fair Housing Act as interpreted by the U.S. Supreme Court, a tenant must first prove that the landlord's screening policy has a discriminatory effect.<sup>65</sup> The HUD guidance highlights the importance of gathering localized statistical data to support allegations of disparate impact, but where national data are available and there is no reason to suspect the local data are different, causality may be established.<sup>66</sup>

If the tenant proves a disparate impact, the burden shifts to the landlord to demonstrate that its policy is necessary to achieve

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55 See, e.g., *Seattle, Wash., Ordinance Relating to Housing Regulations* (Aug. 14, 2017). See also *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effect on Communities: Hearing Before the U.S. Comm'n on Civ. Rts.*, 14 (May 19, 2017) (statement of Kate Walz & Marie Claire Tran-Leung, Sargent Shriver National Center on Poverty Law) (citing ordinances in Newark, San Francisco, Richmond, and Washington, D.C.).

56 OR. REV. STAT. § 90.303(1) (2015).

57 See *Housing Accommodations and Tenant Black Lists*, Introduction 0625-2015 (N.Y. City Council 2015).

58 15 U.S.C. § 1681m.

59 WASH. REV. CODE § 59.18.257. Because tenants should be informed of the reason their applications were denied, tenants can challenge their denials by challenging both the accuracy of the information cited and the legality of using that information to deny the tenant's application.

60 See HousingLink, *supra* note 32, at 37–38.

61 The Washington law further reduces costs by permitting tenants to purchase only one report and share it with multiple landlords, but each landlord must agree to accept the reusable report (*id.*).

62 See Eric Dunn & Merf Ehman, *Rental Housing's Elephant in the Room: The Probable Disparate Impact of Unlawful Detainer Records*, WASHINGTON STATE BAR NEWS, July 2011, at 35.

63 See 42 U.S.C. § 3601–3631 (2015); 24 C.F.R. § 100.500 (2017).

64 U.S. Department of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (April 4, 2016).

65 *Texas Department of Housing and Community Affairs v. Inclusive Communities Project Incorporated*, No. 13-1371 (U.S. June 25, 2015). The Supreme Court in *Inclusive Communities* referred exclusively to policies rather than practices, but whether this distinction will prove meaningful is unclear. The Court did make clear that the causality requirement is a "robust" one (*id.*, slip op. at 20).

66 U.S. Department of Housing and Urban Development, *supra* note 64, at 3.

a substantial, legitimate, nondiscriminatory interest.<sup>67</sup> The HUD guidance supplies helpful arguments for debunking landlords' claims that screening out tenants with eviction court histories is necessary to protect other residents; the HUD guidance notes that the landlord must offer "reliable evidence" that its screening policy "actually assists in protecting resident safety and/or property."<sup>68</sup> This should pose a particular problem for landlords denying any applicant with any kind of court history. Even landlords denying only those with nonpayment filings could face an uphill battle; just as an arrest record does not prove that a crime occurred, the filing of a nonpayment case—even one that results in a move-out agreement—does not itself indicate that the tenant failed to pay rent duly owed or is likely to fail to pay rent in the future.<sup>69</sup>

Moreover, even if a landlord were to prove a nondiscriminatory interest, the tenant could still prevail by proving that the interest could be met by a practice with a less discriminatory effect. The alternative suggested by HUD for criminal history—individualized assessment of any records and of relevant mitigating circumstances—should prove equally useful in the housing-record context.<sup>70</sup>

This approach was recently attempted in Washington, where tenants filed a fair housing challenge to a landlord's blanket policy of rejecting or adversely treating any tenant with a record of a housing court case, regardless of the cause or resolution.<sup>71</sup> As suggested by the HUD guidance, tenants' advocates worked with social

scientists to run a statistical analysis of the local housing court dockets and were able to allege in the complaint that, in the county of the lawsuit, African Americans are almost four times more likely than whites to have been sued in an eviction case, and African American women are sued more than five times as often as households headed by white men.<sup>72</sup> The Washington tenants also make the argument found in the HUD guidance that performing an individualized assessment of a tenant's records and mitigating circumstances is a less discriminatory and equally effective means of meeting any legitimate nondiscriminatory interests a landlord might have in screening tenants with housing court histories.<sup>73</sup> The success of the suit will offer a window into the feasibility of this strategy in other parts of the country.

While appealing at a theoretical level, restrictions on the use of housing court records can be difficult to implement in practice both because they require case-by-case adjudication by tenants without access to lawyers and because catching violations of such use restrictions is difficult. Nonetheless, as with other litigation-based solutions, a coordinated strategy of strong individual cases might succeed at changing the culture in a particular jurisdiction.

### Lessons Learned: Advocacy Strategies

Following are a few takeaways from successes, and failures, across the country.

#### Raise Public Awareness and Be Patient.

People who are not and do not interact with low-income renters are sometimes skeptical about the impact of housing records on "good" tenants' ability to find housing.

In California, Washington, and elsewhere, advocates laid the groundwork for exciting recent reforms through years of media work and incremental legislative efforts.<sup>74</sup> Collecting compelling tenant stories and working with researchers to develop the sometimes elusive proof of prejudice to tenants is crucial to making change.

**Work with the Courts.** The coalition advocating the successful California bill wrote it in such a way that necessary administrative changes to implement it would be limited. Minimizing administrative changes secured support from the courts as well as avoided fiscal costs for the bill.<sup>75</sup> In New York the courts themselves refused to include tenant names in the courts' electronic data feeds to tenant-screening bureaus, albeit under pressure from lawmakers.<sup>76</sup> Conversely, in the era of online court records, correcting errors or limiting public access to housing case information is nearly impossible without the courts' active assistance.

**Aggregate Small Cases to Change the Culture.** Litigation to seal or correct records is time-consuming, and tenants face a dearth of legal aid. As the Minnesota example shows, however, a small number of well-argued individual cases can educate the judiciary and public officials and pave the way for self-represented litigants or legislative reform by court rule or otherwise.

67 24 C.F.R. § 100.500(c)(2).

68 U.S. Department of Housing and Urban Development, *supra* note 64, at 5 (emphasis added).

69 See *id.* at 5–6.

70 See *id.* at 7.

71 *Complaint, Smith v. Wasatch Property Management*, No. 2:17-cv-00501 (W.D. Wash. March 30, 2017).

72 *Id.* at 2.

73 *Id.* at 10.

74 See, e.g., Esme Caramello & Annette Duke, *The Misuse of Mass Courts as a Free Tenant Screening Device*, BOSTON BAR JOURNAL (Oct. 21, 2015); David Chiu, *Don't Blacklist Tenants for Asserting Rights*, SACRAMENTO BEE (Sept. 7, 2016); Dunn & Grabchuk, *supra* note 3; Satow, *supra* note 10.

75 Telephone Interview with Jith Meganathan, Policy Advocate, Western Center on Law and Poverty (Sept. 1, 2016).

76 See *Press Release, New York State Senator Liz Krueger, Victory for Tenants: Sen. Krueger Announces Courts to End Electronic Sale of Housing Court Data Used in "Tenant Blacklists"* (April 26, 2012).



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# CLEARINGHOUSE COMMUNITY

## Clearinghouse Article

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