

ASYMMETRICAL TENANCIES

*Allyson E. Gold**

Tenant screening reports are a standard feature of the rental application process. These reports provide landlords with comprehensive histories on prospective tenants' civil court records (with an emphasis on eviction filings), credit history, and criminal records. While the reports are touted as tools to help landlords mitigate risk involved in tenant selection, the reality is that they omit important context, and frequently include inaccurate and misleading information.

Conversely, tenants do not have access to the same depth of information about their prospective landlords. Moreover, the intense competition for limited safe and affordable rental housing stock means that tenants lack the market power to demand it. Many jurisdictions prohibit tools designed to minimize risks to tenants, such as landlord licensure, rental housing registries, and proactive rental inspection. In restricting information available to tenants, while at the same time allowing landlords to collect error-prone information about prospective renters, the law facilitates information asymmetry, thereby centering the concerns of the property owner at the expense of the tenant.

TABLE OF CONTENTS

INTRODUCTION	794
I. MITIGATING RISK TO LANDLORDS.....	796
A. <i>Tenant Screening as a Risk Management Tool</i>	797
B. <i>Racial Disparities Inherent to Tenant Screening Reports</i>	803
C. <i>Regulating Tenant Screening</i>	806
II. MITIGATING RISK TO TENANTS.....	812
A. <i>Market Incentives to Create Risks to Tenants</i>	813
B. <i>Tenant Risk Mitigation Tools</i>	814

* Allyson E. Gold is a Professor of Law at Wake Forest University School of Law and Director of the Medical-Legal Partnership Clinic. I am grateful to the members of the Wake Forest Law Review for hosting a symposium exploring the relationship between housing and health. It was a pleasure to work with you to bring your vision for the symposium to life. Thank you to Anna Duong-Harrison for outstanding editing and to Lauren Howle for excellent research assistance.

C. <i>Preempting Risk Management</i>	817
CONCLUSION	819

INTRODUCTION

My first job out of college was working as a non-legal tenant advocate for low-income tenants in Washington, D.C.¹ Much of this work centered on helping tenants assert their rights to safe and (somewhat) affordable housing under D.C.'s patchwork of laws that regulate the relationship between landlords and tenants.² These laws shape the relationship between, and importantly, *the incentives of*, landlords and tenants with respect to each other as well as to the property.³

The differing incentives of landlords and tenants were underscored during a recent guest lecture in a 1L property class.⁴ I was there to provide an overview of basic rental property law. Before diving into the black letter law, I started by asking the students to identify the motivations of the landlord, or to put it another way, What are landlords hoping to get out of their relationship with their tenants? The response was immediate and loud: to maximize profit and keep their investment (the property) secure. What about tenants? I asked. What do tenants want? "I want a safe place to live," one student answered. "And I want to pay as little as I can."

As the students said loud and clear, the same property that is home to a tenant is a source of income for a landlord. As the operator of a business, the landlord's goal is to minimize costs in order to maximize profits. On the other hand, tenants would typically like to spend as little as possible to live in safe and healthy conditions.⁵ Rent is a zero-sum game. Every dollar the landlord collects is one more that the tenant pays. The opposing goals between landlords and tenants creates an innate tension between two parties who are tethered to each other. The law serves to navigate this tension.

In addition to the legal schema, a thriving third-party industry has sprung up to navigate goals of landlords and tenants. Landlords routinely run background checks on prospective tenants to make

1. Officially, I was a *Tenant Anti-Displacement Specialist* at Housing Counseling Services, a non-profit organization located in the Adams Morgan neighborhood of Washington, D.C. I loved it, and it's the reason I decided to go to law school.

2. The Tenant Opportunity to Purchase Act, Condominium Conversion Act, Rent Control Law, and the Washington, D.C. Building Code were the core sources of law during my time at this non-profit organization.

3. The landlord/tenant relationship is primarily regulated at the local level, so not all states and cities have the same statutory framework.

4. A true delight for someone who typically only teaches upper-level law school classes.

5. This oversimplification does not take into account amenities, size, location, or other aspects of rental housing.

decisions on who should be granted a possessory interest in a subject property.⁶ This is influenced by a desire to mitigate risk (is this tenant likely to pay rent consistently and on time? Will this person damage the property?) and is facilitated by legal and economic systems that make information widely available.

Conversely, tenants do not have access to the same depth of information about their prospective landlords, nor the power to demand it. Moreover, the shortage of safe, decent, and affordable housing creates intense demand for a limited supply.⁷ Resulting market forces can then pressure tenants to pay for landlords to conduct these very background checks on the tenants.⁸ Accordingly, because there are more tenants in search of affordable rental housing than there is available housing supply, there is no such pressure for landlords to provide relevant information to a prospective tenant (is the landlord likely to make repairs? Does the landlord have a history of noncompliance with habitability standards? Does the landlord carry insurance in case a tenant is injured on the property?).⁹ Scarcity of safe, affordable housing exacerbates the power imbalance in the relationship between property owner and possessory interest holder, making it even less likely that landlords will voluntarily provide information to prospective tenants.

Asymmetric information exists when one party “in an economic transaction has more knowledge than the other.”¹⁰ The vast amount of information available to landlords about prospective tenants, compared to the dearth of information about prospective landlords available to tenants, is an example of information asymmetry. Information asymmetry functions as an exclusion strategy whereby landlords can leverage their ability to access troves of information about prospective tenants to reject applicants, while simultaneously withholding information that would allow tenants to weigh risks associated with entering into a particular tenancy.¹¹

6. CONSUMER FIN. PROT. BUREAU, TENANT BACKGROUND CHECKS MARKET 7 (2022), <https://perma.cc/8T6W-W9VE>.

7. See generally JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA'S RENTAL HOUSING 2024 (2024), <https://perma.cc/GP7B-3NS2>.

8. See, e.g., *Who Pays for Background Checks: Tenant or Landlord?*, RENTSPREE (Nov. 25, 2024), <https://perma.cc/84AJ-7PVK>.

9. While state and local law may require basic disclosures about conditions about the property, it often does not require the landlord to disclose information about their conduct. See Kaycee Miller, *Landlord Disclosures: What You Have to Tell Your Tenant—State Guide*, RENTEC DIRECT (Jan. 25, 2017), <https://perma.cc/86MX-M5ZD>.

10. Andrew Bloomenthal, *Asymmetric Information in Economics Explained*, INSTOPEDIA (Aug. 22, 2024), <https://perma.cc/WXF2-5F2C>.

11. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1898 (2006) (“Orthodox property scholarship has equated the right to exclude with those rights that arise under trespass law. . . . [M]uch can be gained from thinking about exclusion with a bigger-tent

Housing is essential. It provides not just shelter, but also household structures, privacy, and stability.¹² As possessory interest holders in the property, tenants are dependent on landlords to meet these needs. This Essay explores information asymmetry to raise questions about why access to housing centers the concerns of the property owner at the expense of the tenant.

I. MITIGATING RISK TO LANDLORDS

Operating a rental property is not without risk to the landlord. By entering into a lease agreement and providing a possessory interest in a property to another party, the landlord is making a bet that the tenant will make timely rental payments and not damage the property beyond normal wear and tear. These risks are primarily financial; nonpayment of rent directly affects the landlord's source of income. For some landlords, rental income could even be their primary source of income. The stakes are raised further if the landlord depends on rental payments to pay a mortgage on the property. In that instance, there is a throughline from tenant selection to the possibility of a future foreclosure. There is also a risk of property damage. Damage that exceeds a security deposit necessitates out-of-pocket repairs or claims on an insurance policy, if there is one on the property.

These are real risks to be sure. But they are similar to the risks that every business owner must contend with. Prudent businesspersons expect this and include a buffer in their accounting processes.¹³ Additionally, there is a billion-dollar tenant screening industry to help landlords mitigate risk. However, this industry doesn't just provide landlords with information relevant to tenant selection. A lack of regulation and limited enforcement creates a cascade of collateral consequences for tenants before they ever step foot in the home. Tenant screening companies are incentivized to prioritize the "comprehensiveness of derogatory information at the expense of accurate information."¹⁴ This increases the likelihood of inaccurate information being included in a report,¹⁵ which may cause lasting damage to prospective tenants in search of decent housing. The result is a market that prioritizes bad information with devastating consequences for tenants in search of a home.

approach, one that is sensitive to the ways in which non-trespass-based exclusion rights substitute for in rem, trespass-based rights. Such an approach further underscores the extent to which various exclusion strategies can prove . . . more dangerous than governance regimes when the basis for exclusion is problematic.”)

12. See ALISON BLUNT & ROBYN DOWLING, *HOME* 9 (1st ed. 2006).

13. See *Building a Cash Flow Buffer for Your Startup*, ACCT. CLOUD (Aug. 2023), <https://perma.cc/9VHE-BMP2>.

14. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 2.

15. See *id.* at 22.

A. *Tenant Screening as a Risk Management Tool*

The primary tool landlords use to mitigate risk prior to conveying a possessory interest in their property to a tenant is rental application screening.¹⁶ As part of the rental application process, landlords charge tenants a fee to cover the cost of tenant screening.¹⁷ There is usually no refund if the tenant is ultimately rejected for the rental property.¹⁸

Landlords use screening tools to mitigate risk involved in selecting a tenant to occupy their properties.¹⁹ TransUnion and others boldly proclaim, “screening tenants is the first step in finding a high-quality renter.”²⁰ The use of tenant screening has exploded in the last forty years, coinciding with the expansion of technology, online databases, and more recently, algorithmic use driven by AI.²¹ What started as a “simple business transaction” has become an entire sub-industry, purporting to help landlords assess risk,²² as companies “tout the use of tenant screening reports as a tool to avoid tenants that may cause property damage, rent revenue losses, legal liability or otherwise be undesirable.”²³ Today, the tenant screening industry

16. See, e.g., Matthew Harold Leiwant, *Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States*, 6 GEO. L. TECH. REV. 276, 277, 279 (2022) (“Industry associations created to protect the interests of landlords have pushed them to adopt standardized, transparent, and data driven selection criteria for prospective tenants to minimize risk of both property damage and legal liability.”).

17. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 2 (“[T]he CFPB estimates that the majority of landlords use tenant screening reports when considering prospective tenants.”).

18. See Eric Dunn, *The Case Against Rental Application Fees*, 30 GEO. J. ON POVERTY L. & POL’Y 21, 23 (2022).

19. Brent W. Ambrose & Moussa Diop, *Information Asymmetry, Regulations and Equilibrium Outcomes: Theory and Evidence from the Housing Rental Market*, 49 REAL EST. ECON. 74, 76 (2021).

20. *TransUnion Independent Landlord Survey Insights*, TRANSUNION SMARTMOVE (Aug. 7, 2017), <https://perma.cc/YF36-CCNJ> (“The more thorough the screening, the more likely you are to land yourself a qualified, long-term tenant. . . . [TransUnion SmartMove’s] detailed reports provide you with a prospective tenant’s credit history, past evictions, and criminal convictions. Protect your investment property with our complete tenant screening services package.”).

21. Leiwant, *supra* note 16, at 281; Dunn, *supra* note 18, at 25–26.

22. TEX PASLEY ET AL., SHRIVER CTR. ON POVERTY L., SCREENED OUT: HOW TENANT SCREENING REPORTS UNDERMINE FAIR HOUSING LAWS AND DEPRIVE TENANTS OF EQUAL ACCESS TO HOUSING IN ILLINOIS 3 (2021), <https://perma.cc/W73C-SQN5> (discussing the historical origins of racial bias in tenant screening).

23. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 2.

is valued at one billion dollars.²⁴ Given the ubiquity and ease of accessing personal information online,²⁵ there are more than two-thousand companies that offer tenant screening services.²⁶

Through this process, a landlord typically purchases a report or tenant composite score from a tenant screening company.²⁷ Tenant screening companies search online resources and databases to pull information about the prospective tenant's civil court records—with an emphasis on eviction filings—credit history, and criminal record.²⁸ Many tenant screening companies do not just provide this information to the landlord; they go a step further and use this information to evaluate the tenant by providing a subjective numerical recommendation to the landlord, described as a “tenant risk score, recommendation flag, or metric to grade prospective tenant risk.”²⁹ Landlords can tailor scoring metrics to reflect their personal risk tolerance (e.g. weigh eviction history higher than credit history)³⁰ or can rely on the tenant screening company's proprietary tenant screening formula.³¹

24. Lauren Kirchner & Matthew Goldstein, *How Automated Background Checks Freeze Out Renters*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/renters-background-checks.html>.

25. See, e.g., Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1319–20 (2017) (“The U.S. criminal history database holds over 100 million records. And with today's technology, criminal records have become accessible to anyone willing to pay for them, through state public records searches or thousands of online private databases.”).

26. Kirchner & Goldstein, *supra* note 24.

27. CHI CHI WU ET AL., DIGITAL DENIALS: HOW ABUSE, BIAS, AND LACK OF TRANSPARENCY IN TENANT SCREENING HARM RENTERS 7 (2023), <https://perma.cc/E47J-LET3>; see also *TransUnion Independent Landlord Survey Insights*, *supra* note 20.

28. See WU ET AL., *supra* note 27, at 28–60. See generally PASLEY ET AL., *supra* note 22.

29. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 17.

30. *Id.* at 17; see also *Tenant Screening Services for Landlords of Any Property Size*, E-RENTER (2025), <https://perma.cc/5QWT-MKYM>; *Tenant Credit Checks for Landlords*, TRANSUNION SMARTMOVE (2025), <https://perma.cc/8C8A-MQDL> (pricing options include extra fees for income verification and detailed credit tradeline information); *Pricing*, MYRENTAL (2025), <https://perma.cc/F3PG-AY4U> (proprietary tenant risk-scoring metric included in “Premium” package); *Screening Solutions: Tenant*, SHIELD SCREENING (2024), <https://web.archive.org/web/20240811050746/https://www.shieldscreening.com/tenant/> (“With just the right mix of software automation and experienced social media analysts, Social Intelligence identifies a candidate's potentially problematic online activity and provides you with an FCRA-compliant report to use in your decision.”).

31. See *Screening Solutions: Tenant*, *supra* note 30.

Tenant screening company reports commonly fail to provide any context for a court filing on a prospective tenant's record.³² Omitting the circumstances and outcomes means that all cases—including those that are settled, or sealed, or where the judgment is entered in favor of a tenant, or even dismissed—are all included in the tenant screening report. In extreme cases, a landlord may file “out of a desire for revenge . . . to damage the tenant's credit history and warn off other landlords, but [have] little expectation of actually collecting the money.”³³ The damaging effects of filing are far reaching, as many landlords take a scorched-earth approach to naming tenant-defendants in an eviction action, including minors and non-leaseholders.³⁴ The weight of an eviction filing on tenant screening company metrics, coupled with a lack of context, means that the mere existence of an eviction filing negatively affects how the report scores or recommends the prospective tenant,³⁵ a phenomenon scholars refer to as the “Scarlet E” of Eviction.”³⁶

Landlords take these recommendations seriously. The founder of a tenant screening company stated that

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.³⁷

32. See Katelyn Polk, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW. J.L. & SOC. POL'Y 338, 344 (2020).

33. Philip M.E. Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 647 (2019); see also Lillian Leung et al., *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316, 317–19 (2021) (discussing the use of the courts by landlords to “discipline” tenants).

34. Shelby R. King, *Minor Defendants: Kids Are Being Named in Evictions*, SHELTERFORCE (Nov. 11, 2021), <https://perma.cc/S6SE-P7V5>.

35. *Id.*

36. Kathryn A. Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, APPEAL (Apr. 12, 2021), <https://perma.cc/Y3C4-JPYZ>; see also Matthew Goldstein, *The Stigma of a Scarlet E*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/business/eviction-stigma-scarlet-e.html>.

37. Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES (Nov. 26, 2006), <https://www.nytimes.com/2006/11/26/realestate/26cov.html>.

This reflects the tendency of landlords to conflate the mere existence of tenant records with outcomes,³⁸ and rarely consider mitigating circumstances.³⁹

Even without an appearance in eviction court on their record, the majority of landlords will use credit scores as a proxy to assess risks posed by of a prospective tenant; in a survey of landlords by the National Consumer Law Center found that 84% of landlords use credit score as the basis to deny rental applications.⁴⁰ Critics argue that credit scores do not reliably predict a prospective tenant's future rental payments due to pervasive errors and difficulty making corrections⁴¹ coupled with a lack of prevision,⁴² and systemic biases,⁴³ discussed more below.

This critique is even stronger when a landlord relies on a prospective tenant's credit score to deny a rental application and that tenant has a rent-payment subsidy. Some low-income tenants receive a rent subsidy—e.g. a Housing Choice Voucher or property-specific subsidies—to offset the financial burden of monthly housing payments for private-market housing.⁴⁴ For tenants who receive a Housing Choice Voucher or other rental subsidy, the responsibility to pay rent rests largely on the shoulders of the housing authority. These

38. Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, 33 HOUS. POL'Y DEBATE 1484, 1484 (2023); see also Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, CONSUMER REPS. (Mar. 11, 2021), <https://perma.cc/7JNT-8E5M> (“In a report like that, it might not matter if an eviction proceeding was handled correctly, or even if the tenant won the case. Just the fact that it was filed could be enough to tank an application.”).

39. WU ET AL., *supra* note 27, at 4–5 (“For private housing, landlords are unlikely to consider mitigating factors. Most respondents reported that landlords rarely (54%) or never (24%) considered personal hardship/extenuating circumstances. About three-quarters of respondents [to a survey of the National Consumer Law Center] reported that private landlords do not consider additional context or the outcome of evictions either on their own or when an advocate intervenes, or they rarely or never consider such information.”).

40. *Id.* at 5.

41. See generally *What Are Common Credit Report Errors That I Should Look For on My Credit Report?*, CONSUMER FIN. PROT. BUREAU (Jan. 29, 2024), <https://perma.cc/DMY2-VQBP>.

42. See Will Douglas Heaven, *Bias Isn't the Only Problem with Credit Scores—and No, AI Can't Help*, MIT TECH. REV. (June 17, 2021), <https://perma.cc/6GZH-K62R>.

43. NAT'L CONSUMER L. CTR., PAST IMPERFECT: HOW CREDIT SCORES “BAKE IN” AND PERPETUATE PAST DISCRIMINATION 1, 2–3 (2024), <https://perma.cc/2LVJ-VPVS>.

44. See generally *HCV Applicant and Tenant Resources*, U.S. DEP'T OF HOUS. & URB. DEV. (2025), <https://perma.cc/PE6M-KBYM> (Tenant-based subsidy programs differ from other housing affordability programs like public housing and Project-Based Section 8, which provide rental assistance when a tenant lives in a particular property).

tenants are not personally responsible to pay the entirety of the rent. In most instances, the voucher or subsidy covers at least 70% of the rent.⁴⁵ Logically then, it makes more sense for a landlord to assess the housing authority's risk of non-payment, rather than the tenant's, since it is the housing authority that will pay the rent. Here, the tenant's payment history is largely irrelevant; that a tenant defaulted on a credit card years ago is simply not predictive of whether a housing authority will continue to make on-time rental payments on a voucher issued to a tenant.⁴⁶ The contract to do so has already been signed between the housing authority and the tenant. However, even though the responsibility to make timely rental payments lies with the housing authority, 65% of landlords report using a *tenant's* credit score to deny rental applications from voucher holders in the private market, and 40% will deny such applications for property-specific subsidized housing.⁴⁷

Too often, a tenant doesn't have the right or ability to explain to a prospective landlord that a case was ultimately dismissed or that she prevailed against an unscrupulous former landlord.⁴⁸ Though landlords in subsidized housing may be more likely to consider mitigating factors that contributed to an eviction or strike on a tenant's record, few seek out additional context from the tenant.⁴⁹ Instead, the *Scarlet E*, low credit score, or other strike is enough to

45. See *id.*; See also Erik Gartland et al., *Where Households Using Federal Rental Assistance Live*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 5, 2025), <https://perma.cc/RJ82-VALU>.

46. *Louis v. SafeRent Sols., LLC*, 685 F. Supp. 3d 19, 27 (D. Mass. 2023) (“Housing providers who rent to tenants with housing vouchers are guaranteed to receive at least some of their tenants’ monthly rental payments, because the local housing authority disburses payment directly to the housing provider . . . insulat[ing] housing providers from the risk of non-payment for units rented to voucher holders. As such, credit scores and histories fail to predict whether a rental applicant would make a quality tenant, particularly when housing vouchers are involved.”); see also Wonyoung So et al., *Choice Denied: Impact of Income and Credit-Based Tenant Screening on the Housing Choice Voucher Program*, HOUS. STUD. 1, 2 (Apr. 30, 2025), <https://www.tandfonline.com/doi/epdf/10.1080/02673037.2025.2498385> (“Our research highlights that tenant screening practices based on credit can impact voucher holders, even though the HCV program is designed to alleviate financial barriers to housing access.”).

47. WU ET AL., *supra* note 27, at 5.

48. Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 669 (2018).

49. WU ET AL., *supra* note 27, at 5 (“Subsidized housing providers appear to consider personal hardship/extenuating circumstances more often, with half of respondents reporting that these providers were usually (12%) or sometimes (34%) willing to consider these factors. About half of respondents reported that subsidized housing providers will consider additional context or outcome of an eviction when an advocate intervenes.”).

reject the applicant.⁵⁰ In my personal experience as a housing advocate for nearly twenty years, I've had some success explaining the circumstances underlying the information in a tenant screening report directly to a landlord to demonstrate the tenant is not a risk. However, this requires a tenant to (a) be aware of potential strikes on their record; and (b) affirmatively raise the issue with the landlord in a way that eases the landlord's concern about alleged risk posed by the item on the tenant's record. Having an advocate through the process undoubtedly helps. And even then, it usually takes several rounds of phone calls to explain—and then reexplain—why the tenant screening report is not an accurate predictor.

Despite companies' insistence that tenant screening reports are an appropriate and efficient tool for landlords to mitigate risk in the rental housing market, there is skepticism about their predictive value.⁵¹ Criminal records, for instance, do not predict whether someone will pay the rent and depending on the nature of the act, may not offer any insight into a tenant's abilities as a household steward or neighbor.⁵² Yet, they are often a foundational component of a screening company's recommendation or score for a particular tenant.⁵³ While criminal history does not accurately predict whether someone will pay future rent, past rental history is instructive. Despite this, the Consumer Financial Protection Bureau estimates that rental payment history is only included in 1.7–2.3% of all tenant screening reports.⁵⁴ Tenant screening reports omit beneficial information about a tenant's rental payment history, exclude relevant context, and include bad predictive data. The effects of these practices are compounded by racial disparities in underlying systems.

50. *See id.* at 4–6.

51. *See, e.g.*, Brief of Amicus Curiae Consumer Data Industry Association and the Professional Background Screening Association in Support of Appellants' Request for Reversal at 2–5, *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023) (No. 21-35567).

52. Tenant screening reports are widely inclusive of all available information about a prospective tenant's criminal record. Compare that to FED. R. EVID. 404, which places firm limitations on what prior acts may not be used as evidence in a trial because their probative value is outweighed by their prejudicial effects. No such exclusions are afforded to tenants.

53. *See* Calvin Johnson, *Tenant Screening With Criminal Background Checks: Predictions And Perceptions Are Not Causality*, PD&R EDGE (May 17, 2022), <https://perma.cc/7CG6-9VS7> (citing Daniel K. Malone, *Assessing Criminal History as a Predictor of Future Housing Success for Homeless Adults with Behavioral Health Disorders*, 60 PSYCHIATRIC SERVS. 224, 227–28 (2009) (finding that housing success among tenants with a criminal history was similar to that of tenants without a criminal history)).

54. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 39; *see also* Joanne Gaskin, *Leveraging Alternative Data to Extend Credit to More Borrowers*, FICO BLOG (May 22, 2019), <https://perma.cc/ZL87-6CCX> (describing rental payment history as “alternative data”).

B. Racial Disparities Inherent to Tenant Screening Reports

The use of tenant screening reports disproportionately affects the ability of non-white prospective tenants to secure housing.⁵⁵ Tenant screenings collect and synthesize eviction records, credit reports, and criminal histories that “are laden with decades of discriminatory information.”⁵⁶ Tenant screening reports rely on proprietary algorithms to collect and synthesize information about a prospective tenant.⁵⁷ AI puts these processes into overdrive.⁵⁸ The use of algorithms to gather data gives tenant screening reports an appearance of neutrality, presented as superior to an individual landlord exercising their personal judgement about which tenant to accept.⁵⁹ However, under the surface, eviction records, criminal records, and credit scores serve as proxies for race, imbued with a legacy of institutional racism.⁶⁰

Algorithmic bias heightens the disproportionately negative effect of tenant screening on non-white applicants. Despite claims that automated tools, unlike human decision-making, eliminate bias, racial disparities in the data used by algorithms produce worse outcomes.⁶¹ As the National Consumer Law Center highlights, this “create[s] a misleading veneer of objectivity while concealing

55. WU ET AL., *supra* note 27, at 4 (“Each of the components of tenant screening reports is highly problematic and also creates a disparate impact on Black and Latino/Hispanic renters.”).

56. Nadiyah J. Humber, *A Home for Digital Equity: Algorithmic Redlining and Property Technology*, 111 CALIF. L. REV. 1421, 1449–50 (2023).

57. Erin Smith, *Landlords Use Secret Algorithms to Screen Potential Tenants. Find Out What They’ve Said About You.*, PROPUBLICA (Sept. 20, 2021), <https://perma.cc/X4X4-R5ZH>; *see also* So, *supra* note 38, at 1487 (“Practices such as eviction filings, ‘scraping’ by third-party data brokers, and screenings based on eviction histories make it harder for tenants who have had prior dealings with eviction courts (regardless of how their cases actually turn out) to find rental housing in the future.”).

58. *See, e.g., Tenant Screening with AI: A Property Agent’s Trump Card*, BEAM (Apr. 15, 2024), <https://perma.cc/UR6G-VL5H> (“AI agents systematically process credit reports, past rental histories, and even social media profiles to provide a comprehensive background check, reducing the risk of property damage and payment defaults.”).

59. Humber, *supra* note 56, at 1424 (“Algorithms give screening tools a false aura of neutrality . . .”).

60. *Id.* at 1424–25 (“Landlords have long relied on imperfect proxies to turn down prospective tenants, and those proxies—given the United States’ social and legal history—very often track race.”); *see also* Lorena Rodriguez, *All Data is Not Credit Data: Closing the Gap Between the Fair Housing Act and Algorithmic Decisionmaking in the Lending Industry*, 120 COLUM. L. REV. 1843, 1848–49 (2020).

61. *See* WU ET AL., *supra* note 27, at 8; *see also* Michelle Ewart, *Their Home Is Not Their Castle: Subsidized Housing’s Intrusion Into Family Privacy and Personal Autonomy*, 99 N.C. L. REV. 869, 879–80 (2021).

underlying racial disparities.”⁶² This “color-evasiveness”⁶³ willfully masks problems inherent in the data by clinging to the supposed neutrality of outcomes, when in fact these systems have “inherit[ed] the prejudices of prior decision-makers.”⁶⁴ Or as others have quipped, *garbage in, garbage out*.⁶⁵

Tenant screening reports are highly susceptible to *garbage*. Part of this is due to the fact that eviction actions—kryptonite to a prospective tenant’s application—disproportionately affect Black tenants in the first place.⁶⁶ As the Department of Housing & Urban Development acknowledges, “[l]andlords do not pursue eviction equally across households.”⁶⁷ Data analysis from the Princeton University Eviction Lab found that “filing and eviction rates were, on average, significantly higher for [B]lack renters than for white renters.”⁶⁸ The study found that Black tenants comprise 19.9% of all renters, but 32.7% of defendants in eviction cases.⁶⁹ Persistent systemic inequities result in Black women experiencing the highest rates of eviction filings.⁷⁰ The Covid-19 pandemic exacerbated

62. WU ET AL., *supra* note 27, at 9.

63. Subini Ancy Annamma et al., *Conceptualizing Color-Evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-Blind Racial Ideology in Education and Society*, 20 RACE ETHNICITY & EDUC. 147, 156 (2017) (“Color-evasiveness as an expanded racial ideology acknowledges that to avoid talking about race is a way to willfully ignore the experiences of people of color, and makes the goal of erasure more fully discernible. In other words, to use the term ‘evade’ highlights an attempt to obliterate.”).

64. Humber, *supra* note 56, at 1430.

65. E.g., Austin Cummings, *Credit Inequality Undermines Access to Fair Housing and Opportunity*, FAIR HOUS. CTR. FOR RTS. & RSCH. (Aug. 30, 2022), <https://perma.cc/Z98S-MNDQ>.

66. WU ET AL., *supra* note 27, at 9 (“Landlords often automatically reject prospective tenants if they have: . . . eviction records—regardless of the outcome, context, or how long ago the case was filed”); MATTHEW DESMOND, *EVICTED 252* (2016); *see also* ELORA RAYMOND ET AL., *CORPORATE LANDLORDS, INSTITUTIONAL INVESTORS, AND DISPLACEMENT: EVICTION RATES IN SINGLE-FAMILY RENTALS 18* (2016).

67. U.S. DEP’T OF HOUS. AND URB. DEV., OMB APPROVAL NO. 2501-0044, *EVICTION PROTECTION GRANT PROGRAM* (2021) (“[P]eople of color, women, and families with children are more likely to be evicted.”).

68. Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 657 (2020).

69. *Id.* at 653. The study also found that “[t]here were slightly fewer than 40 Black renters for every 100 white renters in [the counties studied]. Yet for every 100 eviction filings to white renters, we estimated that there were nearly 80 eviction filings to Black renters.” *Id.* at 658.

70. Cleo Bluthenthal, *The Disproportionate Burden of Eviction on Black Women*, CTR. FOR AM. PROGRESS (Aug. 14, 2023), <https://perma.cc/UXL5-DYZQ> (discussing how systemic inequities make Black women particularly vulnerable to eviction); Sophie Beiers et al., *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, AM. C.L. UNION (Jan. 10, 2020),

existing eviction inequalities,⁷¹ leading to a greater proportion of evictions being filed against non-white tenants.⁷² These underlying systemic inequalities feed into tenant screening algorithms, which in turn lead to increased rental rejections of non-white prospective tenants.⁷³

Like eviction, structural racism endemic to the criminal justice system means that tenant screening reports that contain criminal records are equally flawed.⁷⁴ In her foundational work, *Race After Technology: Abolitionist Tools for the New Jim Code*, Ruha Benjamin “explores how technologies, which often pose as objective, scientific, or progressive, too often reinforce racism and other forms of inequity.”⁷⁵ Her analysis of racial bias embedded in predictive policing software underscores the degree to which racial disparities permeate tenant screening reports.⁷⁶

Predatory lending is yet another practice that disproportionately harms the credit scores of Black borrowers.⁷⁷ As the District Court for the District of Massachusetts noted when considering the tenant screening score’s reliance on credit history, “[r]acial disparities in

<http://perma.cc/TYU7-NVGG> (“[R]acial discrimination often compounds other forms of discrimination—such as discrimination against families with children and domestic violence survivors—that disproportionately impact women. As a result, eviction and screening policies often exacerbate and reproduce conditions of economic insecurity for low-income women of color.”).

71. Sophia Wedeen, *Black and Hispanic Renters Face Greatest Threat of Eviction in Pandemic*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. (Jan. 11, 2021), <https://perma.cc/S7N4-4Y5T>. See generally Carl Romer et al., *The Coming Eviction Crisis Will Hit Black Communities the Hardest*, BROOKINGS INST. (Aug. 2, 2021), <https://perma.cc/BN7Q-VK6Q>.

72. Wedeen, *supra* note 71.

73. However, at least one federal court has been willing to consider the systemic bias inherent to tenant screening reports and landlords’ unwillingness to rent to anyone who has been named in an eviction action. In an order denying a motion to dismiss a disparate impact claim under the Fair Housing Act brought against a Jacksonville landlord for automatically denying admission to anyone with a record of being named in an eviction action, the court found that tenant-plaintiffs alleged robust causality linking race and eviction action. See *Byrd v. JWB Prop. Mgmt., LLC*, No. 3:33-cv-266, slip op. at 7–8 (M.D. Fla. June 3, 2024).

74. So, *supra* note 38, at 1486; see also Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 271 (2020).

75. See RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE* 1 (2019).

76. *Id.* at 53–56.

77. See generally KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019); Ramenda Cyrus, *Predatory Lending’s Prey of Color*, AM. PROSPECT (June 5, 2025), <https://perma.cc/87YJ-LVWW>.

credit health reflect historical inequities that reduced wealth and limited economic choices for communities of color.”⁷⁸

While tenant screening companies allegedly rely on race-neutral data to make recommendations about prospective tenants, the data itself is the product of deep-seeded structural racism.⁷⁹ Further, by “basing their assessment [of prospective tenants] on the decisions or scores of the tenant screen report, landlords perpetuate implicit racial discrimination.”⁸⁰ Instead of meaningfully measuring financial risk, tenant screening reports’ reliance on flawed data contributes to a vicious cycle of structural discrimination.

C. *Regulating Tenant Screening*

Despite the enormous impact screening reports have on a tenant’s housing prospects—which in turn has downstream effects on the tenant’s health, employment, and school—there is limited regulatory oversight of the industry.⁸¹ Unlike regulations governing credit scores, the Consumer Financial Protection Bureau notes that, among tenant screening, “common practices in financial services credit risk operations, such as documented model validation and risk management, do not appear to be prevalent in tenant risk modeling.”⁸² Furthermore, there are no “independently validated, publicly available evidence that they reliably predict rental outcomes.”⁸³

The Fair Credit Reporting Act (FCRA)⁸⁴ offers the strongest protections concerning tenant screening reports. Under the FCRA, consumer reporting agencies include

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit

78. *Douglas v. SafeRent Sols., LLC*, 1:22-CV-10800, slip op. at 5 (D. Mass. July 26, 2023) (alteration in original).

79. *See So, supra* note 38, at 1486.

80. *Id.* at 1505.

81. Caroline B. Swope & Diana Hernández, *Housing as a Detriment of Health Equity: A Conceptual Model*, 243 SOC. SCI. & MED. 1, 9, 12 (2019); Kirchner & Goldstein, *supra* note 24 (“Tenant screeners don’t have to register with any government agency. People can complain about faulty background reports to the Federal Trade Commission or the Consumer Financial Protection Bureau—or sue. But regulators have not limited tenant screening as much as other kinds of background checks.”).

82. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 3, 40; *see also id.* at 41 (“In contrast to the documented model risk management in the financial services space, we are unaware of objective validation of tenant screening company models or detailed descriptions of the specific variables or weights used in a given model.”).

83. *Id.* at 40.

84. Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x.

information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁸⁵

Under this definition, tenant screening companies are consumer reporting agencies. Furthermore, tenant screening reports fall under the FCRA's definition of consumer report—any information by a consumer reporting agency on a consumer's credit, reputation, personal characteristics.⁸⁶ As such, tenant screening companies and the reports they sell to landlords are supposed to “follow reasonable procedures to assure maximum possible accuracy.”⁸⁷

Despite the plain language of the FCRA, lack of rigorous oversight contributes to significant noncompliance, and resulting errors, by tenant screening companies. Common errors include incomplete information, duplicate information about criminal cases (thereby suggesting that the prospective tenant was involved in more than one criminal case), outdated information,⁸⁸ records that are sealed or expunged, and the inclusion of flat-out wrong information in the reports.⁸⁹ These issues are exacerbated by standard tenant screening practices wherein reports are generated by algorithm and lack any human oversight,⁹⁰ a model popular for its speed, convenience, and cost.⁹¹

In many instances, inaccurate matching by tenant screening companies can incorrectly classify prospective tenants as “deadbeats, criminals, or sex offenders.”⁹² Inaccurate matching is best understood through an example: Imagine a prospective tenant named Steve

85. *Id.* § 1681a(f).

86. *Id.* § 1681a(d)(1).

87. *Id.* § 1681e(b).

88. Most civil lawsuits and judgments, such as housing court cases, cannot be reported after seven years. *Id.* § 1681c(a)(2). Bankruptcies should no longer be reported after ten years. *Id.* § 1681c(a)(1). Despite this, they are often included in tenant screening reports.

89. Tenant *Background Checks and Your Rights*, FED. TRADE COMM'N (Mar. 2024), <https://perma.cc/64GP-SBJT>.

90. See generally Catherine Killough, *How Tenant Screening Algorithms Deepen Housing Disparities*, CHANGEWIRE (June 30, 2023), <https://perma.cc/PXN9-MDQB>.

91. See CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 3, 12 n.36 (“Manual verifications, which can cost seven times as much as automated data pulls, are generally only undertaken in the event of a dispute, at the specific request of the landlord, or by some smaller tenant screening companies as a special value proposition.” For example, “[i]n court filings, RealPage disclosed that the company pays a data broker \$0.22 for court records, while manual verification of these records costs \$7.00”).

92. Kirchner & Goldstein, *supra* note 24 (The New York Times reviewed hundreds of lawsuits against tenant screening companies stemming from “hasty, sloppy matches”).

Smith applies for a rental apartment. Steve pays an application fee and, as part of the application, consents to a tenant screening report. The landlord uses a tenant screening company to run a consumer report on Steve Smith. The screening company delivers a report to the landlord that contains information about the Steve Smith that applied for the rental housing at issue *and also includes* information about other people named Steve Smith. This could be court appearances, arrest records, credit blemishes, and more. As a result, prospective tenant Steve Smith is rejected for the rental housing because of the prejudicial activities of another Steve Smith. Inaccurate matching forecloses housing opportunities and wreaks reputational havoc. So much so that the Federal Trade Commission (FTC) brought a case against RealPage for “fail[ing] to follow reasonable procedures to assure that the criminal record information contained in its tenant screening reports concerned the actual applicant for housing. . . . In multiple instances, RealPage’s practices led to the identification of criminal records that do not belong to the application and to the inclusion of this inaccurate information in tenant screening reports,” in violation of the FCRA.⁹³ The court agreed, and ordered RealPage to pay three million dollars in civil penalties.⁹⁴

Further, tenant screening reports frequently include inaccurate and misleading information about a prospective tenant’s eviction history, something that can be fatal to a rental application.⁹⁵ In light of this, the FTC and the Consumer Financial Protection Bureau (CFPB) brought a case against TransUnion alleging that TransUnion violated the FCRA.⁹⁶ The FTC and CFPB determined that TransUnion failed to follow reasonable procedures to prevent inaccurate information. TransUnion allowed the inclusion of multiple entries for the same eviction case, failed to accurately reflect the status of the prospective tenant’s eviction record, inaccurately labeled eviction records, and improperly included sealed eviction records.⁹⁷ TransUnion ultimately settled the case for more than fifteen million

93. Complaint for Civil Penalties, Permanent Injunction, and Other Equitable Relief at 5, Fed. Trade Comm’n v. RealPage, Inc., No. 18-cv-02737 (N.D. Tex. Oct. 16, 2018).

94. Stipulated Order for Permanent Injunction and Civil Penalty Judgment at 3, Fed. Trade Comm’n v. RealPage, Inc., No. 18-cv-02737 (N.D. Tex. Oct. 16, 2018).

95. See, e.g., Kathryn A. Sabbeth, *Erasing the “Scarlet E” of Eviction Records*, APPEAL (Apr. 12, 2021), <https://perma.cc/Y3C4-JPYZ>.

96. Complaint at 1, Fed. Trade Comm’n v. TransUnion Rental Screening Sols. Inc., No. 23-cv-2659 (D. Colo. Oct. 12, 2023).

97. *Id.* at 7.

dollars and agreed to revise its processes to prevent future harm to prospective tenants.⁹⁸

Unfortunately, the errors in RealPage and TransUnion tenant screening reports are not unique. According to the FTC, one in five people will find an error on their credit report,⁹⁹ a statistic that hardly instills faith in the system. Consumer reporting agencies counter that “renters dispute fewer than 1 percent of reports.”¹⁰⁰ However, the number is misleading for many reasons. First, landlords are not obligated to provide copies of the reports to rejected tenants—landlords are merely obligated to provide notice of a negative decision, called an *adverse action*¹⁰¹—and many don’t even meet this paltry threshold.¹⁰² The National Consumer Law Center conducted a survey of landlords and found that most landlords fail to comply with the FCRA’s adverse action notification requirements.¹⁰³ Consequently, tenants may simply not be aware there is a problem on their tenant screening report and are therefore oblivious to the need for correction. Second, the law allows a landlord to notify a tenant of an adverse action orally—a writing is not required.¹⁰⁴ The ability of landlords to communicate this information orally may make it difficult for tenants to understand the adverse action. Lack of understanding, in turn, can prevent a tenant from correcting a false record. Third, the law does not require landlords to disclose the reason an adverse action was taken.¹⁰⁵ This means that a tenant could be told they were rejected from rental housing but not the reason for the denial. Without a reason, a tenant may not know what to look for on a tenant screening report or realize there is an inaccuracy that needs to be corrected.

98. Press Release, Fed. Trade Comm’n, *FTC and CFPB Settlement to Require Trans Union to Pay \$15 Million over Charges It Failed to Ensure Accuracy of Tenancy Screening Reports* (Oct. 12, 2023), <https://perma.cc/E5W2-4VGW>.

99. *FTC Issues Follow-Up Study on Credit Report Accuracy*, FED. TRADE COMM’N (Jan. 21, 2015), <https://perma.cc/8N83-RA5M>.

100. Kirchner & Goldstein, *supra* note 24.

101. *Tenant Background Checks and Your Rights*, *supra* note 89.

102. WU ET AL., *supra* note 27, at 6.

103. *Id.* (“For private housing, nearly half of [landlord] respondents reported that adverse action notices were provided rarely (34%) or never (14%), with a third (34%) reporting they were provided only sometimes. Subsidized housing providers appear to provide notices more often, with only a minority of respondents reporting that they observed such providers giving them rarely (16%) or never (2%). Subsidized housing providers are also more likely to give a statement of reasons for rejecting an applicant. Both private and subsidized housing providers are unlikely to provide copies of information they receive about an applicant.”).

104. *Tenant Background Checks and Your Rights*, *supra* note 89 (explaining that the Fair Credit Reporting Act requires a landlord to communicate notice of the adverse action in writing, electronically, or orally, and must include the contact information for the tenant screening company).

105. Fair Credit Reporting Act, 15 U.S.C. § 1681s-2(b).

Finally, the FCRA gives screening companies thirty days to respond to a tenant's dispute and request to correct their report.¹⁰⁶ The dearth of safe, decent, and affordable housing means that the housing market moves quickly. In thirty days' time, it is unlikely that the rental home for which the tenant applied is still available, meaning they will need to pay another fee to apply for alternative housing, spending time and money that may be in short supply.

In addition to the FCRA, the Fair Housing Act has been leveraged to secure justice for tenants harmed by tenant screening reports. For example, a group of tenants brought a case against SafeRent alleging that SafeRent's proprietary screening reports and scoring system—which included a prospective tenant's credit and other, non-tenancy debt histories—disparately impacted Black and Hispanic tenants in violation of the Fair Housing Act.¹⁰⁷ Plaintiff-tenants also alleged that SafeRent's practices discriminated against voucher-holders in violation of Massachusetts state law.¹⁰⁸ SafeRent ultimately settled the case and agreed to no longer display scores for prospective tenants who are voucher-holders across the country, to terminate their recommendations of whether to accept or deny tenants based on voucher use, and to pay damages to tenants who were harmed by these practices.¹⁰⁹ The long-term effects of this victory, however, may be short-lived. In April 2025, President Trump signed an executive order to “eliminate the use of disparate-impact liability in all contexts to the maximum degree possible.”¹¹⁰ This Executive Order has the potential to limit redressability under federal causes of action. Going forward, therefore, tenants may be limited to state causes of action to protect against discriminatory conduct by tenant screening companies.

In response to widespread noncompliance by tenant screening companies and in recognition of the fact that “rental housing applicants and tenants across [the] country should not be denied housing opportunities because of unjust background checks and

106. *Id.* § 1681i(a)(1)(A); *see also* FED. TRADE COMM'N, CONSUMER REPORTS: WHAT INFORMATION FURNISHERS NEED TO KNOW 8 (2024), <https://perma.cc/97QP-LLJM>.

107. Amended Complaint at 2, *Louis v. Saferent Sols., LLC*, 685 F. Supp. 3d 19 (D. Mass. 2023) (No. 22-CV-10800) (“SafeRent Scores cause Black and Hispanic rental applicants to be disproportionately likely to be denied housing; and doing so cannot be justified as a necessary business practice for evaluating applicants who are voucher-holders, since a tenant's housing voucher uniquely protects their housing provider's receipt of monthly rent.”).

108. *Id.* (“SafeRent Scores also have a disparate impact on renters of all races who use housing vouchers, and no business necessity can justify that disparate impact on individuals whose source of income includes a housing voucher.”).

109. Class Action Settlement Agreement and Release at 13–14, *Louis v. Saferent Sols., LLC*, 685 F. Supp. 3d 19 (D. Mass. 2023) (No. 22-CV-10800).

110. Exec. Order No. 14,281, 90 C.F.R. § 17537 (2025).

discriminatory screening policies,”¹¹¹ the FTC, the CFPB, and the Department of Housing and Urban Development collaborated during the Biden administration to provide information for tenants.¹¹² The joint resource, *Tenant Background Checks and Your Rights*, provides detailed information on what tenants should expect, what to do if their application for rental housing is rejected, and where to get help, among other subcategories.¹¹³ This resource, which was an important acknowledgement of the fraught, and often discriminatory process of tenant screening, was removed by the Trump administration in the spring of 2025.

However, even if the guide were still publicly available, improving outcomes for tenants requires more. Educating consumers is important, to be sure. Still, more must be done to regulate tenant screening agencies in the same manner as other consumer report agencies. For example, unlike credit bureaus, regulators have not forced tenant screening agencies to adhere to standards for matching records to a person.¹¹⁴ While employers who use screening tools to evaluate prospective employees are required to share negative reports, the same is not true for landlords.¹¹⁵ As discussed, the FCRA does not require a landlord to share written notification of a negative tenant screening report with a prospective renter.¹¹⁶

Without making written report distribution mandatory any time a landlord performs a tenant screening, many applicants may have no idea about their rights or what steps to take if they are rejected. Written notification, combined with increased oversight to ensure compliance by tenant screening companies, would go a long way to ensuring that “mistakes in your background check [don’t] cost you a home or create one more hurdle to overcome as you search for affordable housing.”¹¹⁷

States may go further than the FCRA, but few do. Oregon shines as a rare example of a state that has taken measures to limit how a landlord may use information in a tenant screening report.¹¹⁸ Under Oregon law, a landlord may not consider an eviction action on a prospective tenant’s record if it was dismissed or resulted in a

111. Press Release, U.S. Dep’t of Just., *Justice Department, Federal Trade Commission, Consumer Financial Protection Bureau and Department of Housing and Urban Development Jointly Issue Resource on Protections for Rental Housing Applicants and Tenants* (Mar. 21, 2024), <https://perma.cc/MZL7-HJ6R> (quoting statement by Assistant Attorney General Kristen Clarke of the Justice Department’s Civil Rights Division).

112. *Id.*

113. *Tenant Background Checks and Your Rights*, *supra* note 89.

114. Kirchner & Goldstein, *supra* note 24.

115. *Id.*

116. *Id.*

117. U.S. Dep’t of Just., *supra* note 111 (quoting statement by Samuel Levine, Director of the Federal Trade Commission Bureau of Consumer Protection).

118. OR. REV. STAT. § 90.303 (2025).

decision for the tenant.¹¹⁹ Even if the judgment was for the previous landlord, a prospective landlord may not consider it if it was more than five years ago or occurred during the COVID-19 pandemic.¹²⁰ Oregon law further restricts how a landlord may weigh a prospective tenant's criminal and arrest records.¹²¹ In Minnesota, a landlord must disclose the reason for denying a prospective tenant within fourteen days of rejecting a rental application.¹²² This disclosure must specifically "identify[] the criteria the applicant failed to meet."¹²³ Furthermore, a landlord is prohibited from denying a rental application based on "a pending eviction action; any court file that is not public, has been expunged, or has been destroyed; or any eviction that has not resulted" in judgment against the tenant.¹²⁴

The ubiquity of tenant screening reports to mitigate risk to landlords calls for greater regulation of their use. While individual jurisdictions have taken this step, lack of widespread oversight means that most tenants lack recourse. Moreover, given the reduction in federal action under the current administration, it will be up to states and localities to regulate use of tenant screening reports. As the next Part discusses, limitations of risk mitigation tools for tenants compound information asymmetries that result in a rental market system that continually elevates the financial interests of landlords over tenants' essential human need for shelter.

II. MITIGATING RISK TO TENANTS

Between ten and twelve million landlords manage approximately forty-five million rental properties in the United States,¹²⁵ providing housing to over one-hundred million tenants.¹²⁶ While a booming third-party industry exists to help landlords mitigate financial risk to their properties and rental portfolios, the same cannot be said for tenants' ability to diminish their risk of harm from living in unsafe properties. The ease with which landlords can obtain information about prospective tenants is unmatched by any tools available to tenants to assess the risks posed by living in a particular property or interacting with a particular landlord or management company. Landlords are financially incentivized to enter into a contractual relationship with a tenant who will pay the rent on time and maintain

119. *Id.* § 90.303(1).

120. *Id.* § 90.303(1)(b)(A)–(B).

121. *Id.* § 90.303(3)–(4).

122. MINN. STAT. § 504B.173, subd. 3(2) (2025).

123. *Id.*

124. *Id.* subd. 3a(1)–(3).

125. CONSUMER FIN. PROT. BUREAU, *supra* note 6, at 6. Notably, while "[m]ost landlords are individual 'mom and pop' landlords . . . [c]orporate investors grew their rental market share from 8 to 26 percent of rental properties between 2001 and 2018. This growth is expected to continue . . ." *Id.*

126. *Id.* at 5.

the integrity of the property. This is so well-understood that tenants do not balk at footing the bill for tenant screening—it's simply the cost of doing business as a tenant in search of rental housing. And, given the prevalence of deficiencies in tenant screening reports, the very tools designed to mitigate risk to landlords pose their own risks to tenants.

While risks to landlords are understood and mitigation is embedded into the process of establishing a tenancy, the same is not true of risks to tenants. Like landlords, entering into a lease agreement poses risks to renters. Unlike landlords, the risks to tenants are not merely financial. As the possessor of the property, the physical health and well-being of tenants is at risk as well. Most people spend over 90% of their time indoors,¹²⁷ so the quality of that space matters; it has a huge effect on the health outcomes of occupants.¹²⁸ Despite this, the laws and policies governing the rental housing ecosystem create and exacerbate information asymmetry that prevent tenants from protecting their interest in safe housing to the same degree that landlords are able to protect their financial interests.

A. *Market Incentives to Create Risks to Tenants*

As sociologist Philip M. E. Garboden notes, focusing on the actions of individuals—like landlords or even tenant screening companies—“obscures the manner in which an economic system creates opportunities for exploitation that individuals are bound to take advantage of.”¹²⁹ Garboden argues that two levels of exploitation operate in the rental housing market. At the first level, there is a power imbalance between individual renters and individual tenants.¹³⁰ At the second, “systemic vulnerabilities facilitate economic inequalities.”¹³¹

Applying this framework to the rental application process helps explain information asymmetry between landlords and tenants. On a systemic level, existing laws often prohibit tenants from accessing information about a prospective housing accommodation and landlord, while at the same time making detailed information about prospective tenants widely available to landlords.¹³² This facilitates a

127. *Indoor Air Quality*, U.S. ENV'T PROT. AGENCY (June 17, 2025), <https://perma.cc/97AK-HYSG>.

128. *Quality of Housing*, U.S. DEPT OF HEALTH & HUM. SERVS., OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION (2025), <https://perma.cc/M9WM-CHDC>.

129. Philip M.E. Garboden, *Moving Beyond “Good Landlord, Bad Landlord,”* in *THE SOCIOLOGY OF HOUSING* 225, 226–27 (Bryan J. McCabe & Eva Rosen, eds., 2023).

130. *Id.*

131. *Id.* at 228.

132. See discussion *infra* Section II.C; WU ET AL., *supra* note 27, at 28–49.

rental housing system that allows landlords to command fees for problematic tenant screening reports but discourages tenants from learning about the landlord's reputation, the history of housing code violations, and other information relevant to a prospective tenant in search of a home. That these laws operate against a backdrop of a persistent rental housing shortage¹³³ compounds the effects; tenants, particularly low-income tenants, have few options available in the rental housing market. The systemic vulnerabilities encourage the power imbalance between individual landlords and individual tenants, making it even more difficult for tenants to access the same degree of information about a prospective home that a landlord can demand about a prospective renter.

B. *Tenant Risk Mitigation Tools*

Tenants take a risk when they sign a rental contract. By signing a lease agreement, a tenant is entering into a legally binding relationship with a landlord. While the details may vary, the general parameters are the same across jurisdictions: a tenant makes a regular rental payment for the right to occupy the premises and the landlord maintains the property in conformity with local habitability standards.¹³⁴ Housing codes are determined locally—there is no federally enforceable housing code—but generally require landlords to meet minimum standards for health and safety.¹³⁵ Some jurisdictions have enacted policies to address specific indoor environmental health hazards common to that locality. For example, properties in Chicago are subject to the city's bed-bug ordinance, which outlines the liability and procedures when bed bugs are discovered in a rental property.¹³⁶ In California, landlords must disclose the presence of mold to tenants prior to signing a rental agreement.¹³⁷

While the law establishes the standards to which a rental property must conform, policy alone does not ensure that a given landlord will reliably maintain the property to protect the health and safety of tenants. The failure to do so can be devastating for residents. Over 40% of American homes have at least one health and/or safety

133. See generally WHITNEY AIRGOOD-OBRYCKI ET AL., JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., RENTAL DESERTS, SEGREGATION, AND ZONING (2024), <https://perma.cc/SSP9-FMKC>.

134. "Under property rules, the covenants were viewed as independent, and the breach of one by the landlord did not give the tenant the right to cease paying rent." Richard C. Josephson, Note, *The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development*, 12 WM. & MARY L. REV. 581, 582 (1971).

135. *Housing Code*, BLACK'S LAW DICTIONARY (12th ed. 2024).

136. See CHICAGO, ILL., MUN. CODE ch. 4-4-322 (2013).

137. CAL. HEALTH & SAFETY CODE § 26147 (2025).

hazard.¹³⁸ The quality of housing has an enormous effect on the health of occupants.¹³⁹ Living in a home with substandard housing conditions can cause a “wide range of illnesses and injuries, including asthma, cancer, falls, respiratory infections, and mental health issues.”¹⁴⁰ For example, those residents who live in homes that contain “poor insulation, . . . cockroach and rodent infestation, dust mites, hyper- and hypothermia, . . . and dangerous levels of lead in soil and household paint” are more likely to experience “asthma, neurological damage, malnutrition, stunted growth, accidents, and injury.”¹⁴¹ Lack of running water in a home can increase the risk of “respiratory illnesses, skin infections, severe bacterial infections . . . , and dental cavities.”¹⁴² Without proper heating, individuals can experience an increased risk of “heart attacks, pneumonia, social isolation, mental illness, insomnia, stress, and even death.”¹⁴³ Lack of access to stable housing can lead to depression, anxiety, and increased risk of hospitalization, among other negative health outcomes.¹⁴⁴

Unlike landlords, there is no multi-million-dollar industry in place to help tenants mitigate their risks in a rental agreement. Instead, the primary tools that tenants may use to mitigate risk are landlord licensure, proactive rental inspection (PRI), and rental housing registries. The availability of these tools is jurisdiction specific. Moreover, licensing requirements and PRI depend on obligations imposed by local ordinances. Rental housing registries may be managed by a local administrative organ (e.g. the local Department of Buildings) or informally by user-generated review websites.¹⁴⁵

In certain jurisdictions, landlords are required to register with the locality and/or obtain a rental license or participate in a registration system prior to tenant occupancy. For example, Boulder, Colorado, prevents prospective landlords from renting out or

138. CHANGE LAB SOLS., A GUIDE TO PROACTIVE RENTAL INSPECTIONS 5 (2022), <https://perma.cc/7QBS-ZTCA>.

139. See *Quality of Housing*, *supra* note 128.

140. William C. Tilburg, *Policy Approaches to Improving Housing and Health*, 45 J.L., MED. & ETHICS 90, 91 (2017).

141. Frank Griffin, *Administering Housing Law as Health Care: Attorneys as Healthcare Providers*, 71 S.C. L. REV. 349, 355 (2019) (quoting Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 91 AM. J. PUB. HEALTH 733, 733 (2002)); see also Allyson E. Gold, *No Home for Justice: How Eviction Perpetuated Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 73 (2016).

142. Griffin, *supra* note 141, at 356.

143. *Id.*

144. *Id.* at 354–55.

145. See Caroline Biggs & Grace Cassidy, *7 of the Best Landlord and Apartment Review Sites Out There*, APARTMENT THERAPY (July 16, 2024), <https://perma.cc/5FCA-23TV>.

advertising rental units prior to licensure.¹⁴⁶ In New York City, residential property owners of multi-family dwellings (three or more residential units) or a private dwelling (one or two residential units, neither occupied by the property owner nor their immediate family) must register each year with the city's Department of Housing Preservation & Development.¹⁴⁷ As part of the registration process, a landlord may need to submit to a rental inspection¹⁴⁸ or self-certify that the premises comply with habitability standards.¹⁴⁹ Failure to comply or falsification of registration documents can result in fines.¹⁵⁰

Licensure reduces risks to tenants. A well-regulated and enforced system that ensures landlords comply with habitability standards prior to participating in the residential housing market removes the greatest threat to the health and safety of tenants: substandard housing conditions.¹⁵¹ Moreover, unlike other tools to reduce risk to renters, licensing requires nothing on the part of the tenant. It only concerns the actions of the landlord and the licensing body, eliminating potential risks before the tenant ever enters the picture. However, rental licensing exists in only a handful of local jurisdictions, so only a fraction of tenants nation-wide benefit from this type of risk mitigation strategy.¹⁵²

Proactive rental inspections are another tool designed to mitigate the risks of substandard housing conditions. Under a traditional, complaint-based system of residential housing inspection, a tenant must affirmatively identify that there is a threat to health and safety

146. See PLAN. AND DEV. SERVS. CTR., CITY OF BOULDER, RENTAL HOUSING LICENSE HANDBOOK: STANDARD/LONG-TERM LICENSE 3 (2021), <https://perma.cc/8LFM-ZYY4> (“No operator shall allow, or offer to allow through advertisement or otherwise, occupancy of any dwelling, dwelling unit or rooming unit unless each room or group of rooms constituting the rental property has been issued a valid rental license by the city manager. . . . Any advertisement shall include the rental licensing number assigned by the city manager.”).

147. *Register Your Property*, N.Y.C. HOUS. PRES. & DEV. (2025), <https://perma.cc/D8MQ-WYCF>.

148. See, e.g., *Welcome to the City of Tukwila Rental Housing Program*, CITY OF TUKWILA, WASH. (2025), <https://perma.cc/Y8W4-WM4K>.

149. See VICTORIA BOURRET & HANNAH YORK, NAT'L LOW INCOME HOUS. COAL., HABITABILITY PROTECTIONS: TWO CASE STUDIES 3–4 (2024), <https://perma.cc/STV8-H8P9>.

150. See, e.g., N.Y.C., N.Y., ADMIN. CODE § 27-2107 (2025) (articulating a “penalty of not less than five hundred dollars and not more than one thousand five hundred dollars” for a multiple dwelling with five units or less and “not less than one thousand dollars and not more than five thousand dollars for a multiple dwelling containing more than five dwelling units” as well as a “penalty of not less than seven hundred and fifty dollars and not more than five thousand dollars” for anyone willfully filing a false registration document).

151. See Katrina Forrest & Catherine Patterson, *Healthy Rental Housing: Protecting Renter Health Through Policy*, CITYHEALTH (Aug. 30, 2022), <https://perma.cc/83Q7-BLHY>.

152. See, e.g., *supra* notes 146–147 and accompanying text.

in the home and take steps to contact the local entity tasked with enforcing habitability standards before conducting an inspection of the premises.¹⁵³ This traditional system of housing code enforcement has the potential to obscure the true number of housing code violations, as many go unreported. This model is also vulnerable to power imbalances inherent to the landlord/tenant relationship; “tenants with the greatest needs and the least resources may be unaware of how to access the system, may fear retaliation from their landlord, [and] may be less likely to make complaints.”¹⁵⁴ Moreover, requesting an inspection *after* a hazard is discovered renders the tenant a canary in a coal mine: once the condition is present, the harm to health and safety has already occurred.

Conversely, in jurisdictions that have adopted a proactive rental inspection program, all units are subject to routine inspection to ensure compliance with habitability standards.¹⁵⁵ While the frequency of the inspection cycle varies between jurisdictions, the defining feature of a PRI inspection system is that all units are regularly inspected by the locality.¹⁵⁶ An inspection system that implements mandatory inspections of rental units, rather than waiting for tenants to self-report, avoids the pitfalls of complaint-based systems and decreases risk of adverse health outcomes for tenants “by reducing exposure to environmental hazards.”¹⁵⁷

C. *Preempting Risk Management*

Tools like landlord licensure, rental housing registries, and PRI have successfully helped tenants navigate the risks inherent in the rental housing market.¹⁵⁸ However, these tools are not available in all jurisdictions. While some localities have taken steps to provide tenants with systems to mitigate risks to health and safety, others have done the opposite; instead of expanding access to information so that tenants can meaningfully participate in the rental housing market, certain jurisdictions legally restrict the information available

153. CHANGE LAB SOLS., *supra* note 138, at 10.

154. *Id.* These systems also have the potential to be much more expensive for landlords. *Id.* at 11 (“Complaint-based code enforcement can lead to landlords’ having to pay for more expensive repairs that could have been averted or minimized if issues had been addressed earlier. Rather than encouraging property owners to invest in preventive maintenance, complaint-based code enforcement generally incentivizes property owners to make the minimum repairs necessary to avoid being fined.”).

155. *Id.*

156. *Id.*

157. *Id.* at 13.

158. Claudia Aiken et al., *Rental Registries*, LOC. HOUS. SOLS. (Jan. 29, 2024), <https://perma.cc/89UA-LUS2>.

to tenants, thereby leaving them vulnerable to substandard housing conditions.¹⁵⁹

In limiting information available to tenants, while at the same time allowing landlords to collect error-prone information about prospective renters, the law creates information asymmetry. To say that information asymmetry produces market inefficiencies¹⁶⁰ obscures the harms to tenants. It's not just that tenants overpay for homes that contain substandard housing conditions. Discussing this issue in purely economic terms reduces the concept of home to a commodity and obfuscates both its necessity to human flourishing and also the risks to health and safety posed by living in a home that contains substandard housing conditions. Yes, tenants will lose money as a result of information asymmetry in the rental housing market. But it's more than that—people will be injured, their health will be harmed, and lives will be disrupted.

Information asymmetry in the rental housing market entrenches power among those controlling an asset essential for human flourishing. While the law encourages landlords to collect information to safeguard their financial investment in rental property, jurisdictions frequently decimate tools for tenants to protect their health and safety.

Several jurisdictions across the country limit the use of PRI.¹⁶¹ In these jurisdictions, the legislature has passed law prohibiting the implementation of a PRI program, frequently on the basis of the Fourth Amendment of the U.S. Constitution.¹⁶² The Fourth Amendment prohibits unlawful search and seizure.¹⁶³ Jurisdictions that have banned PRI claim that an affirmative inspection program violates the Fourth Amendment rights of the tenant.¹⁶⁴ In many jurisdictions, prohibition is enacted at the state level to preempt local governments that have implemented a PRI program. For example, Georgia state law forbids local government from “perform[ing] investigations or inspections of residential rental property unless there is probable cause to believe there is or has been a violation . . . of applicable codes, and in no event may a local government require the registration of a residential rental property.”¹⁶⁵ States have also

159. *See, e.g.*, WIS. STAT. § 66.0104 (2025).

160. *See generally* Ambrose & Diop, *supra* note 19.

161. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-1304 (2025); TENN. CODE ANN. § 6-54-511 (2025); WIS. STAT. § 66.0104 (2025).

162. *See, e.g.*, GA. CODE ANN. § 36-74-30 (2025).

163. U.S. CONST. amend. IV.

164. *See, e.g.*, GA. CODE ANN. § 36-74-30 (2025).

165. *Id.*; *see also, e.g.*, KAN. STAT. ANN. § 12-16,138 (2025) (“No city or county shall adopt, enforce or maintain a residential property licensing ordinance or resolution which includes a requirement for periodic interior inspections of privately owned residential property for city or county code violations unless the

limited the ability of localities to implement another important tool to protect tenants: landlord licensing programs.¹⁶⁶ In Oklahoma, for example, registration of real property is prohibited “for purposes of promoting commerce and the equitable treatment of the citizens of this state.”¹⁶⁷ Oklahoma municipalities are free to create a general list of property owners and designees.¹⁶⁸ However, such a list, without more, does not provide adequate information for prospective Oklahoma tenants to weigh the risks associated with a potential tenancy. Oklahoma’s laws are indicative of a system that provides a wealth of information to landlords but, at best, only crumbs to tenants.

CONCLUSION

Juxtaposing access to information by landlord and tenant reveals stark information asymmetry in the rental housing market. While landlords can demand that tenants pay to participate in a background screening that includes credit, criminal, and civil court history, the law often bars tenants from seeking information about a landlord’s history. Even though a home is an essential human need, housing law and policy prioritize the landlord’s economic interests. Information asymmetry in the rental housing market exacerbates the power imbalance between landlords and tenants, and contributes to multiple layers of tenant exploitation. Without greater access to information, tenants will continue to be at risk.

lawful occupant has consented to such interior inspections.”); WIS. STAT. § 66.0104 (2025).

166. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-1304(B)–(C) (2025) (Arizona preempts licensing/registration but not inspection programs entirely); GA. CODE ANN. § 36-74-30 (2025); OKLA. STAT. tit. 11, § 22-110.1 (2025); WIS. STAT. § 66.0104 (2025).

167. OKLA. STAT. tit. 11, § 22-110.1(A) (2025).

168. *Id.* § 22-110.1(C).