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Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State

Eric Dunn & Marina Grabchuk

INTRODUCTION

In October 2007, the website FreeCreditReport.com—not to be confused with the publicly mandated annualcreditreport.com[1]—launched a series of television commercials featuring a young singer who laments having neglected to watch over his credit report. He is turned down for jobs, loans, and in one spot, housing:

> *Well I married my dream girl, I married my dream girl*
> *But she didn't tell me her credit was bad*
> *So now instead of living in a pleasant suburb*
> *We're living in the basement at her mom and dad's*
> *Now we can't get a loan for a respectable home*
> *Just because my girl defaulted on some old credit card*
> *If we'd gone to free credit report dot com*
> *I'd be a happy bachelor with a dog and a yard.*[2]

Some might agree with the singer—that he should have run his fiancée's credit report before saying "I do." Others might find the thought revolting. But there is no denying the jingle's underlying premise: poor credit absolutely can doom a young couple's dreams of moving into their own home. And though most families who cannot qualify for a home loan would probably sooner rent an apartment than live in their parents' basement, unfavorable credit reports are no less a barrier to obtaining rental housing.

Indeed, those seeking housing in today's rental market find it, in some ways, even more difficult than qualifying for a mortgage. Loan applications

are approved or denied almost exclusively on the basis of financial criteria. Rental applicants, however, must usually also satisfy a series of inquiries into matters of character, lifestyle, and personal history. This has long been the case, but modern information systems have vastly expanded the amount of information available to landlords about prospective tenants and the warped speeds at which that information can be obtained,. In today's age of online public records and digital transmission, a rental applicant's complete residential history, credit report, criminal record, civil litigation background, and other information are available within hours or even minutes, and in Washington, all at the prospective tenant's expense.[3] Some landlords access this information directly from public websites and databases; however, most contract with tenant-screening services (a subset of the consumer-reporting industry) to cull records from various sources and prepare custom "tenant-screening reports."

These technologies have revolutionized the processes by which rental housing providers choose tenants, supplementing or even replacing traditional tenant-screening tools like written applications, personal interviews, or phone calls to past landlords. Today's residential landlords are able to choose their tenants much more selectively than in the past, and do so in hopes of reducing the risk of leasing to a tenant who will default in rent, damage the premises, or be otherwise problematic. As is common with technological advances, however, these benefits have come at significant, though largely overlooked, social costs.

In Washington, individuals and families are frequently denied housing due to inaccurate or misleading background reports that they have no practical way of correcting.[4] Other potential tenants are deterred by or unable to afford screening fees, which, if they pay and are rejected at one property, they must pay again to apply elsewhere.[5] Still others find they are simply unable to rent at all; they are disqualified from the rental market almost entirely due to past eviction lawsuits, criminal prosecutions,

domestic violence protection order cases, poor consumer credit, or other disfavored characteristics.[6]

In Washington, unfavorable tenant-screening reports probably do not deter too many marriages among perfectly matched mates, but they do keep plenty of people living in their parents' basements. Contemporary tenant-screening practices (and the exclusionary policies they support) also swell the ranks of the homeless,[7] frustrate offender reentry programs, deter domestic violence survivors from leaving abusive partners, chill existing tenants from asserting basic legal rights, and cause other significant public policy effects Washington can scarcely afford to ignore.

This article will take a deeper look at these problems, how they arose, and possible methods to address them. Part One looks at current residential screening industry practices, including common tenant-selection criteria, and the procedures and information sources that landlords use to evaluate applicants. Part Two will detail how these practices lead to social problems, such as unfair rejections for rental housing or the collective effects of disqualifying people categorically from broad sections of the rental market due to criminal records, eviction cases, or poor credit. Part Three examines the limited strengths and numerous drawbacks to the few potential legal remedies for frustrated rental applicants under existing U.S. and Washington law, including theories under the Fair Credit Reporting Act, Washington's Residential-Landlord Tenant Act and Consumer Protection Act, fair housing statutes, and privacy claims. Finally, Part Four discusses possible legislative solutions that, if enacted, could mitigate abusive tenant-screening practices in Washington, such as proposals for "portable screening reports," enhanced procedures for sealing judicial records, and expanded protection for tenants under the Fair Credit Reporting Act.

I. CURRENT INDUSTRY NORMS

Tenant-screening policies typically entail two components: a set of criteria for accepting tenants and a method for determining whether a

particular applicant meets those criteria. Both aspects profoundly affect how rental housing opportunities are distributed in Washington.

A. Tenant-Selection Criteria

The purpose of tenant screening is to predict the likelihood that a particular rental applicant will make (what the landlord considers) a "good tenant." To this end, the criteria landlords use for selecting tenants can range from amorphous judgments about an applicant's desirability to formal admission policies that evaluate applicants across a wide spectrum of factors. But most of the time, rental criteria relate to the essential requirements of residential tenancies like paying rent and complying with basic rules. Despite variations from one housing provider to the next, basic criteria usually fall along the twin axes of financial suitability and behavioral suitability.[8]

Financial suitability means being able to meet the anticipated pecuniary obligations of the tenancy.[9] This most obviously includes rent, as well as other expected expenses such as utility bills, security deposits, renter's insurance (if required), and so on. Some landlords may also consider whether the applicant would be likely to pay a claim or judgment in the event of damage to the premises, early lease termination, or other breach.[10] Many housing providers assess financial suitability using mathematical formulas or thresholds (e.g., monthly gross income of two-and-a-half to three times the rent is common).[11] An applicant may also need to demonstrate that the income is reliable, such as through a minimum duration of employment.[12] Some landlords may require a cosigner or extra security deposit for applicants whose financial qualifications are marginal.[13] Notably, many housing providers refuse to accept tenants who rely on child support, government housing subsidies, welfare benefits, or certain other often-stigmatized income sources.[14] Even assuming the tenant has the financial resources to afford the rent and other bills, a history of late

payments, debts—especially to former landlords—or other adverse credit history can disqualify a rental applicant.[15]

Behavioral suitability means satisfying the housing provider that the applicant will follow the rules, fulfill other nonfinancial obligations of the tenancy, and live harmoniously in the community.[16] This determination is typically based on an applicant's history at previous residences, as shown by interviews with the applicant, with prior landlords and other references, and, especially, with various background reports such as civil litigation records, criminal histories, and credit scores. Applicants who receive critical reports from past housing providers or who cannot demonstrate a stable residential history are generally treated less favorably.[17] Applicants with acute blemishes such as bankruptcies, foreclosures, eviction records, or felony convictions are often categorically excluded.[18]

B. Screening Methods and Information Sources

Today's landlords commonly obtain the reports that facilitate the use of both financial and behavioral tenant-selection criteria from background-check providers,[19] many of whom specialize in so-called "tenant screening" and others who also conduct pre-employment screening and other types of consumer reports.[20] Tenant-screening companies can provide residential landlords almost-instant access to extensive background information about practically any rental applicant. Tenant-screening reports, which typically cost between $35 and $75 per adult occupant[21]—with the entire cost generally passed along to the applicant[22]—commonly include four main components concerning an applicant: (1) a residential history; (2) a credit report; (3) a criminal background check; and (4) civil litigation records (especially eviction reports).[23] In addition, many tenant-screening services also market analysis or evaluation of this raw information, usually in the form of "scores" or "recommendations" concerning the applicant's fitness for tenancy.[24] The methods and practices by which this information is compiled, expressed, transmitted, analyzed, verified, and ultimately used

present new challenges for contemporary consumer advocates as well as the judicial system itself. We begin with a closer look at the reports.

1. Residential History

Housing providers routinely require applicants to disclose their prior residences for the preceding period, often about three to seven years into the past, usually on a written rental application**.** This residential history provides names and contact information for past housing providers, and indicates the proper states and localities to search for criminal records, civil litigation records, or other public records. Most housing providers and screening services will cross-check past addresses that an applicant supplies against a credit report or other external sources. The failure to fully and accurately disclose past housing providers or places of residence may alone be sufficient grounds for rejection.[25] Some screening services, usually for higher fees, will interview past housing providers and include the resulting information in the screening report,[26] whether verbatim, in a summary or abbreviated form, or by incorporation into a recommendation or other evaluation of the applicant's desirability.

2. Credit Reports

Another regular feature of a tenant-screening report is a credit report, that is, a "consumer report,"[27] about the applicant from a credit bureau, often (but not always) from one of the so-called "big three" credit bureaus:[28] Equifax, Experian, and Trans Union.[29] Although "credit bureau" has no official meaning in U.S. law,[30] the term is popularly understood to mean "a company that collects information from various sources and provides consumer credit information on individual consumers for a variety of uses."[31] A credit report will generally list an applicant's prior addresses, consumer accounts and the status of each account, bankruptcies, foreclosures, civil judgments, and records of other financial obligations (such as support orders, criminal fines, restitution orders, etc.).[32] The credit

report should also identify anyone who has requested the report and the purpose of such inquiries.[33]

3. Criminal Background Checks

A criminal background check is a consumer report containing information related to arrests, criminal charges, or convictions pertaining to the applicant.[34] Some screening services search for criminal records only in local jurisdictions; others search across the country for records or in any jurisdiction where the applicant has reported living.[35] Though there is no nationwide database or other central repository of criminal records, some tenant-screening companies offer a fifty-state search for criminal records, which may include jurisdictions where the applicant has never lived or even visited.[36]

In Washington, criminal records are available through the WATCH (Washington Access To Criminal History) database, which is maintained by the Washington State Patrol.[37] WATCH contains records produced by courts and criminal justice agencies throughout the state and include conviction records, records of arrests within one year if pending disposition, and records of registered sex offenders and kidnappers.[38] WATCH matches records to the name, date of birth, or other identifiers used in the search inquiry.[39] Any member of the public can access WATCH online and obtain an immediate criminal record for a $10 fee per search.[40]

Like with credit reports, some tenant screeners—particularly those that market nationwide criminal-history reports—purchase private criminal-background reports for resale as part of the tenant-screening package.[41] Hundreds of private vendors assemble and resell criminal records as part of background checks for pre-employment and tenant screening.[42] The largest providers include USIS Commercial Services, which has over thirty thousand clients and performs more than four million reports per year, and Choice Point, which conducts over three million background checks per year and claims to perform criminal screening for half of America's largest

companies.[43] Many private vendors maintain their own "shadow databases," which may contain criminal records that have been expunged or vacated, or otherwise restricted or sealed to public access.[44]

4. Civil Litigation Records

Tenant-screening reports also usually contain records concerning various forms of civil litigation, most of which are obtained directly from courts or court-maintained indices.[45] Money judgments usually appear on credit reports, such as in collections cases for consumer or medical debt.[46] Judicial foreclosure actions are rare in Washington, but may also appear in screening reports.[47] Other civil litigation records common in tenant-screening reports include rental collections,[48] tenant-initiated landlord-tenant suits,[49] antiharassment or domestic violence protection order proceedings,[50] and civil commitment proceedings.[51]

Most important are unlawful detainer (i.e., eviction) lawsuits[52] which tenant-screening firms report when the applicant is named as a defendant. In Washington, unlawful detainer cases are heard in county-level superior courts.[53] Civil case records for superior courts, including unlawful detainer actions (UDs) are indexed in the Superior Court Management Information System (SCOMIS), a statewide electronic case management database.[54] SCOMIS data is free and instantly accessible by anyone via internet.[55] Whenever a new civil action is filed in any of Washington's thirty-nine superior courts, the clerk enters the parties' names, case number, and "case type" into SCOMIS; for an eviction lawsuit, the case type will appear as "unlawful detainer." In addition to the public site, the Washington Administrative Office of the Courts provides a subscription service whereby subscribers may periodically download SCOMIS data into private computer systems.[56]

Landlords and tenant-screening services can find out whether a prospective tenant has ever been sued for unlawful detainer in Washington by running a name search in SCOMIS (or a private database containing

information downloaded from SCOMIS). A person who has such a record is deemed by the tenant-screening industry to have an "eviction history."[57]

Detecting an eviction history may be fast and free to anyone with internet access, but more detailed and trustworthy information about civil actions is comparatively difficult, expensive, and time-consuming to obtain. SCOMIS does allow access to cryptic docket entries in pending or recently closed cases, but it does not include or link to any additional records or documents containing the claims, defenses, findings, evidence, or other details about cases being searched.[58] Some superior courts, such as King County's, make scanned case documents available on-line—but for a fee, and access requires a special account.[59] Few housing providers choose to incur such expenses and delays to obtain more detailed records.

II. CURRENT PROBLEMS IN TENANT-SCREENING

Contemporary tenant-screening practices raise two types of problems for residential tenants in Washington. First, tenant-screening reports that contain inaccurate or misleading information impair many tenants' housing prospects undeservedly. Second, exclusionary policies deprive many individuals and families of access to housing for reasons that, while based on true information, are objectively unfair or conflict with other significant public policy goals.

A. Inaccurate or Misleading Information in Tenant-Screening Reports

Studies assessing the accuracy of consumer reports show alarming rates of factual errors. A 2004 study based on 197 interviews across thirty U.S. states found errors in 79 percent of respondents' "big three" consumer reports.[60] One in four of those errors were significant enough to cause a consumer's wrongful denial of credit.[61] An ABC News investigation in 2008 uncovered "dozens of lawsuits, on behalf of hundreds of people, filed in the last two years against the major criminal records database companies, alleging that background checks contain inaccurate information about

criminal convictions."[62] Public records databases can be compromised by similar errors. For instance, state sex offender registries, which often rely on offenders to update their own listings, are notorious for reporting outdated or inaccurate information.[63]

Tenant-screening reports typically incorporate several components into a single report.[64] This suggests that the chance of finding significant errors in a tenant-screening report is at least as high as the combined likelihood of finding errors in each particular component,[65] and additional opportunities for clerical errors and other mistakes tend to arise any time a screening agency interprets, repackages, abridges, or otherwise modifies information in a component part. This is especially true of scores or recommendations based on criminal and civil litigation records, which may require substantial skill to properly interpret.[66]

Types of errors common in background checks include overreporting (i.e.., when a record about a different person with the same name as the applicant is reported as being a potential match for the applicant),[67] records based on criminal identity theft (i.e., where an actual arrestee gives a false name or claims to be another actual person), reports containing expunged records, and mundane clerical errors.[68] Washington's public records systems are susceptible to all of these problems.

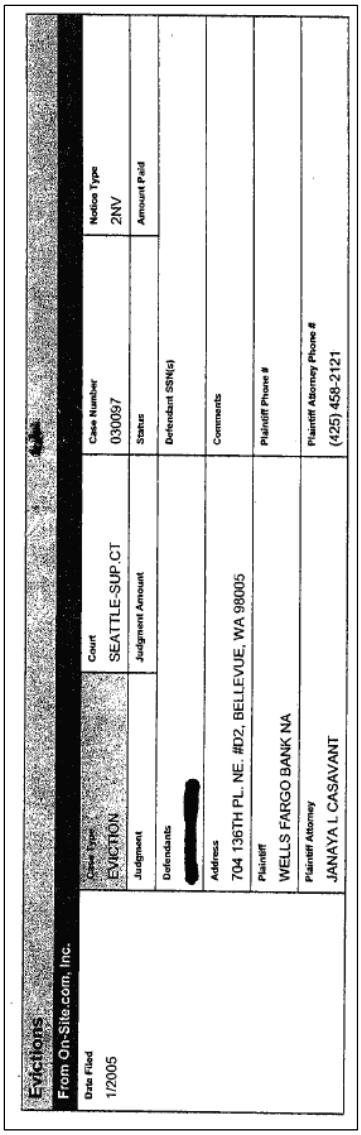
WATCH reports records based on replicable identifiers such as names and birth dates, which can lead to a high incidence of potential matches and, thus, overreporting of criminal records.[69] The possibility for potential matches is even higher with SCOMIS, which narrows name searches only by county.[70] Inevitable clerical errors occur, whether by court clerks, law enforcement personnel, or others inputting information or making changes in the database.[71] Safeguards against identity theft—criminal or otherwise—do not exist. For these reasons, WATCH warns users that it "cannot guarantee the records you obtain through this site relate to the person on whom you are seeking information,"[72] while SCOMIS makes "no representations regarding the identity of any person whose name appears on

these pages," and warns that data may not be "accurate or complete [or] in its most current form."[73]

A related problem is the presentation of true information in misleading ways, resulting in harm to prospective tenants. For instance, criminal history reports often make "several criminal charges connected with one arrest look like they involve multiple incidents."[74] A report showing that a rental applicant was sued for unlawful detainer often creates an impression that the person was evicted, even though she may have been improperly sued or prevailed in the case.[75] In fact, eviction reports seldom contain more than the most basic information about unlawful detainer suits: the names of the parties, the court where the action was filed, and a filing date.[76] Further details—such as the grounds for suit, any defenses raised, or the outcome—are typically omitted or, if included at all, reported in a perfunctory, incomplete, or even incoherent manner.

Figure 1 shows an eviction report prepared by On-Site Manager, Inc., a major tenant-screening company active in Washington. This report exceeds the norm in that it gives the address of the property and the name and telephone number of the plaintiff's attorney. But the report does not state the outcome or present status of the case, nor does it indicate whether the property was a residence, commercial property, or other type of tenancy. The grounds for suit are not stated, and the cryptic abbreviation "2NV" (under "Notice Type") is nowhere else defined. The report makes no mention of any defenses raised or of any findings or adjudications by the court. Perhaps most importantly, all the information appears on a grid labeled "Evictions."

Figure 1: "Eviction" report from On-Site Manager, Inc.



Eviction

From On-Site.com, Inc.

Date Filed	Case Type	Court	Case Number	Notice Type
1/2005	EVICTION	SEATTLE-SUP.CT	030097	2NV

Judgment	Judgment Amount	Status	Amount Paid

Defendants
[redacted]

Address
704 136TH PL. NE. #D2, BELLEVUE, WA 98005

Comments

Plaintiff
WELLS FARGO BANK NA

Plaintiff Attorney	Plaintiff Attorney Phone #
JANAYA L CASAVANT	(425) 458-2121

Erroneously attributed criminal records or eviction cases can obviously cause applicants to be denied housing, for such records make applicants appear as less desirable tenants than they truly are. Inaccurate or misleading screening reports also cause applicants to be rejected for nondisclosure or misrepresentation, as housing providers almost always ask potential tenants to disclose any criminal convictions or eviction suits on their applications, and false or incomplete information is usually an independent basis for rejection.[77] Despite the serious consequences of such errors and misleading information, correcting inaccurate tenant-screening reports is seldom practical or beneficial to rental applicants.

B. Monitoring or Correcting Inaccurate Tenant-Screening Reports

Both the federal and Washington Fair Credit Reporting Acts provide dispute and reinvestigation mechanisms that enable consumers to rectify inaccurate or misleading credit records.[78] These statutory procedures obligate a consumer reporting agency[79] ("CRA") that receives a dispute concerning the accuracy or completeness of information on a "consumer report" to "reinvestigate" the item, at no charge to the consumer, within thirty days.[80] Unless the CRA verifies the disputed entry, the information must be "promptly delete[d] from the file of the consumer, or modif[ied] as appropriate, based on the results of the reinvestigation."[81] If reinvestigation does not resolve the dispute, the CRA must permit the consumer to file a "brief statement setting forth the nature of the dispute" along with the adverse item.[82]

Albeit imperfect, this process at least enables consumers who anticipate applying for credit to take proactive steps that can prevent them from being turned down or charged higher rates due to inaccurate information. But a vital component in this scheme is an automated updating system, "e-Oscar" (for Online Solution for Complete and Accurate Reporting),[83] through which the results of any reinvestigation and correction by one national credit bureau are automatically transmitted to other national credit bureaus

on a periodic basis.[84] Because of e-Oscar, a consumer only needs to dispute an item with one national credit bureau to correct the same information with all of them.[85]

In stark contrast, rental applicants have no practical method to check their tenant-screening reports or to dispute inaccurate or misleading information in advance of a housing search. Only CRAs that "regularly engage in the practice of assembling or evaluating, and maintaining . . . [c]redit account information from persons who furnish that information regularly and in the ordinary course of business" are required to participate in e-Oscar or a comparable automated reinvestigation or updating service.[86] Tenant-screening agencies tend to avoid this requirement because they do not ordinarily receive regular credit account updates from banks, credit card companies, or other "furnishers."[87] Because there are dozens of tenant-screening services operating in Washington,[88] obtaining and reviewing tenant-screening reports from so many companies, as well as disputing any inaccuracies found in the reports, is not feasible.[89]

Also, unlike the big three and other CRAs that maintain running files on all consumers, a tenant-screening firm customarily compiles a report on a specific rental applicant only when requested by a housing provider.[90] Upon transmitting that report to a landlord, the screening service ordinarily will not continue to collect or update information about that applicant, and may even delete the file altogether.[91] When a screening company has no report to obtain and review ahead of time,[92] it is nearly impossible for a consumer to preemptively assure his report is accurate, even if he knows which screening service the prospective landlord will use.

Housing providers typically order tenant-screening reports only upon receiving rental applications for then-available dwelling units and usually make prompt use of such reports.[93] If a report contributes to an applicant's rejection, the landlord must so inform the applicant and provide the name, address, and telephone number of the screening service that supplied it.[94] The applicant may then obtain a free copy of that report (from the screening

firm) within the next sixty days, which the consumer may use to detect and dispute any inaccuracies that may have led to the denial.[95] But submitting such a dispute is seldom worthwhile.

Disputing an inaccurate or misleading tenant-screening report after a denial is often futile because the desired rental unit will likely be leased to another person well before a rejected applicant can obtain the report, lodge a dispute, wait up to thirty days for the reinvestigation, and (if successful) secure a corrected report, which may or may not cause the housing provider to reconsider the application.[96] Because there are so many tenant-screening firms operating in Washington, the next housing provider to whom the applicant applies is unlikely to request a screening report from the same source.[97] Furthermore, if the disputed information is derived from an erroneous or misleading public record, the CRA may not even owe a duty to correct its report unless (and until) the public record itself is corrected.[98]

C. Multiple Screening Fees for the Same Information

Another problem associated with incorrect records is multiple screening fees. A person who applies for housing at successive providers must ordinarily pay a separate screening fee each time, even though the reports purchased with those fees usually contain substantially identical information.[99] Applicants with blemished credit or adverse background information often face a substantial risk of rental rejections and the associated prospect of paying multiple screening fees any time they search for rental housing.[100] For these individuals, screening fees can easily extend into the hundreds of dollars,[101] sometimes consuming funds that might be needed for security deposits, moving expenses, or other housing-related costs.[102] Social service agencies that offer financial assistance with such expenses are similarly affected.[103]

Landlords have little incentive to limit screening costs. Though Washington prohibits landlords from earning profits on tenant-screening charges, landlords can, and almost always do, pass the entire cost of

screening reports on to applicants.[104] Borderline applicants, faced with the prospect of paying such fees repeatedly, may limit their housing searches to inferior properties and less desirable neighborhoods rather than risk money on application fees at high-quality rental properties they perceive as more likely to deny them.[105] On a collective level, this phenomenon may foster the concentration of poverty and frustrate efforts to promote diverse and economically integrated communities.

D. Social Consequences of Outsourcing to Tenant-Screening Services

A rental decision theoretically entails a unique evaluation of whether the applicant's household appears consistent with the nature of the housing and whether the applicant is likely to comply with the relevant rules and policies, coexist peaceably with the neighbors, and fulfill the financial obligations of the tenancy. Yet in practice, this analysis is typically reduced to a purely mechanical comparison of rigid suitability criteria against individual applicants' background reports. Tenant-screening services often facilitate such decision making by marketing scores, recommendations, or other opinions concerning prospective tenants, purportedly based on the raw reports.[106] Some invite landlords to outsource rental decisions entirely by selling only the opinion (e.g., "accept" or "reject") and withholding the data upon which it is predicated.

For example, the Rental Housing Association of Puget Sound (RHA) offers a product it calls "Rent Right," in which the landlord is provided only a decision (either "Approved," "Approved with Conditions," or "Declined") and is not given any reason for the decision or permitted to view any of the applicant's credit details.[107] RHA extols this method as sparing landlords "[t]he task of reading and understanding complex credit reports."[108] Unlike housing providers themselves, a screening service has no countervailing incentive to approve marginal tenants, which may cause screening companies to apply the selection criteria more strictly than landlords would

if making rental decisions themselves—though, under tighter rental market conditions, even landlords themselves tend to be extremely selective.[109]

Rental recommendations, and the ultimate approvals or rejections, are typically predicated on the broadly accepted assumption that a person's past is the best predictor of future performance—in this case, as a tenant. But its strict application tends to produce controversial consequences that threaten numerous public policy concerns. Rental policies excluding applicants who lack a "stable housing history," for instance, inhibit public efforts to combat homelessness. Overly restrictive rules against applicants with criminal records frustrate offender-reentry initiatives. Excluding applicants with certain disfavored income sources (like housing vouchers, welfare benefits, or child support) undermines the efficacy of poverty relief and welfare programs. Rules which disqualify applicants with records of home foreclosures tend to multiply, often arbitrarily, the economic and social ills of the recent national foreclosure crisis. Then, probably the most significant tenant-screening abuse is the widespread practice of automatically rejecting applicants with "eviction" records.

Figure 2: "Rent Right Decision Model"

RHA's Rent Right Decision Model provides subscribers with:

Verification of information on the rental application

Objective analysis of applicant's credit report

A rejection letter, fully compliant with the FCRA laws, if applicable

All the information you need to make a sound rental decision regarding credit, in a easy-to-understand format

What you avoid:

- Bureau-required on-site inspections of your place of business
- Potential inconsistent decision making, which may lead to claims under federal fair housing laws
- The task of reading and understanding complex credit reports
- The potential of sensitive consumer data falling into the wrong hands

In much of Washington, residential landlords commonly reject any applicant who has been involved in an unlawful detainer litigation against a prior landlord, period—regardless of whether the case resulted in a judgment for the landlord and physical "eviction" of the tenant, a complete dismissal and exoneration of the tenant on all claims, or anywhere in between.[110] It may be only natural that landlords seek to avoid leasing to tenants they perceive as "high risk," but the practice dramatically impairs the rental housing opportunities of a significant number of Washington families.[111] On a widespread basis, this exclusionary practice erodes access to our courts, weakens the due process rights of all residential tenants, and relegates some to an intractable condition of homelessness.[112]

Rental policies which automatically disqualify applicants because of unlawful detainer suits undermine access to justice by chilling tenants from even appearing in landlord-tenant court.[113] Tenants who have meritorious defenses and compelling evidence often decide that preserving a particular tenancy is not worth the damage that an unlawful detainer record will inflict upon their future rental prospects—especially when that damage is not ameliorated by a favorable outcome in the case.[114] Consequently, rather than assert defenses, tenants often decide simply to move out after being served eviction notices or unfiled legal pleadings.[115] Housing providers justify these exclusions on grounds of efficiency and economy (since obtaining and evaluating additional information about an unlawful detainer action can impose significant costs, delays, and other difficulties), but cynically, many landlords are equally or even more strongly averse to having tenants who have successfully defended against eviction lawsuits by prior housing providers.[116]

This phenomenon affects not only those tenants facing the specter of eviction lawsuits, but any tenant who seeks to enforce rights against a landlord. This can include demanding repairs, enforcing the provisions of a lease agreement, objecting to discriminatory or retaliatory conduct, and so forth.[117] When a landlord may inflict a serious and permanent injury upon a

tenant's future housing opportunities merely by filing suit—a measure solely within the landlord's control—tenants are deterred from doing anything they predict might invite litigation.[118] Of course, not all tenants avoid being sued for unlawful detainer or incurring other irreparable injuries to their rent-worthiness.

E. The Result: "Unhouseables"

The process of screening prospective residential tenants naturally implies that some will be accepted as tenants by particular landlords and others will not. Though rental rejections may often be attributed to errors and false impressions, plenty of rental applicants do have damaged credit, lack bank accounts or other established credit, have been arrested or convicted of criminal offenses, have been asked to leave previous rental properties, sued for unlawful detainer, or evicted by a court, or have recently been homeless or without verifiable "residential history." Many of these would-be tenants encounter great difficulty nowadays in locating willing landlords, often on the basis of information that few landlords would have discovered before the age of digitized records and free online databases.[119] Indeed, as the information available to landlords has increased, so too have the grounds for rejecting applicants, especially in tight market conditions when overly selective criteria are not punished.[120]

To many such applicants, the cost of these difficulties is measurable in hours wasted in futile apartment searches and hundreds of dollars in application fees.[121] Yet many such applicants secure housing eventually—even if in substandard facilities or less-than-desirable locations. Increasingly, however, tarnished rental applicants are finding they are unable to secure any housing at all.[122] As a 2004 study observed in connection with tenant-screening legislation then pending in Minnesota, "the increasingly popular use of tenant-screening reports has resulted in a new class of people who are unable to access rental housing because of past credit problems, evictions, poor rental histories, or criminal

backgrounds."[123] More locally, housing counselors and advocates from major social services agencies, such as Seattle's Solid Ground, have cited tenant-screening as an issue of top priority to their clients and a first-rank barrier to reducing homelessness in Washington.[124]

III. POTENTIAL REMEDIES UNDER EXISTING LAW

Though Washington has made no effort to comprehensively regulate the tenant-screening industry, a handful of laws bearing more broadly on subjects like fair housing, landlord-tenant, and credit reporting do reach certain tenant-screening practices, sometimes substantially.

A. Tenant-Selection Criteria

Perhaps the most straightforward legal theory for challenging unfair tenant-screening practices is a simple breach of contract claim. A person who applies for rental housing presumably contracts with the landlord for a good-faith consideration of her application (especially if a fee is paid), so a landlord's unreasonable rejection of the application could sustain an actionable claim.[125] An unreasonable or bad-faith basis for rejection might be a ground contrary to the landlord's established rental criteria,[126] a reason unrelated to predicting future performance in a tenancy, or some socially malevolent basis that conflicts with public policy.[127] Also, since a rental application involves an interest in land, the unjust denial of a leasing application constitutes an irreparable injury for which a court could order specific performance.[128] But, while appealing in the abstract, numerous practical considerations undermine breach of contract as a viable legal theory for addressing tenant-screening problems.

Two significant proof problems immediately emerge. While many do so voluntarily, no law requires Washington landlords to establish, publish, or abide by particular tenant-selection policies. Where tenant-selection policies are tacit or even ad hoc, it may be impossible for an applicant to demonstrate that he qualified for the rental under the relevant criteria. Even

if the criteria are known, a rental applicant may be unable to prove a deviation from those criteria because Washington law permits a landlord to deny a rental application without disclosing the reasons for rejection.[129] All that Washington law does require is that the landlord inform the rental applicant (either orally or in writing) of the denial, and if a tenant-screening service was used the landlord must provide its name and address.[130] This lack of transparency may prevent a rental applicant from detecting that his rental application was denied unfairly, let alone prove such a claim.

The lack of viable remedies is another significant obstacle. Since an offending landlord will typically rent vacant premises to another tenant well before a rejected applicant could bring a lawsuit or obtain relief, gaining access to the desired premises is often not feasible.[131] Even if the rental unit is still available, many prospective tenants would probably prefer not to start new tenancies with landlords embittered by litigation. Courts may also be reluctant to issue injunctions likely to require extensive subsequent oversight.[132] This means damages, though inadequate as a matter of law,[133] may be the only realistic remedy for a wrongful denial of rental housing claim. Such damages, which might include the application fee, related incidental costs, and possibly compensation for loss of expectation (e.g., if the tenant had to pay more in rent or settle for inferior housing elsewhere), would often appear inadequate to make bringing a lawsuit for damages worthwhile, particularly given the absence of a fee-shifting statute.[134]

1. Residential Landlord-Tenant Act

An applicant who feels he was wrongfully denied rental housing may also consider bringing an action under Washington's Residential Landlord Tenant Act (RLTA), a 1973 statute that governs most residential tenancies in Washington.[135] With one exception, the RLTA does not regulate the grounds by which landlords may select tenants; but it does impose a general duty of good faith in all landlord-tenant transactions.[136] A landlord who

rejects an applicant for an untenable reason (such as those discussed above) theoretically violates this duty of good faith.

The RLTA, however, provides no specific remedy for a breach of the duty of good faith, and in the only reported case discussing the provision, the Washington Court of Appeals, Division I, openly questioned whether the duty actually affords tenants "a substantive right to good faith treatment by the landlord."[137] Basic principles of statutory construction suggest that the RLTA duty of good faith is substantively enforceable,[138] but without specific remedies for a violation, the good faith provision appears scarcely more helpful to rental applicants than the analogous breach of contract theory.

2. Consumer Protection Act

Another statute that provides mistreated rental applicants with a potential avenue for legal redress is the Consumer Protection Act (CPA), which prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[139] Unlike the RLTA, common law, or good faith theories discussed above, the CPA provides distinct and potent remedies for persons injured by unfair or deceptive practices, including actual damages, costs and attorney fees, injunctions against "further violations," and even exemplary damages.[140] The Washington Supreme Court has also authorized other types of equitable relief in association with CPA claims on the basis of "[t]he superior court's inherent authority to enforce orders and fashion judgments."[141]

To establish a CPA claim, a plaintiff must prove that the defendant committed an unfair or deceptive act or practice in the scope of trade or commerce, that the act or practice affects the public interest, and that the act or practice injured the plaintiff.[142] A rental applicant who is rejected for an objectively unfair reason could, it would certainly appear, state a CPA claim under these elements. The same kinds of tenant-selection policies that might give rise to a common law or RLTA bad faith claim would presumably also

enable a CPA unfair practice claim—indeed, "unfair" probably covers a broader range of practices than "bad faith."[143] The leasing of residential homes is commerce, and tenant-selection practices affect the public, because landlords regularly advertise vacancies, solicit applications, and make leasing decisions in the course of their business.[144] But while the CPA appears to be a promising tool for challenging unfair rental housing rejections, appearances can sometimes be deceiving.

In 1985, the Washington Supreme Court ruled in *State v. Schwab* that residential tenants may not sue landlords for unfair or deceptive practices under the CPA.[145] It is unclear whether (and to what extent) *Schwab* reaches transactions between landlords and rental applicants (i.e., persons who have applied for rental housing but have not yet been accepted as tenants).[146] The RLTA sets forth the rights and duties belonging to persons defined as "landlords" and "tenants," rental applicants are not mentioned, and the definition of "tenant," though broad ("any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement"), does not embrace applicants.[147] The original RLTA did not feature any provisions governing transactions between landlords and applicants, and no such components had been inserted by the time of *Schwab* in 1985. Thus, it is reasonably clear the legislature did not originally intend the RLTA, rather than the CPA, to govern transactions between landlords and rental applicants.

However, in 1991 and 2004, two provisions governing transactions between landlords and applicants were added to the RLTA.[148] One of the 1991 amendments (now codified at RCW 59.18.253 and 257) limited the fees landlords can charge for the cost of obtaining tenant-screening reports and background information.[149] The other provision imposed rules on deposits to secure occupancy of rental units.[150] These regulations benefit prospective "tenants," rather than the actual tenants to whom the RLTA traditionally applied.[151] Both provisions contain specific, self-contained remedies, and neither provision purports to authorize a CPA claim.[152]

The 1991 amendments are capable of two basic interpretations. One view is that by extending the RLTA to some transactions between landlords and "prospective tenants," the legislature intended to bring all such relationships under the RLTA and, thus, exempt them from the CPA (per *Schwab*).[153] The other, more likely view, is that the legislature intended only to create a remedy for people charged excessive application fees or unfair rental deposits, and did not intend to fully determine which transactions between residential landlords and nontenants belonged within the RLTA. Whereas the RLTA had been a comprehensive statute governing practically all aspects of the landlord-tenant relationship, the 1991 amendments were directed at two specific problems: application fees and deposits. Also, the 1991 limits on fees and deposits were designed to make rental housing more affordable to low-income people, not to counteract charges the legislature had found unfair or deceptive.[154] The CPA may, therefore, not have appeared to be the appropriate enforcement tool. The findings did not indicate any intention for the 1991 amendments to extend *Schwab* to all transactions between residential landlords and rental applicants, or even any explicit consideration that the amendments could have such an effect.[155]

In 2004, however, the RLTA acquired (for the first time) a provision that actually regulates a ground upon which landlords may select tenants: the Victim Protection Act (VPA).[156] Among other things, the VPA prohibits a residential landlord from denying a rental application because of the person's status as a victim of domestic violence or certain other crimes.[157] Like the 1991 RLTA amendments, the VPA is codified under the RLTA and provides specific, self-contained remedies for violations.[158] The VPA did not comprehensively regulate the field of possible transactions between landlords and rental applicants; instead, it addresses a narrow set of specific evils—housing discrimination against domestic violence victims and the economic barriers to leaving abusive partners.[159] Nevertheless, this regulation of a tenant-selection criterion expands the RLTA into an area in which it had been completely silent before 2004.

It is highly doubtful that, in prohibiting landlords from rejecting tenants on such an egregiously unfair and socially obnoxious basis as in the VPA, the legislature truly intended to extend the RLTA—and with it *Schwab*—to the full spectrum of residential tenant-selection decisions. But it can no longer be denied that the RLTA reaches tenant-selection practices, and some may interpret the VPA as evidence that the legislature assumed the RLTA applied to tenant selection all along (and, thus, that claims based on unfair tenant-screening practices are exempt from the CPA per *Schwab*). Followed to its logical conclusion, this argument assumes, probably unrealistically, that the legislature could not pass a law to protect domestic violence victims from housing discrimination without also revisiting *Schwab*. On the other hand, placing the VPA antidiscrimination provision under the RLTA makes it consistent with the Law Against Discrimination, under which housing discrimination claims are also specifically exempt from CPA enforcement.[160]

It is likely only a matter of time before a Washington appellate court will have to decide squarely whether or not *Schwab* extends to rental applicants; in fact, several cases have come close. In the unpublished 2002 decision of *Collard v. Reagan,* the Court of Appeals, Division II, upheld an award of CPA damages to a group of rental applicants who had been scammed out of application fees and deposits by a residential landlord.[161] The landlord argued on appeal that the CPA claim was barred by *Schwab,* but the Court of Appeals did not consider the defense because the landlord had not presented it to the trial court.[162]

More promising for rental applicants is the 2001 case of *Ethridge v. Hwang,* in which the Washington Court of Appeals, Division I, declined to extend *Schwab* to mobile home park tenancies.[163] In *Ethridge,* a mobile home park tenant attempted to sell his mobile home and located at least two potential buyers, but the park refused to approve either buyer to live in the park. The tenant contended that the park's rejection of the buyers' rental applications—which effectively frustrated the sales—was an unfair practice,

and brought several claims, including one under the CPA. The park challenged the CPA claim, reasoning that relationships between mobile home parks and their tenants are exclusively governed by the Mobile Home Landlord-Tenant Act (MHLTA), and thus, by analogy to *Schwab,* the park could not be held liable under the CPA.

The Court of Appeals rejected the park's argument, finding that "[t]he Legislature, in enacting the MHLTA to govern the unique case of mobile home tenancies, implicitly rejected the idea that the MHLTA and RLTA are substantially similar."[164] Because of a lack of detail in the *Ethridge* opinion, it is not clear what points of dissimilarity the court found relevant between the RLTA and MHLTA. But as none are immediately apparent, what *Ethridge* and *Collard,* together with *Eifler v. Shurgard Capital Management*[165]—a 1993 Court of Appeals, Division Two, decision holding the CPA applicable to a claim by the tenant of a self-storage unit against the storage company—may truly signal is a mounting discomfort with the far reaches of *Schwab* among Washington's appellate courts.

3. Antidiscrimination Laws

The clearest limitations on the criteria by which residential landlords may select tenants arise under classic fair housing laws, such as the federal Fair Housing Act[166] and Washington's Law Against Discrimination.[167] Some Washington cities and counties have enacted significant local fair housing policies as well, such as Seattle's Open Housing Ordinance[168] or Tacoma's Law Against Discrimination,[169] which extend antidiscrimination protections to additional protected classes or broaden the membership of recognized groups by defining existing protected classes differently. Many of the problematic tenant-selection practices discussed above are assailable on fair housing theories, and because discriminatory tenant-selection practices can deprive others of opportunities to live in diverse communities, such challenges can sometimes be brought even by persons outside the relevant protected classes.[170]

a) Disparate Treatment Theories

The most basic form of discrimination, "disparate treatment," occurs where a landlord "expressly treats members of a protected group differently than others who are similarly situated."[171] Contemporary housing providers rarely employ criteria that overtly exclude members of statutorily protected classes or openly admit having rejected an applicant on a basis such as race, ethnicity, or another protected status.[172] However, many landlords do not provide, and Washington law does not ordinarily require, any reason for rejecting a rental application.[173] A landlord who rejects an application without explanation may, in fact, have denied the applicant for an unlawful, discriminatory reason. Therefore, a rejected applicant who belongs to a protected class can raise a prima facie case of disparate treatment through circumstantial evidence by showing that he met the minimum qualifications for the rental, and the property remained available for rent after he was denied.[174] Confronted with such a claim, a landlord acquires a burden to "produce evidence that the refusal to rent or negotiate for a rental was motivated by legitimate, nondiscriminatory considerations."[175] A housing provider who cannot so justify a prospective tenant's rejection may be liable for housing discrimination.[176]

A landlord will ordinarily articulate at least a superficially legitimate reason for rejecting a rental applicant. If nothing else, the classic disparate treatment analysis can be useful for extracting such reasons. If the explanation given is insincere or pretextual, the applicant may yet prevail on the disparate treatment claim by refuting the justification.[177] Often, however, the housing provider's basis for rejecting a rental application will be a genuine policy that does not explicitly discriminate against members of any protected class. Most of the reasons discussed above meet these characteristics: a criminal record (whether arrests, charges, or convictions), an unstable housing history, a past unlawful detainer, poor overall credit, a negative reference by a prior landlord, etc.[178] Contesting these kinds of

rejections on fair housing grounds usually entails application of the more sophisticated "disparate impact" theory.

b) *Disparate Impact Claims*

A rental applicant may establish a prima facie case of disparate impact discrimination by demonstrating that her application was denied pursuant to an "outwardly neutral practice" that causes "a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."[179] Statistical evidence is appropriate and often essential to prove disparate impact claims, and only the effects of the challenged practices are relevant—a plaintiff need not show that the landlord harbored any intent to discriminate unlawfully.[180] If a rental applicant establishes a prima facie case of disparate impact, the challenged tenant-selection rule is presumed unlawful; only by demonstrating a "compelling business necessity" for the challenged practice can a landlord overcome the presumption of discrimination.[181]

An example of a rental admissions policy that is "outwardly neutral" and well-suited to a disparate impact challenge is one that automatically excludes applicants with criminal records.[182] Such a policy makes no explicit distinction between applicants based on race, national origin, gender, or any other protected status. Yet, a blanket exclusion of applicants with criminal records has a substantial adverse and disproportionate impact on African Americans who, as a group, are much more likely to be arrested, charged with crimes, and imprisoned.[183] A policy of this kind is, thus, unlawful unless justified by a compelling business necessity.[184] Such a justification is likely untenable because some potential applicants may make perfectly good tenants despite having criminal records, and because a landlord could, instead of a rigid exclusion, evaluate applicants on a case-by-case basis and take other relevant factors—such as the nature of the crime and evidence of rehabilitation—into consideration.[185]

Countless other tenant-selection criteria are potentially assailable on disparate impact grounds. Landlords who refuse certain forms of income, such as welfare benefits, child support, or government housing subsidies, disproportionately harm members of groups more heavily represented among recipients of such income.[186] Rigid minimum income rules (e.g., requiring applicants to have monthly income of three times the rent) can unlawfully exclude members of groups more highly represented among the local poverty population or exclude persons with disabilities, which preclude them from earning wages or otherwise increasing their financial resources.[187] Requiring applicants to display a stable housing history may have discriminatory results on those who are or have recently endured homelessness, a group widely believed to consist disproportionately of persons with mental illness or other disabling conditions.[188] Similar claims are possible on behalf of applicants who, despite having a background that raises legitimate cause for concern (e.g., serious criminal offenses, misconduct in past tenancies, a history of delinquency in the payment of rent or household utilities, etc.), face exclusion even despite proof of rehabilitation or changed circumstances.[189]

Ironically, many landlords who adhere to formulaic admissions policies defend the practice as a means of avoiding unlawful discrimination in the selection of tenants. The RHA, for instance, claims its "Rent-Right Decision Model" saves landlords from "[p]otential inconsistent decision making, which may lead to claims under federal fair housing laws."[190] Even if, as RHA suggests, the objective of these products is to create only a veneer of equal treatment, the consistent application of standard, written rental admissions criteria across all manner of applicants is not generally inconsistent with notions of fair housing. But because outwardly objective rules often affect some applicants much more significantly than others—and sometimes those disproportionate effects fall more harshly upon members of protected classes—inflexible tenant-selection policies designed to insulate landlords from fair housing claims may actually do them more

harm than good, much to the chagrin of supposedly unwittingly discriminating landlords.

c) *Impediments to Disparate Impact Claims*

While intuition and anecdotal evidence suggest that members of certain protected classes are more deeply disadvantaged by particular tenant-screening methods, reliable statistical evidence with which to investigate, confirm, and ultimately prove such disparate impact claims is often unavailable and cost-prohibitive to obtain.[191] For instance, a significant empirical question in this regard is whether, and to what extent, unlawful detainer defendants are more highly represented among certain racial and ethnic groups or people with disabilities in Washington. The same factors that lead to higher rates of poverty, welfare use, incarceration, and other adverse economic statistics among people of color and people with disabilities seem likely to contribute to higher rates of eviction and nonjudicial displacement from housing.[192] Some research shows that low-income African-American women, especially those who are single mothers, tend to face eviction at disproportionately higher rates.[193]

If members of one or more protected classes are significantly more likely to be sued for unlawful detainer, then the categorical exclusion of rental applicants with unlawful detainer records tends to cause a disparate impact on such groups.[194] But mounting a viable fair housing challenge to such policies would require that the statistical evidence be assembled. Washington courts do not keep demographic data on unlawful detainer defendants, and no other reliable source from which such statistics might be derived is readily apparent. Some out-of-state sources exist, but data that is not specific to Washington or does not correlate directly to unlawful detainer case filings, may not be adequate to support a viable claim.[195]

Common tenant-screening practices may also contribute to de facto housing segregation in Washington communities.[196] People seeking rental housing are unlikely to apply where they expect to be rejected, especially

when a screening fee is required.[197] Whether or not the criteria by which such rejections may occur are lawful, a rental applicant—particularly one with limited funds—may rationally forego attempts to obtain rental housing in preferred areas, and instead target less-desirable rental opportunities on the calculation that the tenant-selection criteria will be less stringent. Intuition suggests this process of self-screening, closely tied to the anticipated use of customary-screening criteria, may result in an unequal distribution of rental housing across racial, ethnic, and other lines. If so, fair housing laws may again provide a legal remedy. Yet, the practical impediments to establishing (or confirming the absence of) any such correlations, a likely prerequisite to any effective judicial challenge, could be even more intractable.[198]

Apart from the ever-present challenge of obtaining demographic statistics and other costly empirical data to prove antidiscrimination laws, these laws ultimately cannot do all the work of a comprehensive tenant-screening regime. Abusive tenant-screening practices inflict negative social consequences along an axis different from—if sometimes overlapping with—that with which fair housing laws are concerned. Rental criteria that disqualify applicants with poor overall credit, unstable housing history, old or minor criminal records, undesirable income sources, or even some evictions, tend to most heavily affect those who have experienced poverty or homelessness—conditions that often correlate to race, gender, ethnicity, or disability.

B. Challenging Inaccurate or Unfair Tenant-Screening Reports

1. RCW 59.18.257

The only state law regulating landlords who perform their own tenant-screening is RCW 59.18.257, a provision of the RLTA that restricts a landlord from charging a prospective tenant more than the "actual costs in obtaining the background information, [up to] the customary costs charged

by a screening service in the general area."[199] The payment of a tenant-screening fee is conditioned upon the landlord's disclosure "in writing of what a tenant screening entails [and] the prospective tenant's rights to dispute the accuracy of information provided by the [entities] who will be contacted for information concerning the tenant[.]"[200] Liability for violating this provision is limited to "an amount not to exceed one hundred dollars." However, an applicant's incentive to enforce this right is further lessened in that the statute authorizes an award of court costs and attorney fees to the prevailing party—not necessarily a successful plaintiff.[201]

Although this provision appears to offer little practical value to rental applicants, a few points are intriguing from a regulatory standpoint. First, the applicant's "right to dispute the accuracy of information provided," whether by a tenant-screening service or by "entities listed on the tenant application who will be contacted," undoubtedly references the applicant's right to lodge a Fair Credit Reporting Act (FCRA) dispute with the tenant-screening service[202] and possibly a "furnisher" (that is, an entity that provided information to the screening service).[203] It is plausible that this right to dispute inaccurate information may also guarantee an applicant the opportunity to present that dispute to the prospective new landlord.[204]

The other logical interpretation of the "right to dispute the accuracy of information provided by the . . . entities listed on the tenant application"[205] would be recognition of a right to present the dispute directly to a past landlord, personal reference, or other person who supplied adverse information directly to the new landlord (but not via a tenant-screening service).[206] But this interpretation would render the statutorily-referenced "right" superfluous, because no duties are imposed on such sources to reinvestigate, reconsider, or correct any inaccurate information they may have supplied or to inform the prospective landlord of any such errors or corrections.[207] Recognizing a right to contest information with the prospective landlord not only gives force to the statutory language but it also appears most consistent with the pronounced legislative intent: "for

prospective tenants to be informed of their rights to dispute information they feel is inaccurate in order to help prevent denials of housing based upon incorrect information."[208]

If RCW 59.18.257 does establish a right to dispute inaccurate information with the prospective landlord, the statute is silent regarding the extent of consideration that landlords must afford to such disputes.[209] But in view of the RLTA's universal duty of good faith, it is not unreasonable to expect that a landlord must evaluate the dispute with at least some degree of substantive fairness, and perhaps more controversially, that the dispute must be considered before the premises are leased to another person.[210]

Several other ambiguous terms in RCW 59.18.257 are also worth closer examination. For instance, the RLTA contains no definition for "tenant-screening service."[211] The term probably refers to a consumer-reporting agency[212] that makes consumer reports for use in approving or rejecting rental applications. But with no statutory definition, it is possible that "tenant-screening service" could be interpreted more broadly, and may draw in entities not included within the federal or state FCRA definitions of a "consumer reporting agency."

Also, the landlord's duty to "notif[y] the prospective tenant in writing of what a tenant screening entails" is nowhere further clarified.[213] This could mean that the landlord is required to inform the applicant of the type of background information the landlord will obtain, or it may require more details about the sources that will be contacted or specific questions asked. "[W]hat a tenant screening entails" could also include information about the landlord's tenant-selection criteria, again in more or less detail—arguably, a housing provider that rejects a rental application based on criteria that were not disclosed to the tenant in writing before accepting a screening fee violates this section.[214]

Still another ambiguity regarding RCW 59.18.257 is the statute's silence as to whether a landlord may charge an applicant for the cost of obtaining a tenant-screening report if the same or a substantially similar report (i.e., one

with virtually identical contents) is available to the landlord free of charge. Even if most screening services will not prepare a report at the request of a consumer,[215] once a report has been prepared, the FCRA requires a tenant-screening company to disclose that report to the applicant on request,[216] and for free if requested within sixty days of an adverse action.[217] No law prevents unsuccessful rental applicants from obtaining a copy of their screening report and then presenting that same report to other prospective landlords in subsequent applications.

It is plausible that RCW 59.18.257 could preclude a landlord who is offered such a "recycled" report from charging the applicant for the costs of obtaining another largely duplicative screening report.[218] The statute authorizes a landlord to charge only "his or her actual costs in obtaining the background information," and when the background information is available to the landlord free of charge, arguably the landlord's "actual cost" for that information is $0.[219] This would mean that a housing provider who insists on ordering a new tenant-screening report, rather than accept a substantially similar applicant-supplied report, could not lawfully charge the applicant for the cost of the additional report. The legislature does not appear to have anticipated that applicants would attempt to reuse tenant-screening reports, but this construction is consistent with the spirit and purpose of RCW 59.18.257, making rental housing more accessible and affordable to low-income renters.[220]

2. Disputes with Tenant-Screening Services

No federal or Washington statute at present defines "tenant-screening service" or any equivalent,[221] but usage suggests that it refers to a person or business that compiles and transmits consumer reports bearing on a person's fitness for leasing and occupying rental property.[222] Such entities are a type of CRA subject to the state and federal Fair Credit Reporting Acts (FRCAs),[223] which prohibit CRAs from negligently reporting inaccurate or outdated information to landlords for use in selecting

tenants.[224] Rental applicants certainly enjoy all of the same FCRA rights and protections pertinent to other consumer-reporting agencies.[225] An exhaustive exploration of possible FCRA violations is beyond the scope of this article, but several distinct practices inconsistent with FCRA duties are common among, or unique to, tenant-screening agencies.

At the heart of the FCRA is a requirement that "[w]henever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[226] "Preparing" a consumer report is distinguished in the same FCRA provision from "reselling" a report obtained from another CRA, such as a credit report or private criminal background check.[227] Hence, the duty to follow reasonable procedures to assure maximum possible accuracy applies to tenant-screening agencies, most heavily with respect to eviction records, criminal background checks based on public record searches, recommendations or other evaluations of rent-worthiness, and other original content generated by screening services.

In requiring "reasonable procedures" (for assuring the maximum accuracy of information in a consumer report), the FCRA does not impose strict liability for making a false consumer report.[228] Rather, the statute applies a negligence standard under which the reasonableness of a consumer reporting procedure depends generally on "what a reasonably prudent person would do under the circumstances."[229] This is ordinarily a question of fact.[230] The main factors in this analysis are the degree of harm a particular inaccuracy may potentially cause the consumer, the availability of procedures for improving accuracy, and the costs and burdens those additional procedures would impose.[231] A fourth relevant factor may be the resources (or lack thereof) available to the particular screener.[232]

As noted above, a prevailing practice among tenant-screening services in Washington is to report any filed unlawful detainer action as an "eviction," based on the SCOMIS index alone, without explanation of underlying facts,

claims and defenses, or final disposition.[233] Of course, a more effective way to guarantee accuracy of eviction reports would be to access and review the complete court records from unlawful detainer suits, rather than relying on the SCOMIS entries only.[234] Typical documents in an unlawful detainer case file will include a complaint, an answer, motions, exhibits, declarations, court orders, and other materials setting forth the specific facts, arguments, findings, and particular circumstances of the suit.[235] Thus, tenant-screening companies that report eviction suits without reviewing court files or taking other precautions probably do not follow reasonable procedures to ensure the maximum possible accuracy of their reports and would likely be found liable under the FCRA if a resulting report is inaccurate or casts the rental applicant in a false light.[236] The Ninth Circuit has held that a CRA must consult and properly interpret court records when reinvestigating a consumer dispute,[237] and the California Court of Appeals has held that a tenant-screening agency may not follow reasonable procedures if it makes an initial report based solely on a register of actions (comparable to Washington's SCOMIS) without further review of the court file.[238]

Nonetheless, current tenant-screening industry practices appear predicated on the assumption that the costs and burdens of reviewing and interpreting complete unlawful detainer case files before making tenant-screening reports would be found to exceed the FCRA reasonableness test.[239] This precaution would entail both the logistical burden of obtaining the relevant documents and require the expertise to properly interpret and report the contents.[240] Yet, because the potential harm to a rental applicant from an incorrect, incomplete, or misleading eviction report is so substantial,[241] screening services can be expected to incur significant costs and burdens to ensure the maximum possible accuracy of those reports.[242] Given the particular need for tenant-screening reports to be accurate the first time around, rather than on reinvestigation,[243] Washington tenant-screening agencies should adequately research and confirm unlawful detainer filings

before reporting them to prospective landlords, and any such reports should include information favorable to the tenants (such as a positive outcome, meritorious defenses, or mitigating facts and circumstances apparent from the court documents).

The omission of case outcomes, mitigating circumstances, and other key facts concerning unlawful detainer suits is most defensible in counties that do not make superior court documents available online, as the costs and delays of obtaining the necessary information are likely greatest where access to the relevant records entails a physical visit to a (potentially distant) courthouse either by the screening agency itself or through a subcontractor.[244] But in jurisdictions like King County, where superior court records are accessible online at a low cost, the assumption that ascertaining and disclosing case dispositions or other details of UD suits (in initial tenant-screening reports) would be found to impose an unreasonable burden on consumer reporting agencies is highly suspect.[245] Also undermining the contention that such completeness not feasible in unlawful detainer reports is Washington's Criminal Records Privacy Act, which requires law enforcement agencies to report the disposition of an offense whenever a nonconviction record of the offense is reported.[246]

A less-effective precaution for ensuring the accuracy of eviction records would be to cross-reference unlawful detainer records with other materials available to the screening service, especially the applicant's credit report. For instance, if the credit report reveals a judgment in favor of the landlord, the screening service might justifiably presume the action was resolved adversely to the applicant (although this is not always true, as the contents of a court order often reflect different results than the title may suggest).[247] Or, if an applicant continued to reside at disputed premises for a significant length of time after an unlawful detainer suit—thus, suggesting that the case may have been dismissed or otherwise resolved without an eviction—the agency may need to conduct a further investigation to prepare a complete and accurate report.[248] Since a screening agency will almost always obtain

an applicant's credit report anyway (usually for resale as part of the screening package), these procedures—albeit imperfect—entail minimal cost and effort.

3. Public Records

Regardless of the measures tenant-screening services take to ensure the accuracy of their reports, true fairness in the rental application process will remain elusive absent tighter controls on the creation, storage, and dissemination of the public records upon which those screening reports are largely based. Much of the information in tenant-screening reports consists of repackaged data mined from various public databases, many of which were never intended as sources for consumer reports. Once information contained in public records—especially judicial records—reaches the public domain, there are few effective limits on either a tenant-screening firm's further dissemination or a landlord's use of that information in choosing tenants. Thus, keeping harmful information from reaching the public records in the first place or limiting the distribution of such records may be the most practical avenue for preserving tenants' rental-housing prospects.

a) Nonconviction Criminal Records

Washington has extensively regulated the dissemination of nonconviction criminal records (most notably arrests).[249] Generally, a nonconviction record may be disseminated only if it "states the disposition of such charge to the extent dispositions have been made at the time of the request."[250] Inaccurate nonconviction records are subject to dispute and correction procedures,[251] and all such records are deleted after two years.[252] Only records of convictions "may be disseminated without restriction."[253] These rules do not entirely eliminate the risk that a person may be denied housing based on an unjustified arrest or unproven criminal charge, but they do substantially shorten the duration of time that risk can deny that person

housing (as compared with civil litigation records, which may be reported for up to seven years).[254]

b) Litigation Records (Criminal and Civil)

Washington courts have the inherent authority to seal judicial records,[255] that is, to "protect [the court file or court record] from examination by the public and unauthorized court personnel."[256] This authority extends to all judicial records, including criminal cases, civil cases, and even to records of conviction for felonies or other serious crimes.[257] However, because the Washington Constitution expressly protects the openness of judicial proceedings, courts exercise the authority to seal court records under only very limited circumstances.[258] So far, Washington has recognized only two such grounds for limiting public access to court proceedings (or records thereof): where public access threatens a criminal defendant's right to a fair trial, or where public access unreasonably interferes with a person's right to privacy.[259]

Preserving one's access to rental housing is a privacy interest that can establish grounds for sealing a judicial record that diminishes a person's rental prospects.[260] Thus, unlawful detainer defendants, criminal defendants, and other litigants about whom prejudicial judicial records exist may, in some circumstances, obtain orders sealing those records from the public view and, by extension, from tenant-screening companies.[261] Though a promising remedy, the legal standard to secure an order to seal records is high, and as it is subject to considerable trial court discretion, may not be consistently applied across a range of cases.

Judicial records may be sealed on privacy grounds only if the proponent of sealing demonstrates "compelling privacy or safety concerns that outweigh the public's interest in access to the record."[262] Protecting access to rental housing is a compelling concern only if the person shows an actual need for rental housing and that sealing the record will materially increase his ability to obtain it.[263] Even if judicial records are sealed for this reason,

the court may only seal the records as narrowly as necessary to achieve the privacy-related objective.[264] In one recent case, the Washington Court of Appeals, Division I, went so far as to suggest that an order to seal the record of an improperly filed unlawful detainer action might not be justified if an adequate mechanism could be created enabling a tenant to "insert an explanation into [SCOMIS] analogous to that which an individual can insert into a credit history."[265]

4. Due Process Concerns

The courts' reluctance to seal records, coupled with residential landlords' pervasive practice of categorically excluding applicants who have been sued for unlawful detainer, raises due process concerns not typical of other record-sealing contexts. When simply appearing on a court-maintained list of unlawful detainer defendants materially diminishes a person's rental-housing opportunities,[266] a rental applicant may be entitled to heightened procedural safeguards in seeking removal from that list—or in avoiding being named to the list in the first place.[267] Also, while unlawful detainer defendants are seldom denied fair trials in individual cases by prejudicial publicity, the widespread use of SCOMIS as a de facto rental-housing blacklist tends collectively to deny tenants equal access to the civil justice system.

Washington courts have yet to grapple with these due process considerations, but the solution could be a lessening of the "compelling interest" standard applicable to requests sealing unlawful detainer records. A criminal defendant who seeks to close a court proceeding or seal a record to protect her right to a fair trial need only meet a much lower standard: "reasonable possibility of prejudicial publicity."[268] Civil trials generally require fewer procedural safeguards than criminal prosecutions, where threats of incarceration or other severe punishments loom, but the systematic impairment of residential tenants' due process rights injures not only the litigants but also damages the integrity of the tribunal itself.

Therefore, sealing certain unlawful detainer records protects the interests of both the affected tenants and the courts as well.

Sealing unlawful detainer records more readily could greatly counteract this erosion of judicial access. Giving tenants a reasonable expectation that a mere record of an unlawful detainer case filing will not materially diminish their future housing prospects, should they prevail or settle on favorable terms, could lessen the chilling effect that precludes many from asserting and litigating meritorious defenses.[269] This could be largely accomplished just by redacting the full names of unlawful detainer defendants from judicial records, leaving the balance of the court files largely intact.[270] Such redaction would have no discernable effect on the public's ability to monitor and evaluate the court's adjudication of cases—the central function underlying the constitutional mandate that justice be administered openly.[271]

IV. POTENTIAL LEGISLATIVE IMPROVEMENTS

As databases merge and the ranks of the "unhouseables" swell, the need for new consumer protections respecting the realities of the information age could not be more pressing. Four distinct forms of enhanced protections appear specifically appropriate.

First, a practical method for enabling tenants to obtain, review, and dispute inaccurate or improper contents in their tenant-screening reports is necessary to breathe life into existing Fair Credit Reporting Act protections. Second, effective controls on the dissemination and use of information in public records and databases, such as SCOMIS, that consumer reporting agencies have appropriated and used as de facto credit reports (or sometimes blacklists) are in order. Third, tenant-selection criteria that clash with important public policy interests should be curtailed. Fourth, some mechanism for controlling screening costs is needed to ensure that individuals and families with marginal "rent-worthiness" are not steered into substandard housing—or denied access altogether—by having to pay

multiple times for the same reports. Finally, Washington should either devote adequate public resources to meet the housing needs of those remaining persons who will inevitably fail the tenant-screening criteria or implement measured controls on the exclusionary rental-admissions policies of private housing providers.[272]

A. Portable Screening Reports

"Portable" tenant-screening reports (i.e., reports an applicant could reuse in applying for housing at successive providers) would appreciably advance two of these objectives. Most directly, portable reports would exert significant downward pressure on screening costs by enabling applicants to pay just one fee per housing search, rather than a separate fee for every application. Portable reports could also give tenants a way to monitor their reports for accuracy and to meaningfully challenge inappropriate contents under the FCRA dispute process.

Establishing portable screening reports would require only two minor legal adjustments. The first would be a law compelling screening services to compile and disclose tenant-screening reports at the request of a consumer, as at least one Washington tenant-screening company does already.[273] This would assure renters the ability to obtain their screening reports, review them for accuracy, and dispute incorrect items before applying for housing,[274] when the existing FCRA dispute and reinvestigation may be of use.[275]

The second factor necessary to make screening reports "portable" would be to ensure that housing providers actually accept such tenant-vetted reports. Housing providers often form preferences for specific screening companies and may be reluctant to accept or use reports from other sources.[276] As representatives for a major landlord trade association told the Washington Legislature in 2009, many landlords also fear that tenant-supplied reports could be altered or fabricated (a particular concern where the tenant may have access to the report before it reaches the landlord).[277]

Prohibiting landlords from obtaining screening reports from their preferred sources would likely be unconstitutional. But the Legislature could clarify RCW 59.18.257(1) to make clear that a landlord may not charge an applicant for a new screening report when a sufficient portable report is available for free. If landlords had to choose between relying on the portable report or bearing further screening costs themselves, it is reasonable to expect that many landlords would accept the portable reports, particularly reports created by reputable screening firms. Requiring portable screening reports to contain certain basic components (such as a credit report, criminal background check, and eviction history), meet minimal standards of quality, and be transmitted to housing providers in a manner that ensures the reports are not subject to fraud or alteration, could make portability a reality.[278]

A comprehensive approach to portability was recently proposed in the Fair Tenant Screening Act (FTSA), a bill that has steadily gained momentum[279] since its introduction to the Washington Legislature in the 2009–2010 biennium.[280] Under the FTSA as originally proposed, a screening service that receives a fee for issuing a tenant-screening report about a specific rental applicant would be obligated to provide copies of that same report at no charge "to any prospective landlord who has been authorized by the prospective tenant to receive the report" for the sixty-day period thereafter.[281] To protect landlords from alteration or fraud, a screening service would provide the copy directly to the landlord.[282] Another section of the FTSA would prohibit landlords from charging tenant-screening costs to any applicant for whom such a free report was available—provided the report is a "comprehensive screening report," which the bill defines as a report containing the applicant's "criminal history," "eviction history," and "credit report."[283]

B. Enhanced Controls on Dissemination of Civil Litigation Records

Washington currently does very little to restrict public access to civil litigation records or to control dissemination of such records, and virtually nothing to limit the end use of such information. Yet, even true and accurate information in civil litigation records—unlawful detainer records, in particular—can be, and often is, used to deny housing in ways that are unfair to the applicant or that undermine public policy. Keeping unlawful detainer records, as well as other damaging civil litigation records (e.g., domestic violence protection order cases or rent collection lawsuits), from reaching prospective landlords and tenant-screening companies would be the most effective response to this problem of unfair or socially deleterious use. Even a narrow provision enabling persons with undeserved eviction histories to more readily seal unlawful detainer records (including from SCOMIS itself) could prevent many unjust housing denials and restore much of the procedural fairness that the screening industry's exploitation of judicial records has eroded.

Such a mechanism would need two key features to be effective. First, the prospect of obtaining an order to seal the necessary court records must be virtually ensured for cases in which the tenant prevails or settles on favorable terms. A tenuous prospect of sealing one's name is unlikely to diminish the chilling effect that blacklisting (via unlawful detainer registries) exerts on a tenants considering whether to litigate unlawful detainer actions. Second, the provision must close any "back doors" through which housing providers and screening services might obtain the sealed information.[284] This would include language relieving applicants from having to disclose sealed case information on rental applications, as well as a restriction against reporting sealed case information remaining in private "shadow" databases.

The version of the FTSA bill introduced in the Washington Senate contained a record-sealing proposal that would have lessened the standard for sealing or redacting unlawful detainer records in specified circumstances

where limiting public access would promote the public interest.[285] These included cases that were settled or where the tenant prevailed, cases filed against tenants whose landlords had recently lost the properties in foreclosure, and cases based on nonpayment of rent where the tenant "reinstates" the tenancy (by paying the arrearage and any associated costs, fees, or other court-awarded sums within five days after judgment).[286] Upon a showing that such a circumstance existed, a rebuttable presumption would arise that protecting the tenant's housing prospects is more important than allowing unfettered public access to the case records.[287] Unless rebutted by facts peculiar to that case, this presumption would establish grounds for sealing the records necessary to preserve the tenant's rental opportunities.[288]

California, taking an even more aggressive approach to this problem, "masks" the filing of unlawful detainer cases automatically and unseals those records only if the landlord is found to be the prevailing party.[289] The California statute may be more advantageous to tenants in that the masking occurs automatically and in all cases. However, the parties have less control over the administration of the masking, which may expose tenants to bureaucratic errors or delays and make such problems more difficult to correct than the litigant-directed process envisioned by the FTSA. More significantly, California's wholesale removal of unlawful detainer records from public view may be unconstitutional in Washington.[290]

C. Fair Credit Reporting Act Amendments

Washington could further improve fairness for rental-housing seekers by improving its Fair Credit Reporting Act. Milder improvements—such as expressly requiring the inclusion of favorable information and more complete disclosure of facts, circumstances, and outcomes of civil cases in tenant-screening reports—could improve the overall accuracy of the information used in rental decisions. Regular access to more complete information might induce some housing providers to adopt more nuanced tenant-selection policies. A stronger approach would be to restrict CRAs

from reporting even certain true and accurate unlawful detainer filings, such as cases brought for retaliatory or other illegitimate purposes, or where the tenant prevailed, or where the court lacked jurisdiction. Public policy interests could support limitations on reporting unlawful detainers involving post-foreclosure evictions or—in view of the due process considerations implicated by unlawful detainer reports—cases dismissed or settled before adjudication.

Consistent with the latter approach, the proposed FTSA would have prohibited tenant-screening services from reporting several types of unlawful detainer suits, including cases in which the tenant was not found "guilty of unlawful detainer or otherwise in unlawful possession of the premises, post-foreclosure evictions, or judgments that were vacated, expunged, or sealed."[291] The FTSA would also have precluded reporting "qualified victim protection records," which encompassed various "records or information indicating that the person, about whom the records or information pertains, is a victim of domestic violence, sexual assault, or stalking, or protected by a court order."[292]

1. Free Speech Considerations

In 1992, California passed legislation prohibiting CRAs from reporting any unlawful detainer actions except those in which the tenant lost.[293] A landlord association and a tenant-screening company challenged the statute, and a trial court held it unconstitutional on the grounds that "it prohibit[ed] truthful reporting of 'information contained in court files that are fully available to the public and which can be freely reported and copied by any other person, entity or member of the media.'"[294] A division of the California Court of Appeals upheld the ruling in *U.D. Registry v. State of California* (hereafter "*U.D. Registry I*"), concluding that "[o]nce true information is disclosed in public court documents open to public inspection, the press [or other members of the public] cannot be sanctioned for publishing it."[295] Because the proposed FTSA would, likewise, enact

new limitations on the dissemination of information in the public domain (by commercial tenant-screening companies), similar constitutional questions may also arise in connection with Washington's tenant-screening legislation.[296]

A crucial factor in the outcome of *U.D. Registry I* was the court's determination that unlawful detainer information in tenant-screening reports did not constitute commercial speech.[297] Content-based regulations of commercial speech are analyzed under a four-step test established by the U.S. Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[298] Under *Central Hudson*, commercial speech is entitled to First Amendment protection only if it concerns lawful activity and is not misleading.[299] The government bears the burden of justifying the restriction[300] and will succeed only if the regulation directly advances a substantial government interest and is no more extensive than necessary to serve that interest.[301] Having found the regulated speech at issue (i.e., the contents of tenant-screening reports) not to have been commercial speech, however, the *U.D. Registry I* court applied the much more rigorous strict scrutiny, under which a restriction on speech is presumed unconstitutional "absent a need to further a state interest of the highest order."[302]

Despite finding that "[c]oncern about the availability of rental housing for those needing housing, and particularly those facing eviction, is a valid and significant state interest," the *U.D. Registry I* court struck down the California statute, finding it did "not justify a ban on publication by credit reporting agencies of lawfully obtained truthful information contained in court records open to the perusal of everyone."[303] Viewed in isolation, *U.D. Registry I* casts a dark cloud over Washington's ability to improve its own FCRA. Indeed, the regulations concerning the inclusion of certain unlawful detainer and victim protection records proposed in the FTSA[304] are substantially similar to the restrictions that the *U.D. Registry I* court

declared unconstitutional.[305] In its proper context, however, *U.D. Registry I* is an outlier that has since been called into serious question.[306]

In 2002, California adopted additional "security freeze" provisions to its state fair credit reporting act because of heightened concerns regarding identity theft.[307] The security freeze provision authorized a consumer to place a note in her credit report that would "prohibit [a CRA] from releasing the consumer's credit report or any information from it without the express authorization of the consumer."[308] Once again, U.D. Registry brought a constitutional challenge to the statute.[309] This time, however, a different division of the California Court of Appeals ruled, in *U.D. Registry II,* that the question of "whether the expression proposes a commercial transaction is no longer the sole standard of First Amendment review [and that] there is no single bright line test for defining commercial speech."[310] This conclusion directly contravened the *U.D. Registry I* court, which had declared that "truthful information, taken from public records regarding unlawful detainer defendants, does not propose a commercial transaction and, hence, is not commercial speech."[311]

Reviewing both California and U.S. Supreme Court precedents, the *U.D. Registry II* court further noted that the contents of tenant-screening reports could be considered "commercial speech" under cases extending the term's definition beyond language proposing commercial transactions to reach such things as an alcohol-content label on beer bottles or a statement on an attorney's letterhead indicating the lawyer was a CPA.[312] With "ambiguities exist[ing] at the margins of what may be categorized as commercial speech," the *U.D. Registry II* court opted to evaluate the security freeze statute under intermediate (*Central Hudson*) scrutiny.[313] Ironically, the security freeze law then failed to survive under intermediate scrutiny, leading the *U.D. Registry II* court to leave undecided whether the contents of a consumer report are indeed commercial speech.[314]

Thus, additional restrictions that Washington might place on permissible contents of tenant-screening reports would likely survive a constitutional

challenge because tenant-screening reports very likely do constitute commercial speech. Being speech of a purely private nature and not concerning matters of public importance, a tenant-screening report warrants "significantly less constitutional interest."[315] A tenant screening report does not itself propose a commercial transaction, but is closely related to a proposed commercial transaction and is certainly "expression related solely to the economic interests of the speaker and its audience."[316] Regulating screening reports is consistent with the government's interest in protecting the public against unfair business practices.[317] The *U.D. Registry II* court, which itself tilted toward—though stopping short of—finding that all consumer reports are commercial speech, observed that numerous federal courts have already determined that the contents of consumer reports are commercial speech and treated them as such.[318] Assuming Washington follows *U.D. Registry II* and the greater weight of authority in concluding that tenant-screening reports are indeed commercial speech, then new restrictions on their contents would merit intermediate (*Central Hudson*) scrutiny, not the strict scrutiny to which the regulations challenged in *U.D. Registry I* were subjected.[319]

Carefully drawn restrictions on the reporting of unlawful detainer actions, victim-protection records, and other civil litigation materials could easily survive a review under intermediate scrutiny. The government has a substantial interest in preventing applicants from being unfairly denied access to rental housing, [320] and regulating unlawful detainer reports would directly advance that interest. Other substantial interests, such as preserving the due process rights of residential tenants or deterring retaliation (e.g., against tenants who demand repairs or lodge complaints about their landlords), could also sustain such a regulation—while these interests would be advanced somewhat less directly, the government need only "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[321]

Taking a lesson from *U.D. Registry II,* Washington could ensure that its regulation is narrowly tailored by limiting the reporting of only certain "unfair" court records, rather than extending such restrictions to all eviction suits (or beyond specific well-drawn categories), and applying the restrictions only where the records are sought for tenant-screening purposes (rather than all consumer or employment transactions).[322] Laws prohibiting tenant-screening companies from reporting information (including court records) in a false or misleading manner would receive no constitutional protection at all under *Central Hudson*.[323]

The proposed FTSA would appear to survive constitutional review with respect to its limitations on both unlawful detainer reports, as discussed above, as well as "qualified victim-protection records."[324] The restrictions are narrowly drawn; the same government interest in preventing applicants from being unfairly denied access to rental housing pertains to both victim-protection records and select unlawful detainer records.[325] Prohibiting the reporting of victim-protection records also advances substantial government interests in protecting privacy rights and reducing violence against women.

2. Preemption

A state attempting to regulate tenant-screening reports could also face a potential preemption problem arising under the federal FCRA,[326] a provision of which prohibits any state from making a post-1996 law "with respect to any subject matter regulated under . . . section 1681c of [Title 15 U.S.C.] relating to information contained in consumer reports."[327] In turn, section 1681c prohibits CRAs from reporting "[c]ivil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period."[328]

Because unlawful detainer actions are a type of civil suit, if the reporting of civil suits is a "subject matter regulated under section 1681c,"[329] then a new state law regulation on the reporting of civil suits would be

preempted.[330] This contention appears highly plausible at first blush, because many CRAs operate nationally, and Congress may have intended to create a national standard for what can and cannot be included in a consumer report.[331] But this preemption argument rests on a flawed premise.

The congressional intent behind section 1681c(a) was to prevent CRAs from reporting outdated information.[332] The statute prescribes various time limits beyond which even true and accurate information cannot be reported—including civil suits and judgments older than seven years.[333] Hence, the "subject matter regulated" under section 1681c(a) is the duration for which certain information can be reported before it must be deleted due to outdatedness. Advocates of the preemption claim turn section 1681c(a) on its head, construing the rule as an implicit authorization to report any and all civil suits and judgments that are *not* outdated. Yet section 1681c does not actually authorize CRAs to report anything; it simply specifies some items that cannot be reported.[334]

The possibility that Congress intended section 1681c to implicitly authorize CRAs to report any information not specifically prohibited therein is rebutted by the fact that section 1681c is not the only part of the FCRA that restricts CRAs from reporting certain types of information. Under section 1681i(a)(5), for instance, a civil suit or judgment cannot be reported—even if true, accurate, and less than seven years old—unless it can be verified upon reinvestigation.[335] Indeed, the lack of a conflict between sections 1681c and 1681i, either of which might forbid the reporting of information permitted by the other, reinforces the conclusion that the "subject matter regulated" by section 1681c is the time for which credit information remains current, not whether specific types of information (e.g., civil suits and judgments) may be reported at all.[336]

As laws restricting CRAs from reporting information on grounds other than outdatedness do not regulate the same subject matter as section 1681c(a), such restrictions that originate from state or local enactments are

not preempted by section 1681t(b).[337] Consistent with this view, some other states have enacted laws either restricting CRAs from reporting true, nonoutdated information or governing the manner in which such information may be reported.[338]

CONCLUSION

Tenant-screening is, ultimately, a response to the inherent risks of leasing residential housing. It cannot be denied that some tenants will inevitably default in rent, damage the rental premises, violate criminal laws, or have other negative effects if admitted. Unsuccessful tenancies carry adverse economic repercussions, which landlords naturally seek to avoid. Tenant screening that accurately predicts which applicants are more or less likely to become successful tenants can lessen these risks. This undeniable economic justification makes tenant-screening difficult, if not impossible, to ever condemn absolutely. But while it may be the prerogative of housing providers to choose their tenants carefully, this does not mean tenant-screening must persistently trump other overriding public interests.

Fair housing laws, which prohibit only the most insufferable forms of tenant-selection criteria, establish that housing providers have no inalienable right to choose tenants on whatever grounds they prefer.[339] But the exclusion of tenants for other arbitrary reasons (i.e., besides membership in established protected classes) can also produce socially deleterious effects. The most significant of these adverse consequences include undermining the integrity of unlawful detainer courts and creating a pool of individuals and families lacking realistic access to rental housing. Even federally-subsidized public housing—in many communities the housing of last resort for the indigent and disabled—"[p]reclud[es] admission of applicants whose habits and practices reasonably may be expected to have a detrimental effect on the residents or the project environment."[340] This is perhaps only common sense; yet, one can only wonder how policies such as

this can be reconciled with other policy goals, such as the state's laudable pledge to "end homelessness in Washington by July 15, 2015."[341]

A well-conceived regulatory scheme could appreciably reduce the extent to which tenant-screening contributes to homelessness and other social ills, especially where the method of exclusion inflicts the social harms without even producing a correspondingly material reduction in the housing provider's risk. The first step in such a scheme would be to ensure that rental decisions are made using transparent criteria that are reasonably related to predicting an applicant's future performance as a tenant. The best way to promote transparency would be for housing providers to establish written, binding tenant-selection criteria and inform rejected applicants of the reasons for denials or other adverse decisions. Practical legal remedies for applicants who are rejected on grounds inconsistent with such written policies could give teeth to such a requirement. A second tier of regulations could then prohibit rental criteria lacking some minimal degree of predictive value (as to the applicant's future performance in a tenancy) or criteria that conflicts with public policy goals—one of which must eventually include ending homelessness.[342]

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[1] FreeCreditReport.com, owned and operated by a subsidiary of credit giant Experian, markets a credit-monitoring product called "Triple Advantage," for a monthly fee. FREECREDITREPORT.COM, http://www.freecreditreport.com (last visited Mar. 21, 2010). AnnualCreditReport.com was established by the three major credit bureaus, Experian, Equifax, and TransUnion, after the Fair and Accurate Credit Transactions Act of 2003, to enable consumers to obtain free annual copies of their reports. 15 U.S.C. § 1681j(a)(1) (2006); ANNUALCREDITREPORT.COM, http://www.annualcreditreport.com (last visited Mar. 21, 2010).

[2] *FreeCreditReport.com—Dream Girl*, SPLENDAD, http://www.splendad.com/ads/show/1915-FreeCreditReport-com-Dream-Girl (last visited Sept. 29, 2010).

[3] *See* WASH. REV. CODE § 59.18.257 (2008) (residential landlords may pass along only actual costs of tenant screening to applicants).

[4] *See* Jonathan Grant, *Tenant Screening*: *A Housing Barrier for the 21st Century*, SOLID GROUND BLOG (Jan. 21, 2010),

http://solidgroundblog.wordpress.com/2010/01/21/tenant-screening-a-housing-barrier-for-the-21st-century/ ("Currently residents in Washington State are hit with repeated fees in background checks for housing applications, often paying hundreds of dollars for screening reports that can contain misleading or inaccurate information with no recourse to dispute their record."); *see also* William Sermons, Meghan Henry & Mary Cunningham, *Homelessness Counts: Changes In Homelessness From 2005 to 2007*, NATIONAL ALLIANCE TO END HOMELESSNESS, 21 (Jan. 2009), http://www.endhomelessness.org/files/2158_file_counts_2_final.pdf (Demonstrating that Washington was among states that had high rates of homelessness per capita in 2007) [hereinafter Sermons, Henry & Cunningham].

[5] *See* Grant, *supra* note 4 ("After every denial the tenant will pay for the same report from another landlord, and the repeated costs can be staggering. At Solid Ground people have contacted our agency with reports of having paid $300–400 in screening fees. One of our families enrolled in our homelessness prevention program reported being denied 15 times and paying over $800 in screening fees."); *see also* Ben Jacklet, *The Screening Scam*, THE STRANGER, 12 (Mar. 4–10, 1999), *available at* http://www.thestranger.com/seattle/the-screening-scam/Content?oid=383.

[6] *See Tenant Screening Agencies in the Twin Cities: An Overview of Tenant Screening Practices and their Impact on Renters*, HOUSINGLINK, 40 (2004), http://www.housinglink.org/Files/Tenant_Screening.pdf ("[T]he increasingly popular use of tenant screening reports has resulted in a new class of people who are unable to access rental housing because of past credit problems, evictions, poor rental histories or criminal backgrounds.") [hereinafter HOUSINGLINK].

[7] *See* Sermons, Henry & Cunningham, *supra* note 4, 20–21.

[8] As an illustrative example, the U.S. Department of Housing and Urban Development (HUD) recommends that public housing agencies screen applicants to publicly-subsidized housing for "suitability," which, though taking into account "all relevant information," especially focuses on "(1) An applicant's past performance in meeting financial obligations, especially rent; (2) A record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of other tenants; and (3) A history of criminal activity involving crimes of physical violence to persons or property and other criminal acts which would adversely affect the health, safety or welfare of other tenants." 24 C.F.R. § 960.203(c) (2010).

[9] *Id*.

[10] *See, e.g.*, *Landlord Criteria Instructions*, MYSCREENINGREPORT.COM, http://www.myscreeningreport.com/MSR%20Landlord%20Criteria%20Instructions.pdf (last visited Sept. 29, 2010) (from a Washington tenant-screening agency Moco, Inc., recommending that landlords distinguish between garnishable and nongarnishable income in forming rental admissions policies).

[11] *See, e.g.,* Geibeler v. M & B Assoc., 343 F.3d 1143, 1145 (9th Cir. 2003).

[12] *See Minimum Criteria & Checklist For Tenant Selection,* RENTAL HOUSING ASS'N, http://www.rhaps.com/AM/Template.cfm?Section=Tenant_Screening_Test&Template=/CM/ContentDisplay.cfm&ContentID=4893 (last visited Oct. 15, 2010); *see also* MYSCREENINGREPORT.COM, *supra* note 10.

[13] *See, e.g.*, *Geibeler*, 343 F.3d at 1145 (landlord may have an obligation to accept a co-signer for an applicant with disabilities who cannot meet minimum income requirements due to their inability to work). *But see* Schanz v. Village Apts., 998 F. Supp. 784, 790 (E.D. Mich. 1998) (landlord had no duty to accept a guarantor agreement from a nonprofit organization for an applicant with mental health disability).

[14] Twelve states (California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont, Wisconsin), the District of Columbia, and numerous municipalities have enacted laws prohibiting housing discrimination on the basis of a person's lawful source of income. *See* Mencer v. Princeton Square Apts., 228 F.3d 631 (6th Cir. 2000). However, a similar effort was unsuccessful in Washington. H.R. 1766, 61st Leg., 1st Reg. Sess. (Wash. 2009).

[15] *See* Head v. Cornerstone Residential Mgmt., Inc., No. 05-80280-CIV, 2010 WL 3781288, at *9 (S.D. Fla. Sept. 22, 2010) (dismissing the fair housing claim because "HUD guidelines unequivocally permit owners to reject applicants with a poor credit history or with a debt to a prior landlord."); Cotto v. Jenney*,* 721 F. Supp. 5, 6–7 (D. Mass. 1989) ("report stating that a prospective tenant has fallen behind on its rent payments on a prior occasion . . . would certainly give [landlord] pause before incurring a potential financial risk by allowing the would-be tenant to occupy the residence."); *see, e.g.,* Pasquince v. Brighton Arms Apts., 876 A.2d 834, 838–39 (N.J. Super. Ct. 2005) ("it is well established that creditworthiness is a legitimate, non-discriminatory criteria which landlords are permitted to consider when evaluating prospective tenants");

[16] *See, e.g.,* 24 C.F.R. § 960.203(c)(2) (2010) ("record of disturbance of neighbors, destruction of property, or living or housekeeping habits at prior residences which may adversely affect the health, safety or welfare of other tenants" may indicate a lack of suitability for tenancy).

[17] *See, e.g., Mencer,* 228 F.3d at 635 ("The record supports that the plaintiffs lacked steady rental history and that their application interview with defendant revealed four different addresses."); Martha R. Burt, *Life After Transitional Housing for Homeless Families*, 57 (Mar. 2010), http://www.urban.org/uploadedpdf/1001375_transitional_housing.pdf (listing poor rental history, bad credit, and criminal records among the most common barriers for formerly homeless families seeking their own rental homes after graduation from transitional housing); Wilson v. Rental Research Servs., Inc., 165 F.3d 642, 643 (8th Cir. 1999), *vacated*, 191 F.3d 911 (1999), *and rev'd in part en banc by an equally divided court*, 206 F.3d 810 (2000).

[18] *See, e.g.,* Harrison v. Darby, No. 2:08-3874-PMD, 2009 WL 936469 (D. S.C. Apr. 7, 2009) (landlord declined to renew lease with tenant due to discovery of unspecified "criminal record" on background check); State v. McEnry*,* 103 P.3d 857, 858–60 (Wash. 2004) (compelling circumstances to seal criminal conviction record did not exist because, although it was "certainly possible that an employer or a landlord could review an unsealed court file and see the record of a vacated conviction," the defendant had stated that the "potential loss of housing based on his court records was 'not an issue' because he owns his home."); Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987, 1002–03 (D. Minn. 2008) (discussing testimony by the director of a municipal building code enforcement agency that, to improve neighborhood conditions, landlords should "screen

their tenants [and] showing the 'best' tenants as those with the most income, best credit, and least criminal history. The 'bottom of the box' tenants were those having poor credit scores, criminal records, poor rental histories, and lower incomes."), *aff'd in part and rev'd in part sub nom*; Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010); Brett Theodos, et al., *Inclusive Public Housing: Services for the Hard to House*, THE URBAN INST., 26 (Feb. 2010), *available at* http://www.urban.org/uploadedpdf/412035_inclusive_public_housing.pdf.

[19] *See* HOUSINGLINK, *supra* note 6, at 31 ("Overall, 72 percent of [housing providers surveyed] stated that they use a tenant screening agency to screen potential renters. The 28 percent who responded that they do not use tenant-screening services were more likely to be property managers who own or manage 10 units or [*sic*] less.").

[20] *See id.* (discussing specialized tenant-screening services). Compare, e.g., one of the more prolific companies that conducts tenant-screening services in Washington is Kroll Factual Data, which—in addition to tenant-screening services—also markets pre-employment screening, financial credit reports, reports about businesses, and other investigatory services. *See* KROLL, http://www.krollfactualdata.com/ (last visited Oct. 29, 2010).

[21] *Housing Search–Tenant Services*, SOLID GROUND, http:/www.solidground.org/Tenant /Pages/HousingSearch.aspx (last visited Sept. 5, 2010).

[22] *See* WASH. REV. CODE § 59.18.257(1) (2008) ("If a landlord uses a tenant screening service, then the landlord may only charge for the costs incurred for using the tenant screening service under this section. If a landlord conducts his or her own screening of tenants, then the landlord may charge his or her actual costs in obtaining the background information.").

[23] *See Facts For Business, Using Consumer Reports: What Landlords Need to Know*, BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, 2 (Dec. 2001), http://business.ftc.gov/sites/default/files/pdf/bus49-using-consumer-reports-what-landlords-need-know.pdf; *see also e.g.*, Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 321 (Cal. Ct. App. 2002) (agency typically provides its subscribers with consumer reports consisting of a standard credit report, plus public record information including any court records regarding evictions, property damage cases, rent cases, foreclosures, and bankruptcies; the report may also contain information from its subscribers concerning "good" tenants or "problem" tenants). For examples of typical tenant-screening reports available in Washington, see ON-SITE.COM, http://www.on-site.com/qualify (last visited Sept. 29, 2010); ORCA INFO., http://www.orcainfo-com.com/screening.html (last visited Sept. 29, 2010); *Residential Screening*, KROLL FACTUAL DATA, http://www.krollfactualdata.com/services/resident-screening.aspx (last visited Sept. 29, 2010).

[24] *See, e.g.*, *Smart Leasing Tools*, ON-SITE.COM, http://www.on-site.com/private_owners (last visited Sept. 29, 2010); *Residential Screening*, MOCO, INC., http:// http://www.moco-inc.com/pages/tradService.asp (last visited Sept. 29, 2010) (Moco, Inc. offers "Instant Score-based Preliminary Recommendation"); *RHA's Rent Right Decision Model,* RENTAL HOUS. ASS'N, http://www.rha-ps.com/Content/NavigationMenu/TenantScreeningTest/RentRightDecisionModel/default.htm ("there are three possible decisions: Approved, Approved with Conditions or

Declined. With this type of report, you will not be able to view any credit details; you will only be provided the decision based on credit. NOTE: if your applicant's credit comes back "Declined," RHA will not be able to tell you why") (emphasis in the original); s*ee also* Miller v. Brookside at Summerville, L.L.C., 2008 WL 351338, at *2 (N.J. Super. Ct. App. Div. Feb. 11, 2008) (landlord "processed plaintiff's application in accordance with a screening procedure that uses a mathematical formula to assess an applicant's credit history, landlord-tenant history, income and criminal background.").

[25] *See generally* Trujillo v. First Am. Registry, Inc., 157 Cal. App. 4th 628 (Cal. Ct. App. 2007) (false information on rental application is a sufficient ground for rejection); State v. McEnry*,* 103 P.3d 857 (Wash. 2004) (contemplating the prospect that the a person with a vacated criminal conviction may be denied rental housing due to an appearance of non-disclosure or false information on the application).

[26] *See* Anthony Rodriguez, *Tenant-Screening Agencies Under the Fair Credit Reporting Act*, 39–40 CLEARINGHOUSE REV. 335, 336 (Sept.-Oct. 2005).

[27] See 15 U.S.C. § 1681a(d) (2006) and WASH. REV. CODE § 19.182.010(4)(a) (2008) for definitions of "consumer report."

[28]*See Your Rights: Credit Reporting,* FED. TRADE COMM'N (Mar. 13, 2009), http://www.ftc.gov/bcp/menus/consumer/credit/rights.shtm.

[29] *See* HOUSINGLINK, *supra* note 6, at 20 ("The four agencies interviewed for the survey pull credit report information from one or more of the three main credit reporting agencies, Equifax, Experian and TransUnion.").

[30] *See* 15 U.S.C. § 1681a(f) (2006) ("The term 'consumer reporting agency' means 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 information or other information on consumers for the purpose of furnishing consumer reports to third parties…"); *see also* WASH. REV. CODE § 19.182.010(5) (2008).

[31] *Credit bureau*, WIKIPEDIA, http://en.wikipedia.org/wiki/Credit_bureau (last visited Aug. 11, 2009).

[32] *See Your Credit Report,* FED. RESERVE BANK OF SAN FRANCISCO, 3, http://www.frbsf.org/publications/consumer/creditreport.pdf (last visited Oct. 5, 2010).

[33] WASH. REV. CODE § 19.182.050(4).

[34] *See, e.g.,* 16 C.F.R. pt. 600, App. § 4(E) Public Record Information (2010) (criminal background is "information bearing on the consumer's 'personal characteristics'" for purposes of Fair Credit Reporting Act).

[35] *See* HOUSINGLINK, *supra* note 6, at 20–21.

[36] *See Transition Paper for the Federal Trade Commission: It's Time to Regulate the Background Screening Industry*, CMTY. LEGAL SERVS., INC., et. al, 8 (Dec. 9, 2008), http://www.reentry.net/library/attachment.138696 ("What appears to be a recent growth area for the commercial background screening industry is selling '50-state' background checks. In most cases, the screener appears to use criminal court databases which permit matches by only name and date of birth.") [hereinafter COMMUNITY LEGAL SERVICES]; *see, e.g.*, *Instant Nationwide Criminal Records Search*, CRIM. RECORDS SEARCH, http://www.criminal-records-search.com/nationwidecriminalrecords.htm (last visited Oct. 1, 2010); *Criminal Background Checks*, DIRECT SCREENING, http://www.directscreening.com (last visited Oct. 1, 2010); *Tenant Screening*, E-

RENTER.COM, http://www.e-renter.com (last visited Oct. 1, 2010); *Nationwide Public Records Search*, MACDATA ADVANTAGE, http://www.macdataadvantage.com (last visited Oct. 1, 2010); *Products*, TENANTAUTHORITY.COM, http://www.tenantauthority.com/products.php (last visited Oct. 1, 2010).

[37] *See* WASH. REV. CODE § 10.97.090 (2008); Washington Access to Criminal History (WATCH), http://watch.wsp.wa.gov/, (last visited Oct. 8, 2010).

[38] *See* WASH. REV. CODE §§ 10.97.050, 4.24.550 (2008). WATCH also contains additional information, such as arrest records, but in a criminal history file that is not open to general public. The Washington Association of Sheriffs and Police Chiefs provides a free online sex offender database that indicate the names of registered sex-offenders and classification levels. http://www.waspc.org/index.php?c=Sex%20Offender%20Information (last visited Oct. 1, 2010). The Federal Bureau of Investigation also maintains a national sex offender registry. http://www.nsopw.gov/Core/Conditions.aspx (last visited Oct. 1, 2010).

[39] *See* WATCH*, supra* note 37.

[40] *Id*.

[41] *See* 15 U.S.C. § 1681e(e) (2006) (regarding duties of persons who act as "resellers" of consumer report).

[42]*See generally id.*

[43] *See* CMTY. LEGAL SERVS., *supra* note 36, at 4 (citing Nat'l Consortium for Justice Info. & Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005)).

[44] *See* 2 Wash. Prac. §15(b)(4) ("To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, or erase, or redact shall be treated as a motion or order to seal.")

[45] See HOUSINGLINK, *supra* note 6, 21–22.

[46] FED. RESERVE BANK OF SAN FRANCISCO, *supra* note 32, at 2.

[47] Nonjudicial deed-of-trust foreclosures will nonetheless appear on a financial credit report. *Id.*

[48] *See, e.g.,* Wilson v. Rental Research Servs., Inc., 165 F.3d 642, 644 (8th Cir. 1999), *vacated*, 191 F.3d 911 (1999), *and rev'd in part en banc by an equally divided court*, 206 F.3d 810 (2000) (rental collections and related proceedings in tenant-screening reports); Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 315 (Cal. Ct. App. 2002) (UDR typically provides its subscribers with . . . court records regarding evictions, property damage cases, rent cases, foreclosures, and bankruptcies.").

[49] *See, e.g.,* White v. First Am. Registry, Inc., No. 04 Civ. 1611(LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007) ("This lawsuit arises by reason of the nature of defendants' business, which consists of selling landlords the opportunity to consult a list of individuals who have been involved in landlord-tenant litigation."); *see* Teri K. Rogers, *Only the Strongest Survive*, N.Y. TIMES, Nov. 26, 2006, http://www.nytimes.com/2006/11/26/realestate/26cov.html ("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," said Jake Harrington, a founder of On-Site.com. "Renters are presumed litigious if they stopped paying rent to a

slumlord or even if they acquired a court record by mistake."); *see also* Miller v. Brookside at Summerville, L.L.C., 2008 WL 351338, at *5 (N.J. Super. Ct. App. Div. Feb. 11, 2008) (declining to decide whether "defendant's application process, specifically the erroneous use of lawsuit history, violates public policy."); *see also Schoendorf*, 118 Cal. Rptr. 2d at 315 (Cal. App. 2002) (UDR also obtains information directly from its subscribers concerning "good" tenants and "problem" tenants, and that information, too, is included in a tenant's report.").

[50] *See* Sandra Park*, Fair Housing for Domestic Violence Survivors,* THE NAT'L L. CTR. ON HOMELESSNESS & POVERTY (Nov. 13, 2008) http://www.nlchp.org/content/pubs/ACLU_Park_Webinar_Gender_Discrimination.pdf.

[51] *See* HOUSINGLINK, *supra* note 6, at 35.

[52] The term "unlawful detainer" comes from the Unlawful Detainer Act, an 1890 statute establishing summary proceedings by which a landlord may recover possession of real property from a holdover tenant. WASH. REV. CODE § 59.12.030 (2005).

[53] WASH. REV. CODE § 59.12.050 (2005).

[54] *Superior Court Management Information System (SCOMIS)*, WASHINGTON STATE, http://www.courts.wa.gov/jislink/?fa=jislink.scomis (last visited Oct. 5, 2010).

[55] *Id*.

[56] Testimony of John Bell, Washington House Judiciary Committee, June 8, 2010, *available at* http://www.tvw.org/media/mediaplayer.cfm?evid=2010060031B&TYPE=V&CFID=7810673&CFTOKEN=13413583&bhcp&bhcp=1.

[57] *See, e.g.,* HOUSINGLINK, *supra* 6, at 21–23 ("[T]he largest agency in the study uses eviction data from 45 states and provides a list of all the names that come up during a search . . . interviews with representatives from the four tenant screening agencies in the study show that they are likely drawing from similar data sources. The methods of reporting the data are also similar. The standard procedure is to report all criminal records and eviction records that turn up from a search.").

[58] *See accord* White v. First Am. Registry, Inc., No. 04 Civ. 1611(LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007) ("The problem is compounded by the fact that the information available . . . from the New York City Housing Court is sketchy in the best of cases and inaccurate and incomplete in the worst.").

[59] *See* http://www.metrokc.gov/kcscc/copies.htm (last visited Aug. 29, 2008) ("King County Superior Court records filed after November 1, 2004, are now available online for purchase and viewing. Currently we offer criminal, civil and probate cases . . . The fee is $.10 per page, and an account is required.").

[60] *See Mistakes Do Happen: A Look at Errors in Consumer Credit Reports,* U.S. PIRG: THE FED'N. OF STATE PIRGS, at 4 (2004), http://cdn.publicinterestnetwork.org/assets/BEevuv19a3KzsATRbZMZlw/MistakesDoHappen2004.pdf ("79% of the credit reports surveyed contained either serious errors or other mistakes of some kind.").

[61] Candace Heckman, *Study Assails Accuracy of Credit Reports*, SEATTLE POST-INTELLIGENCER, (June 21, 2004), *available at* http://www.seattlepi.com/local/178825_creditscores21.asp.

[62] Scott Michels, *Advocates Complain of Background Check Errors*, ABC NEWS (Oct. 13, 2008), http://abcnews.go.com/TheLaw/story?id=6017227&page=1.
[63] *See* Robert E. Freeman-Longo, *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem,* AM. PROB. & PAROLE ASS'N, 4 (2000), http://www.appa-net.org/eweb/docs/appa/pubs/RML.pdf ("Many states report that the registered addresses are not updated [or are incorrect]. Many states post these on the Internet, listing innocent people's addresses as those of convicted sex offenders."); *see* Radley Balko, *Sex Flaws: Database Mistakes*, CBS INTERACTIVE BUSINESS NETWORK (Mar. 2008), http://findarticles.com/p/articles/mi_m1568/is_10_39/ai_n24966455/?tag=content;coll; *see* Ryan Tracy, *Sex Offender Registry Mistake Hits Home for Hamilton Family*, N.J. TIMES, (Mar. 7, 2009), http://www.nj.com/mercer/index.ssf/2009/03/sex_offender_registry_mistake.html; *see also* HOUSINGLINK, *supra* note 6, at 20.
[64] HOUSINGLINK, *supra* note 6, at 17 ("Tenant screening agencies typically evaluate prospective renters using three types of data, including: (1) financial information pulled from one or more of the three primary credit reporting agencies, (2) information pulled from public records, including criminal data and court records and (3) verification of personal information including social security numbers, employment and address histories.").
[65] *Id.* at 36.
[66] *See* Dennis v. BEH-1, LLC*,* 520 F.3d 1066, 1071 (9th Cir. 2008) (case in which tenant-screening company misinterpreted settlement agreement filed in unlawful detainer court record "illustrates how important it is for Experian, a company that traffics in the reputations of ordinary people, to train its employees to understand the legal significance of the documents they rely on.").
[67] *See* CMTY. LEGAL SERVS., *supra* note 36, at 22.
[68] *Id.* at 7–10.
[69] *See* HOUSINGLINK, *supra* note 6, at 24 ("The more identifiers that are attached to a record, the easier it is for tenant screening agencies to access the information and provide accurate information on an applicant."); *see* CMTY. LEGAL SERVS., *supra* note 36, at 8.
[70] *See* WASHINGTON STATE, *supra* note 54.
[71] Testimony of Barbara Miner, King County Clerk, Washington House Judiciary Committee, June 8, 2010, *available at* http://www.tvw.org/media/mediaplayer.cfm?evid=2010060031B&TYPE=V&CFID=7810673&CFTOKEN=13413583&bhcp&bhcp=1.
[72] *See* WATCH*, supra* note 37 ("[We] cannot guarantee the records you obtain through this site relate to the person on whom you are seeking information. Searches based on names and other identifiers are not always accurate. The only way to positively link someone to a criminal record is through fingerprint verification.").
[73] *Case Number/Case Name Search - Terms and Conditions*, SUPERIOR COURT MANAGEMENT INFORMATION SYSTEM, http://dw.courts.wa.gov/?fa=home.casesearchTerms (last visited Aug. 12, 2009).
[74] CMTY. LEGAL SERVS., *supra* note 36, at 9.

[75] *See* White v. First Am. Registry, Inc., No. 04 Civ. 1611(LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007) (tenant screening company "defendants have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless individuals . . . The fact that defendants are willing, indeed anxious, to engage in activities that are bound to harm innocent people is distressing."); *see also* HOUSINGLINK, *supra* note 6, at 23–25.
[76] *See* HOUSINGLINK, *supra* note 6, at 23–24.
[77] *See* Trujillo v. First Am. Registry, Inc., 157 Cal. App.4th 628, 733–34 (Cal. Ct. app. 2007) (rental applicant who had prevailed in prior unlawful detainer action checked "no" box on application asking if he had "ever had an unlawful detainer action filed against [him]" rejected for misrepresentation on application); *see also* State v. McEnry, 103 P.3d 857, 859 (Wash. 2004) (contemplating the prospect that a person with a vacated criminal conviction may be denied rental housing due to an appearance of non-disclosure or false information on the application).
[78] *See generally* 15 U.S.C. § 1681 (1968); WASH. REV. CODE § 19.182.005 (1993).
[79] 15 U.S.C. § 1681(a)(f) (1998); WASH. REV. CODE § 19.182.010(5) (1993).
[80] 15 U.S.C. § 1681(i) (1998); WASH. REV. CODE §19.182.090 (1993).
[81] 15 U.S.C. § 1681(i) (1998); WASH. REV. CODE §19.182.090 (1993).
[82] 15 U.S.C. § 1681(i) (1998); WASH. REV. CODE §19.182.090 (1993).
[83] E-OSCAR, http://209.34.249.149/about.htm (last visited Oct. 5, 2010).
[84] 15 U.S.C. § 1681i(a)(5)(D) (1994) ("Any consumer-reporting agency that compiles and maintains files on consumers on a nationwide basis shall implement an automated system through which furnishers of information to that consumer reporting agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other such consumer reporting agencies.").
[85] *Id.*; *see About E-OSCAR*, EOSCAR, http://209.34.249.149/about.htm (last visited Oct. 5, 2010).
[86] *See* 15 U.S.C. § 1681a(p) (2003); § 1681i(a)(5)(D) (1994).
[87] § 1681i(a)(5)(D) (1994); § 1681s(2) (1996) (discussing "furnisher duties").
[88] A Google search for "tenant screening Washington State" on Aug. 12, 2009, returned 52,000 hits, including links to more than forty websites of companies offering tenant-screening services in Washington. Some representative sites included: www.infocubic.com, www.screeningworks.com, www.evictionrecords.com, www.calleleanore.com, www.rentlaw.com, www.uslandlord.com, www.E-Renter.com, www.megascreening.com, www.criminalbackgroundrecords.com, www.landlord411.com, rentalexpress.com, www.TenantScreening.net , www.mypropertyguard.com, www.manta.com, www.cibackgrounds.com, and others. Interestingly, this search did not turn up links to the websites of some of Washington's most prolific tenant-screening agencies, such as On-Site Manager, Inc., Orca Information, Inc., or the Rental Housing Association of Puget Sound.
[89] *See accord* Cox v. St. Owner, L.P., No. 114062/08, 2009 WL 2986667, at *2 (N.Y. Sup. Ct. Aug. 27, 2009) ("The blacklisting effect that may result from [New York State Office of Court Administration's] practice of selling data to tenant screening bureaus [TSBs] is a realistic concern for prospective tenants. . . Realizing that there are numerous TSBs, this court acknowledges that prospective tenants are still faced with the possibility

of being blacklisted when seeking accommodations."); *see also Fact Sheet 6b: 'Other' Consumer Reports: What You Should Know About Specialty Consumer Reports*, PRIVACY RTS. CLEARINGHOUSE, §6 (Nov. 2008), http://www.privacyrights.org/fs/fs6b-SpecReports.htm ("Consumers may have a particularly difficult time exercising their right to a free specialty report when the 'specialty' market is saturated with agencies. This may prove to be the case for tenants who want to check their file.").

[90] *See* PRIVACY RTS. CLEARINGHOUSE, *supra* note 89, at § 3 ("[consumer] 'report' is the document provided to the employer, landlord, insurer or creditor. The report reflects information collected and compiled at any given time. Your 'file' on the other hand is the information the consumer reporting agency maintains about you. Your right to a free disclosure is to your 'file,' not your 'report.').

[91] *See id*.

[92] *See* 15 U.S.C. § 1681g(a) (1994) (Consumer Reporting Agency (CRA) must, on request, "clearly and accurately disclose to the consumer: (1) All information in the consumer's file *at the time of the request*) (emphasis added); *accord* WASH. REV. CODE § 19.182.070 (1993).

[93] *See* Wilson v. Rental Research Servs., Inc., 165 F.3d 642, 646 (8th Cir. 1999).

[94] *See* WASH. REV. CODE § 59.18.257(1) (1991); *see also* WASH. REV. CODE § 19.182.110(2) (1993); 15 U.S.C. § 1681m(a)(2)(A) (1996).

[95] *See* 15 U.S.C. § 1681j(b) (1996); WASH. REV. CODE § 19.182.100(2) (1993).

[96] *See Wilson*, 165 F.3d at 646 ("Because landlords need to fill units promptly, by the time a tenant screening report is corrected, the unit is often rented.").

[97] *See* PRIVACY RTS. CLEARINGHOUSE, *supra* note 89, §6. *See generally* Jacklet, *supra* note 5.

[98] *See* Dennis v. BEH-1, LLC*,* 520 F.3d 1066, 1069 (9th Cir. 2008) (citing Williams v. Colonial Bank, 826 F. Supp. 415, 418 (M.D.Ala. 1993) ("A credit reporting agency has no duty, as a part of its reinvestigation, to go behind public records to check for accuracy or completeness when a consumer is essentially collaterally attacking the underlying credit information.")). *But see* Henson v. CSC Credit Servs., 29 F.3d 280, 287–88 (7th Cir. 1994) ("[A] credit reporting agency may initially rely on public court documents, because to require otherwise would be burdensome and inefficient. However, such exclusive reliance may not be justified once the credit reporting agency receives notice that the consumer disputes information contained in his credit report. When a credit reporting agency receives such notice, it can target its resources in a more efficient manner and conduct a more thorough investigation.").

[99] *See* Jacklet, *supra* note 5 ("tenants often pay for three or four (supposedly) different credit checks each time they move); *see* BUREAU OF CONSUMER PROT., FED. TRADE COMM'N*, supra* note 23, at 2; *see also* Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 315 (Cal. Ct. App. 2002) ("UDR typically provides its subscribers with consumer reports consisting of a standard credit report from one or more of the three major credit bureaus (Trans Union, Experian, and Equifax) and public record information that is gathered by its own employees from a review of court records regarding evictions, property damage cases, rent cases, foreclosures, and bankruptcies.").

[100] Testimony of Jonathan Grant, Washington House Committee on Financial Institution & Insurance Regarding HB 2622 (Jan. 25, 2010), *available at*

http://www.tvw.org/media/mediaplayer.cfm?evid=2010010115&TYPE=V&CFID=944768&CFTOKEN=55618456&bhcp=1.

[101] *See* note for Grant, *supra* note 4. *See generally* Jacklet, *supra* note 5.

[102] *See generally* Jacklet*, supra* note 5.

[103] *See generally id.*

[104] *See* WASH. REV. CODE § 59.18.257(1) (1991) (stating that landlord may charge actual costs of obtaining background information about prospective tenants, whether from a screening service or through the landlord's own activities).

[105] *See* Claudia Coulton, Brett Theodos, & Margery A. Turner, *Family Mobility and Neighborhood Change: New Evidence and Implications for Community Initiatives,* URBAN INST., 20–23 (Nov. 2009), http://www.urban.org/uploadedpdf/411973_family_mobility.pdf (discussing patterns of family relocation in the White Center neighborhood of Seattle as a possible "comfort zone" for low-income families); *see also* Rogers, *supra* note 49 (quoting leasing professionals who recommend that renters with blemished credit or rental history seek housing from "less-selective" landlords).

[106] *See* HOUSINGLINK, *supra* note 6, at 18 ("screening agencies also use statistical scoring models which predict future financial risk based upon characteristics of their past behavior.").

[107] *See generally* RENTAL HOUS. ASS'N*, supra* note 24.

[108] *Id*.

[109] *See* Wilson v. Rental Research Servs., Inc., 165 F.3d 642*,* 646 (8th Cir. 1999) ("Landlords have little incentive to verify 'possible' negative information, since they have the option of simply choosing another prospective tenant who has no negative information."). *See generally* Rogers, *supra* note 49 ("Landlords can afford to be picky, because vacancy rates have lurked beneath 1 percent for a year."). *See also* HOUSINGLINK, *supra* note 6, at 12 ("An extremely tight rental market in the Twin Cities exacerbated the issues cited in the analysis of impediments.").

[110] *See also* U.D. Registry, Inc. v. State, 40 Cal. Rptr. 2d 228 (Cal. App. 4th, 1995) (discussing legislative findings in support of California statute which provided that "inappropriate inclusion of information about unlawful detainer actions results in 'tenant blacklisting' and imposes an unfair and unnecessary hardship on tenants seeking rental housing" and quoting report of the California Senate Committee on Judiciary regarding AB 1796 of 1991) [hereinafter *U.D. Registry Div. 4*]; *see* White v. First Am. Registry, Inc., No. 04 Civ. 1611(LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007) ("This lawsuit arises by reason of the nature of defendants' business, which consists of selling landlords the opportunity to consult a list of individuals who have been involved in landlord-tenant litigation. As defendants doubtless well understand, risk averse landlords are all too willing to use defendants' product as a blacklist, refusing to rent to anyone whose name appears on it regardless of whether the existence of a litigation history in fact evidences characteristics that would make one an undesirable tenant."); *see also* Gary Williams, *Can Government Limit Tenant Blacklisting?,* 24 SW. U.L. REV. 1077, 1080 (1995) ("Today landlords refuse to rent to persons identified as defendants in unlawful detainer actions, regardless of the outcome of the litigation.") (citing Barela v. Superior Court, 636 P.2d 582, 583 (Cal. 1981)).

[111] *See U.D. Registry Div. 4*, 40 Cal. Rptr. 2d at 231; Pultz v. Economakis, No. 114915/2004, 2005 WL 1845635, at *1 (N.Y. Sup. Ct. June 5, 2005); Wallace Oman, *The Need for Masking Court Unlawful Detainer Records*, S.F. APT. MAG. (July 2008), http://www.sfaa.org/july2008/0807oman.html.

[112] *See, e.g.,* Save Harlem v. Pinnacle Grp., 575 F. Supp. 2d 499, 504 n.1 (S.D.N.Y. 2008) (discussing claim under Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (1970), that property management enterprise "create[d] a climate of fear and intimidation aimed at making tenants afraid to exercise their legal rights or object to defendants' conduct by (1) using the existence of 'blacklisting' . . . 'a practice where commercial tenant screening bureaus purchase electronic housing court case data[,] use this data to prepare so-called 'tenant screening reports' based on that data, and then sell such reports to prospective landlords.").

[113] *See* Testimony of Jonathan Grant, *supra* note 100; *see generally* Brief of Amicus Curiae Solid Ground, Indigo Real Estate Servs. v. Rousey, 215 P.3d 977 (Wash. Ct. App. 2009) ("Many of our clients who are housed report to Solid Ground housing counselors that they are not able to assert their rights because the landlord threatens to file an eviction lawsuit against them. Tenants cannot realistically access their legal remedies or assert other rights for fear of this type of retaliation . . . . Many renters report to me that if they move out before the filing, at least they will have a clean record to seek housing later."); *see also* Regina Wagner, et al., *Regional Analysis of Impediments to Fair Housing,* WASHINGTON COUNTY, at 160 (May 2001), http://www.co.washington.mn.us/client_files/documents/css/CSS_CDBG/CSS--2001_Analysis_of_Impediments.pdf ("The negative impact of an eviction is so great that many tenants have become increasingly reluctant to enforce any of their rights for fear that an owner will retaliate and file an eviction proceeding, which would impact their housing choices for the next seven years.").

[114] *See accord Pultz,* 2005 WL 1845635, at *7 (granting preliminary injunction to stop landlords from filing unlawful detainer actions against tenants in part because "there are now various credit agencies whose primary business is to report to landlord subscribers, the names of all tenants who have appeared in the computer indices of Housing Court, no matter whether they were the petitioner or respondent and without regard to whether they were successful in their proceedings. This 'blacklist' makes the finding of a rental apartment potentially very difficult if not impossible . . .As plaintiffs are tenants of relatively modest means, the possibility of winding up on a blacklist should they ultimately lose, would be devastating.").

[115] *Id.* In Washington, the superior court rules enable a landlord to commence an unlawful detainer action by service of an unfiled summons and complaint. *See* WASH. CR 3(a) ("a civil action is commenced by service of a copy of a summons together with a copy of a complaint . . . *or* by filing a complaint.") (emphasis added). The complaint need only be filed if the defendant responds to the summons.

[116] *See* Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1363 (2007); *see also* Rogers, *supra* note 49 ("'if their dispute has escalated to going to court, an owner will view them as a pain,' said Jake Harrington, a founder of On-Site.com.").

[117] *See* WASH. REV. CODE § 59.18.240 (2010) ("So long as the tenant is in compliance with [the Residential Landlord-Tenant Act (RLTA)], the landlord shall not take or threaten to take reprisals or retaliatory action against the tenant because of any good faith and lawful: (1) Complaints or reports by the tenant to a governmental authority concerning the failure of the landlord to substantially comply with any code, statute, ordinance, or regulation governing the maintenance or operation of the premises, if such condition may endanger or impair the health or safety of the tenant; or (2) Assertions or enforcement by the tenant of his rights and remedies under [the RLTA].").

[118] *See generally* B.R.U.S.H. v. Pinnacle Grp., 575 F. Supp. 2d 499, 504 (S.D.N.Y. 2008).

[119] *See generally* White v. First Am. Registry, Inc., No. 04 Civ. 1611(LAK), 2007 WL 703926 (S.D.N.Y. Mar. 7, 2007); Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313 (Cal. Ct. App. 2002); HOUSINGLINK, *supra* note 6. *See* Testimony of Jonathan Grant, *supra* note 100.

[120] *See* Rogers, *supra* note 49.

[121] *See generally* Testimony of Jonathan Grant, *supra* note 100.

[122] *See* HOUSINGLINK, *supra* note 6, at 40 ("the increasingly popular use of tenant screening reports has resulted in a new class of people who are unable to access rental housing because of past credit problems, evictions, poor rental histories or criminal backgrounds."); *see also* Pultz v. Economakis, No. 114915/2004, 2005 WL 1845635, at *7 (N.Y. Sup. Ct. June 5, 2005) ("This 'blacklist' potentially makes the finding of a rental apartment potentially very difficult if not impossible.").

[123] *See* HOUSINGLINK, *supra* note 6, at 7 (emphasis added).

[124] *See* Testimony of Jonathan Grant, *supra* note 100 ("The creation of a permanent eviction record made publicly available on the SCOMIS database is one of the primary reasons why many of our clients are denied housing and their homelessness is perpetuated.").

[125] *See* Carlile v. Harbor Homes, Inc., 194 P.3d 280, 290–91 (Wash. App. 2008) ("The duty of good faith and fair dealing is implied in every contract [and] requires only that the parties perform in good faith the obligations imposed by their agreement.").

[126] *See generally* Simon v. D. Miller & Assoc., P.L.L.C., No. 14-07-00894-CV, 2009 WL 335068 (Tex. App. Feb. 12, 2009) (discussing legal malpractice action against attorney whose procedural errors led to dismissal of plaintiff's claim that his application to rent an apartment had been "improperly [*sic*] rejected for lack of a current W–2 form after he was told by a leasing agent that the lack of a W–2 would not cause a problem."). *See also* Collard v. Reagan, No. 26410-2-II, 2002 WL 1357052, at *2 (Wash. Ct. App. June 21, 2002).

[127] *See generally* Riss v. Angel, 934 P.2d 669, 680 (Wash. 1997) (party's rejection of another's performance under a satisfaction contract will be upheld only if the decision is reasonable and made in good faith).

[128] *See* Crafts v. Pitts, 162 P.3d 382, 386–88 (Wash. 2007) ("No piece of land has its counterpart anywhere else and it is impossible to duplicate by the expenditure of any amount of money" (quoting Carpenter v. Folkerts, 627 P.2d 559, 561 (Wash. Ct. App. 1981)).

[129] *See* WASH. REV. CODE § 19.182.110 (1993); *see also* WASH. REV. CODE § 59.18.257(3) (1991). *But see* 15 U.S.C. § 1681m(b) (1996) (Establishing that if the

source of the information that leads to a rejection is a person other than a CRA, then the FCRA requires the landlord to inform the denied applicant of the right to obtain the reason for denial. On request of the applicant, landlord must also inform the applicant of the right to learn the reason for denial at the time the denial is communicated to the applicant).

[130] *Id.*

[131] *See generally* HOUSINGLINK, *supra* note 6, at 39–40.

[132] *Cf.* Egbert v. Way, 546 P.2d 1246, 1248–49 (Wash. Ct. App. 1976) ("[D]enial of specific performance is proper where enforcement is unreasonably difficult or would require such long continued supervision by the court as is disproportionate to the advantages to be gained.").

[133] *See Crafts,* 162 P.3d at 387.

[134] Weissman v. Safeco Ins. Co., 236 P.3d 240, 242 (Wash. Ct. App. 2010) ("Under the American rule on fees in civil cases, which Washington follows, civil litigants are responsible for paying their own attorney fees and costs absent specific statutory authority, contractual provision, or recognized grounds in equity" (citing Wagner v. Foote, 908 P.2d 884, 888 (Wash. Ct. App. 1996)).

[135] WASH. REV. CODE § 59.18.430 (1973) ("All provisions of [RLTA] shall apply to any lease or periodic tenancy entered into on or subsequent to July 16, 1973.").

[136] WASH. REV. CODE § 59.18.580(1) (2004) ("A landlord may not . . . refuse to enter into a rental agreement based on the tenant's or applicant's or a household member's status as a victim of domestic violence, sexual assault, or stalking.").

[137] Stephanus v. Anderson, 613 P.2d 533, 537 (Wash. Ct. App. 1980) (duty of good faith did not preclude retaliatory eviction of tenant). *But see* Ethridge v. Hwang, 20 P.3d 958, 962–64 (Wash. Ct. App. 2001) (mobile home park's refusal, "on idiosyncratic, frivolous, unreasonable, and unlawful grounds" to permit sale of mobile home to prospective buyer be actionable under Mobile Home Landlord Tenant Act duty of good faith).

[138] *See, e.g.,* Truly v. Hueft, 158 P.3d 1276, 1281 (Wash. Ct. App. 2007). *But see Carlile*, 194 P.3d at 290–91 (stating that the duty of good faith does not "inject substantive terms into the parties' contract.").

[139] WASH. REV. CODE § 19.86.020 (1961) ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."); *see also* WASH. REV. CODE § 19.86.090 (1961) (remedies).

[140] WASH. REV. CODE § 19.86.090 (2009).

[141] *See generally* Allen v. Am. Land Research, 631 P.2d 930 (Wash. Ct. App. 1981).

[142] *See* Panag v. Farmers Ins. Co., 204 P.3d 885, 889–90 (Wash. 2009).

[143] WASH. REV. CODE § 19.86.020 (2009).

[144] Cotton v. Kronenberg, 44 P.3d 878, 886 (Wash. Ct. App. 2002) (whether a practice "impacts the public interest" is usually also a question of fact, but generally turns on factors like whether the acts took place in the course of the defendant's business, whether the defendant advertised to the general public, whether the defendant actively solicited the plaintiff or others, and whether the defendant occupied a superior bargaining position to the plaintiff).

[145] State v. Schwab, 693 P.2d 108, 110 (Wash. 1985) ("Residential landlord-tenant problems are within the express purview of the [RLTA] and we perceive the legislature's

intent to clearly be that violations of that act do not also constitute violations of the Consumer Protection Act.”).

[146] *Id.* at 113–15. Since *Schwab* precludes enforcement of the RLTA via the CPA, it is fairly certain that a rental applicant cannot invoke the CPA remedies clause to enforce a violation of the RLTA duty of good faith under the per se doctrine.

[147] *See* WASH. REV. CODE § 59.18.030(13) (1973) (defining “tenant”); WASH. REV. CODE § 59.18.060 (1973) (duties of landlords); WASH. REV. CODE § 59.18.130 (1973) (duties of tenants).

[148] WASH. REV. CODE §§ 59.18.253, 257 (1991).

[149] WASH. REV. CODE § 59.18.253 (1991) (“Deposit to secure occupancy by tenant—Landlord's duties—Violation”).

[150] *See id.* (“Deposit to secure occupancy by tenant—Landlord's duties—Violation”).

[151] *See* WASH. REV. CODE § 59.18.253 (1991); WASH. REV. CODE § 59.18.257 (1991); WASH. REV. CODE § 59.18.570 (2004).

[152] *See* WASH. REV. CODE § 59.18.253(3) (1991); WASH. REV. CODE § 59.18.257(4) (1991).

[153] Graffell v. Honeysuckle, 191 P.2d 858, 863–64 (Wash. 1948) (“[I]n enacting legislation upon a particular subject, the lawmaking body is presumed to be familiar not only with its own prior legislation relating to that subject, but also with the court decisions construing such former legislation.”).

[154] *See* WASH. REV. CODE § 59.18.253, c 194 § 2 (1991) (“The legislature finds that tenant application fees often have the effect of excluding low-income people from applying for housing because many low-income people cannot afford these fees in addition to the rent and other deposits which may be required. The legislature further finds that application fees are frequently not returned to unsuccessful applicants for housing, which creates a hardship on low-income people.”).

[155] *See id.*

[156] *See* WASH. REV. CODE § 59.18.580(1) (2004).

[157] *Id*.

[158] *Id*. at § 59.18.580(2).

[159] *Id.*

[160] *See* WASH. REV. CODE § 49.60.030(3) (2010).

[161] *See* Collard v. Reagan, No. 26410-2-II, 2002 WL 1357052, at *2 (Wash. Ct. App. June 21, 2002) (plaintiffs and “[s]everal other witnesses also testified at trial regarding their dealings with Reagan. They related almost identical stories: seeing a newspaper advertisement for a rental house; contacting Reagan and completing an application; paying the credit check fee; Reagan's calling to say that they were approved and that they needed to pay a deposit; submitting the deposit; and Reagan's refusing to rent the house or refund the deposit.”).

[162] *Id.* at *3 (“By not apprising the trial court that the complaint potentially alleged a violation of the wrong statute and instead defending under the CPA, Reagan waived his right to assert later that the CPA was not the proper statute to apply.”).

[163] *See* Ethridge v. Hwang, 20 P.3d 958, 965 (Wash. Ct. App. 2001).

[164] *Id.* at 964*; see also* Holiday Park Cmty. Ass’n v. Echo Lake Assocs., L.L.C., 135 P.3d 499, 503 (Wash. Ct. App. 2006) (holding mobile home park tenant organization and

individual mobile home park owners had standing to bring CPA action against park management).

[165] *See* Eifler v. Shurgard Capital, 861 P.2d 1071, 1078 (Wash. Ct. App. 1993).

[166] 42 U.S.C. §§ 3601–3619 (2010).

[167] *See, e.g.,* WASH. REV. CODE § 49.60.222 (2010) ("Unfair practices with respect to real estate transactions, facilities, or services").

[168] SEATTLE MUNICIPAL CODE § 14.08.010–215 (2010).

[169] TACOMA MUNICIPAL CODE § 1.29.100 (2010) ("Unlawful discriminatory housing practices.").

[170] *See generally* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972) (holding tenants of apartment complex who alleged they lost benefits of living in an integrated community because of landlord's discrimination against nonwhites had standing to sue under Fair Housing Act).

[171] *See, e.g.,* Children's Alliance v. City of Bellevue, 950 F. Supp. 1491, 1495 (W.D. Wa. 1997); *see also* Fountila v. Carter, 571 F.2d 487, 489 (9th Cir. 1978).

[172] John Relman, HOUSING DISCRIMINATION PRACTICE MANUAL, §2:23, at 2–68 (Oct. 2008) ("This type of evidence is rare, for the simple reason that 'most persons will not readily admit publicly that they entertain any bias or prejudice against members of [protected classes].'") (quoting U.S. v. Real Estate Development Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972).

[173] *See* WASH. REV. CODE § 19.182.110(1) (2010) (describing limits of written notice requirements under the fair credit reporting act); *see also* WASH. REV. CODE § 59.18.257(3) (2010) (describing extent of notice landlord must give to prospective tenant).

[174] *See generally* Antonio v. Ward's Cove Packing Co., Inc., 810 F.2d 1477, 1480 (9th Cir. 1987) (discussing process for bringing a prima facie disparate treatment claim in the employment context).

[175] *See* Blomgren v. Ogle*,* 850 F. Supp. 1427, 1437 (E.D. Wa. 1993) (citing Tex. Dept. of Cmty. Affairs v. Burdine*,* 450 U.S. 248, 254–55 (1981)).

[176] *See id*.

[177] *Id*.

[178] *See, e.g.,* Pasquince v. Brighton Arms Apts., 876 A.2d 834, 838–39 (N.J. Super. Ct. 2005) ("it is well established that creditworthiness is a legitimate, non-discriminatory criteria which landlords are permitted to consider when evaluating prospective tenants"); Head v. Cornerstone Residential Mgmt., Inc., No. 05-80280-CIV, 2010 WL 3781288 (S.D. Fla. Sept. 22, 2010) (dismissing fair housing claim because "HUD guidelines unequivocally permit owners to reject applicants with a poor credit history or with a debt to a prior landlord."); *see* Cotto v. Jenney*,* 721 F. Supp. 5, 6–7 (D. Mass. 1989) ("report stating that a prospective tenant has fallen behind on its rent payments on a prior occasion . . . would certainly give [landlord] pause before incurring a potential financial risk by allowing the would-be tenant to occupy the residence.").

[179] Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (quoting Palmer v. U.S., 794 F.2d 534, 538–39) (9th Cir. 1986).

[180] *Id.* at 745–46; *see also* Gamble v. City of Escondido, 104 F.3d 300, 306 (9th Cir. 1997).

[181] *See Pfaff*, 88 F.3d at 747 (discussing Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1254 (10th Cir. 1995)); *see also* Oliver v. Pac. Nw. Bell Tel. Co., Inc., 724 P.2d 1003, 1006 (Wash. 1986) (applying the "business necessity" standard to disparate impact claims in Washington State).

[182] *See Oliver*, 724 P.2d at 1006; *see also* Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1292–93 (8th Cir. 1975) (describing one company's absolute policy of denying employment to anyone convicted with a crime).

[183] According to the U.S. Census in 2000, 12.9 percent of the U.S. population was African American. *The Black Population: 2000*, U.S. CENSUS BUREAU (Aug. 2001), http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf. Yet throughout the country, 27 percent of all persons arrested in 2003 were African American. *Crime in the United States – 2003, Section IV – Persons Arrested* FED. BUREAU OF INVESTIGATION, (2003), http://www.fbi.gov/filelink.html?file=/ucr/cius_03/pdf/03sec4.pdf. Of all persons arrested that year for drug-related offenses, 32.6 percent were African American. *Arrests,* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, (2003), http://www.albany.edu/sourcebook/pdf/t4102003.pdf. African Americans represent a greatly disproportionate 45 percent of the U.S. prison population. In all, an African American person in 2000 was 8.2 times more likely to be incarcerated than a Caucasian person. *See Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH (MAY 2000), http://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm#P167_28183.

[184] *See Mountain Side Mobile Estates P'ship*, 56 F.3d at 1254. The seminal case concerning the disparate impact of criminal records on rental applicants is *Talley v. Lane,* 13 F.3d 1031, 1034 (7th Cir. 1994), which upheld the Chicago Housing Authority's use of HUD-prescribed selection criteria for public housing tenants that excluded "individuals with a history of convictions for property and assaultive crimes [who] would be a direct threat to other tenants[.]"). *See also* Evans v. UDR, Inc*.,* 644 F. Supp.2d 675, 694 (E.D. N.C. 2009) (applicant denied under rental policy providing that "[t]he application or occupancy of any person may be denied at any time based on their criminal history, in Management's sole and absolute discretion," but where policy also provided that denials for criminal history would be made on a case-by-case basis and limited to crimes involving physical violence, property damage, or fraud). *But see generally* Harrison v. Darby, No. 2:08-3874-PMD, , 2009 WL 936469, at *1–6 (D. S.C. Apr. 7, 2009) (landlord declined to renew lease with tenant due to discovery of unspecified "criminal record" on background check).

[185] *See, e.g., Oliver*, 724 P.2d at 1006–07 (employer's policy of taking disciplinary action against employees based on "dishonest acts committed outside of employment" held not to cause a disparate impact African Americans, who were statistically more likely to be arrested for property crimes such as theft, because rather than "a flat rule which requires automatic termination resulting from commission of a dishonest act, [the employer] addresse[d] each specific situation regarding a violation of the standards of conduct on a case-by-case basis, and ultimate disciplinary action depend[ed] on a variety of factors.").

[186] *See* Green v. Sunpointe Assocs., Ltd., 1997 WL 1526484 (W.D. Wash. 1997) (holding that landlord's policy of refusing to participate in voluntary Section 8 voucher program would cause a disparate impact against a protected racial group); *accord.,* Montgomery County v. Glenmont Hills, 936 A.2d 325 (Md. App. Ct. 2007) (upholding Maryland

statute prohibiting discrimination on basis of lawful source of income); Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1112 (N.J. 1999) (holding that a landlord's refusal to accept a Section 8 voucher violates New Jersey statute to the detriment of low-income tenants); *but cf.* Salute v. Stratford Greens Garden Apts., 136 F.3d 293, 302 (2nd Cir. 1998) (holding by a 2–1 decision that a landlord could not be required to accept Section 8 vouchers even if refusal would cause a disparate impact on a protected class).

[187] *See generally* Giebeler v. M & B Assocs. Inc., 343 F.3d 1143 (9th Cir. 2003) (holding that landlord must accept applicant's co-signer as reasonable accommodation for applicant's disability that affected his ability to gain employment).

[188] *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1557–58 (S.D. Fla. 1992).

[189] *See* Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002) (holding policy of automatically denying parole to prisoners with substance abuse histories violated Title II of ADA); *Green*, 523 F.2d at 1298 (holding employer's policy of excluding from employment any person convicted of a crime even if remote in time or relevance was overly harsh and not justified by "business necessity"); *Oliver*, 724 P.2d at 1006 (finding plaintiff employee could not bring disparate impact claim against company policy requiring employees not to commit criminal acts because policy used subjective criteria that were not facially neutral).

[190] *See RHA's Rent Right Decision Model, supra* note 24.

[191] *See Pfaff*, 88 F.3d at 746.

[192] *See* HOUSINGLINK, *supra* note 6, at 40 ("Numerous studies have shown that those who are evicted are typically poor, women, and minorities.").

[193] *See* Eric Eckholm, *A Sight All Too Familiar in Poor Neighborhoods*, N.Y. TIMES, Feb. 19, 2010, available at http://www.nytimes.com/2010/02/19/us/19evict.html.

[194] *See* Pfaff v. U.S. Dep't of Hous. & Urban Dev., 88 F.3d 739, 745 (9th Cir. 1996) (noting that a party can establish a prima facie case of disparate impact discrimination by demonstrating the following elements: "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." (quoting Palmer v. United States, 794 F.2d 534, 538 (9th Cir. 1986).

[195] *See* Stout v. Potter, 276 F.3d 1118, 1122 (9th Cir. 2002) ("A prima facie case of disparate impact is 'usually accomplished by statistical evidence showing 'that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants.' Although statistical data alone, in a proper case, may be adequate to prove causation, the "statistical disparities must be sufficiently substantial that they raise such an inference of causation.") (quoting Robinson v. Adams, 847 F.2d 1315, 1318 (9th Cir. 1988) and Ward's Cove Packing Co., v. Atonio, 490 U.S. 642, 650 (1989)).

[196] *See* John P. Relman, 1 HOUSING DISCRIMINATION PRACTICE MANUAL, § 2:26 (Oct. 2008) ("Courts of appeals have held that if a defendant's action has the effect of perpetuating segregation 'and thereby prevents interracial association[,] it will be considered invidious under the Fair Housing Act independently of the extent to which it produces a disparate effect on different racial groups.'" (quoting Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977)).

[197] For this reason, fair housing laws typically prohibit landlords not only from applying discriminatory tenant-selection policies to received applications, but also from merely describing or advertising discriminatory selection policies. *See, e.g.*, 42 U.S.C. § 3604 (2010) ("[I]t shall be unlawful . . . (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."); *see also* WASH. REV. CODE § 49.60.222(1)(g) (2007).

[198] In this example, for instance, a theoretical plaintiff would need to meet the following criteria to establish standing to sue: (i) the tenant would need to have applied for housing at a residence and paid a screening fee; (ii) the housing provider would need to have obtained a tenant-screening report; (iii) the housing provider would need to have denied the application; (iv) the tenant would next have to obtain a copy of the screening report; (v) the tenant would then need to promptly apply for subsequent rental; (vi) the tenant would have to request that the new housing provider review the tenant's (already-obtained) screening report in lieu of charging the tenant the cost of obtaining a new one; and (vii) the landlord would need to deny the request. *Cf.* Lake Valley Assocs., LLC v. Township of Pemberton, 987 A.2d 623, 625 (N.J. Super. Ct. App. Div. 2010) (upholding municipal zoning ordinance requiring landlords to "conduct tenant screening for new occupants [including] a check for activity in the landlord/tenant section of the Special Civil Part of the Superior Court; Municipal Court convictions for the past [three] years; and convictions for offenses in the Superior Court for a period of [three] years.").

[199] WASH. REV. CODE § 59.18.257(1) (2010).

[200] *Id.* at § 59.18.257(2) (2010).

[201] *Id.* at § 59.18.257(4) (2010) (emphasis added).

[202] *See id.* at § 59.18.257(2) (2010); *see also* 15 U.S.C. § 1681i (2010); WASH. REV. CODE § 19.182.090 (2010); *see also* 2010 Wash. Legis. Serv. 194 (West) ("The legislature also finds that it is important to both landlords and tenants that consumer information concerning prospective tenants is accurate. Many tenants are unaware of their rights under federal fair credit reporting laws to dispute information that may be inaccurate. The legislature therefore finds and declares that it is the policy of the state for prospective tenants to be informed of their rights to dispute information they feel is inaccurate in order to help prevent denials of housing based upon incorrect information.") (amending WASH. REV. CODE § 34.05.110 (2009)).

[203] The right to dispute information with furnishers was established in 2003 as part of the Fair and Accurate Transactions Act (FACTA) amendments to the federal FCRA. *See* 15 U.S.C. § 1681s–2(a)(8) (2010).

[204] *See* WASH. REV. CODE § 59.18.257(2) (2010); 15 U.S.C. § 1681i (2010); WASH. REV. CODE § 59.18.253 (1991 c. 194) ("The legislature also finds that it is important to both landlords and tenants that consumer information concerning prospective tenants is accurate. Many tenants are unaware of their rights under federal fair credit reporting laws to dispute information that may be inaccurate. The legislature therefore finds and declares that it is the policy of the state for prospective tenants to be informed of their rights to

dispute information they feel is inaccurate in order to help prevent denials of housing based upon incorrect information.”).

[205] *See* WASH. REV. CODE § 59.18.257(2) (2010).

[206] *See* Truly v. Heuft, 158 P.3d 1276, 1281 (Wash. Ct. App. 2007) (finding that a court interpreting a statute “must consider the statute as a whole and avoid rendering any section meaningless or superfluous.”).

[207] Such duties now pertain under the federal FCRA to certain “furnishers” who provide information to consumer reporting agencies. *See* 15 U.S.C. § 1681s–2(a)(8) (2005). However, no such furnisher duties existed prior to the 2003 enactment of FACTA. As WASH. REV. CODE § 59.18.257(2) was enacted in 1991, the applicant’s “right to dispute the accuracy of information provided by the . . . entities listed on the tenant application” could not be a reference to a consumer’s right to dispute information with furnishers under the federal FCRA. *See* WASH. REV. CODE § 59.18.257(2) (2010).

[208] 1991 Wash. Legis. Serv. 194 § 1 (West); *see also* WASH. REV. CODE § 59.18.253 (2010).

[209] *See* WASH. REV. CODE § 59.18.257(2) (2010).

[210] *Id.* at § 59.18.020 (2010).

[211] *Id.* at § 59.18.257 (2010). Curiously, an original version of House Bill 1336 of 1991, the bill which later became WASH. REV. CODE § 59.18.257 (2010), defined “tenant-screening service” as “a consumer reporting agency as defined in WASH. REV. CODE § 59.18.240,” and would have amended WASH. REV. CODE § 59.18.240 to define “credit reporting agency” in the virtually the same way as “consumer reporting agency” is defined in the FCRA. 1991 Wash. Legis. Serv. 194 (West) (“credit reporting agency means any person who, 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 information or other information on consumers for the purpose of furnishing consumer reports to third parties”); *see also* WASH. REV. CODE § 19.182.020(5) (2010). The apparent reason for defining “credit reporting agency” in WASH. REV. CODE § 59.18.240, however, was a separate portion of HB 1336 that would have prohibited a landlord from making a report to a consumer reporting agency about a tenant as a reprisal for a tenant’s good faith and lawful act. *See* 1991 Wash. Legis. Serv. 194 § 3(2)(e) (West). This provision was later removed, along with the definitions for both “credit reporting agency” and “tenant screening service,” so the resulting legislation contains no definition for “tenant-screening service.” 1991 Wash. Legis. Serv. 194 § 1 (West).

[212] *See* 15 U.S.C. § 1681a(f) (2010); WASH. REV. CODE § 19.182.010(5) (2010).

[213] WASH. REV. CODE § 59.18.257(2) (2010).

[214] *Id*.

[215] One exception is myscreeningreport.com, a tenant-screening report that Moco, Inc., will prepare at the request of a consumer. This product can enable rental applicants to avoid successive application charges, provided the housing providers (to whom the applicant applies) accept the report. MY SCREENING REP., http://www.myscreeningreport.com (last visited Sept. 29, 2010).

[216] *See* 15 U.S.C. § 1681g (2010); Wash. Rev. Code § 19.182.070 (2010).

[217] *See* 15 U.S.C. § 1681j(b) (2010); WASH. REV. CODE § 19.182.100(2) (2010); *see also* § 19.182.010(1)(a)(iv) (2010) (defining adverse action as “[a]ction or determination with

respect to a consumer's application for the rental or leasing of residential real estate that is adverse to the interests of the consumer"); 15 U.S.C. § 1681a(k) (2010) (defining "adverse action").

[218] *See* WASH. REV. CODE § 59.18.257(1) (2010) ("If a landlord uses a tenant screening service, then the landlord may only charge for the costs incurred for using the tenant screening service.").

[219] *Id*.

[220] *See id.*; H.B. 1336, 52nd Leg., Reg. Sess. at § 1; WASH. REV. CODE § 59.18.257(1) (1991) ("The legislature finds that tenant application fees often have the effect of excluding low-income people from applying for housing because many low-income people cannot afford these fees in addition to the rent and other deposits which may be required. The legislature further finds that application fees are frequently not returned to unsuccessful applicants for housing, which creates a hardship on low-income people. . . . [T]herefore . . . it is the policy of the state that certain tenant application fees should be prohibited and guidelines should be established for the imposition of other tenant application fees.").

[221] *See* 15 U.S.C. § 1681a(w) (2010).

[222] *See* WASH. REV. CODE § 59.18.257 (2010).

[223] *See* 15 U.S.C. § 1681 (d), (f) (defining "consumer report" and "consumer reporting agency"). *See also* WASH. REV. CODE § 19.182.010(4)–(5) (defining "consumer report" and "consumer reporting agency"). *See Wilson*, 165 F.3d at 643 ("Rental Research is a credit reporting agency that provides information about prospective tenants to subscribing landlords . . . . In a typical transaction, the subscriber submits the name, current and former addresses, date of birth, and social security number of the prospective tenant to Rental Research and asks for an 'Instant Inquiry' report. At the time in question, an 'Instant Inquiry' report cost $15. For an additional $14, landlords could also receive a 'Verified Completion Report' (VCR) which, according to Rental Research, reports only confirmed information. In preparing an 'Instant Inquiry' report, Rental Research relies on information compiled from multiple databases, including housing court unlawful detainer records in Minnesota, western Wisconsin, and eastern North Dakota and credit reports from national credit reporting agencies such as TRW, Inc."). *See also* Weisent v. Subaqua Corp., No. 102108/07, 2007 WL 2140947 at *1 (N.Y. Sup. Ct. 2007) ("[C]ompanies known as 'tenant-screening bureaus' ('TSBs') . . . prepare tenant-screening reports which they then sell to other companies and to prospective landlords.").

[224] 15 U.S.C. § 1681e(b) (1997) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.").

[225] *See Dennis*, 520 F.3d at 1069 (applying federal FCRA to a credit report agency in a suit filed by a tenant.).

[226] *See* 15 U.S.C. § 1681e(b) (1997); *see also* WASH. REV. CODE § 19.182.060(2) (2010) (Washington Fair Credit Reporting Act with identical language).

[227] *See* 15 U.S.C. § 1681e(e) (1997) (establishing the same duty for resellers to follow reasonable procedures to assure maximum possible accuracy, but fulfill this duty when they resell an accurate copy of a current report obtained from a third-party CRA.). *But cf.* Lewis v. Ohio Prof'l Elec. Network, L.L.C., 248 F.Supp.2d 693, 698 (S.D. Ohio 2003)

(stating that "[a]lthough § 1681e(e)(2)(A) uses the term 'reasonable procedures,' it does not incorporate the same requirements as §1681e(b).").

[228] *See* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).

[229] *See* Cousin v. Trans Union Corp., 246 F.3d 359, 368 (5th Cir. 2001) (citing Thompson v. San Antonio Retail Merch. Ass'n, 682 F.2d 509, 513 (5th Cir. 1982)). *See also* Bryant v. TRW, Inc., 689 F.2d 72, 78 (6th Cir. 1982).

[230] *Guimond,* 45 F.3d at 1333.

[231] *See* CAROLYN L. CARTER ET AL., FAIR CREDIT REPORTING, (Nat'l Consumer L. Ctr., 6th ed. 2006 & Supp. 2008 at § 4.4.5.1.2) (citing Philbin v. Trans Union Corp., 101 F.3d 957 (3rd Cir. 1996)); *cf.* Stewart v. Credit Bureau, Inc., 734 F.2d 47 (D.C. Cir. 1984); Alexander v. Moore & Assocs., Inc., 553 F. Supp. 948, 952 (D. Haw. 1982); Wilson v. CARCO Grp., Inc., 518 F.3d 40, 42 (D.C. Cir. 2008).

[232] *See* CAROLYN L. CARTER ET AL., *supra* note 231, at 26 (citing FAIR CREDIT REPORTING ACT § 1681(n) (1977) (Compliance)).

[233] *See* Testimony of Jonathan Grant, *supra* note 100.

[234] *See* Dennis v. BEH-1, LLC, 520 F.3d 1066, 1071 (9th Cir. 2008) ("When conducting a reinvestigation pursuant to 15 U.S.C. § 1681i, a credit reporting agency must exercise reasonable diligence in examining the court file to determine whether an adverse judgment has, in fact, been entered against the consumer.").

[235] *See id*.

[236] *See id*.

[237] *See id.*

[238] *See* Schoendorf v. U.D. Registry, Inc., 118 Cal. Rptr. 2d 313, 321–22 (Cal. Ct. App. 2002).

[239] Ordering records remotely can take several days or even weeks, a timeline incommensurate with that of landlords seeking to make rapid rental decisions. *Wilson*, 165 F.3d at 646.

[240] *See Dennis,* 520 F.3d at 1071.

[241] *See* Wilson v. Rental Research Servs., 165 F.3d 642, 646 (8th Cir. 1999) ("The importance of housing and the nature of the rental housing market intensify the damage done to consumers who are the victims of an inaccurate report."). *See also* Weisent v. Subaqua Corp., No. 102108/07, 2007 WL 2140947 at *1 (N.Y. Sup. Ct. 2007) (filing unlawful detainer action against person claiming right of succession to rent-controlled apartment would cause a tenant irreparable harm because "regardless whether or not a tenant prevails in the Housing Court, his or her name may appear on the blacklist, making "the finding of a rental apartment potentially very difficult if not impossible, particularly for a tenant of relatively modest means.") (quoting Pultz v. Economakis, No. 114915/2004, 2005 WL 1845635, at *7 (N.Y. Sup. Ct. June 5, 2005).

[242] *See* Cousin v. Trans Union Corp., 246 F.3d 359, 368 (5th Cir. 2001). *See also Dennis*, 520 F.3d at 1071.

[243] See *Wilson*, 165 F.3d at 647.

[244] Ordering records remotely can take several days or even weeks, a timeline incommensurate with that of landlords seeking to make rapid rental decisions. *See Wilson*, 165 F.3d at 646.

[245] *See* WASH. REV. CODE § 59.18.257(1) (2010) (The King County Superior Court charges a per-page fee to view case records online, but the fee is modest ($.10 per page) and can be entirely passed along to the landlord, which may pass the charge along to the applicant.). *Cf. Dennis*, 520 F.3d at 1071 ("Experian could have caught Hogan's error if it had consulted the Civil Register in Dennis's case, which can be viewed free of charge on the Los Angeles Superior Court's excellent website.").
[246] *See* WASH. REV. CODE §10.97.040 (2010).
[247] *See* WASH. REV. CODE §59.18.410 (2010).
[248] Although the statutory duty not to report unverifiable information technically does not arise until a consumer has disputed an item, the FCRAs generally establish that unverified information—even if true—may not be reported. *See* 15 U.S.C. § 1681i(a)(5). *See* WASH. REV. CODE § 19.182.090 (1993). *See also* F.T.C. v. Gill, 265 F.3d 944, 1035 (9th Cir. 2001) (consumer reporting agency must delete unverifiable information from a credit report). *See also* Henson v. CSC Credit Servs., 29 F.3d 280, 287 (7th Cir. 1994) (CRA acquires duty to look beyond original source before reporting information if CRA has reason to question accuracy of original source).
[249] *Id.;* WASH. REV. CODE §10.97.040 (2010). Exceptions to this completeness requirement govern the disclosure of non-conviction criminal records for uses unrelated to tenant-screening or other credit transactions.
[250] *Id*.
[251] *Id.* at § 10.97.080 (2010).
[252] *Id.* at § 10.97.060 (1977).
[253] *Id.* at § 10.97.050(1) (2005).
[254] *See* 15 U.S.C. § 1681c(a)(2) (2010); *see* WASH. REV. CODE § 10.97.040(1)(b) (2010).
[255] *See* State v. C.R.H., 27 P.3d 660, 663 (Wash. Ct. App. 2001) ("[C]ourt may order a criminal record sealed without express statutory authority") (citing State v. Noel, 5 P.3d 747, 749 (Wash. Ct. App. 2000)).
[256] WASH. STAT. CT. G.R.15(c)(4) ("When the clerk receives an order to seal the entire court file, the clerk shall seal the court file and secure it from public access."). *See also* WASH. STAT. CT. G.R.15(c)(5) ("When the clerk receives a court order to seal specified court records the clerk shall . . . [r]emove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record.").
[257] *See, e.g.*, *In re* Marriage of R.E., 183 P.3d 339, 344 (Wash. Ct. App. 2008) (family court records may be sealed to protect mental health of children); *Noel,* 5 P.3d at 749–50 (criminal conviction records); *C.R.H.,* 27 P.3d at 663 (juvenile records).
[258] *See* WASH. CONST. art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."); *see also* Seattle Times Co. v. Ishikawa, 640 P.2d 716, 720–21 (Wash. 1982). Art. I, §10 protects public access to judicial records as well as live proceedings. *See* Allied Newspapers v. Eikenberry, 848 P.2d 1258, 1261 (Wash. 1993); State v. McEnry, 103 P.3d 857, 860 (Wash. 2004) (discussing sealing records of court proceedings currently underway).
[259] *See Seattle Times Co.*, 640 P.2d at 720; *see also* WASH. CONST. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

[260] *See* Indigo Real Estate Servs. v. Rousey, 215 P.3d 977, 981 (Wash. Ct. App. 2009); *see also McEnry*, 103 P.3d at 860.
[261] *See* WASH. STAT. CT. G.R.15(c).
[262] *Id.*; *see also* WASH. REV. CODE § 9.94A.640(3) (2006) ("Once the court vacates a record of conviction . . . the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history [and] the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime."). *See* State v. Waldon, 202 P.3d 325, 333 (Wash. Ct. App. 2009) (Art. I, § 7 provides authority for court to seal records of vacated conviction to promote ex-offender's employment, but order must be narrowly tailored consistent with the state constitution, as interpreted by *Seattle Times Co.,* 640 P.2d 716). *See also Noel*, 5 P.3d at 749 (trial court erred by failing to consider whether compelling circumstances justified an order sealing records of misdemeanor convictions even absent statutory authority); WASH. REV. CODE § 36.23.065 (authorizing destruction of court records for archival purposes; information must be retained elsewhere).
[263] *See Indigo Real Estate Servs.,* 215 P.3d at 982. *See also McEnry,* 103 P.3d at 860 ("McEnry conceded that potential loss of housing based on his court records was 'not an issue' because he owns his home.").
[264] *See Waldon*, 202 P.3d at 330–31; *Seattle Times Co.,* 640 P.2d at 720.
[265] *Indigo Real Estate Servs*., 215 P.3d at 981.
[266] *See, e.g.,* White v. First Am. Registry, Inc., No. 04 Civ. 1611(LAK), 2007 WL 703926, at *1 (S.D.N.Y. Mar. 7, 2007); Pultz v. Economakis, No. 114915/2004, 2005 WL 1845635, at *7 (N.Y. Sup. Ct. June 5, 2005).
[267] *See* Humphries v. County of Los Angeles, 554 F.3d 1170, 1188 (9th Cir. 2009) (parents cleared of child abuse allegations have constitutional property interest in having their names removed from Child Abuse Central Index); *see also* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (public officials must afford constitutionally adequate procedures before engaging in actions that stigmatize individuals); *see also* Paul v. Davis, 424 U.S. 693, 711 (1976) (due process rights are implicated where the government inflicts a reputational injury that distinctly alters or extinguishes a right or status previously recognized by state law).
[268] *See* Federated Publ'ns, Inc., v. Kurtz, 615 P.2d 440, 446 (Wash. 1980); *Seattle Times Co.*, 640 P.2d at 719.
[269] *See* HOUSINGLINK, *supra* note 6, at 12.
[270] *See* WASH. STAT. CT. G.R.15(b)(5) ("To redact means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.").
[271] *See* Allied Daily Newspapers of Washington v. Eikenberry, 848 P.2d 1258, 1261 (Wash. 1993) ("Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity."); *see* Dreiling v. Jain, 93 P.3d 861, 866–67 (Wash. 2004) ("access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and to safeguard the

integrity of the fact-finding process."); *see also* Rufer v. Abbot Labs., 114 P.3d 1182, 1191 (Wash. 2005) (public has "very little, if any, interest" in court records that are not relevant to the administration of justice).

[272] *See* HOUSINGLINK, *supra* note 6, at 40.

[273] *See* Tami Bettendorf, *Industry's First Consumer-Initiated (Portable) Tenant-Screening Reports,* EZINEARTICLES (Jan. 11, 2010), http://ezinearticles.com/?Industrys-First-Consumer---Initiated-%28Portable%29-Tenant-Screening-Reports&id=3559106.

[274] *See* WASH. REV. CODE § 19.182.070 (2010) ("A consumer reporting agency shall, upon request by the consumer, clearly and accurately disclose: (1) All information in the file on the consumer at the time of request, except that medical information may be withheld. . . . (2) All items of information in its files on that consumer, including disclosure of the sources of the information, except that sources of information acquired solely for use in an investigative report may only be disclosed to a plaintiff under appropriate discovery procedures…). Whether it is an unfair practice for a screening service not to compile and produce a report at the consumer's request, when the screening service would compile and produce a report at a landlord's request, appears possible, but has not yet been litigated. *See* WASH. REV. CODE § 19.86.020 (2004) (*preempted by* 15 U.S.C. § 1692(f) (1977) *in* In re Chaussee, 399 B.R. 225 (B.A.P 9th. Cir. 2008).

[275] *See* HOUSINGLINK, *supra* note 6, at 40.

[276] *See WMFHA Government Affairs 2009 Legislative Success Sheet,* WASH. MULTIFAMILY HOUSING ASS'N, at 1, http://www.wmfha.org/associations/3138/files/LegislativeSummary2009.pdf (last visited Oct. 16, 2010); *see also* Amy Maly, *Leader in On-Line Leasing Welcomes Top Producer*, ON-SITE.COM (June 1, 2009), https://www.on-site.com/blog/jake_harrington/2009/05/leader_online_leasing_welcomes_top_sales_producer.

[277] *See* Testimony of Brad Faulks to the Washington Senate Committee on Financial Institutions, Housing & Insurance Regarding S.B. 5922, 61st Leg., Reg. Sess. (Wash. Feb. 25, 2009), *available at* http://www.tvw.org/media/mediaplayer.cfm?evid=2009021296&TYPE=V&CFID=2314362&CFTOKEN=c76111f662eb78d6-4136E6A1-3048-349E-4EAF7D290A0F36E8&bhcp=1. Brad Faulks is the Owner of Alliance 20–20, a tenant-screening company in Renton, Washington.

[278] Moco, Inc., a screening service that markets a tenant-initiated screening product called "myscreeningreport.com," overcomes the specter of applicant-tampering by posting the screening report to a secure website. The applicant is then given a web address and password with which to access and view the report, which may be shared with housing providers. However, the tenant has no ability to change the contents of the report that appears on the website.

[279] *See* Peter Zimmerman, *Words from the front: a legislative report from Olympia*, SOLID GROUND BLOG (Mar. 4, 2010), http://solidgroundblog.wordpress.com/2010/01/21/tenant-screening-a-housing-barrier-for-the-21st-century/ ("The tenant screening laws did not make it through the session, but we got further this year than ever before. So, I am already thinking about next year!

We've located a few chinks in the armor, and we are going to work on those. We actually got farther than ever this year, pulling members of the House and the Senate out of session to talk to them. We got a lot more dialogue going out of committee. Down the road, I think we will achieve our goal of limiting tenant screening fees, removing this barrier for folks looking for rentals. It might take two to three years, but I think it is finally starting to sink in.").

[280] SB 5922, 61st Leg., Reg. Sess. §§ 4, 7 (Wash. 2009); H.B. 2622, 61st Leg., Reg. Sess. §§4, 7 (Wash. 2009).

[281] SB 5922 § 4; HB 2622 §4.

[282] *See* SB 5922 § 4(3)(b); HB 2622 §4(3)(b).

[283] *See* SB 5922 §§ 3(1), 7(2); HB 2622 §§ 3(1), 7(2).

[284] *See, e.g.*, State v. McEnry*,* 103 P.3d 857, 859 (Wash. 2004) ("The statute says that after vacation an offender may say he/she has never been convicted of this crime. However, no provision is made to effectuate this statement by limiting access to the court file. It is certainly possible that an employer or a landlord could review an unsealed court file and see the record of a vacated conviction which might seem inconsistent with the defendant's statement that no conviction existed.").

[285] SB 5922 §§ 3(1), 7(2), 8(2).

[286] *Id.* at § 8(3); see also RCW 59.18.410 regarding reinstatement of a tenancy terminated for non-payment of rent.

[287] *Id*.

[288] See WASH. STAT. CT. G.R.15(c).

[289] CALI. CIV. CODE § 1161.2 (1991).

[290] *See* Allied Daily Newspapers of Washington v. Eikenberry, 848 P.2d 1258, 1261 (Wash. 1993) (statute automatically prohibiting disclosure of victim's names in child sexual assault prosecutions unconstitutional because sealing requires individualized determination on case-by-case basis).

[291] *See* SB 5922 §§3(8), 6(b); HB 2622 §§ 3(8), 6(b).

[292] *See* SB 5922 §§3(8), 6(b); HB 2622 §§ 3(8), 6(b).

[293] *U.D. Registry Div. 4*, 40 Cal. Rptr. 2d 228, 231 (1995).

[294] *Id.* at 229–30

[295] *Id.* at 230 (quoting Cox Broad. Corp. v. Cohn*,* 420 U.S. 469, 496 (1975)).

[296] *Id.* ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."). This is a question of particular importance in Washington, where the protection afforded speech under the State Constitution has been interpreted more broadly than the First Amendment. *See* State v. Reece*,* 757 P.2d 947 (1988); *see also* State v. Gunwall*,* 720 P.2d 808 (1986).

[297] *See* U.D. Registry v. State, 50 Cal. Rptr. 3d 647 (Cal. Ct. App. 5th 2006).

[298] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*,* 447 U.S. 557 (1980) [hereinafter *Cent. Hudson*].

[299] *Id*.

[300] *See* Thompson v. W. States Med. Ctr.*,* 535 U.S. 357, 373 (2002).

[301] U.D. Registry, Inc. v. State*,* 50 Cal. Rptr. 3d 647, 660 (Cal. Ct. App. 5th 2006) (quoting *Cent. Hudson,* 447 U.S. at 566) [hereinafter *U.D. Registry Div. 5*]; *see also*

Kitsap County v. Mattress Outlet, 104 P.3d 1280 (Wash. 2005); *see also* Spafford v. Echostar Comm. Corp., 448 F.Supp.2d 1220, 1224 (W.D. Wash. 2006).
[302] *U.D. Registry Div. 4*, 40 Cal. Rptr. 2d 228, 231–32 (Cal. Ct. App. 1995) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).
[303] *Id.*
[304] *See* SB 5922, 61st Leg., Reg. Sess. § 8 (Wash. 2009).
[305] *U.D. Registry Div. 4*, 40 Cal. Rptr. 2d at 203.
[306] *See U.D. Registry Div. 5*, 50 Cal. Rptr. 3d at 660.
[307] *See id*. at 652–53.
[308] *See id.*
[309] *See id.* at 650.
[310] *See id.* at 659 (citing Intel Corp. v. Hamidi, 71 P.3d 296 (Cal. 2003)).
[311] *U.D. Registry Div. 4*, 40 Cal. Rptr. 2d at 230.
[312] *U.D. Registry Div. 5*, 50 Cal. Rptr. 3d at 658–59.
[313] *Id*. at 660.
[314] *Id.* at 660–61.
[315] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985).
[316] *See* Kitsap County v. Mattress Outlet/Gould, 104 P.3d 1280, 1284 (Wash. 2005) (citing Cent. Hudson Gas & Elec. Corp., v. Pub. Serv. Comm'n. of New York, 447 U.S. 557, 561 (1980)).
[317] *Id*.
[318] *See, e.g., U.D. Registry Div. 5*, 50 Cal. Rptr. 3d at 658–60 (citing Trans Union Corp. v. F.T.C., 245 F.3d 809, 818–19 (D.C. Cir. 2001)); Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829, 832–33 (8th Cir. 1976); Hood v. Dun & Bradstreet, Inc., 486 F.2d 25, 30 (5th Cir. 1973); Individual Reference Servs. Group, Inc. v. F.T.C., 145 F. Supp. 2d 6, 40–41 (D. D.C. 2001).
[319] *See generally Kitsap County*, 104 P.3d 1280.
[320] *U.D. Registry Div. 4*, 40 Cal. Rptr. 2d 228, 231–32 (Cal. Ct. App. 1995).
[321] *Kitsap County*, 104 P.3d at 1284–85.
[322] *Id.* at 1285–86 ("The [government] bears the burden of establishing that the restrictions are no more extensive than necessary to serve the . . . stated interests. The restriction must be narrowly tailored. While the means chosen need not be the least restrictive means, the fit between the means chosen and the interests asserted must be reasonable. The existence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is relevant in reviewing the reasonability of the means chosen") (internal citations omitted).
[323] Nat'l Fed'n of Retired Persons. v. Ins. Comm'r, 838 P.2d 680, 688 (Wash. 1992).
[324] SB 5922, 61st Leg., Reg. Sess. § 6 (Wash. 2009); H.B. 2622, 61st Leg., Reg. Sess. § 6 (Wash. 2009).
[325] *See* SB 5922 §1; HB 2622 §1 ("The legislature finds that residential landlords frequently use a type of credit report more commonly known as a tenant-screening report in evaluating and selecting tenants for their rental properties. These tenant-screening reports frequently contain misleading, incomplete, or inaccurate information about: eviction lawsuits where the landlord was unsuccessful and the tenant prevailed; protection orders the tenant obtained for protection against domestic violence, stalking, or

sexual assault; or other court records that, although not predictive of an applicant's suitability for a residential tenancy, are often cited by housing providers as a basis for rejecting rental applicants. This use of court records unfairly diminishes the housing opportunities of many qualified rental applicants, and impairs the access of residential tenants to their day in court. These court records threaten a tenant's future housing prospects irrespective as to the outcome of an action.").

[326] *See* 15 U.S.C. § 1681t(b)(1)(E) (2010) ("No requirement or prohibition may be imposed under the laws of any State—(1) with respect to any subject matter regulated under [42 USC] section 1681c … relating to information contained in consumer reports, except that this subparagraph shall not apply to any State law in effect on September 30, 1996.").

[327] *Id.* at §1681t(b).

[328] *Id.* at §1681c(a)(2).

[329] *Id.* at §1681t(b)(1)(E).

[330] *Id.*

[331] Note that the proposed FTSA, which would have restricted tenant-screening companies from reporting filed unlawful detainer suits or qualified victim protection records, was potentially vulnerable to this argument. *See id.* at 1681c(a)(2), (5); SB 5922 §6(1); HB 2622 §6(1).

[332] 15 U.S.C. § 1681c(a) (1970).

[333] *Id*.

[334] *Id.* at § 1681c(a)(2).

[335] *See id.* at § 1681i(a)(5) (CRA must delete information found to be inaccurate or unverifiable on reinvestigation).

[336] *Id.* at § 1681t(a).The federal FCRA does not preempt any state credit reporting law except as provided in subsections (b) and (c) of § 1681t or where inconsistent with the federal act. § 1681t(a).

[337] *See id.* at § 1681t(b)(1)(E).

[338] *See Fair Credit Reporting,* NATIONAL CONSUMER LAW CENTER, §5.7.2 at 171–72, discussing laws in Maine, New York, and elsewhere; *see also* ME. REV. STAT. ANN. tit. 10 § 1321(3) (West). A previous version of the Maine FCRA survived a preemption challenge in 1980, but multiple sections of it were enjoined as impermissible restraints on free speech. *See* Equifax Servs., Inc. v. Cohen*,* 420 A.2d 189 (1980). The current §1321(3) was added in 1981.

[339] *See, e.g.,* 42 U.S.C. § 3604 (1968); *see* WASH. REV. CODE § 49.60.222 (2007).

[340] 24 C.F.R. § 960.202(a)(2)(iii) (2008).

[341] WASH. REV. CODE § 43.185C.005 (2007). Of course, Washington has scaled back its goal of ending homelessness by 2015, and now hopes only to reduce homelessness by 50 percent in that time. WASH. REV. CODE § 43.185C.050(1) (2007).

[342] WASH. REV. CODE § 43.185C.005 (2007). As discussed above, there is a strong argument under existing Washington law that a housing provider may not reject a rental application for reasons unrelated to a person's suitability for tenancy, either as an "unfair" practice forbidden by the CPA (WASH. REV. CODE § 19.86.020), as a failure to exercise good faith as required by the RLTA (WASH. REV. CODE § 59.18.020), or—particularly where a screening fee or other consideration has been paid—as a breach of

contract or other common law infraction. As this remains unclear and as remedies appear limited, legislation specifically prohibiting arbitrary rejections of rental applications and creating a meaningful remedy under the CPA, RLTA, or other statute, could significantly enhance the rights of rental applicants facing unfair tenant-selection practices.