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# No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants

Allyson E. Gold\*

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## I. INTRODUCTION

People spend more time in their homes than in any other location. As a result, the majority of allergen, irritant, and toxic substance exposure occurs in the home.<sup>1</sup> Substandard housing conditions disproportionately impact low-income, minority tenants who are confined to areas where the housing stock is poorly maintained.<sup>2</sup> For tenants with publicly-available eviction records, it is nearly impossible to obtain safe, decent, and affordable housing; this threatens not only the tenant, but also her family members' ability to achieve their full potential.

Eviction proceedings are a routine occurrence in courtrooms across the country. The large volume of eviction filings threatens the due process rights of tenants, particularly those that are pro se.<sup>3</sup> For example, in Chicago, the average duration of a hearing is under two minutes, and landlords are seldom required to establish the elements of a prima facie case entitling them to an order of possession.<sup>4</sup> Additionally, whether to place an eviction court file under seal is discretionary in nearly all jurisdictions. In practice, because the due process rights of pro se tenants are commonly violated, eviction court files are rarely placed under seal.<sup>5</sup> Consequently, nearly all tenants named in detainer actions have a publicly available record linking them to an eviction, regardless of fault and regardless of whether a judgment was entered.<sup>6</sup> In a digital age in which personal information is easily accessed and aggregated, court records result in automatic damage to an individual's renting prospects. These records are culled by tenant-screening companies and sold to prospective landlords, thereby creating a "tenant blacklist."<sup>7</sup> As a result, any tenant who has been named in an eviction proceeding is effectively barred from obtaining safe, decent, and healthy housing.

Following a court-ordered eviction, tenants struggle to find replacement housing that is both affordable and habitable. Consequently, eviction almost

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1. See Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733, 733 (2002).

2. *Id.*

3. See KAREN DORAN ET AL., LAWYERS' COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 6 (2003), <http://www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf>.

4. *Id.*

5. *Id.*

6. *Id.*

7. Julie Satow, *On the List and Not in a Good Way: A Tenant Blacklist, Culled from Tedium*, N.Y. TIMES (Oct. 16, 2014), <http://www.nytimes.com/2014/10/19/nyregion/a-tenant-blacklist-culled-from-teedium.html>.

always results in a “downward move: a relocation to a disadvantaged neighborhood and/or substandard housing.”<sup>8</sup> Because many landlords will not rent to tenants with a record of eviction proceedings, these individuals often must accept conditions worse than their previous housing. Compounding this issue, there is a well-documented, clear connection between housing quality and residents’ health outcomes.<sup>9</sup> For example, research demonstrates the harmful relationship between health outcomes—such as asthma, malnutrition, accidents, lead poisoning, and injury—and household conditions—such as vermin and pest infestation, lead paint, aging appliances, and building code violations.<sup>10</sup>

Overcrowding and substandard housing are also associated with poor mental health and developmental delays.<sup>11</sup> Because tenants with records of eviction proceedings are typically relegated to the bottom of the housing market, they are particularly vulnerable to negative health outcomes that result from substandard housing conditions.<sup>12</sup> Current remedies, such as sealing the record, permitting disclosure only in certain circumstances, and imposing time limits, do not provide adequate protection for vulnerable tenants, who are predominately low-income and minority individuals.<sup>13</sup>

Health equity is concerned with the capability of an individual to achieve her full health potential.<sup>14</sup> When health equity is achieved, no one is disadvantaged from reaching her full health potential by social determinants such as socioeconomic status, gender, nationality, race, or eviction history. Tenants with eviction records do not have this luxury. This is not the result of a personal decision, but rather, from forces outside of the tenants’ control, beginning with a dearth of attorneys to uphold the rights of tenants in eviction court and culminating in substandard housing stock. Evicted tenants and their families often do not have the opportunity to prioritize good health. These families largely have no choice but to live in unsafe, substandard housing and do not have additional resources to devote to preventative or corrective health. Using a health equity lens to evaluate eviction processes and policies will help eliminate barriers

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8. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 119 (2012).

9. See Bashir, *supra* note 1, at 733; Andrew F. Beck et al., *Identifying and Treating a Substandard Housing Cluster Using a Medical-Legal Partnership*, 130 PEDIATRICS 831, 834 (2012).

10. See Bashir, *supra* note 1, at 733 (noting that there is a “harmful association of asthma, neurological damage, malnutrition, stunted growth, accidents, and injury with household triggers like poor insulation, combustion appliances, cockroach and rodent infestation, dust mites, hyper- and hypothermia, unaffordable rent, and dangerous levels of lead in soil and household paint”).

11. See HEALTH JUSTICE PROJECT, BARRIER TO HEALTH: LEAD, [http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/policy\\_barriers\\_lead\\_poisoning.pdf](http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/policy_barriers_lead_poisoning.pdf) (last visited Nov. 4, 2016) (discussing how lead poisoning damages the developing brain and nervous system, which results in learning disabilities, behavioral problems, developmental delay, seizure, coma, and other serious health complications).

12. See Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8, at 118.

13. David D. Fukuzawa & Fred Karnas, *Reconnecting Health and Housing: Philanthropy’s New Opportunity*, 8 ENVTL. JUST. 86, 89 (2015), <http://online.liebertpub.com/doi/pdf/10.1089/env.2015.0006>.

14. See Amartya Sen, *Why Health Equity?*, 11 HEALTH ECON. 659, 659–63 (2002).

tenants face in obtaining habitable housing and positively affect residents' opportunities.

This Article analyzes the relationship between the eviction court process, including unlawful detainer law and eviction court procedure, and health outcomes for tenants. Because eviction records are publicly accessible in nearly all jurisdictions,<sup>15</sup> tenants named in those records are excluded from healthy housing.<sup>16</sup> This Article proposes using a health equity approach to eviction court that protects tenants from dangerous health consequences. Part II examines the current state of eviction court proceedings. Part III discusses how records of eviction proceedings threaten the health and well-being of tenants. Part IV analyzes how current law fails to adequately protect tenants from the negative health consequences of eviction proceedings. Part V uses a health equity analysis to advocate for policies that contemplate the health of tenant-defendants.

## II. OVERVIEW OF THE EVICTION PROCESS

*"[Eviction court] reminded me of the Scarlet Letter, like a shaming mechanism for people who haven't paid their rent." —Health Justice Project Student<sup>17</sup>*

Eviction hearings are commonplace in courtrooms around the country.<sup>18</sup> Baltimore City courtrooms evict between six and seven thousand households each year.<sup>19</sup> In New York City, three to four hundred housing court judgments are entered on a typical day.<sup>20</sup> In Chicago more than 31,000 eviction cases are filed every year.<sup>21</sup> Over 16,000 adults and children are evicted in Milwaukee yearly.<sup>22</sup> Eviction is the process by which a landlord dispossesses a tenant from a

15. See generally Hon. T. S. Ellis, III, *Sealing, Judicial Transparency and Judicial Independence*, 53 VILL. L. REV. 939, 941 (2008).

16. As discussed in Part III, landlords have access to eviction records when evaluating prospective rental applications. Because landlords control access to a limited commodity, tenants who have been named in an eviction proceeding are effectively blackballed from affordable healthy housing.

17. Health Justice Project Student 1, *Reflection on Eviction Court* (Spring 2016) (on file with author).

18. Eviction proceedings were developed to eliminate self-help evictions, in which a landlord unilaterally dispossesses a tenant from the property. See DORAN ET AL., *supra* note 3, at 6. Self-help evictions often result in wrongful dispossession and may result in a violent confrontation between the landlord and tenants. See *id.*

19. PUB. JUSTICE CTR., *JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT* iv (2015), [http://www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf).

20. Julie Satow, *supra* note 7. In 2015, there were 246,834 evictions filed. STATISTICAL REPORT OF ACTIVITY OF L & T CLERK'S OFFICE, CIVIL COURT OF THE CITY OF NEW YORK, 7 (Feb. 23 2016), <http://cwtfhc.org/wp-content/uploads/2009/06/Housing-Court-Case-Filings-2015.pdf>.

21. MARK SWARTZ ET AL., *LAWYERS' COMM. FOR BETTER HOUS., THREE YEAR IMPACT ASSESSMENT – APARTMENT BUILDING FORECLOSURES AND THE DEPLETION OF RENTAL HOUSING IN CHICAGO* 11 (2012), <http://lcbh.org/sites/default/files/resources/2011-LCBH-Foreclosure-Report-Full-Report.pdf>.

22. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, FAST FOCUS (Mar. 2015), <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>. Similarly, in Los Angeles, 56,354 evictions were filed in fiscal year 2013–14. L.A. SUPERIOR COURT, *ANNUAL REPORT 2015* 22

property. A landlord may initiate an eviction if the tenant has failed to pay rent, violated the lease, engaged in a prohibited use of the property, or remained in the property following the expiration of the tenancy. The high volume of cases produces several due process violations.

In nearly all jurisdictions, once the landlord files, the case is searchable on the clerk of court's online electronic docket search.<sup>23</sup> The digital record of eviction proceedings has supported a lucrative market for tenant-screening companies, which easily access records and sell them to landlords. This allows landlords to be highly selective when reviewing rental applications. As a result, any involvement in an eviction action stigmatizes tenants, preventing them from renting healthy housing. This stigma disproportionately affects women of color, who are overrepresented in tenant-defendant cohorts.<sup>24</sup> The shortage of affordable housing compounds the stigma, pushing these tenants, predominately low-income minority renters, further down-market into substandard housing.

#### *A. High Volume, Short Hearing*

Once he files, a landlord must prove five things in order to prevail in an eviction action: (1) he has the right to possession; (2) the tenant is in possession; (3) the tenant is unlawfully occupying the premises; (4) he served the tenant with proper notice; and, if applicable, (5) the amount of rent due.<sup>25</sup> However, a study by the Lawyers' Committee for Better Housing (LCBH), a nonprofit Chicago law firm that serves low- and moderate-income renters, found that landlords are seldom required to establish the elements of the prima facie case entitling them to an order of possession.<sup>26</sup>

The tenant has the right to present relevant defenses.<sup>27</sup> However, in practice, tenants are seldom asked if they have a defense to the eviction.<sup>28</sup> In Chicago, tenants are asked in only 27% of cases.<sup>29</sup> If the landlord prevails, the judge will grant an order of possession, which is the eviction.<sup>30</sup> The order states the date by which the tenant must vacate the property. If the tenant remains after that time,

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(Apr. 2015), <https://www.lacourt.org/newsmedia/uploads/2015LASCAnnualReport.pdf>. In Washington, DC, 32,590 cases for possession were filed in Landlord & Tenant Court in 2015. DISTRICT OF COLUMBIA COURTS, STATISTICAL SUMMARY 2015 4 (2015), <http://www.dccourts.gov/internet/documents/2015-Statistical-Summary.pdf>.

23. For example, in Chicago, anyone can visit the [www.cookcountyclerkofcourt.org](http://www.cookcountyclerkofcourt.org) and conduct an electronic full case docket search, which allows the user to search by either the tenant or the landlord's name and access records as soon as the case is filed.

24. PUB. JUSTICE CTR., *supra* note 19, at 13.

25. Harold J. Krent et al., *Eviction Court and a Judicial Duty of Inquiry*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 547, 549 (2016).

26. DORAN ET AL., *supra* note 3, at 16.

27. In Illinois, for example, this is governed by the germaneness doctrine. See 735 ILL. COMP. STAT. ANN. 5/9-106 (West 1998) (stating, in part, "[N]o matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise").

28. DORAN ET AL., *supra* note 3, at 16.

29. Lloyd T. Wilson, Jr., *The Beloved Community: The Influence and Legacy of Personalism in the Quest for Housing and Tenants' Rights*, 40 J. MARSHALL L. REV. 513, 528–30 (2007).

30. Krent et al., *supra* note 25, at 548.

the landlord can file the order with the sheriff's department, which will physically remove the tenant and her belongings from the property and, unless she has made arrangements, leave them by the curb.

To those unacquainted, the reality of the eviction process can be shocking. Each semester, students enrolled in the Health Justice Project<sup>31</sup> clinic are assigned to observe eviction proceedings at Chicago's Daley Center. Without fail, students walk away frustrated questioning the "justice" they witnessed. As one student noted, "Cases were called and heard dizzyingly quickly. . . over in a matter of minutes."<sup>32</sup> The average duration of eviction proceedings in Chicago is one minute and forty-four seconds—shorter if the landlord is represented and the tenant is pro se.<sup>33</sup> The brevity of these cases produces repeated procedural and substantive law failures.<sup>34</sup>

Exacerbating the difficulties experienced by tenants, the vast majority of tenant-defendants are pro se. The LCBH study found that only 5% of tenants were represented, while over half of landlords had an attorney.<sup>35</sup> For pro se tenants, unfamiliar with the process, the system can be difficult to navigate, which results in harmful outcomes. Unrepresented tenants are often unable to articulate a legally-recognized defense. To be clear, this is not because the tenant does not have a defense, but rather, she lacks the expertise to present the facts in the "legalese" required by the court.<sup>36</sup> Furthermore, the rate of erroneous rulings, those unsupported by underlying facts or applicable law, is higher for cases in which the tenant is pro se.<sup>37</sup> Feeling pressured, many tenants enter into agreed

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31. *Health Justice Project*, LOYOLA UNIV. OF CHI., <http://www.luc.edu/law/centers/healthlaw/hjp/index.html> (last visited Nov. 4, 2016). The Health Justice Project is an award-winning medical-legal partnership between Loyola University Chicago School of Law, LAF Chicago, and Erie Family Health Center, a Federally Qualified Health Center that serves nearly 70,000 low-income patients annually, who are predominately Hispanic and Spanish-speaking, at thirteen Chicagoland locations. ERIE FAMILY HEALTH CENTER, <https://www.eriefamilyhealth.org> (last visited Nov. 4, 2016). Health Justice Project students of law, public health, social work, and medicine collaborate to address the social and legal issues underlying poor health for low-income individuals. *Health Justice Project*, LOYOLA UNIV. OF CHI., <http://www.luc.edu/law/centers/healthlaw/hjp/index.html> (last visited Nov. 4, 2016). In addition, the interprofessional team engages in medical-legal partnership (MLP) policy advocacy to overcome systemic barriers to health. *Id.*

32. Health Justice Project Student 2, Reflection on Eviction Court, Spring 2016 (on file with author).

33. DORAN ET AL., *supra* note 3, at 4.

34. *Id.*

35. *Id.* at 13 (finding that 53% of landlords are represented). Moreover, this number does not reflect that many landlords are sophisticated, repeat players in eviction proceedings and therefore may not require counsel to successfully navigate the dispossession process.

36. NEW SETTLEMENT APARTMENTS' CMTY. ACTION FOR SAFE APARTMENTS & CMTY. DEV. CTR. AT THE URBAN JUSTICE CTR., TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT 13 (Mar. 2013), [https://cdp.urbanjustice.org/sites/default/files/CDP.WEB.doc\\_Report\\_CASA-TippingScales-full\\_201303.pdf](https://cdp.urbanjustice.org/sites/default/files/CDP.WEB.doc_Report_CASA-TippingScales-full_201303.pdf) (citing Paris Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 665 (Jan. 2006)) ("even when tenants have the substantive law on their side, they lose in Housing Court with 'stunning regularity,' in part due to their inability to articulate their claims and defenses in the cryptic rules of the adversarial court system.").

37. *Id.* at 9.

orders to vacate,<sup>38</sup> not realizing this results in an eviction on their record.<sup>39</sup> Many judges routinely rubber-stamp these agreements without reviewing the terms of the order with the tenant.<sup>40</sup> While others may review with the tenant the basic terms of the order, such as the move out date, they do not discuss rights the tenant has forfeited by signing or the effect of the order on the tenant's credit report or future renting prospects.<sup>41</sup> At one hearing, Health Justice Project faculty witnessed a tenant ask the judge directly if the agreed order would affect her credit.<sup>42</sup> The judge told her it was not a credit issue and made no mention at all of how the order would appear on a tenant screening report. Sealing the record is rarely, if ever, raised.

The consequences of eviction proceedings fall disproportionately on women of color. Research on eviction demographics in Baltimore reveal that most tenant-defendants are black women living on \$2,000 or less per month.<sup>43</sup> This is striking; black women comprise only 34% of Baltimore's population, yet 79% of defendants.<sup>44</sup> Baltimore is not an outlier. Eviction researcher Matthew Desmond found that black women were disproportionately represented in Milwaukee eviction court as well; while black women make up only 9.6% of Milwaukee's population, they account for 30% of court-ordered evictions.<sup>45</sup>

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38. An agreed order functions as a settlement between the landlord and the tenant. Often these are hastily reached after a landlord's attorney offers to forgive unpaid rent if the tenant vacates immediately. Tenants rarely have time to consult with an attorney or raise any defenses to the eviction.

39. Krent et al., *supra* note 25, at 563.

40. *Id.* at 551 (noting that in the author's study of eviction court in Cook County, Illinois, "more than a quarter of all eviction cases in Cook County are resolved through the agreed-order process. Nearly [75%] of agreed orders are put together and placed before a judge within minutes of the tenant meeting the landlord's attorney, allowing the tenant very little time to obtain counsel or carefully reason through a decision. And, judges explained the terms of the agreed orders in barely [27.5%] of the cases.").

41. *Id.* at 552 (noting that when tenants sign away important rights, judges do not make sure that they understand what they are giving up).

42. Health Justice Project Faculty Observation, Fall 2013 (on file with author).

43. PUB. JUSTICE CTR., *supra* note 19, at 12 (Public Justice Center (PJC) is a nonprofit legal advocacy organization in Maryland that focuses on systemic change for people who live in poverty. PJC conducted a yearlong study of Baltimore rent court.).

44. *Id.* at 13 (stating that "[s]imilarly, African Americans compose [65%] of city renters but [94%] of those surveyed at court.").

45. See MATTHEW DESMOND, MACARTHUR FOUND., POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 1 (2014), [https://www.macfound.org/media/files/HHM\\_Research\\_Brief\\_Poor\\_Black\\_Women\\_Are\\_Evicted\\_at\\_Alarming\\_Rates.pdf](https://www.macfound.org/media/files/HHM_Research_Brief_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf), see also MINNEAPOLIS INNOVATION TEAM, EVICTIONS IN MINNEAPOLIS, 2 (2016), <http://www.housinglink.org/docs/default-source/MainLibrary/evictionsinminneapolis2016.pdf?sfvrsn=2> (finding, "Eviictions are a major issue facing renters in low income and minority neighborhoods, affecting nearly half of renter households in North Minneapolis. When comparing the number of eviction filings to the number of estimated renter households, between 45–48% of renter households in two Minneapolis ZIP codes, 55411 and 55412, experienced a filing in the past [three] years.").



*B. Eviction in the Digital Age*

“Our landlord tenant screening services . . . make your job as a landlord or property manager so much easier. Our credit and background check services allow you to make sure that you line up responsible tenants for your rental properties.” — *TenantBackgroundSearch.com*<sup>46</sup>

One of the greatest, most debilitating consequences of a record of an eviction proceeding is the inability to secure decent, affordable housing.<sup>47</sup> In nearly all jurisdictions,<sup>48</sup> after a landlord files for eviction, a searchable record is created in the court’s online docketing system.<sup>49</sup> Private companies collect this information and sell reports to members, including landlords and property managers.<sup>50</sup> When a tenant applies for a rental unit, a landlord procures a “tenant screening report” that includes “a rental applicant’s complete residential history, credit report, criminal record, civil litigation background” and more.<sup>51</sup> Tenant screening reports provide minimal information about eviction cases and do not include any defenses raised by the tenant, reduction or rent abatement found by the court, or the reason for any dismissal or discontinuance of the case.<sup>52</sup> These reports inform landlords of any time a prospective tenant has been named as a defendant in an eviction action,<sup>53</sup> regardless of whether there is any degree of fault.<sup>54</sup> This readily accessible information allows landlords to be highly selective when identifying a “good tenant.”<sup>55</sup> Landlords do not advertise their unwillingness to rent to tenants who have previously been involved in litigation.<sup>56</sup> As a result, a tenant’s

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46. TENANT BACKGROUND SEARCH, <https://www.tenantbackgroundsearch.com> (last visited Nov. 4, 2016).

47. See Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8, at 118.

48. For a discussion on sealing the record, see Part IV.

49. See generally Ellis, *supra* note 15, at 939, 941 (“Electronic filing and paperless docketing have transformed the way the courts do business and the way in which the public interacts with the courts. No longer is it necessary for a citizen to go to the clerk’s office at the courthouse to review court records . . .”).

50. Satow, *supra* note 7. See generally *Frequently Asked Questions about Tenant Screening*, SCREENING WORKS, <http://www.screeningworks.com> (last visited Nov. 4, 2016) (advertising resident screening made simple, offering landlords “a variety of different product package combinations consisting of: *multi-state eviction*, multi-state criminal, credit evaluation, address search, national sex offender registry, social security number fraud check, and OFAC – US Treasury Dept. Database Watch” for \$29.95 or less. Applicant screens are processed in under ninety seconds (emphasis added)).

51. Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 320 (2010).

52. James B. Fishman, Remarks at the 2013 Housing Justice Network Meeting (Oct. 16, 2013).

53. Dunn & Grabchuk, *supra* note 51, at 326.

54. Dennis Hevesi, *When the Credit Check is Only the Start*, N.Y. TIMES (Oct. 12, 2003), <http://www.nytimes.com/2003/10/12/realestate/when-the-credit-check-is-only-the-start.html>.

55. Dunn & Grabchuk, *supra* note 51, at 322.

56. Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1680 (2008).

apartment search can be very expensive with tenants continually paying rental application fees until they can secure replacement housing.<sup>57</sup>

In practice, landlords are not concerned with the outcome of a tenant's case. If a tenant prevailed, she is a troublemaker who will assert her rights.<sup>58</sup> If an order of possession was entered, the landlord assumes the tenant will not pay her future rent, even though past evictions may not accurately correlate with future need for a dispossessory action. Even an agreed order does not protect a tenant from a tenant screening report.<sup>59</sup> As the founder of a tenant screening company told the *New York Times*, "It is the policy of 99 percent of our customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is, because if their dispute has escalated to going to court, an owner will view them as a pain."<sup>60</sup>

The ubiquity and affordability of these reports stigmatizes any involvement in an eviction action, including tenants who lawfully withhold rent to compel a landlord to make repairs.<sup>61</sup> This unfairly increases the strength of landlord remedies, disturbing the balance of power between landlords and tenants. Many landlords, and nearly all who own well-maintained housing, simply will not rent to a tenant with a record of eviction proceedings.<sup>62</sup> Consequently, tenants are discouraged from exercising the very rights enacted to protect them from abusive and irresponsible landlords.

The stigmatization of court involvement chills tenant action even when essential services are disrupted.<sup>63</sup> Recently the Health Justice Project consulted with a tenant whose running water and plumbing services were discontinued after a pipe burst, leaving her without access to a shower or toilet. Further threatening her health, the water, which flooded her bathroom and damaged her personal property, caused mold to grow in the apartment. Despite the landlord's failure to

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57. To decrease housing search expenses, Washington State amended its Residential Landlord—Tenant Act to include a definition for a "comprehensive reusable tenant screening report," a "tenant screening report prepared by a consumer reporting agency at the direction of and paid for by the prospective tenant and made available directly to a prospective landlord at no charge, which contains all of the following: (a) A consumer credit report prepared by a consumer reporting agency within the past thirty days; (b) the prospective tenant's criminal history; (c) the prospective tenant's eviction history; (d) an employment verification; and (e) the prospective tenant's address and rental history." WASH. REV. CODE ANN § 59.18.030 (West 2016). Unlike tenant screening reports, ordered by the landlord, the comprehensive reusable tenant screening report is portable, allowing the tenant to share it with prospective landlords without incurring multiple fees for duplicative information. In addition to financial savings to the tenant, the comprehensive reusable tenant screening report is also easier on the tenant's FICO score, since the tenant's credit history is only pulled one time.

58. See generally Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES (Nov. 26, 2006), <http://www.nytimes.com/2006/11/26/realestate/26cov.html?pagewanted=all> (noting landlords' reluctance to rent to prospective tenants who had any history with housing court).

59. See Joe Lampport, *Blacklisting Tenants*, GOTHAM GAZETTE (Feb. 8, 2006), <http://www.gothamgazette.com/index.php/development/3152-blacklisting-tenants>.

60. See Rogers, *supra* note 58.

61. See Satow, *supra* note 7.

62. See Lampport, *supra* note 59.

63. While there is variation across jurisdictions, an essential service typically includes "heat, running water, hot water, electricity, gas or plumbing." CHICAGO, ILL., MUN. CODE § 5-12-110(f) (2007).

adequately address the emergency, and the tenant's concern that the mold was causing her headaches and respiratory issues, she was reluctant to take action for fear of harming her future rental prospects. Describing her hesitation, the tenant noted, "My landlord has a very bad reputation. He will sue you for anything. I don't want to do anything if it means I won't be able to find a good place to live after this."<sup>64</sup>

### *C. Eviction and the Affordable Housing Shortage*

Barriers to renting for tenants with a record of eviction court involvement are exacerbated by the dearth of affordable housing options. The housing market has experienced dramatic changes in the past ten years. After the boom period that produced high levels of home ownership and inflated property values, the ultimate collapse of the housing market led to increased levels of distress in many communities as well as growing rental demand.<sup>65</sup>

Little has been done to meet this growing demand. As of 2015, new home construction remained near historic lows.<sup>66</sup> At the same time, the number of cost-burdened rental households has risen significantly, with 21.3 million households paying more than 30% of income for housing, and 11.4 million paying more than 50% of income for housing.<sup>67</sup> In light of the affordable housing shortage, renters with a record of eviction court involvement have an even more difficult time securing replacement housing. Because landlords have control over a severely limited commodity, tenants with a record of eviction proceedings are effectively barred from accessing safe and healthy housing. In light of the affordable housing shortage, many tenants apply for admission to federal housing programs such as Public Housing and Section 8. However, a housing authority may use the eviction as a basis to reject a tenant's application, thereby denying affordable housing to families who need it the most.<sup>68</sup>

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64. Health Justice Project Tenant Consultation, Aug. 2016 (on file with author).

65. See INST. FOR HOUS. STUDIES AT DEPAUL UNIV., *THE STATE OF RENTAL HOUSING IN COOK COUNTY* 1, 21 (2011), <http://www.housingstudies.org/media/filer/2012/05/22/cookcountyhousing2011.pdf> (examining rental housing specifically in Cook County, Illinois); INST. FOR HOUS. STUDIES AT DEPAUL UNIV., *OVERVIEW OF THE CHICAGO HOUSING MARKET* 17 (2013), [http://www.housingstudies.org/media/filer\\_public/2013/10/01/ihs\\_2013\\_overview\\_of\\_chicago\\_housing\\_market.pdf](http://www.housingstudies.org/media/filer_public/2013/10/01/ihs_2013_overview_of_chicago_housing_market.pdf).

66. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 1 (2016), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs\\_2016\\_state\\_of\\_the\\_nations\\_housing\\_lowres.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_2016_state_of_the_nations_housing_lowres.pdf).

67. *Id.* at 4.

68. DESMOND, MACARTHUR FOUND., *supra* note 45, at 2 ("Many landlords will not rent to persons who have been evicted, and an eviction can also ban a person from affordable housing programs."). Further, pursuant to the Department of Housing and Urban Development Housing Choice Voucher (HCV) Guidebook, an application for admission to the HCV program includes "[i]nformation on previous evictions from federally assisted housing." U.S. DEP'T OF HOUS. & URBAN DEV., *HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK* 4-15 (2001), [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_11748.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11748.pdf). Under the HCV program, tenants use a government issued voucher to rent private housing managed by individual landlords. In the event that a participating landlord chooses to pursue a detainer action, he will do so under local eviction law. 24 C.F.R. § 247.6.

As a result, eviction nearly always results in “increased residential instability and homelessness, as well as to a downward move: a relocation to a disadvantaged neighborhood and/or substandard housing.”<sup>69</sup> Many tenants with eviction records are forced to search for housing for months before securing a place to stay,<sup>70</sup> and when tenants do find housing, they often must accept conditions far worse than those of their previous housing.<sup>71</sup> In fact, eviction often causes two moves: “A forced move into degrading and sometimes dangerous housing and an intentional move out of it. But the second move could be a while coming.”<sup>72</sup> Landlords’ rejections of applicants with a record of eviction proceedings pushes these tenants “to the very bottom of the rental market” often forcing them “to move into run-down properties in dangerous neighborhoods.”<sup>73</sup> For other tenants, it is simply impossible to secure housing following an eviction proceeding and they are forced into homelessness.<sup>74</sup> An estimated 47% of all families in New York City homeless shelters are homeless as a result of eviction.<sup>75</sup> These consequences can adversely affect the tenant’s ability to secure and maintain employment or attend school, exacerbating the negative economic and social penalties of being named in an eviction proceeding. In light of the disproportionate representation of black women as defendants in dispossession proceedings, eviction records cluster low-income renters of color in run-down, unhealthy neighborhoods, perpetuating segregation, which in turn compounds poverty.<sup>76</sup>

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69. Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8, at 119.

70. In addition, if a renter has negative information relating to an order of possession on her record, the record can not only “make securing replacement housing difficult, but also can adversely affect the tenant’s ability to secure employment, insurance, or other business opportunities.” Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. MARSHALL L. REV. 407, 416 (2007).

71. Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8, at 118.

72. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 69 (2016) (citing Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227 (2015)).

73. Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8, at 118.

74. This includes living on the street, in the shelter system, or doubled up with other families. “Eviction is a leading cause of homelessness.” Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, *supra* note 22, at 4; *see also*, *Providing Legal Counsel for Low-Income Eligible Tenants Who are Subject to Eviction, Ejection or Foreclosure Proceedings: Hearing on Bill 214-a Before the Courts & Legal Serv. Comm.*, 2016 Leg. Sess. 15–19 (N.Y.C. 2016) (statement of New York City Councilmember Vanessa Gibson), <http://legistar.council.nyc.gov/View.ashx?M=F&ID=4731727&GUID=660697C6-51CE-4F4F-BF5B-9199129AFECA> (“Many studies have shown that a tenant with legal counsel will increase their chance of winning their case in Housing Court, of staying in their home, and *staying out of the expensive shelter system.*”) (emphasis added).

75. STOUT RISIUS ROSS, INC., *THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A 3–4* (2016), [http://www2.nycbar.org/pdf/report/uploads/SRR\\_Report\\_Financial\\_Cost\\_and\\_Benefits\\_of\\_Establishing\\_a\\_Right\\_to\\_Counsel\\_in\\_Eviction\\_Proceedings.pdf](http://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf) (citing Housing Help Program; Homelessness Prevention Pilot Final Report (June 2010)).

76. *See* Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373–74 (1989). The authors note, “A high level of segregation on any one of these dimensions [evenness, exposure, clustering, centralization, and concentration] is problematic because it isolates a minority group from amenities, opportunities, and resources that affect social and economic well-being. . . . As high levels of

### III. EVICTION AND THE HEALTH AND WELL-BEING OF TENANTS

*“The connection between the health and dwelling of the population is the most important one that exists.” —Florence Nightingale<sup>77</sup>*

There is a well-documented, clear connection between the quality of the home environment and residents’ health outcomes.<sup>78</sup> The majority of Americans spend nearly 90% of their time indoors.<sup>79</sup> For young children, whose underdeveloped nervous systems, immune systems, and overall bodies make them particularly vulnerable to environmental health hazards,<sup>80</sup> the percentage of time spent in the home is even greater.<sup>81</sup> For this reason, conditions within the home are of critical importance.

#### *A. Physical Health Outcomes*

Inadequate housing is a public health crisis.<sup>82</sup> Substandard housing contains indoor health hazards, such as dust (lead, particulate matter, mold, pet and pest allergens, insects), gas (cigarette smoke, radon, carbon monoxide), water (moisture and polluted sources), and structural deficiencies.<sup>83</sup> These hazards contribute to a variety of poor health conditions, including asthma, lead poisoning, elevated blood pressure, developmental delays, heart disease, and exposure to communicable diseases.<sup>84</sup> Lead poisoning and respiratory illness

segregation accumulate across dimensions, the deleterious effects of segregation multiply because isolation intensifies.” *Id.* at 373.

77. Letter from Florence Nightingale to Robert Lowe (May 10, 1860), in 5 THE COLLECTED WORKS OF FLORENCE NIGHTINGALE, FLORENCE NIGHTINGALE ON SOCIETY AND POLITICS, PHILOSOPHY, SCIENCE, EDUCATION AND LITERATURE 96, 98 (Lynn McDonald ed., 2003).

78. See Bashir, *supra* note 1, at 733; Beck et al., *supra* note 9, at 834.

79. ROBERT WOOD JOHNSON FOUND., HOUSING AND HEALTH, EXPLORING SOC. DETERMINANTS HEALTH 1 (May 2011).

80. HEALTH JUSTICE PROJECT, THE PROBLEM OF INDOOR ENVIRONMENTAL HEALTH HAZARDS 1 (2014), [http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/The%20Problem%20of%20Indoor%20Environmental%20Hazards%20HJP%20\\_%20HHHCI%20FINAL.pdf](http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/The%20Problem%20of%20Indoor%20Environmental%20Hazards%20HJP%20_%20HHHCI%20FINAL.pdf) [hereinafter INDOOR ENVIRONMENTAL HEALTH HAZARDS].

81. *Id.*

82. See Bashir, *supra* note 1; HEALTH JUSTICE PROJECT, BARRIER TO HEALTH: ASTHMA, [http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/policy\\_barriers\\_asthma.pdf](http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/policy_barriers_asthma.pdf) (last visited Nov. 4, 2016) (discussing how asthma is caused and exacerbated by the presence of dust mites, bacteria, animal dander, cockroaches, rodents, and mold results in oxygen depletion and how oxygen depletion has long-term negative effects on child development behavior and academic achievement); see also HEALTH JUSTICE PROJECT, BARRIER TO HEALTH: LEAD, [http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/policy\\_barriers\\_lead\\_poisoning.pdf](http://luc.edu/media/lucedu/law/centers/healthlaw/pdfs/hjp/policy_barriers_lead_poisoning.pdf) (last visited Nov. 4, 2016) (discussing how lead poisoning damages the developing brain and nervous system, which results in learning disabilities, behavioral problems, developmental delay, seizure, coma, and death).

83. HEALTH JUSTICE PROJECT, INDOOR ENVIRONMENTAL HEALTH HAZARDS, *supra* note 80, at 1–2.

84. See Bashir, *supra* note 1, at 733 (noting that there is a “harmful association of asthma, neurological damage, malnutrition, stunted growth, accidents, and injury with household triggers like poor insulation, combustion appliances, cockroach and rodent infestation, dust mites, hyper- and hypothermia, unaffordable rent, and dangerous levels of lead in soil and household paint”); Beck et al.,

illustrate the profound adverse consequences of exposure to these hazards for residents.

Exposure to lead-contaminated paint, water, soil, and lead dust causes lead poisoning, which results in negative consequences on most major bodily systems, including the cardiovascular, reproductive, immune, nervous, digestive, kidney, and renal systems.<sup>85</sup> This biological and neurological damage affects cognition, behavior, bodily functions, growth, and development. Even low levels of exposure to lead hazards can cause brain damage, reduced IQ, diminished intellectual and academic abilities, academic failure, juvenile delinquency, developmental delay, and learning disabilities.<sup>86</sup> The Centers for Disease Control and Prevention (CDC) estimates that each blood lead level increase of one microgram/deciliter results in a loss in lifetime productivity ranging from \$3,000 to nearly \$8,000.<sup>87</sup> At high levels, lead exposure can result in coma and even death.<sup>88</sup>

Poor housing conditions also affect respiratory health. The growth and spread of allergens is affected by “water leaks, poor ventilation, dirty carpets and pest infestation.”<sup>89</sup> These conditions lead to the proliferation of mold and mites within the home, which, in turn, cause and exacerbate asthma.<sup>90</sup> The prevalence of substandard housing conditions is so severe that 44.4% of all diagnoses of asthma among older children and adolescents are attributable to residential risk factors.<sup>91</sup>

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*supra* note 9; see also Diana Becker Cutts et al., *US Housing Insecurity and the Health of Very Young Children*, 101 AM. J. PUB. HEALTH 1508, 1508 (2011).

85. NAT’L TOXICOLOGY PROGRAM, HEALTH EFFECTS OF LOW-LEVEL LEAD xviii–xix (2012), <https://ntp.niehs.nih.gov/pubhealth/hat/noms/lead/index.html>.

86. Bruce P. Lanphear et al., *Cognitive Deficits Associated with Blood Lead Concentrations <10 pg/dL in US Children and Adolescents*, 115 PUB. HEALTH REP. 521, 526–28 (2000); Bruce P. Lanphear et al., *Low-Level Environmental Lead Exposure and Children’s Intellectual Function: An International Pooled Analysis*, 113 ENVTL. HEALTH PERSP. 894, 897–98 (2005); Letter from Sheela Sathyanarayana, Chair, Children’s Health Prot. Advisory Comm., to Gina McCarthy, Administrator, Env’t Prot. Agency (Jan. 8, 2015), [https://www.epa.gov/sites/production/files/2015-01/documents/naaqs\\_for\\_lead\\_letter.pdf](https://www.epa.gov/sites/production/files/2015-01/documents/naaqs_for_lead_letter.pdf) (noting that at a blood lead level of 0.1 µg/dL, lead poisoning was associated with a one-point IQ loss, as well as other neurological and health and developmental harms).

87. CTR. FOR DISEASE CONTROL & PREVENTION, CDC’S HEALTHY HOMES/LEAD POISONING PREVENTION PROGRAM 1 (Feb. 4, 2013), [https://www.cdc.gov/nceh/information/program\\_factsheets/lead\\_program\\_overview.pdf](https://www.cdc.gov/nceh/information/program_factsheets/lead_program_overview.pdf) (stating that “[i]n 2010, more than [twelve] million U.S. children had levels above this threshold, and it is estimated that they will suffer a \$45 to \$99 billion loss in lifetime productivity associated with this exposure.”).

88. AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, ED-324–135, THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS 1 (1988), <https://stacks.cdc.gov/view/cdc/13238>.

89. ROBERT WOOD JOHNSON FOUND., WHERE WE LIVE MATTERS FOR OUR HEALTH: THE LINKS BETWEEN HOUSING AND HEALTH 2 (Sept. 2008), <http://www.commissiononhealth.org/PDF/e6244e9e-f630-4285-9ad7-16016dd7e493/Issue%20Brief%20%20Sept%2008%20%20Housing%20and%20Health.pdf>.

90. *Id.*

91. Bruce Lanphear et al., *Contribution of Residential Exposures to Asthma in US Children and Adolescents*, 107 PEDIATRICS 1, 1 (2001), <http://pediatrics.aappublications.org/content/pediatrics/107/6/e98.full.pdf>.

In addition to mold and mites, radon and asbestos negatively affect respiratory health. It is estimated that “one in [fifteen] homes has elevated radon levels,” which are associated with lung cancer.<sup>92</sup> Exposure to certain organic compounds and asbestos is associated with poor respiratory health and certain cancers.<sup>93</sup>

Examining the relationship between substandard housing and negative health outcomes, such as lead poisoning and respiratory illness, reveals that the burden of unhealthy housing falls disproportionately on low-income people of color<sup>94</sup> and exacerbates health disparities. Compared to their white peers, black children are three times more likely to have elevated blood lead levels.<sup>95</sup> According to the U.S. Department of Health and Human Services Office of Minority Health, the rate of asthma-related deaths is significantly higher among black Americans than their white peers; between 2012 and 2014, the asthma-related mortality rate among black children was *ten times* higher than non-Hispanic white children.<sup>96</sup>

Individuals and families without other options are forced to enter the shelter system or live on the streets. Like poor housing quality, the negative health effects of homelessness are particularly severe for children. Those whose mothers were homeless during pregnancy but who were housed after birth were 20% more likely to have been hospitalized compared to children who were never homeless.<sup>97</sup> Those who experienced homelessness during infancy or toddler years were 22% more likely to be hospitalized compared to children who were never homeless.<sup>98</sup> Finally, those whose mothers were homeless during pregnancy and who experienced homelessness after birth were 41% more likely to be hospitalized compared to children who were never homeless.<sup>99</sup>

The consequences of exposure to substandard housing conditions are far-reaching,<sup>100</sup> linked to negative health outcomes later in life. Longitudinal studies have found that inadequate housing during childhood is connected to disability

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92. ROBERT WOOD JOHNSON FOUND., *supra* note 89, at 2.

93. *Id.*

94. *See* Fukuzawa & Karnas, *supra* note 13.

95. CTR. FOR DISEASE CONTROL & PREVENTION, *supra* note 87, at 1.

96. *Asthma and African Americans*, U.S. DEP'T OF HEALTH & HUM. SERV. OFF. OF MINORITY HEALTH (May 9, 2016), <http://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=15> (emphasis added). Research also shows that “[b]lack children are [four] times more likely to be admitted to the hospital for asthma, as compared to non-Hispanic white children.” *Id.*

97. Megan Sandel et al., *Housing as a Health Care Investment: Affordable Housing Supports Children's Health* 1 (2016), <http://www.childrenshealthwatch.org/wp-content/uploads/Housing-as-a-Health-Care-Investment.pdf>.

98. *Id.*

99. *Id.*

100. *See generally* CLAUDIA COULTON ET AL., LEVERAGING INTEGRATED DATA SYSTEMS TO EXAMINE THE EFFECT OF HOUSING AND NEIGHBORHOOD CONDITIONS ON KINDERGARTEN READINESS (2016), [http://povertycenter.case.edu/wp-content/uploads/2016/04/Coulton\\_et\\_all\\_2016\\_Leveraging\\_Integrated\\_Data.pdf](http://povertycenter.case.edu/wp-content/uploads/2016/04/Coulton_et_all_2016_Leveraging_Integrated_Data.pdf) (finding that poor housing conditions negatively affect children's educational outcomes).

development and increased mortality.<sup>101</sup> These negative health outcomes, in turn, affect an individual's ability to learn, work, and participate fully in society.

### *B. Behavioral Health Outcomes*

The consequences of poor housing conditions are not limited to physical health outcomes; they affect behavioral and emotional health as well. Among various housing characteristics, “poor housing quality [is] the most consistent and strongest predictor of emotional and behavioral problems in low-income children and youth.”<sup>102</sup> For example, childhood lead poisoning can result in behavioral health issues such as depression, anger, anxiety, and ADHD.<sup>103</sup> Adults are not immune to the behavioral health consequences of poor housing conditions. Housing problems, such as inadequate heat, dampness, noise, and disrepair, are associated with increased anxiety and depression.<sup>104</sup>

Furthermore, unstable housing, a reality for tenants stigmatized by involvement in eviction proceedings, leads to depression, anxiety, and, in children, diminished functioning.<sup>105</sup> To avoid entering the shelter system or living on the street, many families must “double up,” wherein multiple families occupy a space meant for fewer people. Overcrowding negatively affects children's ability to cope with stress, maintain healthy social relationships, and sleep.<sup>106</sup> The stress of inadequate housing can cause permanent, harmful changes in brain function, which are linked to chronic conditions later in life.<sup>107</sup>

## IV. EXISTING LAW AND THE NEGATIVE HEALTH OUTCOMES OF EVICTION

*Chronic illness forced Ms. Jones to quit her job and apply for Social Security Disability Income (SSDI). While waiting for her SSDI to be approved, Ms. Jones*

101. James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 759 (2002), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1447157/>.

102. REBEKAH LEVINE COLEY ET AL., MACARTHUR FOUND., POOR QUALITY HOUSING IS TIED TO CHILDREN'S EMOTIONAL AND BEHAVIORAL PROBLEMS 1 (2013), [https://www.macfound.org/media/files/HHM\\_Policy\\_Research\\_Brief\\_-\\_Sept\\_2013.pdf](https://www.macfound.org/media/files/HHM_Policy_Research_Brief_-_Sept_2013.pdf). Further, “Children exposed to homes with leaking roofs, broken windows, rodents, nonfunctioning heaters or stoves, peeling paint, exposed wiring, or unsafe or unclean environments experienced greater emotional and behavioral problems.” *Id.* at 2.

103. *Lead in Kids' Blood Linked with Behavioral and Emotional Problems*, NAT'L INST. OF HEALTH (June 30 2014), <https://www.nih.gov/news-events/news-releases/lead-kids-blood-linked-behavioral-emotional-problems>; see also CTR. FOR DISEASE CONTROL & PREVENTION, EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 4–5 (2015), [https://www.cdc.gov/nceh/lead/publications/educational\\_interventions\\_children\\_affected\\_by\\_lead.pdf](https://www.cdc.gov/nceh/lead/publications/educational_interventions_children_affected_by_lead.pdf).

104. Matt Barnes, et al., *People Living in Bad Housing Numbers and Health Impacts*, NATCEN (Aug. 2013) 8, [https://england.shelter.org.uk/professional\\_resources/policy\\_and\\_research/policy\\_library\\_folder/people\\_living\\_in\\_bad\\_housing\\_-\\_numbers\\_and\\_health\\_impacts](https://england.shelter.org.uk/professional_resources/policy_and_research/policy_library_folder/people_living_in_bad_housing_-_numbers_and_health_impacts).

105. *Id.*

106. Cutts et al., *supra* note 84.

107. See MEGAN SANDEL ET AL., MACARTHUR FOUND., COMPOUNDING STRESS: THE TIMING AND DURATION EFFECTS OF HOMELESSNESS ON CHILDREN'S HEALTH 1 (2015), [http://media.wix.com/ugd/19cfbe\\_07b13c8e56a14337a316e2e991aa0bf7.pdf](http://media.wix.com/ugd/19cfbe_07b13c8e56a14337a316e2e991aa0bf7.pdf).



*fell behind on rent and was evicted from her home. With an eviction on her record, the only housing Ms. Jones could secure for herself and her young son was in a dilapidated neighborhood. After moving into the home, Ms. Jones's vibrant son became despondent and stopped meeting developmental milestones. Testing revealed he was severely poisoned from exposure to lead paint in the home. Her son's blood lead level was so high that he required chelation treatment. Child Protective Services intervened and secured a Section 8 voucher for the family. However, despite the steady rental income provided by SSDI and the Section 8 voucher, Ms. Jones's eviction record prevented her from securing healthy replacement housing. Her son was exposed to lead at four more homes, spiking his blood lead levels and causing permanent neurological damage and developmental delay.<sup>108</sup>*

Existing legal remedies are insufficient to protect tenants from the negative health consequences of having an eviction record. Current law must be understood within the context of the First Amendment, which governs information contained in, and distributed through, tenant screening reports. The First Amendment promotes judicial openness. However, open access may be tempered by compelling privacy interests. Within this framework, current protections include limiting initial disclosure of eviction proceedings, sealing eviction records, promoting accuracy of information as well as limiting the time frame of disclosure under the Fair Credit Reporting Act, and regulating the information landlords may consider when evaluating prospective tenants. These protections fail to adequately safeguard tenants, and prevent individuals with a record of eviction proceedings from achieving health equity. Instead, tenants are relegated to unhealthy housing and denied entry to programs created to help the very people who are excluded.<sup>109</sup>

#### *A. First Amendment Considerations: Judicial Openness and Compelling Privacy Interests*

Access to, and dissemination of, tenant screening reports raises two considerations under the First Amendment. The first inquiry regards access and the right of third parties, such as tenant-screening companies, to obtain information regarding eviction proceedings. The courts have repeatedly iterated that, pursuant to the First Amendment, there is a presumption of judicial openness in criminal court proceedings.<sup>110</sup> While the Supreme Court has not

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108. Health Justice Project Client Interview (Jan. 2016) (on file with author).

109. Section 8 of the Housing Act of 1937 was created to provide rental assistance to low-income tenants. 42 U.S.C. § 1437f(a) (West 2013). Local housing authorities, which administer the Section 8 program using HUD funds, may deny applications if the tenant has an eviction on her record. *See generally, Housing Authority v. Lamothe*, 627 A.2d 367, 371 (Conn. 1993) (stating that an eviction judgment “could have [a] lasting negative impact upon [a tenant’s] ability to be eligible for low income subsidized housing.”).

110. Ellis, III, *supra* note 15, at 945 (suggesting that “although the Supreme Court has not specifically extended this First Amendment right of public access to civil proceedings, a number of

directly extended this right to civil proceedings, several circuit courts have done so.<sup>111</sup> This openness has two components: (1) “the right of access to trials themselves” and (2) “the right of access to judicial documents for inspection and copying.”<sup>112</sup> Public access to judicial documents is entrenched in the American legal system, predating even the Constitution.<sup>113</sup> Courts have articulated several grounds in support of this presumption, including assuring fair proceedings, protecting informed criticism of government affairs and officials, enhancing the public’s understanding of, and confidence in, the legal system, and serving as a check on the judicial process.<sup>114</sup>

The second inquiry concerns the right to free speech raised by the distribution of information gathered from judicial records, which is directly implicated by the sale of tenant screening reports. The California legislature encountered this issue when it passed a law in 1982 preventing consumer credit reporting agencies from disseminating reports that included information about “[u]nlawful detainer actions, where the person against whom the action was filed was adjudged the prevailing party,” when the report concerned the rental of a dwelling unit under one thousand dollars a month.<sup>115</sup> In a 1995 case finding the law unconstitutional, the California Court of Appeals stated that a concern for tenants “does 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.”<sup>116</sup>

In determining that the First Amendment protects the public’s right to search and access filed records, the California Court of Appeals stated “[t]he information is in the custody of the state. If the state is concerned about dissemination of this information, it has the power to control its initial release.”<sup>117</sup> In making this recommendation, the court relied on the Supreme Court’s reasoning in *The Florida Star v. B.J.F.*,<sup>118</sup> which stated that the government may classify certain information to prevent its release; doing so does not violate the First Amendment.<sup>119</sup>

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circuit courts have done so.”); *see also Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 596 (1982) (stating, “The right to access to criminal trials in particular is properly afforded protection by the First Amendment both because such trials have historically been open to the process and public and because such right of access plays a particularly significant role in the functioning of the judicial process and the government as a whole.”).

111. Ellis, III, *supra* note 15, at 944 (noting that several circuit courts have found “that the same considerations of experiences and logic apply equally in the civil and criminal contexts”).

112. Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 785 (2012).

113. *Id.* at 785-86.

114. Peter W. Martin, *Online Access to Court Records: From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 857-58 (2008).

115. S.B. 1406, 1981-82 Leg., Reg. Sess., ch. 1127, § 4 (Cal. 1982) (codified as amended at Cal. Civ. Code §1785.13(a)(4) (1982)), *invalidated by* U.D. Registry, Inc. v. State, 40 Cal. Rptr. 2d 228 (Cal. Ct. App. 1995).

116. U.D. Registry, Inc., 40 Cal. Rptr. 2d at 232.

117. *Id.*

118. 491 U.S. 524 (1989).

119. *Id.* at 534.

More recently, in March 2016, the Washington legislature passed a law giving courts the ability to limit dissemination of unlawful detainer actions. Under the law, the court may enter an order preventing dissemination if (1) “the court finds that the plaintiff’s case was sufficiently without basis in fact or law”; (2) “the tenancy was reinstated”; or (3) “other good cause exists for limiting” access to “the unlawful detainer action.”<sup>120</sup> When such an order is entered, a tenant screening company may not disclose the existence of the eviction action in a tenant screening report or use the eviction action as a factor in determining any score or recommendation of a tenant’s fitness.<sup>121</sup> Signed by the governor on March 29, 2016, the law went into effect on June 9, 2016.<sup>122</sup>

Washington’s law is similar to the California law deemed unconstitutional in 1995. Both laws limit the dissemination of lawfully obtained, truthful information, gathered from court records.<sup>123</sup> The legislative history of the Washington law does not include a discussion of First Amendment issues.<sup>124</sup> It remains to be seen whether credit reporting agencies will challenge the validity of the law and, if so, whether a Washington court will reach the same conclusion as its California counterpart.

Although courts have emphasized the importance of First Amendment rights with regard to judicial records, such rights are not absolute.<sup>125</sup> Access to judicial records is tempered by compelling privacy interests.<sup>126</sup> Scholars and courts alike note this tension between transparency and privacy.<sup>127</sup> While there is a presumption of judicial access, courts recognize that, in certain cases, privacy interests are paramount. For example, cases involving minor children, divorce proceedings, and judicial bypass are commonly restricted from public access.<sup>128</sup>

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120. S.B. 6413, 64th Leg., Reg. Sess. (Wash. 2016), <http://lawfilesex.leg.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/Senate/6413.SL.pdf>.

121. *Id.*

122. *Id.*

123. *Id.* Like California, Washington’s statute does not expressly prevent tenant screening companies from accessing information. Rather, it prohibits dissemination of the information.

124. Concerns about the proposed language were limited to the definition of tenant screening report. (“This bill defines screening report so precisely that no screening report will qualify. Many credit reports are structured as pass/fail as opposed to containing detailed information.”) S. 64–6413, Reg. Sess., at 3 (Wash. 2016), <http://lawfilesex.leg.wa.gov/biennium/201516/Pdf/Bill%20Reports/Senate/6413%20SBA%20FI%2016.pdf>.

125. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 590 (1978).

126. *See U.D. Registry, Inc. v. State*, 40 Cal. Rptr. 2d 228, 232 (Cal. Ct. App. 1995).

127. *See, e.g., U.D. Registry, Inc.*, 40 Cal. Rptr. 2d at 229 (finding that “[t]he tension here is between the First Amendment right to free speech and the Legislature’s desire to protect prospective tenants by limiting the information a credit agency may report regarding a tenant’s involvement in unlawful detainer actions.”). *See generally* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137 (2002).

128. *See generally*, Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CT. L. REV. 158, (2009) (“In December 2007, to address general concerns about privacy and confidentiality of information in the context of the new system of electronic court records, the Judicial Conference adopted amendments to the Federal Rules of Procedure. The new rules establish general prohibitions on of filing certain types of sensitive information in court records, such as social security numbers, taxpayer identification numbers, birth dates, names of minor children, and financial account numbers.”).

### *B. Limiting Initial Disclosure: California's Second Approach*

In 1991 California passed another law regulating information contained in tenant screening reports.<sup>129</sup> Similar to the court's future recommendation in *U.D. Registry*, policymakers sought to delay initial disclosure of eviction records. Under the 1991 law, eviction records were not publicly available "until [thirty] days following the date the complaint [was] filed."<sup>130</sup> The law was later amended to extend the non-disclosure period to sixty days,<sup>131</sup> and to permanently prohibit third-party access if the *defendant* "prevail[ed] in the action within [sixty] days of the filing of the complaint."<sup>132</sup>

While California's law limiting initial disclosure was an important step, it was insufficient to protect innocent tenants from the negative health consequences of an eviction record. By placing the burden of prevailing on the tenant, rather than the landlord, the law created a chilling effect on the pursuit of justice; it disincentivized tenants from pursuing meritorious defenses for fear that it may take more than sixty days to prevail. A tenant was similarly penalized if court delays caused the eviction to require more than sixty days to complete. The law also failed to protect tenants from "zombie lawsuits" that resulted when a landlord and tenant resolved the underlying issue but the landlord failed to dismiss the case. As discussed below, the California legislature amended the law in 2016 to address these issues.

### *C. Limiting Access After Entry of Judgment: Sealing and Expunging Eviction Records*

In an effort to limit the dissemination of court records, many jurisdictions have processes to seal or expunge eviction records. When a record is sealed, it is "unavailable to the public."<sup>133</sup> Some eviction courts are "afforded the power to seal their records when interests of privacy outweigh the public's right to know."<sup>134</sup> Unlike sealing, when a record is expunged, it is eliminated from the record; it is as if it never existed.<sup>135</sup>

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129. S.B. 892, 1991–92 Leg., Reg. Sess., ch. 1007 (Cal. 1991) (codified as amended at Cal. Civ. Proc. Code § 1161.2 (1992)).

130. *Id.*

131. See S.B. 236, 1993–94 Leg., Reg. Sess., ch. 1191, § 3 (Cal. 1993).

132. S.B. 345, 2003–04 Leg., Reg. Sess., ch. 787, § 2 (Cal. 2003). See also Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1366–67 (2007).

133. Nicola J. Pangonis, *Criminal Records: Sealing and Expungement*, in MASS. CONTINUING LEGAL EDUC., CRIME AND CONSEQUENCES: THE COLLATERAL EFFECTS OF CRIMINAL CONDUCT § 18.2.1 (2013).

134. *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983) (citing *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); see also *In Re Halkin*, 598 F.2d 176, 190–92 (D.C. Cir. 1979), *overruled by* *E.E.O.C v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406 (D.C. Cir. 1996); *Ottaway Newspapers, Inc. v. Appeals Court*, 362 N.E.2d 1189, 1196 n.16 (Mass. 1977).

135. Pangonis, *supra* note 133.

Certain jurisdictions, for example, prevent access to eviction records brought in connection to a foreclosure proceeding. In Illinois, eviction actions brought against a tenant pursuant to a foreclosure are mandatorily placed under seal.<sup>136</sup> Likewise, in Minnesota, the court must expunge eviction records “filed by the foreclosing mortgagee or contract for deed canceling vendor if the court finds that the defendant vacated before commencement of the eviction action, or a did not receive a proper lease termination notice.”<sup>137</sup> That these evictions are automatically placed under seal or expunged demonstrates policymakers’ awareness of the threat eviction records pose to tenants’ ability to secure safe housing.

However, more commonly, courts merely have discretion, rather than a mandate, to limit access to an eviction action unrelated to a foreclosure. For example, a court may decide to place the case under seal if the landlord’s action is without basis in law or fact, placing the seal under file is clearly within the interests of justice, and those interests are not outweighed by the public’s interest in accessing the record.<sup>138</sup> In other jurisdictions, courts use the same criteria to decide whether to expunge eviction records.<sup>139</sup>

The court’s powers to seal or expunge fail to adequately protect tenants in eviction proceedings. By their very nature, sealing and expunging the record occur after a case has been filed. In Chicago, for example, where eviction is a summary proceeding, an eviction case may take weeks before a judgment is entered, and longer if a tenant exercises her right to hire or consult an attorney, elects to have a jury trial, or files any pre-trial motions.<sup>140</sup> This means that tenant screening companies have ample opportunity to collect data about the tenant while the case is pending. Even if the tenant prevails and the court grants her motion to seal the record, it is too late. She is already “in the system,” and will face the aforementioned challenges in renting an apartment. This leads to a second inadequacy. Perversely, this system creates a disincentive for tenants to exercise their rights: better for a tenant to resolve the case quickly and hope the judge will grant a motion to seal or expunge than to vindicate her rights and risk a company collecting her information.

In practice, judges do not raise the issue of sealing or expunging the record when a tenant prevails. Attorneys may move to limit access to the record, but the

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136. 735 ILL. COMP. STAT. ANN. 5/9-121(c) (West 2013); 735 ILL. COMP. STAT. ANN. 5/15-1701(h)(6) (West 2013).

137. LAWRENCE MCDONOUGH, RESIDENTIAL EVICTION DEFENSE IN MINNESOTA 318 (Sept. 2015), [http://povertylaw.homestead.com/files/Reading/Residential\\_Eviction\\_Defense\\_in\\_Minnesota.pdf](http://povertylaw.homestead.com/files/Reading/Residential_Eviction_Defense_in_Minnesota.pdf).

138. *See generally* 735 ILL. COMP. STAT. ANN. 5/9-121(b) (West 2013) (Illinois’ statute exemplifies the approach to discretionary sealing taken by some jurisdictions.).

139. *See generally* MINN. STAT. ANN. § 484.014 Subdiv. 2 (2015).

140. In Chicago eviction court, tenants always have the option to proceed to trial the first day the day the case is called. However, if a tenant elects to exercise various rights, the trial will be delayed. For example, under 735 ILL. COMP. STAT. ANN. 5/9-108 (West 2013), a tenant may demand a trial by jury. In practice, once this motion is granted, the case will be transferred to a different courtroom, thereby extending the duration of the eviction action. Similarly, if the tenant makes a motion to quash services of summons under 735 ILL. COMP. STAT. ANN. 5/2-301 (West 2013), the court will proceed by first holding a hearing on the motion. If the motion fails, then the court will move forward on the eviction hearing. *Id.*

motions are not always granted. However, even if motions to seal or expunge were granted in all cases in which a tenant prevailed, it would not be enough to protect tenants from the negative health consequences of eviction. Tenant screening companies collect information about eviction filings on a daily basis. If the record is sealed or expunged after the fact, the tenant is likely already blacklisted and will incur attendant health consequences. Therefore, legislatures must consider alternative policy measures to protect the health interests of tenants named in eviction proceedings.

#### *D. Regulating Tenant Screening Companies: Federal and State Approaches*

Federal and state laws regulate information collection and reporting by tenant screening companies. The federal Fair Credit Reporting Act (FCRA)<sup>141</sup> governs “the collection, assembly, and use of consumer information and provides the framework for credit reporting in the United States.”<sup>142</sup> FCRA was enacted to accomplish three goals: “(1) prevent the misuse of sensitive consumer information by limiting recipients to those who have a legitimate need for it; (2) improve the accuracy and integrity of consumer reports; and (3) promote the efficiency of the nation’s banking and consumer credit systems.”<sup>143</sup>

Tenant screening reports utilized by landlords to evaluate a rental application are governed by the FCRA.<sup>144</sup> The FCRA permits the use of tenant screening reports,<sup>145</sup> but it requires that landlords who take an “adverse action” (i.e. deny a rental application) provide a notice to the tenant that includes information about the credit screening agency that supplied the consumer information, a statement that the agency supplying the information did not make the decision to deny the tenant’s rental application, and notice of the tenant’s right to dispute accuracy and/or completeness of information provided by the tenant-screening company, as well as the tenant’s right to a free report.<sup>146</sup> Under the FCRA, civil suits, such as dispossession actions, may be reported for up to “seven years or until the governing statute of limitations has expired, whichever is the longer period.”<sup>147</sup>

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141. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012).

142. FED. TRADE COMM’N, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT 1 (2011), <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/110720fcrrareport.pdf>.

143. *Id.*

144. See FED. TRADE COMM’N, USING CONSUMER REPORTS: WHAT LANDLORDS NEED TO KNOW (2001), <https://www.ftc.gov/system/files/documents/plain-language/bus49-using-consumer-reports-what-landlords-need-know.pdf>.

145. Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(3)(F)(i) (“[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other: . . . otherwise has a legitimate business need for the information . . . in connection with a business transaction that is initiated by the consumer”). See also FED. TRADE COMM’N, *supra* note 142, at 48 (“A landlord has a permissible purpose to obtain a consumer report on a consumer who applies to rent an apartment”).

146. FED. TRADE COMM’N, *supra* note 142, at 2.

147. Fair Credit Reporting Act, 15 U.S.C. § 1681c(a)(2).

Like other jurisdictions, Minnesota incorporates elements of the FCRA into state law. Under Minnesota law, a tenant may request information directly from a tenant screening company, at which point the company must disclose “the nature and substance of all information in its files on the individual at the time of the request; and. . . the sources of the information.”<sup>148</sup> If “information in a residential tenant report has been used within the past 30 days to deny the rental or increase the security deposit or rent” of that individual, then the tenant screening company must provide this disclosure free of charge.<sup>149</sup> Like federal law, the Minnesota law requires tenant screening companies to investigate and correct inaccurate information identified by the tenant.<sup>150</sup>

While federal and state law provide some relief for tenants whose credit reports contain erroneous information, it is not enough to protect tenants from the downward spiral sparked by an eviction record. First, much like pro se defendants, who experience the greatest degree of due process violations during an eviction hearing, low-income tenants are the least equipped to navigate the process of correcting a credit or tenant screening report. Thus, the tenants most vulnerable to erroneous information are the most likely to be harmed by it.<sup>151</sup> Information contained in a disclosure can be confusing and omit key information such as rental scores and recommendations.<sup>152</sup> In addition, even if a tenant is able to successfully engage in the process, correcting her report may take months or even years. During the interim, the tenant will be blacklisted with few options other than dangerous and unhealthy housing. In an effort to protect against this,

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148. MINN. STAT. ANN. § 504B.241 Subdiv. 1(a) (2015).

149. *Id.* § 504B.241 Subdiv. 1(b).

150. *Id.* § 504B.241 Subdiv. 2. If reinvestigation by the tenant screening company does not lead to resolution, the company must allow the individual to “explain any eviction report or any disputed item not resolved by reinvestigation in a residential tenant report.” *Id.* § 504B.241 Subdiv. 3.

151. Kleysteuber, *supra* note 132, at 1366–67 (2007) (“But even if the FCRA’s provisions were universally understood and followed, the Act would still fall short as a solution to the problems posed by tenant-screening reports. First, the FCRA’s approach is inefficient because errors are corrected on an ex post, item-by-item basis. Tenant-screening agencies have little or no incentive to avoid accurate but misleading items because enforcement is rare and punitive damages are largely unavailable. Furthermore, many tenants—especially poorer tenants—may lack the time, skills, documentation, or other resources needed to correct their files, suggesting that these tenant-screening reports would contain an above-optimal level of error, concentrated in the population that stands to suffer the most as a result. Second, the accuracy remedy does nothing to solve the problem of abuse; a landlord can still strong-arm a tenant into submission simply by filing a (frivolous) lawsuit, branding someone a ‘problem tenant’ without any evidence.”) (citations omitted). *Cf.* Bobby Allyn, *How the Careless Errors of Credit Reporting Agencies are Ruining People’s Lives*, WASH. POST (Sept. 8, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/09/08/how-the-careless-errors-of-credit-reporting-agencies-are-ruining-peoples-lives/?utm\\_term=.ca42ff736385](https://www.washingtonpost.com/posteverything/wp/2016/09/08/how-the-careless-errors-of-credit-reporting-agencies-are-ruining-peoples-lives/?utm_term=.ca42ff736385) (wherein the author recounts his own experience with incorrect information on his credit report affecting his ability to enter into a rental agreement. As the author notes, “A case of mistaken identity, I thought, should be easy to clear up. I was wrong. It took more than a dozen phone calls, the handiwork of a county court clerk and six weeks to solve the problem. And that was only after I contacted the company’s communications department as a journalist.”).

152. A superior court in King County, Washington, however, recently ruled that a tenant screening company must “disclose rental scores, recommendations, and related information in consumer files upon request.” *Handlin v. On-Site Manager, Inc.*, No. 13-2-39897-4 KNT, 2016 WL 4702599, at \*4 (Wash. Super., Aug. 31, 2016).

Minnesota recently updated its Supreme Court Rules to require agencies that purchase bulk data from their courts, such as tenant screening companies, to regularly update their databases.<sup>153</sup>

Finally, for tenants with properly entered orders of possession, the FCRA's seven-year time frame for reports can lead to seven years of substandard housing conditions and their attendant negative health consequences. In contrast, some jurisdictions allow convictions for certain felonies, including theft, forgery, and possession of controlled substances, among others, to be sealed three years after the most recent sentence, provided there has been no contact with the criminal justice system during that time.<sup>154</sup> That certain felony convictions are eligible to be sealed in less than half the time of eviction court records is a failure of the law to adequately protect tenants from harm. This discrepancy also demonstrates how the FCRA fails to contemplate that the circumstances of tenants may have changed during the seven-year period; an eviction for non-payment of rent in year one does not by itself accurately predict whether the tenant will be delinquent on rental payments in a future year.

### *E. Regulating Landlords: The Oregon Approach*

While many jurisdictions focus on access to, and dissemination of, eviction records, others approach the issue by directly regulating landlords. To limit the negative ramifications of a record of eviction proceedings on a tenant's future rental prospects, Oregon law expressly limits what information a landlord may use when evaluating a prospective tenant. Oregon landlords may not consider an eviction action if the tenant prevailed or if judgment was entered five or more years before the tenant applies for housing.<sup>155</sup>

Oregon's limitation of what a landlord can use in a rental evaluation provides important protections for tenants. However, the statute raises questions about enforcement and the ability of landlords to legally circumvent the purpose of the law. Oregon law iterates several lawful reasons a landlord may reject a prospective tenant. These include justifications based on rental information, such as negative reports from references or an unacceptable or insufficient rental history, financial information, such as insufficient income or negative credit history, and failure to meet other written criteria.<sup>156</sup> A tenant who has been haled into eviction court is likely to have negative or incomplete references. If the tenant provides the name of the landlord who initiated the eviction action, the landlord will likely provide an unfavorable reference. If the tenant omits that

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153. MINN. R. PUB. ACCESS RECORDS JUDICIAL BRANCH 8(3)(b) (requiring "periodic updating of the recipient's data no less often than the state court administrator's office updates its bulk records").

154. For a detailed overview of felony convictions eligible to be sealed in Illinois, see OFFICE OF THE STATE APPELLATE DEFENDER, EXPUNGEMENT AND SEALING: A RECORD OVERVIEW (2016), <https://www.illinois.gov/osad/Expungement/Documents/Criminal%20Exp%20Guide/ExpungementSealingOverview.pdf>.

155. OR. REV. STAT. § 90.303(1).

156. OR. REV. STAT. § 90.304(2).



landlord, the tenant's application may be viewed as insufficient. If the eviction action resulted in a money judgment against the tenant, she may have negative information on her credit report. In each of these scenarios, the landlord could lawfully deny a tenant's application and rebut an allegation by the tenant that the denial is based solely on the eviction record, thereby undermining the purpose of the law.

## V. A HEALTH EQUITY APPROACH TO EVICTION RECORDS

*"Health is among the most important conditions of human life and a critically significant constituent of human capabilities which we have reason to value."*  
—Amartya Sen<sup>157</sup>

Health is central to well-being. Without health, an individual cannot completely participate in society—exercise her rights, generate wealth, contribute to her community—or reach her full potential. Health equity is achieved when “everyone has the opportunity to attain their highest level of health.”<sup>158</sup> To achieve health equity “requires valuing everyone equally with focused and ongoing societal efforts to address avoidable inequalities, historical and contemporary injustices, and the elimination of health and health care disparities.”<sup>159</sup> Elimination of disparities “cannot be accomplished without seriously addressing the underlying social determinants of health,”<sup>160</sup> “the conditions in which individuals are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life.”<sup>161</sup> Negative social determinants of health are responsible for societal inequities and inability of certain individuals to flourish.<sup>162</sup>

157. See Sen, *Why Health Equity?*, *supra* note 14, at 659, 663.

158. This framework is rooted in Amartya Sen's capabilities approach, which advocates that systems should be evaluated to ensure that people are “free to do and achieve in pursuit of whatever goals or values he or she regards as important.” Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, Presented at Columbia University (Sept. 17–19), in 82 *J. OF PHIL.* 169, 203 (1985). In contrast, Martha Nussbaum's capabilities to function framework articulates a specific list of capabilities. Martha Nussbaum, *The Tanner Lectures on Human Values: Beyond the Social Contract: Towards Global Justice* (Nov. 12 & 13, 2002, Mar. 5 & 6, 2003), [http://tannerlectures.utah.edu/\\_documents/a-to-z/n/nussbaum\\_2003.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/n/nussbaum_2003.pdf).

159. AM. PUB. HEALTH ASS'N, *BETTER HEALTH THROUGH EQUITY: CASE STUDIES IN REFRAMING PUBLIC HEALTH WORK* ii (2015) (quoting DEP'T OF HEALTH AND HUMAN SERVS., NATIONAL STAKEHOLDER STRATEGY FOR ACHIEVING HEALTH EQUITY: SECTION 1, 1, 9 (2005), [http://minorityhealth.hhs.gov/npa/files/Plans/NSS/NSS\\_05\\_Section1.pdf](http://minorityhealth.hhs.gov/npa/files/Plans/NSS/NSS_05_Section1.pdf)).

160. *Id.*

161. COMM'N ON SOC. DETERMINANTS OF HEALTH, WORLD HEALTH ORGANIZATION, *CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINANTS OF HEALTH* (2008), [http://apps.who.int/iris/bitstream/10665/43943/1/9789241563703\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/43943/1/9789241563703_eng.pdf).

162. See *generally id.* (outlining a comprehensive proposal to address social determinants of health and achieve health equity, thereby closing the health gap in a generation; doing so is predicated on three principles of action: (1) improve the conditions of daily life; (2) tackle the inequitable distribution of power, money, and resources; and (3) use empirical assessment to expand the knowledge base, develop a

The legal system affects nearly every aspect of life, and as such, has an enormous impact on an individual's health. Eviction threatens the health outcomes of tenants who are predominantly low-income minorities. Because the current system is not concerned with health outcomes, it functions to condemn tenants to substandard housing conditions where poor health is the inevitable result. To make matters worse, because many tenants are low-income, they lack resources to access primary or corrective healthcare. This creates a cycle of poverty for the tenant and her family: Eviction begets poor housing conditions, which cause poor health, affecting an individual's ability to work,<sup>163</sup> resulting in outstanding rent due to her already-low-income status, and ultimately leading the tenant and her family to face another eviction and a new downward spiral. In light of the demographics of tenant-defendants, the long-term negative consequences of eviction disproportionately affect black women and their families.<sup>164</sup>

It is clear that current dispossessory proceedings do not consider health equity implications. Tenants with a record of eviction proceedings are robbed of the ability to meaningfully search for alternative housing. Instead, they are confined to the worst, most dangerous housing stock, jeopardizing both their immediate and future opportunities. This outcome is particularly egregious for tenants who prevailed in eviction actions.

A system that allows innocent tenants and their families to be blackballed from affordable healthy housing is antithetical to justice and contributes to the reproduction of segregation and poverty. To prevent this, policymakers should adopt a health equity approach that contemplates how the system will affect an individual's ability to achieve good health.<sup>165</sup> A health equity approach assesses the effect of a policy on population health with particular consideration for vulnerable individuals. This approach also encourages policymakers to seek feedback from experts in a variety of fields, such as public health, medicine, and the sciences, to understand the potential health consequences of proposed legislation. Lawmakers already engage these disciplines on issues with a clear connection to health, e.g., healthcare reform. To achieve health equity, and in recognition of the fact that the law is a social determinant, decision makers should contemplate the health consequences of all policies, including those

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workforce that is trained in the social determinants of health, and raise public awareness of the social determinants of health).

163. This could be because her health is suffering or she must take care of a family member, such as a sick child. See, e.g., Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 8, at 105–10 (noting the constraints women face regarding work and child care).

164. See PUB. JUSTICE CTR., *supra* note 19, at 13 (finding that the typical Baltimore rent court defendant was a black woman who had at least one child).

165. This approach applies the Health Justice framework developed by Emily A. Benfer in *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity & Social Injustice*, 65 AM. U. L. REV. 275, 337 (2015) (outlining a health justice framework that “requires a regulatory and jurisprudential approach that consistently and reliably considers the health ramifications of judicial and legislative decision making”).

without an overt health nexus.<sup>166</sup> Doing so will afford individuals the opportunity to participate fully in their communities. The following recommendations exemplify an approach to eviction that contemplates health equity.

*A. Leveling the Playing Field: Representation for Tenant-Defendants*

A health equity oriented approach includes measures to ensure representation for all tenant-defendants. Unlike criminal defendants, tenant-defendants are not entitled to representation in an eviction action. Given the dearth of attorneys available to take on these cases, the majority of tenants are unable to secure an advocate. This contributes to increased due process violations and tenants pressured into signing agreed orders they may not fully understand.

A study by the Chicago Bar Association and Illinois State Bar Association found that housing was the second most common type of legal problem experienced by surveyed low-income households in Illinois.<sup>167</sup> However, despite the prevalence of these issues, these households only had legal representation for an estimated 16.4% of their legal problems.<sup>168</sup> When the study applied these findings to the population of Illinois as a whole, they concluded that low-income individuals in Illinois lacked legal assistance for more than 1.1 million legal issues each year.<sup>169</sup> In light of the rampant due process violations during eviction hearings discussed above, tenant-defendants require legal representation in order to avoid the health consequences of being named in an eviction action.

Recognizing tenant-defendant need for representation in eviction proceedings, the American Bar Association adopted a resolution urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to [low-income] persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving *shelter*,” among others.<sup>170</sup> A study commissioned by the New York City Bar Association found

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166. For an example of this approach in action, see MEGAN SANDEL ET AL., NAT’L CTR. FOR MEDICAL-LEGAL P’SHIP, THE HEALTH IMPACT ASSESSMENT (HIA) OF THE COMMONWEALTH EDISON ADVANCED METERING INFRASTRUCTURE DEPLOYMENT (Apr. 2012),

<https://skyvisionsolutions.files.wordpress.com/2015/09/health-impact-hia-of-ami.pdf>. This was a 2012 health impact assessment of utility company Commonwealth Edison’s (ComEd) Advanced Metering Infrastructure (AMI). Under AMI, ComEd can remotely connect or disconnect service and “obtain detailed customer usage on a 24/7 basis often in increments as small as 15 minutes.” Among the assessment’s findings was a determination that AMI would result in unintentional injuries and premature deaths from disconnected service.

167. MARK MARQUARDT ET AL., CHICAGO BAR ASS’N, THE LEGAL AID SAFETY NET: A REPORT ON THE NEEDS OF LOW INCOME ILLINOISANS (Feb. 2005), <http://lf.org/wp-content/uploads/2013/02/legalneeds.pdf> (estimating that 20.2% of Illinois households had housing issues).

168. *Id.*

169. *Id.*

170. AM. BAR. ASS’N TASK FORCE ON ACCESS TO CIVIL JUSTICE, ET AL., HOUSE OF DELEGATES RESOLUTION 112A 1 (Aug. 7, 2006)

[http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_06\\_A112A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06_A112A.authcheckdam.pdf) (emphasis added).

that providing counsel to tenant-defendants would enable the city to realize a benefit of \$320 million in reduced homeless shelter costs, affordable housing cost savings, and unsheltered homeless cost savings.<sup>171</sup> Implementing this program would alleviate some of the due process issues that lead to avoidable orders of judgment against tenant-defendants. For example, the New York City Council is currently reviewing a bill, which, consistent with the study, would create a right to legal counsel for “low-income tenants who are subject to eviction, ejection or foreclosure proceedings.”<sup>172</sup> Should it pass, this landmark law will be the first of its kind. Taken with other health equity approaches to eviction, availability of counsel would help to circumvent the stigma of involvement in an eviction action and negative health outcomes for low-income and minority tenants.

*B. Protecting Innocent Tenants: Disclosure Contingent Upon Judgment for the Landlord-Plaintiff*

Employing a health equity approach to eviction records requires courts to limit access to dispossession court records. Tenants who prevail must be protected from the negative health consequences of a publicly accessible eviction record. Currently California is the only jurisdiction that limits initial disclosure of eviction proceedings.<sup>173</sup>

Until September 2016, California law permitted disclosure within sixty days of filing unless the tenant-defendant prevailed.<sup>174</sup> Recognizing the burden on tenants, California recently enacted legislation amending its laws. The recent amendment instead requires the landlord-plaintiff to prevail in sixty days before a third party, such as a tenant screening company, can access eviction case records.<sup>175</sup> The amendment was introduced in light of California’s affordable housing crisis and the difficulty tenants with a record of eviction proceedings experience in obtaining housing.<sup>176</sup> While the law does not expressly consider health consequences of eviction records, there is no doubt that it will positively affect tenants’ ability to achieve health equity.

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171. STOUT RISIUS ROSS, INC., *supra* note 75, at 3.

172. N.Y. City Council, Proposed Introduction No. 214-A (N.Y. 2016), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80>. As of publication, legislation is still pending. On September 26, 2016, the bill was the subject of a hearing held by the Committee on Courts and Legal Services. See Jessica Silver Greenberg, *For Tenants Facing Eviction, New York May Guarantee a Lawyer*, N.Y. TIMES (Sept. 26, 2016),

[http://www.nytimes.com/2016/09/27/nyregion/legal-aid-tenants-in-new-york-housing-court.html?\\_r=0](http://www.nytimes.com/2016/09/27/nyregion/legal-aid-tenants-in-new-york-housing-court.html?_r=0)

173. See Assemb. B. 2819, 2015-16 Leg., Reg. Sess. (Cal. 2016).

174. CAL. CIV. PROC. CODE § 1161.2 (West 2013).

175. See Assemb. B. 2819, 2015-16 Leg., Reg. Sess. (Cal. 2016). Assembly Bill 2819 was introduced in the California Assembly by Rep. David Chiu on Feb. 19, 2016. Gov. Jerry Brown signed it into law on Sept. 13, 2016.

176. Press Release, Rep. David Chui, Governor Brown Signs Tenant Protection Measure (Sept. 13, 2016), <http://asmcd.org/members/a17/news-room/press-releases/governor-brown-signs-tenant-protection-measure> (“Governor Brown’s signature will help protect innocent tenants in California. Tenants who prevail in eviction lawsuits should not be placed wrongfully on tenant blacklists, which jeopardize their credit and undermine their chances of finding new housing.”).

Other jurisdictions must follow California's lead. Rather than placing the burden, and attendant health harms, on the tenant-defendant, eviction laws must instead require the *landlord-plaintiff* to prevail within sixty days in order to make eviction records publicly available. This shift is consistent with reasoning underlying the existing burden of proof, which requires the landlord to establish a *prima facie* case for eviction.<sup>177</sup> If other states adopt this approach, innocent tenants will be protected from the harmful consequences of an eviction record.

### *C. Protections for All: Shorten Time Limits for Reporting Eviction Records*

The ability of landlords to rely upon seven-year-old information unfairly penalizes tenants for their involvement in an unlawful detainer action.<sup>178</sup> At a minimum, eviction records should not be available for a greater period of time than certain felony convictions. This is particularly troubling in light of the fact that many agreed orders, which include an order of possession for the landlord, are entered without a complete understanding by the tenant.

Reducing time limits would also give tenants a meaningful opportunity to demonstrate to prospective landlords their ability to be successful renters. Landlords fear that eliminating information about previous eviction cases will hamper their ability to make good decisions about rental applications. However, decreasing time periods will do nothing to affect a landlord's ability to review a potential tenant's sources of income, which are a much stronger predictor for a successful tenancy than prior eviction court involvement.<sup>179</sup>

## VI. CONCLUSION

The rental housing market penalizes tenants for any involvement in the judicial eviction system, creating a negative feedback loop in which the tenant's health continually deteriorates. To break this cycle and achieve health equity, policymakers must address representation for tenant defendants and third party access to eviction records. To avoid due process violations, tenants should have access to legal counsel. Tenant screening companies must not be able to collect information about eviction proceedings unless and until a landlord prevails and

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177. Furthermore, withholding narrowly tailored information that would otherwise unfairly stigmatize persons involved, as in the case of involvement in eviction proceedings, is already deemed a necessary safeguard in other areas of law. For example, "Ban the Box" laws adopted by jurisdictions around the country eliminate questions of conviction history on job applications. *See* MICHELLE NATIVIDAD RODRIGUEZ AND BETH AVERY, NAT'L EMP'T LAW PROJECT, BAN THE BOX 1 (Oct. 2016), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

178. In some jurisdictions, this time period may be even greater than seven years. While the FCRA prohibits tenant screening companies from reporting evictions more than seven years old, individuals are not limited. For example, in Chicago, a search by name of defendant "John Smith" on [www.cookcountyclerkofcour.org](http://www.cookcountyclerkofcour.org) will produce records that are decades old. There is nothing to prevent an individual landlord from navigating to the website, conducting an electronic full case docket search, running the names of all prospective tenants, and using decades-old information to reject an applicant.

179. Allowing access to old eviction records is more prejudicial than probative. This approach does not prohibit from making informed decisions when evaluating a prospective tenant.

an order of possession is entered. Finally, there must be reasonable time limits on access to records.

Policymakers must consider how eviction is a social determinant that affects a tenant's ability to achieve her highest level of health. Failing to understand the health implications of laws perpetuates cycles of poverty and segregation, placing vulnerable populations, such as low-income, minority tenants, at risk of harm. By evaluating policies using a health equity lens, policymakers can positively affect individuals' opportunities, thereby decreasing poverty and improving community outcomes.

