Legislation Distribution I

Seidman, Robert B.

http://hdl.handle.net/2144/20677

Boston University
CHAPTER IV
VOCABULARIES

I
Chambliss and Seidman

LAW, ORDER, AND POWER (supra), pp. 55-56

Methodology, perspectives, vocabulary: these elements make up every social theory. In this chapter we discuss the various vocabularies (categories, concepts) and theoretical perspectives employed by social scientists, including lawyers, in an effort to understand and use law and the legal order. In this chapter we will also develop more fully the theoretical perspective which we believe to be the most useful and the most consistent with known facts about law and society.

The vocabulary we choose to study a phenomenon ineluctably places blinders on us. It must do this or else we see so much we cannot understand it. Like methodologies and perspectives, vocabularies guide us to relevant data. In the conventional language of theory, vocabularies in general terms identify independent variables, dependent variables, and relevant conditions correlated with the social facts we wish to describe and explain. In the language of the problem-solving methodology we earlier advanced, propositions concerning categories constitute heuristics useful in directing attention to explaining (theory).

There is a fundamental paradox in this process of developing categories and perspectives. No matter how we try, we can never make our minds blank slates. To examine requires that we use a vocabulary. To be useful a vocabulary (or categories) must help in explaining the phenomena under examination. We dare not use our existing vocabulary unexamined, or else our explanations will merely reflect our present biases. Before doing the research designed to explain the legal order, paradoxically, we must generate an explanation for it out of which to generate categories to guide the research. Accomplishing that becomes the principal task of the "ideal-type."

The ideal-type expresses what, based on present knowledge, the theorist supposes constitute the key variables, put together in a pattern whose form derives not from detailed data (for gathering the data constitutes the purpose of the research), but from logical inferences based upon preliminary excursions into the domain of study. Investigators deep in their subject create the great ideal-types, such as Hans Kelsen's model of the legal order, Max Weber's of bureaucracy, or Karl Marx's of capitalism. Such an ideal-type may, facially, prescribe a Utopia, but it may base itself explicitly or implicitly upon an explanation. That explanation, necessarily in general terms, identifies outcomes, causative factors, and conditions and specifies how these logically interact with each other. In law and society studies, ideal-types concern themselves more directly than does "grand theory" with the working of the legal order.

Consider, for example, the vocabulary suggested by H.L.A. Hart. Hart divides the law into "primary" and "secondary" rules. Plainly, that constitutes an ideal-type. Hart does not describe any particular state society when he discusses the character and function of primary and secondary rules. In his book, we find scant reference to any particular legal system. Hart argues, however, that to understand any particular legal order we must distinguish between "primary" and "secondary" rules. By primary rules Hart means those rules of law which are simultaneously addressed to the citizen and government officials (for example, the judge). A rule prohibiting the sale of heroin is addressed to the citizen and warns him or her that they may be punished if they engage in this act; this rule also tells the judge that if someone is found engaging in the sale of heroin the judge is to punish them. But, Hart argues, equally important for an understanding of the legal order are the secondary rules: these are rules addressed solely to the administrators of the law, a rule requiring that a judge conduct a trial in a certain fashion, for example.
In this chapter we consider preliminarily the criteria for an adequate set of categories to serve a legislative drafter. We then consider two different general models: The Rule of Law model, and the legal realist (or institutionalist) model. We conclude with an article examining tenant reporting agencies and law, and ask the reader to analyze these in terms of these two alternative models.

TWO CRITERIA OF AN ADEQUATE SET OF CATEGORIES

SEIDMAN AND SEIDMAN, THE LONG ROCKY ROAD TO DEVELOPMENT (Ms. in process, Chapter 8)).

1. The appropriate level of generality. Explanations express themselves at different levels of generality. One explanation for inflation in China holds that two many yuan chase too few goods - that is, that China suffers from an oversupply of money. On another level of generality, part of an explanation might say that branch bank managers make too many loans for capital projects (thus increasing the money supply). What constitutes the appropriate level of generality for explanation in problem-solving, policy-oriented social inquiry?

The appropriate level of generality of explanations depends upon the work required of them. To explain a football team's loss of a game by its failure to complete a reasonable proportion of its attempts to pass tells the coach only that he must improve the team's passing game. A football coach, however, only rhetorically coaches a "team". He works with individual players,
teaching them moves that when done simultaneously produce a coordinated team effort. To solve weaknesses in the team effort, he needs explanations that identifies which individual moves caused the team's failures to complete sufficient passes. That requires explanations of a much lower order of generality then that the team failed to complete passes: "On passing plays, the left tackle consistently missed his block", or "The quarterback consistently threw the ball behind the receiver". The sorts of proposals for solution expected determine the appropriate level of generality of explanations.

Explanations in problem-solving enquiry serve as predicates for proposals for solution. Governments solve social problems by invoking the legal order. Ultimately, that requires explanations that direct attention to the sorts of data required for a solution by way of the legal order. That requires explanations of different orders of generality.

To move towards a solution requires, in the first instance, quite general explanations. These serve to direct attention at the general part of the research domain that requires investigation -- for example, that to deal with inflation requires attention to the money supply, or that to ensure political decisions in favor of the mass requires attention to the influence of power and privilege in the halls of government. The theories that we have examined in the preceding two chapters lead to explanations of that order of generality.

Left at that order of generality, those theories usually do not help very much in devising laws appropriate to solving specific social problems. Social problems exist because various social actors in economic and political institutions engage in the repetitive patterns of social behaviors that constitute that social problem. Law moves towards the resolution of social problems by seeking to change those behaviors; in that sense, law constitutes a system of governmental social control. The theories we have examined in effect only specify more particularly the difficulty that the lawmakers must address.

Social behaviors always involve people, acting individually or in collectivities. Even when nominally addressed to collectivities ("No corporation shall. . . ") the law in fact addresses individuals -- in the case of a corporation, usually the Board of Directors responsible for corporate behavior. Social behaviors constitute the link between the existential world of behaviors, and the realm of law. That implies that before lawmakers can generate laws apt to resolve a specified difficulty, adequate problem-solving inquiry must first identify whose behaviors and what behaviors constitute the difficulty, and then look for explanations for those behaviors. Explanations more general than that will not serve. Moreover, those explanations must take as the manipulable variable the legal order itself.

2. The legal order as a "cause" of social problems. As argued earlier, behavior consists of people making choices

9 Chapter III (in connection with the Law of Non-transferability of Law).
within their milieu -- social, physical, psychological. To explain behavior requires that, to the extent that actors take them into account, we specify those constraints and resources. Proposals for solutions rest upon explanations. Its underbearer role requires that every solution take the form of a proposal for new law. That implies that part of the explanation for the difficulty must consist of the existing law. Thus the legal order always constitutes not a condition for the social problem at issue, but one of its causes.

* * * *

The notion that law constitutes a cause of problems seemingly does violence to deeply held concepts of that society creates law, and not vice versa. For example, it seems odd to say that the legal order "causes" famine. It does, in this sense: Natural disaster does not inevitably cause famine. The United States, for example, from time to time suffers drought as severe as that which attacks the Sahel. In the Sahel, hundreds of thousands people die as the result of the famine. Not so in the United States. The difference lies in those places's different institutions. In the Sahel, in the face of drought, the institutions that permit specialization and exchange have not developed very far. If peasants cannot grow their own crops, they starve. In the United States those institutions have reached a high degree of sophistication. If farmers cannot grow crops in one area, those institutions bring in crops from other places to sell. In the face of drought, farmers in drought-afflicted areas may go broke, but they rarely starve.

Law has a systematic relationship to social institutions. Institutions consist of repetitive patterns of behavior. People act by making choices within their milieu. For example, railroads interconnect practically every part of the United States, but hardly touch most parts of the Sahel. Railroads got built in the United States because their builders made choices within their milieus -- which included laws favorable to building railroads (as well as a considerable amount of graft and corruption). They did not get built in the Sahel in part because no such laws existed there. Because railroads do not exist in the Sahel, when drought occurs, suppliers elsewhere have difficulty in shipping food to the Sahel. Farmers there do not receive food to substitute for their ravaged crops, and they starve. In the United States farmers do receive food, and they do not starve. Famine results because of the different institutions in each place, and those institutions exist in part because of the legal order within which the relevant actors chose. In that sense, law causes famine.

That is not to say, of course, that law constitutes the sole cause of behavior -- it never does, any more than either physical

10 Dee Brown, Hear that Lonesome Whistle Blow. By law, the federal government gave about 1/10th of the United States land area to railroad builders in exchange for railroads.
conditions, psychological makeup or social institutions ever constitute the sole cause of behavior. People make their choices -- they behave -- by choosing in the light of geographic conditions, social institutions, their psychological makeup -- and the legal order. The legal order "causes" social behaviors only in conjunction with the other constraints and resources of the actor's milieu, just as any one of those constraints and resources "causes" behavior only in conjunction with all the others.

Specification of whose and what behavior constitutes the social problem, and explanations for that behavior that includes the legal order as one among the causes of the behavior at issue: These constitute two criteria for an adequate explanation to predicate law's underbearer role. To generate adequate explanations for behavior in the face of a law, however, requires more than a statement of the law itself. It requires proposing and testing other explanations for the behavior at issue. That requires a set of categories as the basis for generating appropriate middle-level propositions.

II
THE VOCABULARY OF CLASSICAL LIBERALISM AND MODERN-DAY LEGAL PROCESS THEORIES

CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER (Supra, pp. 57 et seq.)

3.1 THE RULE OF LAW

One of the most lasting conceptions of law and the legal order is summarized under the concept the "Rule of Law." Scholars, lawyers, politicians, and laypersons alike have employed this perspective on the legal order for centuries. The "ideal-type" assumed by this model sees the law as a set of rules, norms, and institutionalized processes which function to create predictable, comprehensible rules that limit the discretion of state officials. This perspective on the law emerged in England during those centuries when England's political economy was undergoing a transition from feudalism to capitalism.

Late eighteenth- and early nineteenth-century England saw a dramatic conflict between the older landed gentry and the newer entrepreneurial classes. The former struggling to maintain its hold on state power, the latter trying to dislodge it. At stake lay command over the English economy and the use of state power to bolster directly and indirectly the one class or the other.

The English common law courts developed out of the continuing struggle between the Crown and the great feudatories. Under feudal constitutional law, a feudatory had in effect his own government and his own courts; the power to govern came with the land. The Crown early tried to eat away that jurisdiction by sending the king's judges into the countryside to try cases on a winner-takes-all basis. The substantive law they applied purported to arise from custom, not from the Crown's will. For example, while primogeniture (inheritance of property by the eldest son) prevailed for distributing a dead person's estate, in those parts of England that followed the custom called gavelkind, courts distributed property equally to the deceased's children. The judges purported to apply not laws that they invented, but only customary norms. As a body of decisions accumulated, judges came to follow not the statements of witnesses about the content of the custom, but what the earlier, precedent cases declared it to be. Even legislation at first took its force from the claim that it only embodied custom, as the rules concerning the overseas reach of British law demonstrates.

English law declared that Englishmen colonizing overseas—for Britain, the world's greatest empire, an important occupation—carried their law with them as a
birthright. That law, however, did not include all the law of England, but only part of it: the common law. "and all statutes in affirmation of the common law passed in England, antecedent to the settlement of a colony..."

As we discuss in greater detail below, courts that decide cases by "applying" rules must in some cases create law. Some fact situations fall clearly either within or without a rule. Some, however, fall within the rule's gray areas, in which reasonable lawyers disagree about whether the rule properly subsumes the facts. In deciding whether the rule does or does not control the case, the court in effect must rewrite the rule, expanding it a bit to include the troublesome facts within its embrace, or contracting it to exclude them. To that extent, courts inevitably make new law.

In undertaking this task, the common-law judges wavered between two alternative theories. On the one hand, the common-law judges (at least until the middle of the nineteenth century) perceived themselves in the aristocratic tradition. The common law, they said, resided in their breasts; they announced it from time to time and usually made few bones about their creative role. On the other, they sometimes denied that they created law. Purporting to enforce custom, they readily attributed any change in the law to the slow transformation of social values and standards. To warrant the title of custom, a norm must embody the custom of "all-of-us." In common-law theory, custom and law become the resultant of community determination. It assumed that society had a common set of values, manifested in its common choice of norms. It perceived law not as the molder of society or creator of institutions, but as a newly institutionalized form of norms earlier developed in society's bosom.

The notion that courts did not create norms, but merely enforced "the custom of the realm" conformed nicely to the emerging theme of contract as the principal form of economic cooperation. In feudal England, economic cooperation rested upon customary institutions, upheld by state power. The serf had certain obligations to the owner of the manor, the vassal, to his lord. These obligations ensured that the economy would function and extract the surplus for the benefit of the feudatories. They ensured that the serfs would perform the labor upon which the whole edifice rested.

The Mercantilists aimed at amassing in their own country the greatest possible amount of wealth. The privilege-ridden mercantilist legal ardor made it difficult to estimate how courts and the state would deal with investment, contracts, and property—and above all else, businesswomen must calculate what might happen to their enterprise.

In the sixteenth century, feudalism was in rapid decline. The mercantilist theory was rapidly coming to dominate political and economic thought and practice.

The Mercantilists aimed at amassing in their own country the greatest possible amount of treasure. To this end Navigation Acts attempted to confine trade to English ships so that the navy could be kept strong. Bounties were paid to exporters of corn since corn exports were held to encourage agriculture and to bring in treasure and home industries were protected with tariffs. This was the theory held by the Government and the bourgeoisie in England right up to the Industrial Revolution.

By the eighteenth century, English feudalism had long since died. Britain lay gripped by a mercantilist economy and an aristocratic constitution. State power supported and created an economy in which privilege received a monopoly position. The legal order served the interests of the landed gentry, who governed the countryside as justices of the peace and controlled the tight London circles of Parliament and government.

Meanwhile, in the very heart of mercantilism, new forms of enterprise arose. British and Scotch mechanics began the spate of invention that created the Industrial Revolution. New people, both canny and daring, saw vast opportunities for profits in manufacturing and selling goods. In an unplanned economy, commodity exchange rests upon each economic actress trying to seize her chance as she perceives it. Contracts replaced feudal custom as the economy's glue. Employers hired employees; importers sold to wholesalers; wholesalers to retailers, retailers to consumers, suppliers to manufacturers. Entrepreneurs entered upon large undertakings with one another, based upon their agreement to cooperate in specified ways.

Contract became the legal form of a free-market economy. Mercantilism denied the free market. The form of law associated with mercantilism made contract law—the law of the free market—difficult. The privilege-ridden mercantilist legal ardor made it difficult to estimate how courts and the state would deal with investment, contracts, and property—and above all else, businesswomen must calculate what might happen to their enterprise.

New philosophies arose to express the world views of the new free-market economy entrepreneurs. In economics, Adam Smith explained the relative wealth of nations (why some nations were rich and others poor) by the free market: those nations with free-market economies encouraged invention and productivity, those with other economic forms discouraged these developments. It followed therefore that England was by rights wealthy and Asia poor, for example. In philosophy, jurisprudence, and law, Jeremy Bentham created a theoretical perspective that resonated easily with Adam Smith's daring new notions of the value of laissez-faire capitalism. Bentham argued that people were motivated by an overwhelming concern to maximize pleasure and minimize pain. In law these ideas translated into a utilitarian philosophy in which the state's responsibility was to see that undesirable behavior was swiftly, certainly, and severely punished while desirable behavior was rewarded by the acquisition of material wealth. These new social theories implied a legal order that located economic decisions in the heads of entrepreneurs. Contract law embodied its typical modality. Contracts embody the operative norms of capitalist economic life. From the law businessmen demanded the exclusive power to determine those norms and the law's subsequent aid in enforcing them. (See Chapter 4 for an elaboration on contract law in capitalist society.) That called for a legal order whose courts served mainly to decide conflicts over the performance of bargains, in which entrepreneurs (or their lawyers for them) could predict the decision with reasonable certainty. To do that, a court had to treat those who appeared before it as formally equal, for it would not serve the cause of predictability if the well-born could expect the court's favor for no better reason than the blueness of their blood. A court had to decide pursuant to rules well known in advance, without the intrusion of the judge's personal values; it would not do to make every case depend upon what the particular judge ate for breakfast. A court had to require government officials, too, to act only pursuant to rules that made their behavior...
predictable. The capitalist dreamed of a static legal world, whose courts decided cases like computers, and legislation had no role. In one of the several ideologies of the common law, the bourgeois jurisprudents found a congenial set of norms prescribing how courts ought to behave. In laissez-faire ideologies of the law, the common-law courts became the very core of the legal order.

Nowadays we call such a legal order the "rule of law." The rule of law arose out of the demands of the new entrepreneurial classes for a form of state power commensurate with laissez-faire that would so far as possible endow them with power and that would discipline bureaucrats not to interfere with that power. All the usual attributes of the rule of law resonate with that conception, e.g., judicial independence, narrow discretion, equality before the law, due process, and judicial review of administrative action.

So stated, the ideology of the rule of law constitutes a normative model, a statement, not of how things are, but of how they ought to be. Such ideologies easily fall prey to the normative fallacy, the belief that they describe how things actually are. So with the rule of law: many people fondly believe that we have a society in which the rule of law operates, with at best minor aberrations. Whether the rule of law actually describes the legal order, or whether it in fact mystifies it and why, becomes a central issue for an adequate study of law and society.

The rule of law, moreover, readily fits a consensus model. That model argues that every society has a particular set of values, upon which practically all its members agree. If people do share basic values, then a democratic state must represent that consensus. The only legal problem becomes one of ensuring that individuals do not substitute their own deviant motivations for the values of the polity. A common variant of the consensus perspective holds that, although the polity of course contains conflict, the state itself does not take sides. No matter how antagonistic the contending classes or strata, on this much they must agree, that the peaceful settlement of conflict serves all-of-us better than violence. In this view, the state represents all-of-us, but only for the limited purpose of containing conflict. Every specific law or activity of the state carries its burden of values, but the machinery by which the state comes to the decision to create and enforce any particular law operates impartially.

The rule of law theory par excellence embodies this variant of the consensus model. Its strictures aim at ensuring the value-neutrality of the state machinery. Under the value-neutral state's benign aegis, people (read entrepreneurs) can work out their own destiny, permitting the invisible hand of the market to determine the best allocation of goods and services, made possible by the perfect predictability ensured by the value-neutral state and the rule of law.

In jurisprudence, the dominant school in this tradition became that of analytical positivism; in sociology, that of Max Weber. Here we discuss Weber's theory of law.

Universalistic Rules, Autonomous Legal System, and Legalistic Reasoning

Max Weber wanted to explain why industrial capitalism arose in the West, but not elsewhere. He sought to relate his concept of the unique characteristics of western European law to the rise of nineteenth-century capitalism. A system where profit maximization makes each other's enemy seems opposed to technological demands for cooperation. Exchange through markets resolves this tension. Every bargain accommodates these two disparate forces. From the actor's point of view the exchange brings control over resources. If a party withdraws from a bargain it loses its purpose. Custom loses power and cannot ensure the calculability demanded by modern entrepreneurs. A legal order becomes necessary to enforce agreed-upon bargains. That legal order rests upon three pillars: an autonomous legal system, universalistic rules, and legalistic reasoning. The very notion of a market economy, open to every person, requires sanctions pursuant to universalistic rules that apply to all similar transactions. Market bargains define the norms of economic interchange, within the framework of the general rules of property, tort, and criminal law. Courts sanction violations of these rules. Calculability requires a system where each actor can discover what law will apply in a particular situation. He can discover such rules only under publicly known procedures for determining the law, adhered to by judges who exercise little discretion. That condition presupposes that judges (and lawyers) can find the rules by logical processes—that is, that the law exists as a "seamless web" and that if gaps seem to exist, sources within the legal order can fill them. This system of law-finding we call "legalistic." Its great expression in the English jurisprudence became analytical positivism.

Weber thus defined the ideal-type of capitalistic law. In Weber's view, "legalism supported the development of capitalism by providing a stable and predictable atmosphere; capitalism encouraged legalism because the bourgeoisie were aware of their own need for this type of governmental structure." How well do its categories serve to study law and society in our century?

As we have already argued with respect to the category of an autonomous legal system (Chapter 1), the concept of universalistic rules requires that we ignore most of the law of social administration in favor of lawyers' law. That entails a value-judgment in favor of those solutions which lawyers' law serves—i.e., solutions consistent with an extreme version of laissez-faire. No government in the real world accepts so narrow a limitation upon its powers. If we want to study what governments in fact do, we must adopt categories adapted to studying not only lawyers' law, but also the law of social administration. As a category, universalistic rules read too narrowly.

Legalistic reasoning as a category of study too cannot serve, but for another reason: it does not exist any place except in some jurisprudents' heaven. Judges cannot decide "trouble" cases solely with materials drawn from the universe of norms. The law is not a gapless web.

How would Weber's categories explain the failure of antidiscrimination laws? How would it explain the failure of academic women to receive much comfort from Title VII? His model suggests that laws' failure must result from a legal system insufficiently autonomous, or legal reasoning insufficiently legalistic. He argued that legal rationality worked best when both monopoly power and social interests were weak. Rational legality was undermined by particularistic demands characteristic of democratic governments or governments in societies where one class possessed a
virtual monopoly of power. A rule permitting its addressee great discretion in deciding how to obey does not fit the model of universalistic rules, because it in fact consists not of one prescription for action applicable to everybody equally, but a delegation of power to the authority holder to act with little regard for any particular rule. Title VII permits universities unlimited discretion in deciding the criteria for employment, promotion, and tenure. Its only injunction states a negative: the university may not give adverse weight to the gender of the applicant. By leaving the rest of the criteria for employment decisions in the university’s discretion, however, Title VII creates wide opportunities for discrimination to lurk behind the impenetrable fog of subjective and discretionary criteria.

Weber’s theory does not lack interest, but it does not go very far. The solution that it suggests—more narrowly drawn rules, which limit the criteria officials such as university administrators may use in deciding cases—may defy accomplishment. In any event, plainly a multitude of factors, not merely the rules, affect behavior. The explanation for the legal orders’ behavior cannot lie in the rules themselves, but must lie in the interweaving of rules and these other factors. Because Weber’s categories point us away from behavior to the texts of the positive laws, they cannot serve to solve existential problems of law and society. That domain requires us to consider constantly the tension between the law-in-the-books and the law-in-action. With their emphasis on legalism, Weber’s categories point us away from the law-in-action.

Like the rule of law model generally, the Weberian categories impose a strong ideological bias upon law and society investigations. Those categories impose a pre-cut pattern upon the range of potential explanations and hence of potential solutions. They require us to ask only the narrow question: what will serve to develop or strengthen a legal order appropriate to a market-oriented, privately controlled, laissez-faire economy? It will not do to study today’s world of monopoly capitalism, multinational corporations, state corporations, and social administration.
Resonating with the dictates of classical economics, liberalism provides a normative basis for a political system. Liberal economic theory asserts that an economic system by definition becomes "efficient" when the uses of the available resources constitutes a best fit with consumer dollar-backed demand. Given the assumptions a free market, that can only occur when entrepreneurs make economic choices without interferences from outside the market -- especially, state interferences. Generalizing from that economic perspective, "freedom" becomes freedom from state interferences.

In liberal theory, people create state structures in order to carry on certain collective tasks -- law and order, taxes, war, and so forth. That required that the state empower officials to do those tasks. That raised the central problem of government: How to ensure that these officials acted pursuant to the will of "the people", and not the demands of their own selfish interests, or the claims and demands of faction? First, liberalism devised a means to ensure that the rules that endowed government with power would represent the will of "the people". It rested upon the assumption that "the government intends to serve mass interests even if, in practice, it does not always do that."¹ To ensure that, liberalism relied on the Enlightenment notion that adequate state institutions embodied in a constitution: competitive elections, and parliamentary institutions.² Second, liberalism

¹ Carnoy, p. '11.
² Since in the reigning positivist mode only individuals could value their own preferences, only the law created by a democratically-elected, majoritarian government could represent the greatest good for the greatest number as perceived by the subjects of the law. (C.B. Macpherson, The Life and Times of Liberal Democracy (London: OUP, 1977) 26-27) The laws that emerged represented the summed values of the individuals who comprised the body politic, and government by the consent of the governed explained the legitimacy of the liberal state.

To sire the liberal state, utilitarianism married happily with Adam Smith's "night-watchman" ideal of state functions. As the principal difficulty, classical and neoclassical capitalist theory explicitly focussed on inefficiency (that is, a bad fit between the demands of consumers and the use of economic resources) and, as its principal cause, identified government interference with the market's Invisible Hand. That generated a definition of "freedom" as freedom from government intervention. From that philosophers generalized to a theory of individual autonomy, in which the important unit for understanding society became the autonomous, free-willed individual, aspects of whose life "ought to be immune from (coercive) interference by others and, above all, state interference." (Andrew Levine, Liberal Democracy: A Critique of its Theory (New York: Col. UP, 1981) 1.
devised a means to ensure that government officials acted only within the law. Power tends to corrupt, and absolute power corrupts absolutely, said Lord Bryce, summing up the liberal explanation for failed governments. Power corrupts both electoral majorities and officials alike. Good institutions -- especially, bills of right and limited governmental powers enforced by an independent judiciary -- can police the boundaries of power.

As a philosophy of government, liberalism spoke in the language of rights. It assumed that the world consists of "free" individuals endowed with certain sphere of autonomy embodied in a set of "natural" (i.e., pre-political) rights. The state has the function of protecting those rights, by ensuring that institutional mechanisms exist that protect them and to permit individuals to pursue their interests. It counts among those natural rights the right to hold private property. A central function of the state becomes to protect private property, and to provide a neutral framework through which these rights-bearing, free individuals can interact -- that is, the market. Law's role consists of constraining the state and facilitating the functioning of the market. Law is "facilitative of human desires", which liberalism perceives as pre-political rather than "simply reflective of the existing organization of economic and political power."3

The electoral process consisted of a means by which the majority used state power to impose their views on a minority. Most people, however, obeyed the law without the constant overt threat of fine or imprisonment. Consensus theories argued that society held agreed-upon values; laws represented that consensus; only a deviant (that is, a person insufﬁciently socialized into the common morality), violated the law; against a deviant, the

That perception had an uneasy relationship with utilitarianism. It resonated easily with utilitarianism's notion that people counted equally, and the consequent formula that equated the public interest with the majority interest. A Catch 22, however, haunted majoritarian systems: The majority of autonomous individuals might decide upon a use of governmental power that invaded the autonomy of the minority. The theory of the liberal state explained that potential invasion by a positivist epistemology that identiﬁed policy choices with tastes. It viewed the political process, not as a matter of rational persuasion, but "the mobilization of bias" -- and the biases of the majority might well invade the autonomy of the minority. By erecting constitutional and other barriers to guard the boundaries of private right from intrusion by public power, liberal theory sought to erect guarantees against these impermissible invasions. It explained the frequent overturning of those barriers not by the frailty of the institutions created to police them (mainly courts), but by the wealth-maximizing propensities of government officials.

state properly used coercion. That made short work of explaining why people obeyed the law: If the law represents the values and attitudes of all-of-us, then of course all-of-us obey it.

****

Liberal theory promised that government and state policy would respond to the claims and demands of the majority of the electorate. After three decades of independence, the Third World reality did not conform to that promise. Pluralism and Marxism (and, more recently in the United States, public choice theory) arose to explain why societies generally did not fulfill the democratic promises of liberal theory. All asserted that behind the fancy phrases of liberalism, not the public interest but the parochial claims of class and faction moved governments. All have found scholarly exponents.

The prevailing American orthodoxy, pluralism, in the early years of independence provided the most widely-accepted answer to the question posed by liberalism's failures. It argued that the United States had

"...a pluralist democracy in which competing interest groups and the public at large define public policy. The State is seen as a neutral arena of debate. Elected representatives and appointed bureaucrats lead but simultaneously reflect public wishes, at least for that public which is interested in the issues at hand. And although the State bureaucracy may develop a life of its own, the general public assumes that, through elections, it has ultimate power over government decisions."4

Society's many interest groups each has their own elite. These elites bargain with each other; the outcome constitutes the State's policies.

In this view, the State is an empty vessel: "For pluralists, the State is neutral, an 'empty slate,' and still a servant of the citizenry -- of the electorate -- but the common good is defined as a set of empirical decisions that do not necessarily reflect the will of the majority."5 The neutral state corresponds to the minimal value-consensus to which pluralism still clung. Despite the conflicts in society, all right-thinking people agreed at least that society must continue. That required a neutral state to contain conflict, and to determine which conflicting view would emerge as public choice. Just as in economic life state interferences in bargaining made efficiency impossible, so state interference in the bargaining between elites resulted in outcomes that did not genuinely reflect the power balances between the various interest groups those elites represented.

4 Carnoy, at 9.
5 Carnoy, p.37.
In an article concerning law and development in the Third World, its authors proposed a model of what they perceived as the then-reigning paradigm of law in the First World (in fact, it had wide popularity only in the United States):

"(1) 'Society is made up of individuals, intermediate groups in which individuals voluntarily organize themselves, and the state. The state is the primary locus of supra-individual control in society.' (2) 'The state exercises its control over the individual through law -- bodies of rules that are addressed universally to all individuals similarly situated [and]...by which the state itself is consciously constrained.' (3) 'Rules are consciously designed to achieve social purposes or effectuate basic social principles... Those purposes are the those of society as a whole, not of limited groups within it. Rules are made through a pluralist process...[in which no] single groups...dominates in the process of formulation of legal rules, and no special characteristics of individuals or groups...gives them systematic advantage or disadvantages in rule making.' (4) 'These rules are enforced equally for all citizens, and in a fashion that achieves the purposes for which they are consciously designed.' (5) 'The courts have the principal responsibility for defining the effect of legal rules and concepts...and thus normally have the final say in defining the social meaning of the laws.' (6)

The outcome of adjudication is determined by 'an autonomous body of learning,' not by policies relevant to legal rules or by other considerations. (7)'The behavior of social actors tends to conform to the rules.'"\n
NOTES AND QUESTIONS

1. Vocabulary determines what variables we take into account in proposing explanations, and therefore what solutions we consider. What variables does this "legal process" version propose we take into account in doing research to explain social problems in a way likely to lead to useful legislative solutions? What problems does its use compel its adherents to address?


III
THE INSTITUTIONALIST MODEL OF A LEGAL ORDER

Legal positivism focussed on the rules of law, and ascribed behavioral consequences to the rules alone. As their great contribution to jurisprudence, sociological jurisprudence and their heirs-at-law, the American Legal Realists, discovered that behavior in the face of a rule of law depended on much more than the rules themselves. On the model suggested in the following excerpt all the legatees of the realists would likely agree.¹

CHAMBLISS AND SEIDMAN, LAW, ORDER AND POWER
(Supra, pp. 74 et seq.)

Other concepts employed by practically everyone who has studied the relationships between law and society incorporate a sociological vocabulary: role, position, norm, institutions, power, conflict, interaction. We will discuss those various concepts in turn.

Sociological inquiry often begins by describing people in terms of the positions they hold in society: Father, Mother, Sister, Judge, Professor, Derelict, Thief, Lathe-operator, Carpenter, Churchmember, Atheist, Political Activist, etc. The observed regularities of the position, i.e., its content, arise because the persons who occupy it fulfill a complex of obligations and exercise a complex of rights associated with the position. These "rights" and "obligations" may differ from the rights and

¹ Does this statement hold without exception? Consider the objections to the instrumental use of law discussed in Chapter I

2. As discussed in the Introduction to these Readings, an adequate discussion of legislation ought to include issues of power, of substance, and of expression. Which of these does the Rule of Law model primarily address? How would you summarize its instructions to a drafter on how to justify the substance of her bill?
obligations that lawyers customarily associate with the terms "right" and "duty," for most of them do not derive from the state's edict. One may have an "obligation" to surrender his seat in a train to an elderly person, but in most places the state will not punish you if you do not. Hence, this "obligation" does not comprise a legal duty. The complex of obligations that define a social position we denote collectively as its role and the equivalent complex of rights, its status.

These obligations and rights find their definition in prescriptive rules called norms. These have varying degrees of articulation. Relatively little precision defines the position of Father, although children may let their Father know unmistakably when he acts in a way that to them seems to violate his role. (Act your age, Daddy!) Other norms, such as some embodied in law, have highly explicit contents.

Human societies exhibit a high degree of regularity of behaviors. We denote any regular behavior by people in various positions as an institution. A university in this view constitutes an institution because it consists of many people—administrators, students, teaching staff, clerks, secretaries, and many others—all behaving in particular, repetitive patterns.

Animal and insect societies, too, exhibit a high degree of regularity of behavior. The human condition, however, differs from that of the lower orders. People have consciousness, with which they can create and shape their institutions, their material conditions, and their ideology. The intricate interactions of an ant colony or a beehive, like those of a prairie dog village, rest mainly on the instinctive reactions of natural and social stimuli. To understand the structure of human societies, however, to explain human behavior, we must deal with the symbolic conscious forces that accompany human action. "Consciousness" and "ideology," then, are concepts (categories) essential for our analysis.

One can ask a wide range of questions about norms and social structure: what constitutes the content of the norms and how relevant do they seem to the tasks which people perform? To what extent are the norms institutionalized, that is, to what extent do the persons in the system accept the norms, treat them seriously, and expect the norms to guide the behavior of others? How are norms sanctioned? To what extent are they articulated? How closely does one's actions match the expectations of those concerned? To what extent do the consequences of compliance with the norm match the anticipations of the persons affected?

As one consequence of the normative system, action manifests consciousness and consciousness manifests action. Norms reflect the subjective, internal conceptions that human beings hold, about how people occupying certain positions ought to act. They state the role-expectation for the position. Role-performance refers to how people in fact act, either in pursuit of the norms defining the position or, deviantly, in defiance of the norms.

The rules of law constitute a particular order of norms. Like all norms, they define how people or collectivities ought to act. Some, like the laws against murder, address everyone. Some, like traffic laws, address only a particular category of persons (automobile drivers). Others apply to very specific positions (such as the laws that define the role of the president of the United States). Still others address collectivities (corporation law). The commands of Title VII, requiring universities not to discriminate on the basis of sex in employment decisions, address university faculties, administrators, and trustees. All constitute norms.

They also constitute laws. All the rules that laymen call "law"—statutes, case law, administrative regulations—constitute norms. To understand how these function, we must understand three central "law-jobs": law creation, sanctions, and dispute-settlement. In a centralized state, the state or its agencies create these norms. Every society has as one of its law-jobs the creation of rules of law, the principal task of legislatures, appellate courts, and administrative agencies.

Second, besides understanding the creation of the norms and the determination of their content, we must also understand the enforcement of the norms—their accompanying sanctions. In a centralized state, state authority enforces most (but not
necessarily all) rules of law. If one violates a criminal law, the initiative of a state official (the policeman or the prosecutor) sets the sanctioning system into motion and other state officials (the jailer) actually inflict the punishment. If one violates other sorts of law—e.g., one forbidding negligent automobile driving—one may become liable for damages at the behest of the injured party, who can enlist state power to enforce the judgment. Under Title VII, a woman against whom a university discriminates has the right to ask a federal district court for an order requiring the university to "make her whole" by giving her the job she would have had but for the unlawful discrimination and to pay her back pay to recompense her for any losses occasioned by the discrimination. That order has behind it the federal court's contempt powers, and behind that a gaggle of armed people—sheriffs, jailers, the National Guard, the Army.

Thirdly, disputes arise concerning a variety of issues in connection with the normative system: the content of a norm or whether the person in question actually violated it. To resolve these conflicts, a dispute-settling machine emerges. All these various "law-jobs" constitute a set of processes: the processes of creating law, defining the content of the norms, administering the rules, settling disputes, sanctioning breach. For us, these processes constitute the legal order. Thus viewed, the legal order in a centralized state becomes more than a mere body of rules. Rather, it becomes a dynamic process involving every aspect of state action, for state action will involve at some point creation of a norm, adjudication about its content, administration, adjudication of violation, or sanctioning breach.

The Legal Order and its Components

Like every social subsystem, the legal order performs a myriad of functions; it resolves disputes, creates official norms, educates the people in certain value-sets, provides employment for a professional class, etc. In studying so complex a system comprising so many functions, to what sorts of data ought one direct attention? What categories should we use? Here we put forward a bare-bones outline of a model that we find useful.

We start from the observable fact that people make certain demands upon the bureaucratic organization that constitutes the state. They demand that the state settle disputes, perform certain services, redistribute resources, and make certain kinds of decisions. These demands lead either to the creation of new norms or to a change in the application of existing rules. Every norm, whether legal or nonlegal, aims at the activity of a role-occupant. With most norms, the sanction takes place through direct interaction between the person aggrieved by the breach of the norm in question and the role-occupant. If my children disobey me, my parental role authorizes me directly to punish them; if my employee displeases me, I can rebuke him or her or (in the absence of a union) discharge the said employee.

A relatively small group of norms, rather formal in character, have separate sanctioning institutions. Law constitutes the outstanding example. Other, law-like norms exist sanctioned by separate, although non-state bodies. As Hans Kelsen pointed out, practically every norm of law that addresses a role-occupant simultaneously commands that if the prosecutor proves to a judge that someone has committed murder, the judge shall apply a sanction. Thus the same demand by people that a rule-creating institution formulate a new norm of conduct for a citizen simultaneously demands a new norm for the rule-sanctioning agencies, instructing them to impose a sanction if someone breaches the primary norm. Thus the safety at work laws which command employers to maintain safety standards simultaneously command judges in a proper case to order the employer to remedy unsafe conditions, subject to sanctions, for contempt of court if the employer disobeys.
We can, therefore, very tentatively and very abstractly diagram the flow of demands into the legal system, their conversion by rule-making and rule-sanctioning institutions into norms, addressed both to role-occupants and to the rule-sanctioning agencies, and into sanctioning activity (see Fig. 3.1).

Every normative system induces or coerces activity. The normative system we have defined as the "legal order" uses state power to this end. Our model, therefore, suggests that demands come from various segments of the population and that the state through the legal order exercises its power to induce or coerce certain desired behavior by some set of role-occupants. In the nature of things, demands of this sort respond to the interest of those making the demands. They call for the exercise of state power to induce or coerce the desired activity because the law's addressees do not necessarily want so to act. The legal order, thus defined, becomes a system by which one part of the population uses state power to coerce another segment. It becomes a system for the exercise of state power.

The diagram in Fig. 3.1 does not purport to provide a guide for investigations into the real world. It only traces the flow of demands: demands put to the state by segments of the population, demands that rule-making institutions make upon role-occupants and upon role-sanctioning institutions. The sanctioning activity it refers to concerns the sanctioning activity the appropriate institution ought to apply. It tells us nothing about how in fact any of these various actors behave. It says nothing, for example, about who has the power to influence the state.

Law cannot succeed in its ostensible purposes of affecting the behavior of its addressees unless lawmakers can predict accurately the actual behavior of a law's addressees in the face of the rule. The law-in-action concerns behavior, what in fact takes place, not what ought to take place. How can we in general understand why people do or do not obey a rule of law? To answer that question, what general categories of data ought we to examine?

![Diagram of the flow of demands into the legal system, their conversion into norms, and into sanctioning activity.](image-url)

**Figure 3.1**
We take as our most general model of society people and collectivities making choices among all the myriad forces of their social environment, in the light of what goes on inside their heads—i.e., in the face of the ideological and material forces that make up their milieu. Every role-occupant makes an analogous choice when he obeys or disobeys a norm. Where the legal order defines the role, however, special forces exist that the law's addressee must take into account. First, the role-occupant must take into account the general respect or disrespect that other citizens may accord obedience or disobedience to the law. Universities, for example, cannot today openly discriminate against women on their faculties (as many of them did only a few short years ago) because they may lose respect and esteem (not to speak of financial support) from people who believe that a moral imperative requires obedience to law. More importantly, perhaps, where the law addresses a role, officials exist to adjudicate and enforce it. The role-occupant's arena of choice now includes among the forces that compose it the activity of officials. Since 1972, whenever universities decided whether or not to discriminate against women, they had to take into account the possibility of administrative or judicial action if they did discriminate.

We might diagram the relationships thus presented as shown in Fig. 3.2. The critical factors that a role-occupant must take into account in deciding how to behave consist of the norm addressed to him, the expected activities of law-implementing agencies and officials, and all the material and ideological factors that constitute his

![Diagram](Figure 3.2)
arena of choice. But, the lawmaking and the law-sanctioning agencies do not operate in a vacuum. They, too, consist of people—role-occupants—making choices within a milieu of material and ideological forces, including rules of law defining their positions and the activities of others.

People do not remain passive in the face of undesirable material and ideological or legal conditions. They protest, they resist, they complain, they threaten, they rebel, they revolt. Throughout history, revolution, rebellion, and opposition to the extant legal order occur everywhere. United States history is a catalog of constant rebellion, riot, revolution, and civil disorder. Even our most heavily oppressed class, slaves in the antebellum South, revolted; more than four hundred black slave revolts took place before the Civil War. As a result, the law changed, sometimes slowly, as people won small gains from those in power, sometimes radically, as they succeeded in changing not only the people who operate the levers of state power, but the very structure of the state itself. The legal basis for a contract, for crime, for land ownership changes radically in every country over the years. In our time, following revolutions, they changed radically in Algeria, Cuba, China, and the Soviet Union. Laws have no immortal existence. People make them, people change them. The operative mode by which the people bring this about we subsume under the word "feedback." This category, in turn, contains the idea of the dialectic.

In what sense can we denote Fig. 3.2 a "‘model'? We earlier argued that no single, autonomous legal system exists discontinuous with society. A vast number of specific systems, involving particular laws, bureaucracies, and feedbacks, do exist. How do the model and its existential referents relate?

Models organize thought. No matter how detailed, a physical model of an airplane only represents the airplane. It is not the airplane itself. A diagrammatic representation of the legal system affecting agriculture only represents that system. The model put forward here only represents the form of a variety of legal systems. It directs attention to particular categories of data for investigation, that is, it constitutes a heuristic, a perspective to guide discretionary choice in social inquiry. It is an agenda for research. In principle, one can test it, however, by seeing if there are instances in which significant variables not subsumed by the model do affect behavior in response to a rule of law. Testing will be facilitated, however, after closing the vague boxes labeled "arenas of choice.''

This model implies a definition of law that addresses law's function in channeling behavior. Law is a process by which government structures choice. Law as a device to structure choice expresses at once law's usual marginality in influencing behavior and its importance as the principal instrument that government has to influence behavior. Since a people's history itself determines the arena of choice in most respects, that history determines the limits on law. We can understand law only by understanding it as part of a people's history and present conditions.

The model assumes that society does not have a consensus. The arenas of choice of lawmakers, of law enforcers, and of the addressees of law do not necessarily have the same content. Lawmakers and some law enforcers come from or have close alliances with the upper ranks of society. Some laws address their equals; most address members of society with very different backgrounds. Mainly white male Congressmen wrote Title VII and in 1972 stretched it to cover women academics. Mainly white male judges enforce the law against mainly white male university administrators, at the behest of mainly white female claimants. The women claimants and the other actors plainly do not all have the same arenas of choice—i.e., the same material, social and ideological environments within which they choose and therefore act.
3.6 CONCLUSION

Analytical positivism asserted the independence of law from society. In response, sociological jurisprudence and some crude versions of Marxist jurisprudence claimed that law was merely an epiphenomenon. Neither proposition matched reality. The legal order structures society simultaneously with society's structuring of the legal order. The model we have advanced purports to explicate this complex relationship, by examining how the various actions in the system behave and analyzing that behavior in terms of constrained choice. The constraints that limit choice represent the influence of society on the legal order; the fact of choice represents the legal order's potential for influencing society.

The model depicts a deeply authoritarian legal order, where lawmakers promulgate law, enforcers implement it, and the rest of us respond to it. It assumes that the governors remain distinct from the masses of the people. That authoritarian structure, with its sharp dichotomization between we and they, between the mass and the governors, lies at the heart of the felt deficiencies of the legal order.

The model is admittedly ambiguous. The arrows that represent the arenas of choice of the several actors are no more than signposts. So open a set of residual categories must render a model nonfalsifiable. All we hope to accomplish with the model is to provide a rudimentary vocabulary and the beginnings of a theory for studying and understanding law and society.

The remainder of this book is an attempt to elaborate and complete the suggestions contained in this model. In the next chapter we look at the laws of contract and property. We intend to demonstrate with this example how our historical-sociological model helps us to understand law and the legal order. In particular we intend to open up that part of our perspective which stresses the important role of power in social and legal relationships.

NOTES AND QUESTIONS

1. What difficulty does this model purport to explain? How does it differ from the difficulty that the liberal model addressed? The pluralist model? The "liberal legalist" model of Trubek and Galanter?

2. What variables does this model instruct the researcher to take into account in seeking explanations for social behaviors? On what basis does would the author of the model assure us that no other significant variables exist not comprehended within the model?

4. Theorists frequently guard against a critical omission of the sort suggested by the use of a "residual category" -- that is, a category that says (in effect) "everything else". A theory with a residual category remains unfalsifiable. Residual categories therefore serve as a fruitful starting-point for critique of a model, both to explore its possible weaknesses, and by suggesting new, more precise categories to replace the residual one. What constitutes the residual category in the institutionalist model above?

5. How does the model deal with --
   a. Issues of power in the legislative process?
   b. Questions of the subjective beliefs of actors?
   c. Questions of class interest in determining behavior?
NOTE

TENANT BLACKLISTING: TENANT SCREENING SERVICES AND THE RIGHT TO PRIVACY

Robert R. Stauffer*

Tenant screening services use advanced computer technology to offer data on prospective tenants to landlords. Presently unregulated, these services may illegally report tenants' prior successful lawsuits against landlords and legally justified withholding of rent as well as tenants' race, religion, and intimate personal behavior.

In this Note, Robert Stauffer explores tenant screening services as they now operate, and focuses on the dangers to privacy presented by their growth. He analyzes policy concerns which militate against the practices of these services, and considers opposing arguments, such as those grounded in freedom of speech. After reviewing current law, Mr. Stauffer concludes that the existing legal framework inadequately protects the legitimate interests of tenants, and proposes a scheme of regulation applicable to tenant screening services.

Suppose that in order to find housing in our society, you had to present yourself before a large machine. This machine, in considering your application, would review your life to determine whether you were worthy of housing. It would have access to any information about you that had ever appeared in a public record; it would know if you had ever been involved in a court proceeding; it would know if you had ever been lax in paying your bills; it would know whether any of your previous landlords or neighbors thought you were too loud, or used drugs, or had disreputable friends, or were simply too radical; it would know your sex, your age, your race, your religion, and any other information which you had not succeeded in keeping completely to yourself and your closest friends. And when you asked this machine whether it would grant you a roof over your head, it would examine all of this information and immediately spit back its reply—a reply which would be negative if there were any piece of information in your history which it found disagreeable.

This Orwellian procedure for obtaining housing sounds like science fiction and hopefully will remain so. For an increasing number of Americans, however, this nightmare approaches reality. They have encountered organizations, known as tenant screening services, that compile information on tenants for use in reports to landlords. These companies function like credit bureaus: subscribing landlords submit the names of prospective tenants to the companies, and the companies notify the landlords whether any of the prospective tenants show up in their data bases.

This Note explores the propriety of tenant screening services and analyzes possible responses to their activities. It begins by examining the extent of the organizations and the nature of their practices. In doing so, it points out the ways in which modern computer technology enhances the capabilities of tenant screening services, and thus their threat. The Note then discusses policy concerns, particularly privacy issues, which militate against the practices of tenant screening services. This Note also critically reviews opposing arguments in favor of the screening services, including claims based on the First Amendment. Finally, this Note examines current law to determine whether it protects tenants against the threats posed by screening services. Finding the current legal framework inadequate to deal with these problems, this Note advocates national legislative reform and suggests specific measures which could be adopted.

I. BACKGROUND—THE GROWTH OF TENANT SCREENING SERVICES

The term "tenant screening service," as used throughout this Note, refers to a private agency that sells information about prospective tenants to landlords. Landlords either pay for each individual request or subscribe at annual rates. Many tenant screening companies offer other services as well, such as guaranteeing the rent paid by any approved tenant. Many are also part of larger consumer credit agencies, with the concomitant ability to provide information regarding an applicant's general credit history along with more specialized information dealing with the applicant's history as a tenant.

Tenant screening services originated only about a decade ago, first taking hold in the western United States. They have spread across much of the country and have been organized in every
large metropolitan areas. One of the largest is U.D. Registry ("UDR"), which has offices in Los Angeles, San Diego, and Orange County, California. UDR was established in the mid-1970's and has grown rapidly; by 1985 it had about two million records and was answering requests at the rate of one quarter of a million per year. It collects its information primarily from court records, deriving its name from the "unlawful detainer" eviction proceeding. It has been said that every tenant evicted from a Southern California apartment since 1975 is in its computer.

Although UDR is the paradigm of a local or regional company, it is by no means unique. Tenant screening services similar to UDR also operate in Texas, New Jersey, Rhode Island, and New York.

Other screening services maintain a national focus. Renters Reference of America, for example, is a large tenant reporting company that began operating in Kansas City in 1975 but has expanded into other states and provides information to large apartment management firms. Yet another type of screening service is represented by RentCheck, a division of TeleCheck Services, Inc., a large check verification firm. Although it is based in Denver, RentCheck's operation is national in scope, with offices ranging from Los Angeles to Washington, D.C., where its subscribers own seventy percent of available apartments. Nationally, it claims that its subscribers control two and one half million rental units, or about ten percent of the nation's rental housing.

TeleCheck is not the only pre-existing national organization to decide to enter the tenant screening market. Among the other credit bureaus that have recently begun to offer these services, or are reportedly planning to do so, are Equifax, Inc., TRW Credit Data, and American Service Bureau. Such organizations already maintain an immense number of files on individual tenants which are thus available for use in connection with their tenant screening functions.

Tenant screening services generally maintain at least one of three categories of information about their subjects. The first category consists of information culled from public records, particularly court records of legal disputes between landlords and tenants. Names of all tenants who are involved in legal conflicts with their landlords may be collected for storage. Many companies depend primarily on this source, because court records are easily located and conveniently placed. Most screening services, however, do no more than identify the parties involved in the case, and make no attempt to investigate the nature of the dispute or to follow the case and record its outcome.

The second category includes financial information of the kind maintained in a typical credit report. Screening services run by

---

10 See "General Explanation of the 'Tenant Credit Reporting Act,'" (background information provided by office of Rep. C. Schumér (D-N.Y.) to accompany H.R. 2525, 99th Cong., 1st Sess. (1985) (on file at Harv. L. J. on Legis.); Benson & Biering, supra note 7, at 306-07. Equifax, Inc., for example, offers a tenant report to be used along with credit reports, which includes business, domestic, employment, and rental history information. Id. at 307.

11 In 1971, a Ralph Nader study commissioned by the American Civil Liberties Union (ACLU) reported that the Association of Credit Bureaus of America kept 105 million files. J. Shattuck, Rights of Privacy 185 (1977) (quoting R. Nader, The Dossier Invades the Home, SATURDAY REVIEW, Apr. 17, 1971, at 18). By 1975, the total number of files maintained by consumer credit reporting and investigating agencies was estimated to be 200 million. See PROJECT ON PRIVACY AND DATA COLLECTION/ACLU FOUNDATION, THE FAIR CREDIT REPORTING ACT, III THE PRIVACY REPORT 1, 2 (1975) [hereinafter The Privacy Report]. In 1977, the Privacy Protection Study Commission reported that the five largest credit bureaus alone (TRW Credit Data, Trans Union, Credit Bureau, Inc., Chidton Corp.; and Credit Bureau of Greater Houston) maintained 150 million files altogether. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 53-56 (1977) [hereinafter PRIVACY COMMISSION].

12 UDR, for example, depends primarily on this source of information. See Frontline, supra note 1, at 14; Frenznick, "Tenant Check" Lists the Undesirable—and the Innocent, L.A. Times, Apr. 13, 1982, § 1, at 3, col. 1.

Tenant screening services have also been careful not to let tenants escape their networks by using false names. The information is not organized solely by name, but may be indexed in a variety of other ways. UDR founder Harvey Saltz, for instance, described UDR's method of identifying tenants: "First, it looks for a social [security number] match; then it looks for a driver's license match; then it looks for a name match; then it looks for a nickname match." Frontline, supra note 1, at 20.

13 See Frontline, supra note 1, at 15; Frenznick, supra note 12 at 3, col. 1.
traditional credit bureaus often include credit information in their tenant reports, and other screening services may offer credit reports as well. The information may include data about the subject’s bank accounts, bill-paying habits, charge accounts, creditors, occupation, income, and assets.

The third category, "lifestyle" information, is the most open-ended. It includes any kind of personal data not covered by the first two categories. Some companies obtain this information by doing their own investigations. Their methods range from employing a staff which personally gathers information from the subject’s acquaintances or other sources, to combing newspapers for any negative information about the subject. Some companies may simply purchase this information from other investigative credit bureaus. Finally, most tenant screening services accept or even request complaints about current or former tenants from their subscribing landlords. The resulting files contain information as varied as the personal concerns of the investigators or the complaining landlords, including marital status and history, other domestic relations issues, locations of past residences, property damage, loudness, types of pets, general reputation among acquaintances, political and social affiliations, and drinking and drug habits.

As tenant screening services have become more sophisticated, they have expanded the types of reports that they provide to subscribers. The organizations’ own claims best illustrate the variety of services provided. Austin Renters Research, for example, advertises that it "investigates a prospective resident’s past rental history and patterns of behavior as well as verifying their [sic] finances and employment . . . . Our report points out patterns as to promptness of rental payments, damage and collection of property, noise complaints, ‘skips,’ evictions, and collection items." The most elaborate claims, however, are those of UDR, which advertises that it investigates motor vehicle information, provides legal advice, and guarantees its results.

Tenant screening services have little incentive to check the accuracy of information which is provided to them. They exist to serve landlords, not tenants, and many landlords have enough applicants that they need not worry about the possibility that the company will falsely describe a tenant as unsatisfactory. Verifying tenant information is also much more expensive than simply collecting it. Thus most screening services take their information at face value. Harvey Saltz, who founded UDR, admits that all a landlord need do to insert false information in UDR’s data banks is “factually lie.” UDR’s safeguard, Saltz says, is that staff members omit claims they believe to be wrong or unimportant.

In the face of increasing negative publicity about tenant screening services, many screening companies claim that they

---

14 Renters Reference of America, for example, employs a full-time staff of investigators who collect information on living and behavioral habits, employment history, and financial matters. See Benson & Biering, supra note 7, at 306. See also Belluck, supra note 4, at 11, col. 4.
15 See generally A. Miller, The Assault on Privacy 69 (1971). Landlord Credit Data Service in Pawtucket, for example, keeps a computerized file of newspaper clippings containing information on Rhode Island residents in general. Belluck, supra note 4, at 11, col. 4.
16 See Frenzwick, supra note 12, at 3, col. 1; Frontline, supra note 1, at 22; Burnham, supra note 4, at 11, col. 1.
17 For descriptions of the kinds of lifestyle information kept by tenant screening services, see Belluck, supra note 4, at 11, col. 4; Benson & Biering, supra note 7, at 311; Frenzwick, supra note 12, Part 1, at 3, col. 1; Frontline, supra note 1, at 22.
are tightening their procedures and being responsive to tenants' complaints regarding inaccuracies. Renters Reference of America says it launches its own investigation in such instances, and Saltz asserts that he tries to work with every tenant who complains. RentCheck says it now limits its reports to claims of property damage and unpaid rent. Despite these claims, however, tenants continue to complain about inaccurate or misleading reports.

Landlords have not ignored the benefits of using tenant screening services. In Los Angeles, for example, the majority of landlords routinely use UDR to check on prospective tenants: UDR reportedly receives 800 to 1000 calls a day from Los Angeles landlords. Landlords also place great reliance on the information they receive from these services. Despite the accuracy problems described above, most landlords are not concerned with the nature of the information; they only wish to know if the tenant appears in the files. Landlords interviewed by the Los Angeles Times, for instance, "said they would not rent to a prospective tenant who turns up in U.D. Registry's files, regardless of what explanation the tenant gives."

Some landlords have even begun to use tenant screening services to apply pressure on existing tenants. Consider the following letter sent by a building's owner to one of its occupants:

This is to advise that we now subscribe to a service that records all filings on Unlawful Detainer actions. As this service is used by landlords, it will be impossible, in the future, to rent an apartment if you have been served a legal action. We are advising you of this, as the failure to pay your rent on time will result in your name being placed in the file, and you will be unable to secure any apartment in the future.

Thus landlords may use screening services not only to check on prospective tenants, but also to affect the behavior of existing tenants—not only to ensure prompt rent payments and responsible behavior, but also to deter tenants from pursuing legitimate legal remedies.

One of the factors that has contributed most to the profitability of tenant screening services is advanced computer technology. The development of this technology has facilitated the relatively inexpensive collection, maintenance, and organization of large quantities of information. Advanced technology allows the storage of data in quantities that were previously not profitable and permits manipulation of this data to make it easy to use. The new technology also makes it much easier for companies to share or trade information. Because storage is now cheaper, the information is rarely destroyed, resulting in an overall increase in the amount of data available. Computer banks accumulate an ever-increasing number of personal details. Increased storage capabilities, combined with increased transferability of information, also facilitate the integration of information from diverse sources, producing a more comprehensive description of the subject. One commentator has described the resulting trends as exhibiting "a principle akin to Parkinson's Law, [so that] as capacity for information-handling increases there is a tendency to engage in more extensive manipulation and analysis of recorded data, which in turn, motivates the collection of data pertaining to a larger number of variables."

The use by tenant screening services of this modern technology accounts for much of their success but also contributes to many of the concerns raised by tenants.

II. Policy Considerations

The introduction of computerized data-processing technology into the rental business, while providing a valuable service for landlords, has raised serious problems for tenants. The importance of the human need for housing, combined with the tight rental housing market, aggravates these problems. Several policy considerations militate against the unfettered use of these networks, with perhaps the most significant being the loss of tenants' privacy. On the other hand, landlords have a legitimate desire to ensure that their tenants pay the required rent and take care of the property. The following sections analyze various policy arguments on behalf of tenants and landlords.

A. Arguments Against Screening Services

1. Privacy

a. The individual's right to privacy. The primary concern of many tenants is that the existence and use of tenant screening services violate their privacy interests. "Privacy" is a rather nebulous concept. A look at a variety of sources, however, reveals a general consensus that privacy does, or should, include...
A rather wide consensus has developed which recognizes the existence and importance of informational privacy. This concern for privacy has resulted in several domestic statutes. Although this legislation may not fully protect informational privacy, it does demonstrate the importance Americans place on privacy. The Fair Credit Reporting Act and the Privacy Act provide the mainstay of domestic privacy legislation.

The Fair Credit Reporting Act of 1970 (FCRA) established regulations governing consumer credit reporting agencies. The FCRA has been widely criticized as being inadequate, but it provides a basic framework for protecting the privacy of individuals about whom information is collected by credit bureaus and similar organizations.

In 1973, a committee of the Department of Health, Education and Welfare released a study entitled “Records, Computers and the Rights of Citizens.” This report proposed a detailed federal code of “fair information practices,” intended to enhance personal privacy. The minimum safeguard requirements recommended by the study rested on principles designed to fulfill several goals: that the public be informed of the existence of personal data record-keeping systems; that individuals be granted access to their files to correct wrong information, and to exercise some control over disclosure; and that safeguards be implemented in such systems to assure reliability of information and prevent misuse of data.

The following year, Congress passed the Privacy Act, which reflects many of these recommendations. The Privacy Act gives individuals specific privacy rights regarding information kept by the federal government. It restricts the disclosure of such information and requires agencies to keep an accounting of all disclosures. It places restrictions on the collection and maintenance of personal information, and requires the government to obtain information directly from the individual where possible, to inform the individual of the uses and effects of this information, and to maintain only that information which is “relevant and necessary to accomplish a purpose of the agency.” It also gives individuals the right to review and copy their records, request corrections of their records, and to seek judicial review of a negative determination by an agency.

The original proposal for the Privacy Act would have made these provisions applicable to private industry as well. This aspect was dropped in the final bill, however, which instead established the Privacy Protection Study Commission to conduct a complete investigation of information practices and make comprehensive recommendations.

The Privacy Protection Study Commission published its conclusions in 1977. It formulated specific recommendations similar to those of the Secretary’s Advisory Committee, with three primary objectives in mind: (1) to minimize government’s intrusiveness into the lives of its people while (2) maximizing fairness thus (3) creating a legitimate expectation of privacy in the confidentiality of personal information. Although these recommendations were never enacted, they served as the basis for several bills in Congress.

While the Privacy Act and the Fair Credit Reporting Act provide the basic framework for a statutory approach to privacy concerns, they are supplemented by a wide variety of provisions in other federal legislation. Similarly, state laws protect informational privacy in areas as diverse as arrest records, bank records, employment records, insurance records, mailing lists, medical records, education records, and tax records.

These statutes include:

This compilation is borrowed from Trubow, supra note 32, at 51-52. See also
Together, these reports and statutes confirm the proposition that our nation considers the privacy interest to include a strong commitment to the confidentiality of personal information, which requires stringent safeguards on the collection of such information. This concern with informational privacy is not limited to the United States; other countries, especially European countries, have dealt with these issues through legislation and international agreements.

These domestic and foreign initiatives support the proposition that privacy is generally regarded, and should be recognized, as a basic human right, and that this concept of personal privacy includes substantial control over personal information.

b. Possible effects of computer technology. The view of privacy rights articulated above applies with great force in the context of tenant screening services. Tenants whose names appear in the files of these companies lose control over the collection, maintenance, and use of considerable information about their lives. The use of computer technology aggravates this loss of control.

Before the advent of computer technology, personal privacy was relatively easy to protect. Without the aid of sophisticated, automated methods for keeping track of information, the limits of human capabilities restricted the amount of data which could be easily collected, organized, and utilized. This limited ability to obtain and store data presented no clear threat to privacy, thus rendering stringent government regulation of data collection unnecessary. People's expectations of privacy were directly shaped by a knowledge of the limitations of non-computerized data collection. With the arrival of computer technology, however, these expectations have been seriously threatened. As one commentator has observed, "what we seem to have done is rely on inefficiency [in data collection] to protect our privacy . . . and we suddenly realize that we can no longer do so . . . [W]e ought not to have been relying upon it at all." The computer's capacity for storing, manipulating, transferring, combining, and accessing data quickly and efficiently may lead to greater invasions of privacy, thus creating a need for new forms of privacy protection.

The first way in which contemporary technology affects privacy is by facilitating the initial dissemination of information. Although the initial disclosure of any specific piece of informa-

---

For discussions of foreign privacy statutes and international treatment of privacy concerns, see Secretary's Committee, supra note 35, at app. B; Soma & Wehmoer, supra note 57, at 473-76; Rule, supra note 14, at 111-12.

In 1981, the Council of Europe adopted The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Although it has not been ratified, the Convention has been signed by at least eleven countries. It requires a number of specific limitations and safeguards on the automatic processing of personal data which serve to ensure accuracy and timeliness of data, to afford individuals access to data and an opportunity to correct false information, and to prevent use of data for inappropriate purposes. Article 5 of the Convention, for example, requires that data be used and maintained only for specified, legitimate purposes, and that it be accurate and timely. Article 6 requires strict safeguards against collection of data regarding criminal convictions, health or sexual life, racial origin, and political or religious beliefs. Article 8 gives individuals certain rights against organizations which maintain personal information to ensure compliance with the other requirements. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Jan. 28, 1981, Council of Europe, Europ. T.S. No. 108.


In 1982, the United Nations published "Human Rights and Scientific and Technological Developments," which made specific recommendations regarding personal privacy. It encouraged member countries to adopt legislation governing computerized personal data systems to ensure first that only information necessary for the purpose of the system is collected, and second that such information generally is collected only after informing the individual and obtaining his or her consent. United Nations, supra note 33, at 32-33.
tion is often made by the individual, he or she may feel there is no choice but to reveal it and may expect that it will be used only by the person to whom it was revealed. The entry of this information into a computer system may broaden its use far beyond what the individual ever contemplated. Dissemination of this information invades the individual's privacy as much as if the individual had been forced initially to divulge the information against his or her will, because in either case the information is used without the individual's consent. Not only do computers make it easier for information to be stored and made available to individual users, but also computers facilitate the transfer of information between organizations which may in turn distribute the information, resulting in a sort of "second-generation" dissemination.

"Tenant screening services and traditional credit bureaus are by no means the only situations in which information may be used in ways that the individual would not have expected or desired. Another example is the hotlines which have sprung up in the battle between doctors and lawyers. Doctors may determine whether patients have ever filed malpractice suits, and patients may determine whether their doctors have ever been sued. See Lawyers, Doctors Wage a Hot-line War on Each Other's Lawsuit Record, Minneapolis Star and Trib., Dec. 29, 1985, at 17A, col. 1. Perhaps the most frightening example, however, is the description of an organization outside Chicago that professes to identify those persons in this country who are known to be "attacking or ridiculing a major doctrine of the Christian faith or the American way of life." These include authors of books and articles, speakers, and even signers of group advertisements in leading newspapers. In this organization's files are the names of those individuals who had been involved with the long-defunct House Un-American Activities Committee."


** This loss of confidentiality and control over access to personal data has been widely identified as a serious privacy infringement. See United Nations, supra note 33, at 27. Pemberton notes that this invasion of privacy occurs regardless of whether the information is inaccurate or prejudicial: "even accurate information may be an unfair or an unwarranted invasion of his privacy, because it is information which he is entitled to keep to himself and those to whom he intentionally discloses it." Pemberton, supra note 81, at 221.

Representative Charles Schumer has expressed this idea in more concrete terms:

"Maybe, there are things you'd rather keep to yourself? If you've been fired, or you've been to court, or you've sued your doctor. These are all bits of information which someone might pay to know. In fact there's already a service that tells doctors about people who've filed malpractice suits.

Now, I have a right to sue a bad doctor. And maybe doctors have a right to know about that. But, if you file a malpractice suit, would you want your next doctor to know?"

Frontline, supra note 1, at 26.

New surveillance technologies permit still more severe invasions of privacy because even the initial disclosure occurs without consent. For a description of this use of new technologies, see generally A. Westin, supra note 43, at 67-168; Miller, Personal Privacy, supra note 36, at 1092, 1119-21.

"Process may create frighteningly large chains of distribution because "the

These problems are compounded by the possibility that unauthorized access may occur where a system provides inadequate security. Even where no dissemination to third parties occurs, the very fact that the subject is aware of the possibility of such dissemination infringes on privacy; the individual in today's society, forced by the necessities of daily life to reveal personal information, is injured simply by losing control over this information. As one commentator notes, this results in a feeling of being "naked before the world." No amount of safeguards against unauthorized access or requirements that the information be used for legitimate purposes can eliminate this core injury to privacy. The very act of transferring one's own knowledge of oneself to someone else results in the experience of forfeiture of an essential part of oneself. This feeling is only aggravated by the knowledge that this information is contained in a computerized data file.

A related danger arises from the variety of information collected and the ease with which this information may be combined or organized. The kinds of personal data compiled are endless, including credit histories, medical information, employment records, insurance claims, financial status, and magazine subscriptions. These pieces of information, maintained in a great number of separate locations, present much more serious dangers to privacy when they are combined: the whole becomes greater than the sum of its parts. This contrasts with the individual's expectations, which are formed by the knowledge of usual human limitations. The subject does not expect these various aspects of data concerning his or her life to be combined. Such an aggregation of data is not difficult, however, and the results can be frightening. As one commentator has noted, collecting information in this way would permit not only the formation of a "qualitative picture of the kind of person" involved, but also a reconstruction of "a rough, temporal picture of how I had been living and what I had been doing with my time."
In other words, the compilation in one place of all the information which may have already been "public" or available constitutes a separate injury to privacy interests, opening up a great portion of one's life for easy viewing. 90

The result of such privacy invasions can be dehumanization. As modern information practices begin to eat away at personal privacy, they simultaneously imperil an individual's identity. To begin with, the reliance on automated data systems requires the categorization of information. The otherwise unique characteristics of every individual must be squeezed into preexisting, procrustean molds which are amenable to group manipulation and comprehensible to a computer. 91 Consequently, individuals lose their uniqueness and become fungible bundles of data in the eyes of the information handlers—and soon in the eyes of society as a whole, as increasing use is made of such information systems. People come to be seen and judged on the basis of computerized bits of data rather than on their own individual characteristics.

In turn, individuals will feel a need to plan their actions around the improvement of their records, 92 leading to the possibility that people may view themselves as computerized bits of information. As people are judged more and more by others as simply a nameless, faceless bundle of data, they may begin to believe the resulting judgments. 93 Ultimately, a person might come to rely upon his record to represent himself, and will have no meaningful existence apart from it. 94

Computerization of personal data may also lead to conformity among individuals. As individuals gear their own lives toward perceived objective standards, not only their sense of individuality but also the actual differences between them may diminish. 95 Individuals may converge toward externally-imposed ideals of human behavior, becoming increasingly standardized bundles of data. 96 This process does not just affect a few individuals who have committed serious crimes or who live at the fringes of society; it affects every member of the society. Technology, with its cold, unforgiving scrutiny, demands a perfection and a conventionality which simply cannot and should not exist. 97

The use of a person's data file as a basis for decision-making involves a very real domination over the subject, not only in the abstract sense, information about a person is manipulated by others beyond that person's control, but also in the sense that decisions of great import to the person will be determined by the way in which the data is handled or interpreted. 98 An increasing number of decisions are made on the basis of information which is inaccessible to the person about whom the decisions are made, with the result that the person has less ability to control or affect decisions which have significant effects.

90 A. Miller, supra note 16, at 48-50; see also Miller, Personal Privacy, supra note 36, at 1124.
91 Cf. Tarlton v. Saxbe, 507 F.2d 1116, 1124 (D.C. Cir. 1974) ("[G]overnment collection and dissemination of inaccurate criminal information without reasonable precautions to ensure accuracy could induce a levelling conformity inconsistent with the diversity of ideas and manners which has traditionally characterized our national life and found legal protection in the First Amendment.").
92 This concept has been expressed effectively by a number of commentators. See, e.g., Bloustein, supra note 47, at 1003; Remark by Rep. Cornelius E. Gallagher (D-N.J.) in Hearings on the Computer and Invasion of Privacy Before the House Special Subcomm. on Invasion of Privacy of the House Comm. on Govt. Operations, 89th Cong., 2d Sess. 2 (1966) (quoted in Miller, Personal Privacy, supra note 36, at 1124). See also Richards, supra note 42, at 974; Menard v. Mitchell, 328 F. Supp. 718, 725-26 (D.D.C. 1971); rev'd on other grounds sub nom. Menard v. Saxbe, 498 F.2d 1017 (1974) (remarking that misuse of information by government could lead to suffocation of initiative and individuality).
93 In the words of Representative Schumer, "[i]f everyone were put under a complete magnifying glass they might burn, and our society does not want to become so regimented and so information perfect that people feel that they're living in straight jackets.
94 See Miller, Personal Privacy, supra note 36, at 1117 ("Success or failure in life ultimately may turn on what other people decide to put in an individual's file and the programmer's ability, or inability, to evaluate, process, and interrelate information.").
significant impact on his or her life." The subject is thus deprived of interests protected in other contexts by the principle of due process. As one report has observed, "the net effect of computerization is that it is becoming much easier for record-keeping systems to affect people than for people to affect record-keeping systems." As individuals become more dehumanized, they become more powerless in the face of the information networks.

The resulting power imbalance is manifested in the ability of screening services, which decide what types of information to record and make available, to determine what information will affect an applicant's success in receiving housing. This powerful position, in turn, gives excessive influence to the individual landlords who supply information to tenant screening services.

As landlords rely more on automated data systems, tenants may become increasingly subservient to the screening services, and they may lose their own sense of self-determination and uniqueness. The result may be a profound effect on society as a whole, on the value it places upon individuals, and on the regard which it holds for personal privacy.04

2. Improper Effect on the Decision-Making Process

The use of computers to screen out tenants may also increase the number of resulting decisions that are based on inaccurate or inappropriate information. Tenants have an interest in ensuring that rental decisions are made on proper information, and the use of tenant screening services may impinge dramatically upon this interest.

Although inaccuracy plagues any method for gathering information, reliance on large, computerized data banks heightens the risk of error. Data must be entered into the system by human operators. This task increases the likelihood that entry errors will be made. Furthermore, "there is a widespread and legitimate fear of overcentralizing individualized information and then increasing the number of people who, by having access to it, have the capacity to inflict damage through negligence, sheer stupidity, or a lack of sensitivity to the value of personal privacy." Even without such human error, inaccuracies may result from malfunctions in the system itself. Malfunctions which might be relatively minor in other contexts can be disastrous in computerized data banks, yielding random distortions in the data.

The use of computerized screening systems also increases the possible impact of human or mechanical errors. Such errors will often be difficult to detect, since operators who deal with the information see large quantities of similar information and have no direct knowledge of the subjects on file. Moreover, operators will have little basis for knowing when the reported information is inaccurate. In turn, the difficulty of detecting errors ensures that they will remain in the system for a long time. While it is inexpensive to retain the information, it is very difficult and costly to search for errors.

Tenant screening services also present another factor which may contribute to inaccuracies. Like traditional credit bureaus,

104 See Privacy Commission, supra note 11, at 13.
105 See United Nations, supra note 33, at 27.
106 See Secretary's Committee, supra note 35, at xx.
107 A landlord who has difficulty with a tenant, whether this arises out of the tenant's ability to pay rent or merely reflects personality conflicts, may prevent the tenant from finding any other rental housing in the area served by the screening service simply by reporting a complaint about that tenant. See generally supra text accompanying notes 29-31.
108 See Miller, Personal Privacy, supra note 36, at 1106 ("When the individual is deprived over the information spigot, he in some measure becomes subservient to those people and institutions that are able to gain access to it.").
109 See id. at 1179, asserting that "the unregulated computerization of personalized information may have a numbing effect on the value of privacy as a societal norm."
110 See also Note, Protecting Privacy in Credit Reporting, 24 Stan. L. Rev. 550, 551-54 (1972) (out of dissemination of information damages political and social structure).
they stake their livelihood on collection, compilation, and dissemination of negative information. They have an incentive or bias which may interfere with their attention to accuracy. Accuracy provides little relative benefit to screening services operating in the current market, and it may give way to the interest in finding “valuable,” i.e., negative, data.\footnote{The founder of UDR, for example, has no incentive to remove information which is dated or which regards tenants who have won lawsuits against landlords, and “in fact he has every incentive to do the opposite because once he gets the name on the computer he’s done what will help him make sales. Taking the name off only helps the tenants and he’s not selling his list to tenants.” Rep. Charles Schumer, quoted in Frontline, supra note 1, at 21.} This problem has been noted with regard to traditional credit bureaus,\footnote{See Note, The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act, 26 Hastings L.J. 1219, 1234–36 (1975), for a general discussion of the pressures credit bureaus may apply to their investigators to produce certain amounts of negative information. Former employees of one credit bureau, for example, reported that investigators commonly mishandled reports by fabricating sources, not verifying adverse information from at least two sources, and basing new reports on previous ones. Hearings On Amending The Fair Credit Reporting Act Before the Subcomm. on Consumer Credit of the Senate Comm. on Banking, Housing, and Urban Affairs, 93d Cong., 2d Sess. 5–13 (1974) (testimony of Dick Riley, Mark S. Brodie, and Len O. Holloway, former employees of the Retail Credit Co.); see Note, supra at 1235 (citing above testimony).} and it applies to tenant screening services as well.\footnote{The risk of inaccuracies is not just theoretical. An indication of the possible extent of such mistakes is provided by the statement of a TRW official in 1974 that of 200,000 annual investigations launched in response to consumer requests, “only one third” resulted in the correction of an error. See Note, supra note 112, at 1234 (quoting Computerworld (NewswEEKLY for the Computer Community), May 15, 1974, at 6, col. 1 (quoting Ray Yhaben, speaking as a panelist at National Computer Conference in Chicago, May, 1974)).}

Even more common than such inaccurate information may be information which is true but misleading. Landlords who have biases against certain tenants or their lifestyles may be more likely to report them, and the resulting complaints may not necessarily give an accurate representation of the affected tenants. Further, given the screening services’ use of names contained in court records, many tenants will appear on a company’s files without having done anything wrong. Reported tenants may have initiated a lawsuit against a negligent landlord, or they may have been defendants in eviction cases which were ultimately dismissed. The mere fact that tenants’ names appear in a court proceeding does not mean that they were at fault or are poor rental risks, and yet their names will appear in the screening service’s files, giving landlords the impression that these tenants have broken the law.

\footnote{See Miller, Personal Privacy, supra note 36, at 1115.} \footnote{See United Nations, supra note 33, at 27–28; Murray, Computerized Information Systems Raise Concern Over Privacy Rights, 183 N.Y.L. J. at 28, col. 1 (Jan. 24, 1980); Miller, Personal Privacy, supra note 36, at 1116.} \footnote{See Miller, The Right of Privacy: Data Banks and Dossiers, in PRIVACY IN A FREE SOCIETY 72, 76 (1974).} \footnote{As Tribe describes, users of policy-analytic techniques are under constant pressure to reduce the many dimensions of each problem to some common measure in terms of which “objective” comparison seems possible—even when this means squeezing out “soft” but crucial information merely because it seems difficult to quantify or otherwise render commensurable with the “hard” data in the problem . . . . [The continuing tendency that accompanies analytic techniques is to engage in such reduction whenever possible, with the result not only that “soft” variables tend to be ignored or understated but also that entire problems tend}
Soft information is an important part of the overall picture when a rental decision is to be made. Reliance on tenant screening services can alter the impact of such information, however: negative soft information may be seen as hard data; positive soft information which is recognized as such may be ignored or discounted; and information which is seen as hard may lessen any incentive to seek out soft information which may complete the picture. The human evaluator finds it easy to defer to the machine, abdicating his or her own decision-making responsibility.118 This is particularly true in the tenant screening context because of the market positions of landlords and tenants. Since landlords may often have more applicants than they have rental space available, especially in the large metropolitan areas served by tenant screening services, they are in a position to ignore the individual circumstances surrounding the appearance of an applicant's name in the files of the screening service.

Thus the effects of computerized data on the perceptions of the decision-maker can easily lead to unreliable results. The problem is accentuated both by the tenants' lack of control over the data and by the landlords' failure to consult the tenant regarding negative information. The landlord receives an inadequate picture of the potential tenant, and the tenant is not given an opportunity to correct it; indeed the tenant may not even be aware that the landlord is using this information.

Even where the landlord does have an accurate perception of the information, he or she may still base a decision on information which is inappropriate—i.e., information which is irrelevant to the applicant's performance as a tenant and is thus an inappropriate basis for rental decisions. For example, the landlord may know that a tenant report is negative only because the tenant was involved in a lawsuit with a previous landlord and may realize that this does not in itself mean that the tenant was at fault. The landlord may find this information valuable nonetheless, rationally refusing to rent to a tenant who is more likely to litigate than another.119 Put more succinctly, "to many landlords a disruptive tenant is simply one who stands up for his or her rights."120

There are relatively few characteristics which directly relate to an applicant's future performance as a tenant. Foremost are the ability and willingness to pay rent, to take care of the property, and to show consideration for other tenants. Other characteristics, such as race, sex, religion or political beliefs, may be seen as relevant by some landlords for personal reasons but should not be the basis for denial of housing.

Because such characteristics are widely recognized as not properly relevant in deciding amongst prospective tenants,121 state and federal legislatures have enacted statutory safeguards against housing discrimination. The Fair Housing Act, for example, prohibits refusal to rent or sell housing units on the basis of the customer's "race, color, religion, sex or national origin."122 A similar statute enacted in California has been interpreted by its courts as providing a great amount of protection for tenants, so that it is seen as forbidding landlords to refuse to rent to families with children.123

Despite this anti-discrimination consensus, it is difficult, if not impossible, to combat much of the discrimination which may be practiced by an individual landlord. Discrimination may only be apparent if the landlord operates a significant number of rental units and consistently discriminates against a group large enough to make the exclusion readily apparent. Furthermore, the discrimination legislation is generally limited to a few specified categories. These categories, however, constitute only part of an endless array of reasons for which housing may be denied. Any personal information which is reported may be enough to
result in a negative decision by a landlord who possesses a personal bias against people with that characteristic. For landlords who live in their buildings and lease out only a small number of units, these biases may have some legitimacy. In such cases, the decision as to whose application to accept is more a personal choice of one’s close neighbors than a business decision. For large, institutional landlords, however, any such concern with personality and lifestyle characteristics should give way in the face of the significance of the tenants’ interests in housing. Applicants should not be denied an interest as important as shelter due to the personal grudges of landlords whose involvement with the housing units is primarily commercial.

The use of tenant screening services magnifies the problems of both discrimination and enforcement. Obtaining a tenant’s file from a screening service may facilitate discrimination in the decision not to rent. Discrimination may also affect a landlord’s decision to file an eviction proceeding or to file a complaint with a screening service. Whether it is conscious or not, such decisions may be motivated partially by the landlord’s attitudes toward factors that should be irrelevant, such as the tenant’s race, political views, sexual preference, or willingness to assert legal rights. The introduction of screening services facilitates this type of discrimination. It expands the amount of such information which is available, and it translates the landlord’s individual biases into a systemic bias, since the landlord’s decision not to rent is motivated partially by the landlord’s such information which is available, and it translates the landlord’s individual biases into a systemic bias, since the landlord’s decision not to rent.

3. Infringement upon the Exercise of Tenants’ Rights

Another policy consideration which militates against the use of tenant screening services is that these services infringe substantially upon the legal rights provided to tenants by state laws. For instance, in most states the withholding of rent is the tenant's most effective remedy when the landlord fails to make necessary repairs. If the landlord files an eviction action in response to such withholding, the tenant’s name may end up in a screening service’s files, and the tenant may experience great difficulty finding new housing. The tenant may thus be punished for exercising his or her legal right to withhold rent, regardless of the nature of the dispute or its outcome. Similarly, a tenant has a legal right to make use of the judicial process when the landlord violates the law. Simply by filing a complaint, however, the tenant may cause his or her name to be inserted in the records of a screening service. Again, the tenant can be penalized for asserting rights under the law. The tenant may effectively be blacklisted even where the landlord initiates eviction proceedings solely for the purpose of harassing a "problem" tenant, such as one who is active in a tenants' association. The landlord can punish the undesired tenant, ensuring that he or she may never be able to obtain a new lease in the area served by the screening service, simply by filing a bad faith lawsuit. In fact, the landlord need not even go so far as to file suit; retaliation against a tenant for the tenant’s legally protected conduct can result from a direct report to the screening service. State law often forbids a landlord to retaliate by evicting a tenant, but there is no legal prohibition against retaliation by reporting to a screening service.

---

124 See Note, supra note 104, at 555.

125 One housing activist, who argues that landlords use tenant reports as a means of circumventing anti-discrimination statutes, notes that “[t]hese computerized biographies contain information about income levels, race, marital status—the kind of information that has been determined to be illegal under fair housing laws.” Sweeney, supra note 3, at 63, col. 1 (quoting Carole Norris).

126 Rudine Pettus, for example, withheld rent under the applicable state law after local health officials condemned her apartment. The landlord tried to have her evicted, but failed to settle with Pettus, who moved out of the apartment. Her name, however, was listed by UDR. She asserts that the only way she could find another apartment was "to lie or give a different name or address." Frontline, supra note 1, at 18-19.

127 Not everyone shares this view. Harvey Saltz of UDR, for example, asserts that "under a case cited as an unlawful detainer, a problem existed, there was opportunity to cure it, the tenant refused to cure it and the landlord went to court and made a sworn statement to the court of what the problem was, asking for the court's help. When I pick up a case like that, there is no reason for me to doubt the word of the landlord." Frontline, supra note 12, § 1, at 3, col. 1.

128 Barbara Ward, for example, gave 30 days notice to leave when her apartment was infested with rodents and roaches. The landlord then filed an unlawful detainer, contending that Ward owed back rent. Ward contested on the ground that she had attempted to pay but the landlord had refused to pick up the money and had left no address. The landlord did not even appear in court, and the judge ordered the case set aside until either party reinstated proceedings. Neither did, and even several years later, other landlords refused to rent to Ward because her name was listed by a screening service.

129 See generally Rabin, supra note 123, at 533-34.
The harm to tenants, of course, goes beyond this type of punishment. Where tenants are aware of the screening service, they may be inhibited from exercising their legal rights in the first place. They may refrain from taking legal action in response to illegal conduct by their landlords, and may go to great lengths to settle any conflict out of court, to prevent the landlord from filing the initial suit. Landlords may even bring about this chilling effect by notifying the tenants of the existence of the screening service, indicating an intent to complain to the company if the tenants do not live up to the landlord's expectations, or stating that any lawsuit will become known to the screening service. Tenant screening services, therefore, can provide a useful way for landlords to circumvent some of the safeguards provided to tenants by landlord-tenant laws.

4. Deprivation of Housing

Even where a tenant has behaved in a way that would justify a future landlord's refusal to rent, the submission of the tenant's name to a screening service is an excessive penalty. A bad experience with one landlord may result in the complete exclusion of the tenant from the housing market. Such exclusion contravenes our society's policy of attempting to meet the housing needs of its members and violates what some view as a fundamental right. This functional blacklisting of tenants is most objectionable because of its permanence; the deprivation of housing may last for many years, since the screening services have given no indication that dated information will be deleted periodically.

100 See supra note 31 and accompanying text.
101 For example, Article 25 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . ." G.A. Res. 217, U.N. Doc. A/810 at 76 (1948). At least one court has held that the Universal Declaration of Human Rights "has become, in toto, a part of binding, customary international law," Filartiga v. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980).
See also City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3266 (1986) (Marshall, J., concurring in part and dissenting in part) ("The right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."); Belle Terre v. Boraas, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting) (the right to establish a home is an essential part of Fourteenth Amendment liberty).

B. Arguments for Screening Services

1. Financial Protection of Landlords

In defending tenant screening services, landlords point to an interest in their own financial protection. Leasing an apartment involves a risk similar to the extension of credit. Landlords cannot have first-hand knowledge of the reliability of their applicants, and yet they should not be expected to lease an apartment without some kind of assurance that the tenant will be responsible for future rent payments.

This problem is compounded by the difficulty of obtaining an eviction. As one landlord complained, "[i]t can take me six to eight months to evict somebody who doesn't pay his rent. That means that they're living free off of me for over half a year. And so, I have to be sure to check them out." Landlords have a similar stake in making sure that their tenants observe minimal standards of housing maintenance and behavior. Tenants who damage apartments, or who are so loud that they seriously disturb other tenants, present tangible losses against which landlords should be able to guard.

2. Market Efficiency

Another argument in defense of screening services draws on free market economic theory. Increasing the amount of information available allows the market to work more efficiently. Without screening services, landlords would incur greater costs because they would have greater difficulty excluding tenants who have in the past damaged property or failed to make timely rent payments. These costs to landlords would, in turn, be reflected in higher rents. Thus use of a screening service to guard against problem tenants keeps costs down for responsible landlords.

102 See generally Benson & Biering, supra note 7, at 301-14.
103 See note 7. at 13 (quoting Dan Faller, of Apartment Owners Association).
104 See id. The landlords' financial concerns are also emphasized in a UDR brochure, which states that
[although the unlawful detainer action is supposed to provide a special remedy for the landlord, today's increasing legal complexities and high attorneys' fees make the unlawful detainer more and more costly and impractical . . . .] You can prevent this loss to your profits. You can assure yourself that you are not renting to a prior Unlawful Detainer.
Quoted in Benson & Biering, supra note 7, at 305.
tenants. The increased information may also cause tenants to be more responsible in general, as it gives them an incentive to improve their performance as renters in order to compete for available housing.

Richard Posner uses a variation of this efficiency argument to argue that privacy interests in preventing information disclosures are minimal or non-existent. Posner argues that the interest others have in "prying" is an important kind of economic good. Organizations such as the press (analogous to the screening services) specialize in prying when it becomes too expensive for the individual. The subject’s interest in keeping information secret, however, is not legitimate; it is nothing more than misrepresentation, "akin to the concealment by sellers of defects in their products." Because secrecy reduces the entire social product, the "property right" in personal information should be assigned to the public rather than to the individual.

The problem with an efficiency argument such as Posner’s is readily apparent. By dealing with privacy in economic terms, Posner overvalues interests that are easily quantifiable and undervalues interests that are more intangible; he overvalues the financial interests of creditors and undervalues the privacy interests of individuals. Furthermore, his argument demonstrates, in a perverse sort of way, the need for privacy as a condition of human autonomy and individuality. Posner’s lack of concern for individual privacy engenders a callousness toward people as unique individuals with a right to control their own destinies. Posner’s marketplace analogies elevate group interests above those of the individual.

---

140 See Benson & Biering, supra note 7, at 304 n.20. As one landlord remarked, referring to a tenant who had damaged property, "If the owner is forced to take these losses, the good tenant will eventually pay for it with higher rents. Is it unfair that other owners can find that this guy is pretty much anti-social?" Quoted in Frenznick, supra note 12, § 1, at 3, col. 1.


142 Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S. Ct. Rtv. 173, 174. See also Posner, supra note 141, at 338 ("People sell themselves as well as their goods . . . . [I]f each of us should be allowed to protect ourselves from disadvantageous transactions by ferreting out concealed facts about other individuals that are material to their implicit or explicit self-representations.").

143 Id. at 336–39. Posner concludes that legislative restrictions on credit bureaus “could be justified only if credit bureaus systematically collected and reported information that, because of its staleness, had negligible value to its customers in deciding whether credit should be extended. No such assumption of economic irrationality is possible.” Id. at 344.

144 Cf. supra text accompanying note 117.

145 This lack of concern for individual rights in the face of economic interests is also evident in another argument sometimes advanced on behalf of screening services—that while the cost of compiling and maintaining the information is relatively low, the cost of implementing safeguards would be prohibitive. In the first place, “[n]othing can be considered right from the standpoint of efficiency if it is wrong morally.” Linowes, supra note 83, at 1184. Further, the cost of safeguards may not be all that great. See The Privacy Report, supra note 11, at 4; Hearings on S. 1928 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs, 96th Cong., 2d Sess., Part I, 41–52 (1980) (statement of Henry Geller, assistant to the Deputy Secretary of Commerce).

146 Quoted in Frontline, supra note 1, at 25. Cf. Doe v. Sears, 245 Ga. 83, 86–88, 263 S.E.2d 119, 122–23, cert. denied, 446 U.S. 979 (1980)(newspaper has right to see records of tenants’ names and unpaid rents under state Open Records Laws, despite statutory exception for privacy) (“A partial waiver of the right of privacy may be implied from the act of accepting credit from another . . . . [A] tenant in default under his lease impliedly consents to reasonable and necessary disclosures of his arrearage and his financial condition.”).

147 One report suggests that the individual’s relationship with a credit grantor may be contractual, but the record-keeping practices that facilitate it now involve so many separate institutions that, confronted with this maze, the individual who is not versed in the law and the complexities of the credit system cannot protect himself against honest mistakes, let alone against deliberate abuses by credit institutions.

PRIVACY COMMISSION, supra note 11, at 73.
important rights, and legislatures have rendered ineffective waivers resulting from unequal bargaining positions. At least one court has recognized that the same careful scrutiny applied to waivers in other contexts should apply to instances where informational privacy is violated. Given the importance of housing, the inability of tenants to bargain over background checks, and the uninformed nature of any consent that is obtained, policy makers should hesitate before accepting consent as a justification for the invasions of privacy caused by tenant screening services.

4. Freedom of Speech

The First Amendment will be a primary area of concern in evaluating the validity of any significant regulation of tenant screening services. Landlords can claim an interest in both speaking—informing other landlords about tenants who have caused problems in the past—and listening—receiving this information from other landlords. Screening services may also assert a free speech interest in conveying valuable information to landlords and in facilitating this communication between landlords. These free speech arguments, however, are secondary; they provide possible legal support for the use of screening services, but they do not explain the benefits of the speech itself. Moreover, the type of speech involved here is not central to free speech concerns. It is not political speech, it is not advocacy, and it does not even deal with ideas.

The freedom of speech arguments merely constitute attempts to justify purely commercial reasons for dramatic privacy invasions. The sale of personal data about specific individuals is not speech which aims to convey any message. The tenant screening service does not try to persuade the landlord to believe any claim or to pursue any action but merely profits from the sale of the details of another person's life. The landlord, in turn, simply wants to know whether a given rental decision is likely to cause any future economic problems. To the extent this may constitute a free speech interest, it must be balanced against the extensive privacy interests at stake. These privacy interests go to the heart of what it means to be an autonomous individual, and they should be given adequate protection, whether by the Constitution itself, by common law invasion of privacy actions, or by statutory actions built upon the framework of the Fair Credit Reporting Act.

C. Scenarios of Conflict

As has been shown, tenants have strong interests in maintaining their personal privacy and in fulfilling their basic housing needs. Use of tenant screening services may infringe upon these interests by depriving individuals of control over personal information, by distorting the rental decisions of landlords, by
interfering with legal rights granted to tenants, by facilitating discrimination, or by making it more difficult for many applicants to find housing in a market that is already weighted against tenants. On the other hand, landlords have an understandable interest in ensuring their own financial protection by excluding tenants who will not pay rent or who will decrease the value of their property.

Although these interests inevitably clash, their relative strengths depend to a great extent on the fact situation involved. Possible fact situations may be categorized according to the nature of the information and its subsequent use.

One way to begin is to examine instances where a landlord actually uses the information to make a rental decision. First, the landlord may use truthful and relevant information to make an adverse rental decision. For example, the landlord may refuse to rent to an applicant who has a clear record of not making rent payments. The tenant here has an interest in privacy and an interest in obtaining housing. The landlord has an interest in renting to someone who will make timely rent payments. The tenant's housing interest is strong, but may be outweighed by the landlord's interest in being paid for the lease. The interest in informational privacy is also strong, but is counterbalanced by the landlord's interest in financial protection.

Second, the landlord may use truthful but irrelevant information to make an adverse rental decision. The tenant's interests here are stronger than in the first case: the housing interest remains strong, while the privacy interest increases because it includes the benefit of not having decisions made on the basis of irrelevant information. The landlord's interests, on the other hand, diminish—he or she has no legitimate reason to deny housing due to irrelevant information. The landlord may find it costly to have irrelevant information sifted from relevant information, but such cost is questionable; even if it is substantial, this interest would not seem to rise to a level where it would compete with the tenant's concerns.

Third, the landlord may deny an application on the basis of information which is false. Here, there is no need to distinguish between relevant and irrelevant information; information which is false should always be an irrelevant basis for a decision. The balance of interests here is similar to that in the second scenario: the tenant's interests in privacy and housing are strong, and the landlord's interests are still minimal.

Fourth, the landlord may make a favorable decision based on the information obtained. We might again examine the truthfulness and relevance of the information, but the distinctions would be unlikely to affect the analysis much in this context. Here the tenant's interests decrease. The need for housing has been fulfilled, and only a weaker version of the privacy interest remains.

These four fact scenarios may also be considered where the information involved is not actually used in a rental decision, but remains stored in a screening service's files. The tenants in these circumstances retain privacy interests similar to the parallel situations described above, but their housing concerns are diminished because housing has not been denied. The landlords' interests are diminished to the same extent, since they have been in no danger of renting to an irresponsible tenant. Thus the balance of interests in the storage situations is similar to that where the information is actually used, although the strengths of the interests of each side may be lower in absolute terms.

To summarize, the interests of tenants clearly outweigh those of landlords in the second and third scenarios (where the information is irrelevant or false), whether the information is used or remains stored. In the first scenario, however, the conflict between landlord and tenant is at its sharpest, with strong policy arguments on both sides. This Note takes the position that the tenant's interests in privacy and housing still outweigh the economic interests of the landlord. With this in mind, the remainder of the Note will examine possible ways for tenants to vindicate these interests. Although the avenues to be considered could provide relief in each of the scenarios described above, the actual availability of relief under present law and the political feasibility of passing new legislation may still depend upon the factual context.

III. Litigation Challenges

A. Constitutional Right to Privacy

One approach a tenant might take in challenging the maintenance or use of personal information by a landlord or tenant
B. Invasion of Privacy Torts

A tenant may also challenge the screening services by bringing a tort action for invasion of privacy. This tort has been recognized in nearly every state, either by statute or through the development of the common law. Although there is some variation among different states, the great majority follow the approach of the Restatement (Second) of Torts. This section of the Restatement, which itself was foreshadowed by a law review article by Prosser, divides the privacy tort into four distinct types: (1) unreasonable intrusion upon seclusion; (2) appropriation of name or likeness for commercial advantage; (3) public disclosure of private facts; and (4) publicity which places one in a false light. The third and fourth of these are the most applicable to the tenant’s situation, although the unreasonable intrusion tort might apply to overly aggressive investigators.

Where a landlord has provided false information about a tenant to a screening service, or where the screening service has disseminated false information, the tenant may sue for false light invasion of privacy. Section 652E of the Restatement describes this tort as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
(a) the false light in which the other was placed would be highly offensive to a reasonable person, and
(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

This overall framework for invasions of privacy, developed by William Prosser in his 1960 article, in the Prosser & Keeton hornbook on torts, and in the Restatements of Torts has been followed extensively but has not been without criticism.

Notwithstanding all of their inadequacies and inconsistencies, these burdens which limit the invasion of privacy tort appear to be firmly entrenched. Although some tenants may be able to meet them, further growth of privacy law is needed before the invasions of privacy caused by tenant screening services may be fully redressed. The problem with the present doctrine is not just one of Prosser’s making; much of the history of the privacy right has centered around infringement by the mass media. A body of law which grew up to deal with the threats posed by the mass media has proven inadequate for dealing with privacy concerns which arise in other contexts such as computerized data storage.

**References**


4. See A. Miller, supra note 16, at 175. Miller argues that while the intrusion concept may be an effective approach for remedying wiretapping or surveillance, it was neither designed to nor does it protect against misuse of computer information. However, he is not completely pessimistic; he sees the expansion of the intrusion concept "as an effective first line of defense against abusive information practices and the improper handling of a computer file." Id. at 176. Miller finds some support for this expansion in Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969) (although column was not held liable for publication of information stolen from senator's files because he had not personally rifled through files, "[w]e approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man . . . could reasonably expect that the particular defendant should be excluded"). Miller also argues that the appropriation tort might be expanded to commercial utilization of personal information. He asserts that "if judges were willing to focus on the gravity of the privacy invasion and abandon their past emphasis on photographs and likenesses, this first category of privacy actions might become more responsive to the needs of the future." A. Miller, supra note 16, at 174.

---

30 See Bloustein, supra note 47, at 973-74, 995.

Alfred Hill discusses the public record limitation in his analysis of Cox, arguing that "the Court assumed that it was simply endorsing what was already the law, quoting unqualified assertions of such an immunity by Prosser, as set out in his treatise and in the Restatement (Second) of Torts. However, the cases relied upon by Prosser typically do not proclaim such an immunity unqualified." Id. at 1265-66 (citations omitted). Hill goes on to analyze the various cases relied on by Prosser. Id. at 1266 n.285.

32 See Miller, Personal Privacy, supra note 36, at 1156.
C. Fair Credit Reporting Acts

Finally, a tenant may predicate a claim for relief on the Fair Credit Reporting Act (FCRA) or its parallel state statutes, which regulate the credit reporting industry. Congress passed the FCRA in 1970 to protect consumers from unreasonable invasions of privacy and from damage to their reputations. The FCRA grew out of an increasing awareness of the threat to individual privacy posed by computerized information banks and the failure of common-law remedies to guard against this threat. It provides standards for the maintenance of personal information by consumer reporting agencies and it gives consumers specific rights and remedies to enforce these standards.

The FCRA covers "consumer reports" and "investigative consumer reports." A consumer report is defined as a communication of information which bears on a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" which is used as a factor in determining eligibility for credit, insurance, employment, or related benefits. An investigative consumer report contains information concerning a consumer as obtained through personal interviews of neighbors, friends, or associates of the consumer. The FCRA regulates "consumer reporting agencies," which are defined as persons who regularly engage in the practice of furnishing consumer credit reports.

The FCRA limits the use of consumer credit reports to "legitimate business transactions." It limits the amount of time for which information about a consumer may be kept and requires consumer reporting agencies to "maintain reasonable procedures" to comply with the time and use limitations. The FCRA sets forth specific requirements regarding consumer access to files, providing that the nature and substance of all information, the source of the information, and the names of recipients of the information be furnished to the individual upon request. If the consumer disputes the accuracy of the information, and if the agency reasonably believes that the dispute is not frivolous or irrelevant, the agency is required to reinvestigate the matter and delete any inaccurate information. If this does not resolve the dispute, the individual has the right to file a brief statement, which the agency must include in future reports unless it believes the statement to be frivolous or irrelevant. When this statement is filed or when information has been deleted by the agency, the consumer may require the agency to notify recent report recipients of the change. The agency also has an affirmative duty to notify the consumer of the right to file such a statement. The FCRA imposes other notice requirements as well. A user who takes adverse action against a consumer based on a credit report must notify the consumer of the source of the report, and an agency which initiates an investigative report must notify the consumer. Finally, the FCRA establishes a variety of remedies and sanctions against the agencies, officers and employees of an agency, and people who wrongfully use an agency. In particular, an injured consumer may bring a civil action in federal court to recover actual and punitive damages, costs, and attorney's fees.

---

291 There are a few exceptions. For example, the FCRA provides that [e]very consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information; except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed.

(3) The recipients of any consumer report on the consumer which it has furnished—

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

Id. § 1681g(a) (1982).
A tenant who wishes to sue a tenant screening service under the provisions of the FCRA must clear at least one major hurdle—that of establishing that the service is covered by the FCRA. If the service is covered, it is because its reports are used as the basis of a decision to grant "credit . . . to be used primarily for personal, family, or household purposes." How broadly or narrowly "credit" is defined will prove determinative. Apartment leasing does not seem to fit within the popular notion of granting credit. However, various considerations indicate that it should be treated as credit activity for the purposes of the FCRA. The FCRA manifests a concern for privacy problems created by agencies which collect, organize, and divulge personal information about individuals. In the FCRA, "the regulation of 'consumer credit' is referred to as one of the 'needs of commerce,' along with 'personnel, insurance and other information.' Thus, the scope of the language is broad and refers to information that might be used for any number of commercial purposes." Furthermore, the information compiled in tenant reports closely resembles information compiled in other kinds of credit reports, and the rental of property would seem to come under the FCRA's requirement that information only be used by those with a "legitimate business need for the information in connection with a business transaction involving the consumer." It would also seem strange for landlords to claim that they are not engaged in the business of granting credit when they can rely on the contention that they are granting credit as a justification for using screening services. Thus a tenant who wishes to bring a claim under the FCRA has strong arguments that the FCRA should be read to apply to tenant screening services. Even if the tenant does establish this coverage, however, the FCRA may not provide an adequate remedy. Part IV of this Note will discuss ways in which the FCRA could be improved to make it more effective in the context of tenant screening services.

The FCRA explicitly recognizes the continued authority of states to regulate credit reporting agencies to the extent that state laws are not inconsistent with the FCRA. A number of states have followed this lead and enacted statutes similar to the FCRA. Many of these laws track the FCRA rather closely, and some provide stricter requirements and more effective remedies. The most notable state statute is the California law, passed in 1975. This law, which strengthens the FCRA in various ways, includes a provision allowing consumers to personally inspect their files and receive copies, rather than just being told the nature and substance of the file, and a provision giving consumers the right to place a statement in their files regardless of whether the agency deems it frivolous or irrelevant. Most significantly, the California legislature believed that the 1975 law did not necessarily cover tenant screening services, and it remedied this by amendment in 1982.

IV. LEGISLATIVE REFORM

The minimal chance of success under existing common law and statutory causes of action points toward the need for a new legislative approach to the problems posed by tenant screening services. Although some tenants may be able to vindicate their privacy interests through privacy tort actions or suits under fair credit acts, such victories are likely to be sporadic and limited to the most egregious cases.

One solution would be to ease the burdens which must be met by a plaintiff who sues for invasion of privacy. A more
practical approach, however, may be to build on the helpful foundation of the FCRA. Moreover, the fragmented state law in these areas points out the need for a comprehensive framework—a need which Congress partially remedied in a related credit area by its passage of the FCRA. A similar approach should be taken regarding tenant screening services. States differ in their application of common law and in the degree to which they have supplemented the FCRA, but the problems involved are national in scope.

The FCRA's inadequacies have been widely noted. The ACLU has described it as "a disappointment from the first, except perhaps to the consumer reporting and investigative agencies it was meant to regulate." The reasons for the disappointment were summed up as follows:

"[The law was written...more with a view to safeguarding "the abilities of investigating agencies and credit granting entities to amass and misuse data" than to safeguarding the rights of individuals. In fact, the law was pretty much written by the very industry it purports to regulate."

"A tract explaining your rights under the Fair Credit Reporting Act would be a slim volume indeed. The statute imposes a number of general obligations...but has no real teeth...".

Miller summarized this reaction by proposing that the FCRA's preamble be "[a]n Act to protect credit bureaus against citizens who have been abused by erroneous credit and investigative information." S. 530 (1979).

Suggestions for improving the FCRA also abound. Bills have been introduced in Congress from time to time to strengthen the FCRA, but without success. Other possibilities for re-

forms are suggested by comparing the FCRA with the recommendations of the 1973 "Records, Computers and the Rights of Citizens" report and the 1977 report of the Privacy Protection Study Commission. Various states and foreign countries have gone further in their protection of privacy, and their legislation provides additional guidance for reform. Finally, Representative Charles Schumer has been advocating passage of a Tenant Credit Reporting Act, which would explicitly apply the FCRA to tenant screening services.

The FCRA could be strengthened in numerous, specific ways to enhance its protection of the privacy rights of tenants as well as those of consumers in general. The first and most obvious solution is to expand the initial scope of the FCRA. Both the bill proposed by Representative Schumer and the California statute contain specific provisions applying to a consumer report used in regard to a rental decision. Other recommenda-

---

\[1\] The Privacy Report, supra note 11, at 1, 2.

\[2\] Id.

\[3\] 1.Miller, supra note 16, at 87.

\[4\] A representative sample of these bills includes:

H.R. 14163, 93d Cong., 2d Sess., 120 Cong. Rec. 10696 (1974); entitled the Right to Privacy Act, it would have broadened the reach of the FCRA and instituted a great number of more stringent requirements on credit reporting agencies.

S. 1840, 94th Cong., 1st Sess., 121 Cong. Rec. 1632 (1975); entitled the Fair Credit Reporting Amendments, it would have strengthened individual rights, including those of access and notice.

H.R. 10076, 95th Cong., 1st Sess., 121 Cong. Rec. 3725 (1975); entitled the Omnibus Right to Privacy Act, it would have strengthened privacy rights in other areas as well, including government information files, government access to private files, welfare programs, medical information, tax records, and educational records.

S. 1928, 96th Cong., 1st Sess., 125 Cong. Rec. 29117 (1979); entitled the Fair Financial Information Practices Act, it would have strengthened individual rights under the FCRA and would have made similar requirements applicable to creditors by amending the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1982).


\[15\] Secretary's Committee, supra note 35. This report recommended adoption of a federal "Code of Fair Information Practice," constituting a series of minimum safeguard requirements. Violation of any requirement would be an "unfair information practice" and would subject the wrongdoer to criminal and civil penalties. The Code was based on five basic principles:

- There must be no personal data record-keeping systems whose very existence is secret.
- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.

Id. at x-xi.

\[16\] Privacy Commission, supra note 11. The Commission proposed 162 specific recommendations reflecting three primary objectives necessary for an effective privacy protection policy against the intrusiveness of credit reporting agencies: to minimize intrusiveness; to maximize fairness; and to create legitimate enforceable expectations of confidentiality. "These three objectives both subsume and conceptually augment the principles of the Privacy Act of 1974 and the five fair information practice principles set forth in the 1973 report." Id. at 14-15.

\[17\] See supra notes 77-78.


tions would broaden the FCRA more generally, applying it to all systems which collect personal information.\(^{322}\)

A second way in which the FCRA could be strengthened is to ensure that tenants and consumers are aware of the existence of files which contain personal information. Presently, consumers must be notified only when an adverse decision is already made or when an investigative report is initiated.\(^{323}\) Much damage can therefore be done before the consumer ever finds out about it. At the very least, consumers should be notified when reports are used by landlords or creditors.\(^{324}\) This notification requirement, to be effective, should probably apply both to the organization which disseminates the report and to the user of the report.\(^{325}\)

At the other end of the spectrum is the possibility of requiring public notification of the existence of each credit reporting agency. Under present law, consumers have a right to learn the content of their files, but they generally have no idea where to begin looking. One of the proposed House bills\(^{326}\) would have begun to remedy this by requiring each agency to publish annual notice of its existence. Another solution, adopted in Canada,\(^{327}\) is to publish an annual catalogue listing all such agencies.

Although these approaches solve the problem of lack of awareness of the agencies' existence, they do not inform the consumer that specific agencies have information about him or her. "Unless you are suddenly seized by a fit of paranoia and decide to write every consumer reporting agency in the nation to see whether there is a file on you," notes one commentator,

\(^{122}\) See H.R. 14163, 93d Cong., 2d Sess., 120 Cong. Rec. 10696 (1974); Comment, supra note 45, at 610.
\(^{124}\) See, e.g., H.R. 14163, 93d Cong., 2d Sess., 120 Cong. Rec. 10696 (1974). A Senate bill, S. 1928, 96th Cong., 1st Sess., 125 Cong. Rec. 29117 (1979), would have required notification by the agency when a report was furnished for a use which might be unanticipated by consumers, such as use of a "legitimate business need"—a standard that agencies would probably interpret as broadly as the term "news" is interpreted by the press. See supra notes 267–21 and accompanying text. A report entitled "Records, Computers and the Rights of Citizens" recommended requiring agencies to keep lists of all users who are given access to a file and to make this information available to the subject. Secretary's Committee, supra note 35, at xxiv–xxvi, and this was incorporated into H.R. 14163. 93d Cong., 2d Sess., 120 Cong. Rec. 10696 (1974). A Senate bill, S. 1928, 96th Cong., 1st Sess., 125 Cong. Rec. 29117 (1979), would have required consumer consent for transmittal of a report outside the credit industry.
\(^{125}\) See supra text accompanying notes 295–96.
\(^{127}\) It has also been proposed that subjects be given greater notification of third-party access to their files. Under present law, the agency may distribute a report to anyone who has "credit information in an employment application." The Privacy Protection Study Commission recommended that a credit grantor notify the individual of the types and sources of the information which would be collected. Privacy Commission, supra note 11, app. 4, at 81–82. See also S. 1928, 96th Cong., 1st Sess., 125 Cong. Rec. 29117 (1979).
\(^{129}\) See Somlo & Weimocer, supra note 57, at 473.
that the information sought is essential for the decision to be made and that it cannot be obtained in a manner more protective of privacy, such as obtaining it directly from the individual.\textsuperscript{335}

Credit reporting agencies should also be made subject to stricter requirements regarding the relevance of information to be collected and disseminated.\textsuperscript{336} At present, the only limits on the content of consumer reports are the prohibition of obsolete information and the indirect limit that reports may only be released to those with a legitimate business need.\textsuperscript{337} The FCRA does not create any true requirement that the information collected or reported be relevant to the anticipated or actual use. It thus encourages investigation into the most private areas of one’s life.\textsuperscript{338} This problem may be alleviated in two ways. One would be a general requirement that information not be collected by a reporting agency unless relevant to anticipated uses and not be disseminated by the agency or obtained by a user unless relevant to the particular use. Consumers would be free to challenge in court any determination of relevance made by the agency or user. Such a provision could be strengthened by requiring the agency or user to justify specifically each collection

\textsuperscript{115} J. SHATTUCK, supra note 11, at 432. See also Parent, supra note 45, at 311 (anyone seeking to acquire or disclose undocumented personal knowledge should prove need, probable cause that the information is relevant, lack of a less intrusive alternative, and adequate security against unauthorized disclosure; then the person or agency seeking the information should be required to obtain a warrant).

\textsuperscript{19} As indicated supra at text accompanying notes 124–25, some landlords who operate a small number of units may have more of an interest in knowing about the personal characteristics of their tenants. Exemptions might therefore be sought similar to those in the Fair Housing Act. supra note 122. However, these landlords may be less likely to use tenant screening services in the first place because their concerns may lead them to rely more heavily on personal interviews. Furthermore, it would be difficult and inefficient for tenant screening services to separate information to be used by these landlords from that to be used by larger, institutional landlords, especially when the latter would probably account for the great majority of the report requests.

\textsuperscript{337} See supra text accompanying note 289.

\textsuperscript{19} One woman’s auto insurance, for example, was cancelled due to a report that she lived with a man “without benefit of wedlock.” See THE PRIVACY REPORT, supra note 11, at 8.

This Report goes on to note that

[\ldots] there is nothing to prevent an investigative agency from poking around the neighborhood inquiring into your politics, your sex life, your marital problems, [or] your drinking habits. . . . The FCRA places nothing off limits. Even if your neighbors accurately report that your kitchen floor is unwashed, how relevant is this to a decision on your automobile insurance? If they accurately state that the man with whom you live is not your husband, how relevant is this to an employer’s decision to hire you? At present, you are almost helpless to prevent such information from being collected and used. The invasion of the most private areas of your life is in fact the bread-and-butter of most consumer investigative reporting.

\textsuperscript{114} See Gutman, supra note 330, at 1163. “It should be made clear . . . that adoption of a practice of collecting information on a certain topic imposes upon the designer of the practice as well as its practitioner the burden of articulating and having available for inspection a defensible rationale of relevance and materiality.” Id.

\textsuperscript{115} Indeed, such an approach may be the only way to regulate relevance; one court struck down a statute that simply prohibited the reporting of information which the agency had reason to believe was irrelevant, holding that it was too broad to withstand a First Amendment attack. Equifax Services, Inc. v. Cohen, 420 A.2d 189, 207 (Me. 1980), cert. denied, 450 U.S. 916 (1981).

\textsuperscript{116} See H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974); Note, supra note 104, at 562; J. SHATTUCK, supra note 11, at 428; Gutman, supra note 330, at 1163.

The Maine statute originally prohibited collection of several kinds of information, including uncorroborated hearsay and information relating to race, religion, personal life style, philosophy, and political affiliation. Me. REV. STAT. ANN. tit. 10, § 1321(1) (Supp. 1977–78). This section was replaced in 1978, and the limits on hearsay, personal lifestyle, and philosophy were deleted. The other limits were retained in Me. Rev. Stat. Ann. tit. 10, § 1321 (Supp. 1979–80), but were struck down on First Amendment grounds in Equifax, 420 A.2d 189.

See also A. WESTIN, supra note 43, at 324 (proposing that information be given sensitivity rankings); Miller, Personal Privacy, supra note 36, at 1214 (inherently “soft” data should be excluded; hearsay and ex parte evaluations should be subject to added safeguards).

\textsuperscript{117} Note, supra note 104, at 561.

\textsuperscript{118} Id.

or use of information at that time.\textsuperscript{339} The second method for dealing with relevance is to enumerate particular types of information which may not be collected at all due to their inappropriateness or sensitivity.\textsuperscript{340} Such off-limits information could include political, philosophical, and religious beliefs, race, sexual orientation or practices, and hearsay.\textsuperscript{341} Another commentator has recommended that information filing be restricted “to that which is either innocuous or relevant to the purposes of nearly all report users.”\textsuperscript{342} If the law required all sensitive information to be excluded from general files, such information could be investigated only by request from a user. “Because such a system would raise the cost to the bureau, and hence to the user, of reporting sensitive information, users would be inclined to ask for such information only if it is relevant and of sufficient predictive value to justify the increased cost to them.”\textsuperscript{343}

Specific types of information which are often used by tenant screening services in particular could also be regulated. Given the limited purpose of tenant reports, the most effective method would be to specify the types of information which would be permitted, such as information concerning non-payment of rent and property damage. In the absence of such a provision, specific data inappropriate for rental decisions could be included. Most important would be a prohibition on reporting lawsuits in

\textsuperscript{119} See Gutman, supra note 330, at 1163. “It should be made clear . . . that adoption of a practice of collecting information on a certain topic imposes upon the designer of the practice as well as its practitioner the burden of articulating and having available for inspection a defensible rationale of relevance and materiality.” Id.

\textsuperscript{120} Indeed, such an approach may be the only way to regulate relevance; one court struck down a statute that simply prohibited the reporting of information which the agency had reason to believe was irrelevant, holding that it was too broad to withstand a First Amendment attack. Equifax Services, Inc. v. Cohen, 420 A.2d 189, 207 (Me. 1980), cert. denied, 450 U.S. 916 (1981).

\textsuperscript{121} See H.R. 14163, 93d Cong., 2d Sess., 120 CONG. REC. 10696 (1974); Note, supra note 104, at 562; J. SHATTUCK, supra note 11, at 428; Gutman, supra note 330, at 1163.

The Maine statute originally prohibited collection of several kinds of information, including uncorroborated hearsay and information relating to race, religion, personal life style, philosophy, and political affiliation. Me. REV. STAT. ANN. tit. 10, § 1321(1) (Supp. 1977–78). This section was replaced in 1978, and the limits on hearsay, personal lifestyle, and philosophy were deleted. The other limits were retained in Me. Rev. Stat. ANN. tit. 10, § 1321 (Supp. 1979–80), but were struck down on First Amendment grounds in Equifax, 420 A.2d 189.

See also A. WESTIN, supra note 43, at 324 (proposing that information be given sensitivity rankings); Miller, Personal Privacy, supra note 36, at 1214 (inherently "soft" data should be excluded; hearsay and ex parte evaluations should be subject to added safeguards).

\textsuperscript{122} Note, supra note 104, at 561.

118 Id.
which the landlord has not prevailed. This would exclude both cases where the tenant won and cases which were settled out of court or dropped. California’s statute adopts this approach, as does the proposed House bill. The House bill would also forbid furnishing reports which include information on a tenant’s membership in a tenants’ organization, notification of safety or sanitation concerns to a governmental agency, requests for maintenance, or legal withholding of rent. All of these circumstances should be irrelevant to a rental decision but may currently end up in tenant reports with adverse consequences for the tenant.

The consumer’s rights regarding access to his or her files must also be bolstered. The major inadequacy of the FCRA is its failure to give the subject the right to personally inspect and obtain a copy of his or her file. It requires only that the agency notify the subject of the “nature and substance” of the information. Since this will be determined in the first instance by the agency itself, the resulting disclosure may be slanted as well as incomplete, and the consumer will not even know whether the agency has fulfilled its obligation. The right of personal inspection was recommended by the privacy commissions, was proposed in most of the bills to amend the FCRA, and was granted by several state statutes. Even more effective

would be to require the agency to mail a copy to the subject every year; this would avoid the problem of making consumers aware of the existence of the file and of their right to obtain a copy. Allowing greater consumer access may also benefit the agency itself. As one commentator has recognized,

The consumer’s right to include a statement in his or her file needs similar improvement. Under the FCRA, the right extends only to information the consumer contends is inaccurate. The agency need not initiate the dispute procedures or disclose any resulting statement to report recipients if it reasonably believes the dispute to be frivolous or irrelevant. This qualification can serve no purpose other than to give the agency a legal basis for denying consumers the right to have some say in the content of the information that is maintained and disseminated. It is the consumer whose personal privacy is at stake, and it is thus the consumer who should determine whether additional information should be included in the file, perhaps subject to a limitation on the length of any statement that is submitted. Furthermore, the consumer should have the right to include information which tends to mitigate or explain information which is negative but accurate.

To enforce these various rights, consumers also need more effective remedies than are provided by the FCRA. The present FCRA does provide for civil suits for compensatory and punitive damages. Although this has been interpreted as including damages for mental suffering, it is often difficult to prove monetary damages for invasions of privacy. Privacy, after all, is not an economic right but a basic necessity of one’s individuality. This difficulty can be alleviated by providing for minimum liability or presumed damages when a violation is proven.
The FCRA also makes it difficult to prove violations in the first place. The consumer must show willfulness or negligence, but the agency need only institute "reasonable procedures" to escape liability. Because the FCRA does not specify what constitutes reasonable procedures, a showing of good faith by the agency will usually suffice to avoid liability. The need for the consumer to prove not only failure to comply with the specific provisions of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provisions of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provisions of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provision of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provision of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provision of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provision of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provision of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.

V. Conclusion

Tenants' right to privacy must be safeguarded to prevent unnecessary and unjustified infringement by tenant screening services. Litigation, whether based on an asserted constitutional right to privacy or on an invasion of privacy tort, seems unlikely to succeed at present. In addition, the applicability of the FCRA to tenants seems uncertain. Therefore, Congress or the state legislatures should design legislation that will adequately protect tenants' control over personal information. The basic minimum provision of the FCRA but also a failure to maintain reasonable procedures has been described as a "double negligence standard of proof." One possible solution would be to make the agency strictly liable for violations of the FCRA, at least where the consumer suffers provable damages such as denial of a lease. This should not be overly burdensome; it would simply encourage agencies to exercise more care in the collection and dissemination of information. Another possibility, proposed in a Senate bill, would be to create rebuttable presumptions of negligence for certain violations.
Legislation

(Drafted by David Hanifin)

An Act to insure the fairness and accuracy of tenant screening reports in the Commonwealth.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by authority of the same as follows:

SECTION 1. It is the purpose of this act to regulate agencies who retain information and furnish informational reports about prospective tenants. Tenant screening agencies must follow procedures which insure fairness to individuals, while fulfilling the legitimate need of the property owners for relevant information concerning prospective tenants.

SECTION 2. The General Laws are hereby amended by adding after Chapter ninety-three E the following chapter ninety-three F:

CHAPTER 93 F
TENANT SCREENING REPORTING

Section 1. Definitions.

In this Chapter:

"Agency" means a tenant screening agency.

"Adverse rental action" means refusal to rent, or continue to rent, to a tenant after a lease has expired.

"Landlord" means a private owner of rental housing or a public housing authority.

"Report" means a tenant screening report.

"Tenant" means a person who has in the past or who presently rents or leases, seeks to rent or lease, or who makes oral or written inquiries concerning the rental or leasing of a dwelling or boarding unit.

"Tenant screening agency" means a person or entity which for monetary fees, dues, or on a cooperative non-profit basis, engages in the practice of assembling, storing, or evaluating information on tenants for the purpose of
furnishing or communicating tenant screening reports or credit history reports to a landlord.

"Tenant screening report" means written or other communication of information on a tenant to a landlord by a tenant screening agency.

Section 2. Permissible information.

A tenant screening agency may only include the following types of information concerning a tenant when producing or transmitting a tenant screening report:

(1) a credit history provided by a consumer reporting agency as defined in section 50 of chapter 93 of the General Laws;

(2) an adjudicated housing court proceeding brought by a former landlord against the tenant in which the landlord prevailed. The adjudication must have occurred no more than than seven years before the transmission of the report;

(3) the tenant's withholding of rent from a former landlord as evidenced by that landlord's written statement unless the tenant withheld rent as permitted and carried out in accordance with the requirements of section 8A of chapter 239 and section 127L of chapter 111 of the General Laws. The rent withholding must have occurred no more than three year before the transmission of the report;

(4) the tenant's destruction or damaging of property in a former rental unit as evidenced by a written itemized record prepared by the former landlord. The destruction or damaging of property must have a value greater than the value of the prepaid security deposit and must have occurred no more than three years before the transmission of the report.

Section 3. Tenant disclosure.

(1) A landlord shall not obtain or request from a tenant screening agency a tenant screening report concerning a tenant without: (A) clear and accurate disclosure to the tenant of the future use of the report; and (B) disclosure of the name, address and telephone number of the agency preparing the report.
(2) Upon a tenant's request, an agency shall clearly and accurately disclose to the tenant:

(A) the nature, contents, and substance of all information in the agency's files concerning the tenant at the time of the tenant's request;

(B) the source(s) of the information found in the report prepared by the agency concerning the tenant; and

(C) the recipient(s) of all reports prepared by the agency concerning the tenant which the agency has furnished within the six month period preceding the tenant's request.

(3) Upon reasonable notice to the tenant, an agency shall make the disclosures required by subsection (2) of this section in the following manner:

(A) orally in person if the tenant appears in person and provides adequate identification; or

(B) orally by telephone if the tenant makes a written request in advance and with adequate identification over the telephone; or

(C) written and delivered by certified mail to the tenant if the tenant makes a written request; or

(D) written and in person if the tenant appears in person and provides adequate identification.

(4) An agency shall make available to the tenant an agency employee qualified to explain the disclosure required by subsection (2) of this section.

(5) For disclosures occurring in person pursuant to clauses A and D of subsection(3) of this section, one other person of the tenant's choosing may accompany the tenant. The agency may require a tenant to furnish a written statement granting the agency permission to discuss the tenant's file in the other person's presence.

(6) An agency may require a tenant who requests written disclosure under subsection(3) of this section prior to tenant notification by a landlord of a pending adverse rental action to pay a minimal fee not to exceed the cost of transmission of the report to a landlord.
Section 4. **Tenant screening agency procedures.**

(1) A tenant screening agency shall require all landlords who seek to use the agency’s services to provide adequate identification. All landlords shall sign a statement attesting to the purpose for using a report and attesting that they will use the information for no other purpose.

(2) An agency shall follow procedures reasonably likely to assure accurate information in a tenant screening report.

(3) If a tenant disputes the accuracy or completeness of any information contained in a report concerning that tenant, the tenant may notify the agency. The agency shall reinvestigate the information within a reasonable period of time, unless the agency has reason to suspect a frivolous or irrelevant dispute. If after reinvestigation the agency finds the disputed information inaccurate or no longer verifiable, the agency shall immediately delete such information from the tenant screening report and their files. If after reinvestigation the agency finds no discrepancies, the tenant may file with the agency a brief statement describing the dispute. The tenant’s statement or a clear and accurate summary of it shall accompany the disputed information in any subsequent tenant screening reports containing the disputed information.

(4) If an agency deletes information from a tenant’s file or appends to a report a tenant’s statement regarding disputed information, the tenant screening agency shall notify all landlords who received the disputed report during the two years preceding the time the dispute arises.

(5) An agency may not send out, nor keep in its files, information concerning a tenant except as described in section 2 of this chapter.

Section 5. **Landlord obligations.**

(1) A former landlord shall not communicate or threaten to communicate information on a tenant to a tenant screening agency except in response to a written request for such information by that agency.

(2) A former landlord may not provide information to an agency other than information explicitly described in subsections (3) and (4) of section 2 of this chapter.
(3) A landlord using a report shall not take adverse rental action before notifying the tenant described in the report of the action and of the tenant's right to inspect and dispute the contents of the report. The landlord shall allow the tenant three working days within which to respond. Upon the tenant's request, the landlord shall show the tenant or state in writing all information in the report upon which the landlord relied in deciding to take adverse rental action. If the tenant chooses to dispute the tenant screening report, the tenant may directly notify the agency or may request that the landlord order a re-investigation by the agency of the disputed information. Upon a tenant's request for re-investigation, the landlord must refrain from taking adverse rental action for a period not to exceed five working days from the date of the request or until receipt of a corrected tenant screening report or a report with an appended tenant statement.

(4) A landlord shall not willfully, knowingly or maliciously report or attempt to report false or misleading information to an agency.

(5) A landlord shall report to a tenant any violation of sections 1 thru 4 inclusive of this chapter.

Section 6. Violations and noncompliance.

(1) Any tenant who suspects a violation of or noncompliance with sections 1 through 5 inclusive of this chapter, may bring action in a court of proper jurisdiction for damages. Upon a finding of negligent or willful violation by the court, the court shall assess court costs, attorney's fees, loss of wages, and punitive damages of not less than one hundred dollars nor more than five thousand dollars for each violation or as the court deems proper.

(2) The Superior, Housing, and District Court Departments of the Trial Court shall have jurisdiction to assess damages for violations under this chapter and to enforce provisions thereof.

QUESTIONS

1. Critique the article and the bill using (a) the Rule of Law categories and (b) the institutionalist categories.

2. Which of these seem the most useful to a legislative drafter? Why?