

## GETTING TO HOME: UNDERSTANDING THE COLLATERAL CONSEQUENCES OF NEGATIVE RECORDS IN THE RENTAL HOUSING MARKET

SARA STERNBERG GREENE,<sup>†</sup> BARBARA KIVIAT<sup>††</sup> &  
HESU YOON<sup>†††</sup>

### ABSTRACT

*The United States faces a rental housing crisis marked by a scarcity of housing supply, leading to intense competition among prospective tenants. This crisis is a particular challenge for the more than one hundred million U.S. residents burdened with negative records such as criminal records, debts in collections, and evictions. Landlords have more access than ever to applicants' information, yet little is known about how landlords process and think about these records to make*

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<sup>†</sup> Katharine T. Bartlett Distinguished Professor of Law, Duke Law School.

<sup>††</sup> Assistant Professor of Sociology, Stanford University.

<sup>†††</sup> Assistant Professor of Sociology, Center for Research in Economics and Statistics (CREST), ENSAE Paris, Polytechnic Institute of Paris. For insightful comments at various stages of the project we thank Laura Adler, Angèle Christin, Sharon Fairley, Lee Fennell, Brandon Garrett, Lisa Griffin, William Hubbard, Carly Knight, Veronica Root Martinez, Kim Pernell, Jed Purdy, Eva Rosen, and Mitchell Stevens. We also thank the participants at the 2023 Duke University Summer Faculty Workshop Series, the 2023 Stanford Law School Faculty Workshop Series, the Fall 2023 University of Minnesota Law School Public Law Colloquium, the Spring 2024 University of Chicago's Law and Social Science Colloquium, Boston University's Precarity Lab, the Berkeley Department of Sociology, SCANCOR Stanford, NYU Furman Center, Columbia University's Center for the Study of Wealth and Inequality, and the 2021 Annual Meeting of the American Sociological Association. For exceptional research assistance we thank Mandy Boltax, Angela He, Andrea Pillai, Dana Zhao, and Kathy Zhou. We also thank Kiersten Hasenour, Natasha Overmeyer, Liann Yamashita, and Pamela Zabala Ortiz for their able help in conducting interviews, and Brandon Bishop, Thomas Moy, Molly Ketterer, William Knight, and Maddi Larmore, editors of *Duke Law Journal*, for their dedication. This study was funded in part by the UPS Endowment Fund at Stanford University.

*housing decisions. This Article draws on theories of cultural sociology to provide a data-driven understanding of how landlords conceptualize the value of several types of personal records and what it means to use them legally and fairly. It offers a window into how decision-makers evaluate and ascribe meaning to records—including negative records, for which tenants can be denied housing—and how these meanings subsequently guide landlords’ rental decisions.*

*Through eighty-eight interviews with landlords, property managers, rental company executives, and tenant-screening company executives, this interdisciplinary, multistate study leverages comparisons across record type and organization size. It shows how access to housing largely depends on cultural understandings of the morality of different types of negative records.*

*Depending on the type of risk landlords perceive, they call upon different cultural archetypes when deciding how and why to include certain records in their decision-making. However, the processes by which landlords incorporate these cultural considerations vary by organizational size and stem from their perceptions of the law. This Article thus provides a key theoretical insight: Landlords operate with broadly shared cultural understandings about the nature of risk and the morality of various types of negative records, but with different conceptions of what it means to make rental decisions legally and fairly. Differences correspond with the structure and size of decision-makers’ organizations. This means that collateral consequences play out differently depending on the type of landlord a prospective tenant is dealing with. As part of this discussion, this Article further provides a novel understanding of how state and local data-use laws, as well as the Fair Housing Act, operate on the ground. Ultimately, the theoretical insights from this study can help inform housing policy going forward.*

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## INTRODUCTION

The housing crisis in the United States is no secret. Housing supply is lacking, resulting in an overall dearth of available housing, particularly affordable housing.<sup>1</sup> This, in turn, results in fierce competition for units. Indeed, landlords may reject upward of a quarter of some rental populations.<sup>2</sup> And at least one hundred million U.S. residents carry negative records,<sup>3</sup> records that have the potential to

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1. See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (chronicling eight families' housing struggles and explaining how evictions are a cause of poverty); see also ANDREW AURAND, DAN EMMANUEL, EMMA FOLEY, MATT CLARKE, IKRA RAFI & DIANE YENTEL, *THE GAP: A SHORTAGE OF AFFORDABLE RENTAL HOMES* 6 (2023) ("For every 100 extremely low-income renter households, there are only 33 affordable and available rental homes."); *The Gap*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/gap> [<https://perma.cc/9NF2-MZCQ>] ("The U.S. has a shortage of 7.3 million rental homes affordable and available to renters with extremely low incomes . . . . Extremely low-income renters face a shortage in every state and major metropolitan area.").

2. E-mail from Eric Dunn, Dir. of Litig., Nat'l Hous. L. Project, to Sara Sternberg Greene, Professor of L., Duke Univ. Sch. of L. (Jan. 30, 2023, 10:37 AM) (on file with author).

3. This Article uses the term "negative record" to refer to records that on first pass may indicate risk to a landlord. Different landlords consider different types of records risky, but based on this study's data analysis, the most common potential negative records in the rental housing industry include an eviction, a bankruptcy, any late payments to landlords or other negative reviews from past landlords, a credit score below a certain number, any type of debt in arrears, any pending or past lawsuit associated with debt or money owed, and a criminal record.

keep people from finding housing.<sup>4</sup> Over a quarter of credit reports contain at least one debt in collections,<sup>5</sup> almost three million households receive an eviction notice each year,<sup>6</sup> and between seventy and one hundred million U.S. residents have a criminal record.<sup>7</sup> Because landlords increasingly use such records of applicants' pasts to determine who they do and do not rent to, negative records may result in cumulative disadvantage for applicants.<sup>8</sup>

Indeed, in a world of big data, landlords are presented with a dizzying array of records that contain data on applicants. Criminal records, eviction records, credit reports (including past bankruptcies), credit scores, rental histories, and more are available to them.<sup>9</sup> Which records do landlords consider risky, and how do they act on that risk? How, if at all, do various laws restricting their use of certain types of data factor into their process of using records? In other words, how do the potential collateral consequences of a vast number of negative records play out "on the ground," and how does this vary by the size of the landlord?

Despite the intense interest in the housing crisis among scholars and policymakers,<sup>10</sup> the answer to these critical questions, up until now,

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4. We approximated this figure by considering the number of U.S. residents who hold criminal records, who have debts in collection reported on their credit reports, and who received an eviction notice in the last year. See *infra* notes 7–9 and accompanying text. This figure is believed to be a conservative estimate.

5. Kassandra Martinchek, Miranda Santillo, Breno Braga & Signe-Mary McKernan, *Debt in America 2024*, URB. INST. DATA CATALOG, <https://datacatalog.urban.org/dataset/debt-america-2024> [https://perma.cc/EL86-SZS7] (last updated Sept. 18, 2024).

6. Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Proton & Matthew Desmond, *Estimating Eviction Prevalence Across the United States*, PROC. NAT'L ACAD. SCIS. 1 (2022).

7. Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. 11, 11 (2016).

8. See Michelle Maroto, *The Scarring Effects of Bankruptcy: Cumulative Disadvantage Across Credit and Labor Markets*, 91 SOC. F. 99, 102 (2012) ("Disadvantage accumulates across markets when a person's situation in one market influences outcomes in the other.").

9. See, e.g., Alondra Segoviano, *What Does a Rental Background Check Consist Of?*, AVAIL (Apr. 25, 2024), <https://www.avail.co/education/articles/what-does-a-rental-background-check-consist-of> [https://perma.cc/HMT2-J46S]; *What Does a Landlord Background Check Show?*, RENTSPREE, <https://www.rentspree.com/blog/what-does-a-landlord-background-check-show> [https://perma.cc/4SZJ-J8LU]; *What Do Rental Background Checks Consist of (Factors To Watch)*, TRANSUNION SMARTMOVE (Oct. 8, 2021), <https://www.mysmartmove.com/blog/what-rental-background-checks-consist-of> [https://perma.cc/V5T2-ZK5M].

10. See *supra* note 1.

has largely been “we do not know.”<sup>11</sup> Little is known about *how* and *why* landlords and property managers distinguish between applicants and particularly the role the law plays in these decisions—but this Article sheds light on these questions. In the last twenty years, legal scholars and social scientists have done important work on the collateral consequences of criminal records<sup>12</sup> and to some extent the collateral consequences of eviction records.<sup>13</sup> Some scholars have considered de jure collateral consequences—direct expressions of the law that impose penalties and sanctions on those with negative records that often limit economic opportunity.<sup>14</sup> Scholars have also raised the

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11. “Although evaluations of housing programs have increasingly incorporated a qualitative component to help researchers understand the mechanisms and meanings behind the statistical findings, systematic collection of data from housing suppliers (landlords, property managers, builders, and developers) has been lacking.” Philip M.E. Garboden & Eva Rosen, *Talking to Landlords*, 20 CITYSCAPE 281, 281 (2018) [hereinafter Garboden & Rosen, *Talking to Landlords*]. “[L]andlord practices remain an empirical ‘black box’ for the most part.” Anna Reosti, “*We Go Totally Subjective*”: *Discretion, Discrimination, and Tenant Screening in Landlord’s Market*, 45 LAW & SOC. INQUIRY 618, 626 (2020). However, there is research about how *some* landlords pick tenants, specifically landlords who accept Section 8 vouchers and other smaller landlords. See *infra* notes 76–83 and accompanying text (describing this research).

12. The literature on the collateral consequences of a criminal record is too vast to adequately catalogue here, but for some examples of such work, see Gabriel Jack Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (discussing collateral consequences as “a form of punishment called civil death”); Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031, 1063–75 (2020) (analyzing collateral consequences from a retributivist perspective); see also Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 489–502 (2010) (engaging in a comparative analysis of collateral consequences in the United States and other countries with similar criminal punishment practices).

13. See generally, e.g., Yvette N.A. Pappoe, *The Scarlet Letter ‘E’: How Tenancy Screening Policies Exacerbate Housing Inequality for Evicted Black Women*, 103 B.U. L. REV. 269 (2023) (arguing that having a past eviction makes it more difficult to obtain housing in the future and that this has a disproportionate effect on Black women); Kathryn A. Sabbeth, *Erasing the “Scarlett E” of Eviction Records*, APPEAL (Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records> [<https://perma.cc/S2CS-6TZE>] (arguing that eviction records contribute to the housing crisis and that legislatures can mitigate the harms of the records by controlling how they are “created, maintained, and used”); Barbara Kiviat & Sara Sternberg Greene, *Losing a Home Because of the Pandemic is Hard Enough. How Long Should It Haunt You?*, N.Y. TIMES (Jan. 7, 2021), <https://www.nytimes.com/2021/01/07/opinion/eviction-records-crisis.html> [<https://perma.cc/JLS7-PPT5>] (arguing that more attention must be paid to the long-term consequences of an eviction record on access to housing).

14. See generally Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROB. 19 (1971) (surveying and evaluating the civil consequences of criminal conviction imposed by federal and state governments); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999) (arguing that automatically imposed collateral consequences are unnecessarily

problem of de facto collateral consequences—the economic and social consequences of records that “do not attach by express operation of the law,” but instead arise “independently of specific legal authority.”<sup>15</sup> De facto collateral consequences are imposed by private employers, landlords, and others and usually involve the individual deciding not to hire, house, or otherwise do business with someone due to negative records.<sup>16</sup>

Formal collateral consequences can and have been documented by compiling lists of laws and rules at the federal, state, and local levels.<sup>17</sup> Informal collateral consequences, the focus of this Article, are more complex to document, though scholars have begun to explore them.<sup>18</sup>

Based in part on this existing important work on collateral consequences, policy changes have emerged. More than thirty-seven states and 150 cities across the country have enacted “Ban-the-Box” and “Fair Chance” laws.<sup>19</sup> These laws restrict employers from using

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punitive and should be abolished); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006) (providing an integrated perspective of collateral consequences as they relate to reentry); Alessandro Corda, Marti Rovira & Elina van 't Zand-Kurtovic, *Collateral Consequences of Criminal Records from a Cross-National Perspective: An Introduction*, 23 CRIMINOLOGY & CRIM. JUST. 519 (2023) (discussing formal and informal collateral consequences of criminal records).

15. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013) (describing the increasing significance of informal collateral consequences, defined as collateral consequences “arising independently of specific legal authority,” and concerning “the gamut of negative social, economic, medical, and psychological consequences of conviction”); Corda et al., *supra* note 14, at 519 (describing the difference between formal, or de jure, collateral consequences and informal, or de facto, collateral consequences); *see also* Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 STUD. L., POL. & SOC'Y 69, 77–78 (Austin Sarat ed., 2018) (noting how the line between formal and informal collateral consequences is more “blurred than one might think”).

16. Logan, *supra* note 15, at 1104.

17. *See, e.g.*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTIONS, <https://niccc.nationalreentryresourcecenter.org> [<https://perma.cc/ZN9S-X3WY>]; AM. BAR ASS'N, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251583.pdf> [<https://perma.cc/N4KH-8FNE>].

18. *See* Logan, *supra* note 15, at 1104.

19. Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 1, 2021), <https://www.nelp.org/insights-research/ban-the-box-fair-chance-hiring-state-and-local-guide> [<https://perma.cc/BZ88-DDDV>]; Casey Leins, *More Data Needed To Determine Whether 'Ban the Box' Laws Work*, U.S. NEWS (Sept. 10, 2019, 12:20 AM), <https://www.usnews.com/news/best-states/articles/2019-09-10/ban-the-box-laws-could-nega>

criminal records in making employment decisions. They developed in response to the growing consensus that the collateral consequences of a criminal record unfairly restrict opportunities for those with past criminal involvement.<sup>20</sup> More recently, Fair Chance housing laws have surfaced across the country.<sup>21</sup> These laws similarly restrict landlords and property managers from using certain types of records when deciding whom to rent to.<sup>22</sup>

Recent empirical work, however, has called into question the use of Ban-the-Box laws.<sup>23</sup> Some studies show that in cities where Ban-the-Box mandates were enacted, Black applicants are less likely to find employment than they were before the Ban-the-Box policy<sup>24</sup>—similar concerns could plague Ban-the-Box measures targeted to housing. These studies intensified debates about how much reformers should work toward implementing laws that restrict gatekeepers from accessing certain types of data. Some argue that data restrictions are the way forward, and others that these laws may, in fact, be counterproductive based on the disturbing racial findings discovered in studies of these laws.<sup>25</sup>

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tively-impact-minorities [<https://perma.cc/V5LV-YWEB>]; Emily Nonko, *The Fair Chance Housing Policy Movement Catching On Across the Country*, NEXTCITY (Feb. 25, 2021), <https://nextcity.org/urbanist-news/the-ban-the-box-housing-policy-movement-catching-on-across-the-country> [<https://perma.cc/T5JJ-DXH5>].

20. See *Ban the Box*, NAT'L CONF. STATE LEGISLATURES (June 29, 2021), <https://www.ncsl.org/civil-and-criminal-justice/ban-the-box> [<https://perma.cc/NJ5J-TLP7>] (“Hawaii was the first state to pass ban the box policies in 1998. The state implemented these policies spurred by the belief that people with criminal records have trouble finding jobs, and lack of employment made re-offending much more likely.”).

21. Nonko, *supra* note 19.

22. *Id.*

23. See, e.g., Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 191 (2018) (finding that before Ban-the-Box policies went into effect in two states, white-sounding applicants received 7 percent more callbacks than their Black counterparts, but after Ban-the-Box policies went into effect, white applicants received 43 percent more callbacks than their Black counterparts); Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of “Ban the Box”: Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 321, 321 (2020) (finding that Ban-the-Box policies “decrease the probability of employment by 3.4 percentage points (5.1%) for young, low-skilled black men”).

24. *Id.*

25. For a discussion of this debate, see Noah Zatz, *Ban the Box and Perverse Consequences, Part I*, ONLABOR (Aug. 2, 2016), <https://onlabor.org/ban-the-box-and-perverse-consequences-part-i> [<https://perma.cc/C6SN-Y85W>]; Noah Zatz, *Ban the Box and Perverse Consequences, Part II*, ONLABOR (Aug. 3, 2016), <https://onlabor.org/ban-the-box-and-perverse-consequences-part-ii> [h

One limitation of the current debate, and, indeed, almost all the scholarly work on informal collateral consequences, is that reformers have advocated for legal change without understanding how those they are targeting, the decision-makers, operate and understand negative records. Or, put differently, how a vast array of negative records is processed by decision-makers and thus may or may not lead to collateral consequences on the ground.<sup>26</sup> This hole in the scholarship does not mean that there is not a significant amount of important work on collateral consequences. Legal scholars have identified and cataloged collateral consequences,<sup>27</sup> explained how the misdemeanor criminal justice system and collateral consequences interact,<sup>28</sup> described how prosecutors sometimes influence collateral consequences in questionable ways,<sup>29</sup> and detailed the effects collateral consequences have on those denied opportunities because of them.<sup>30</sup>

But the literature lacks in-depth qualitative studies that can surface the mechanisms, particularly the legal mechanisms, by which negative records may or may not result in a collateral consequence in the first place.<sup>31</sup> Drawing on theories of cultural sociology, this Article provides a data-driven understanding of *how* decision-makers understand, evaluate, and ascribe meaning to records, including negative records. As part of this evaluation, the data also provide a

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<https://perma.cc/AQ3Q-Q2T4>; Noah Zatz, *Ban the Box and Perverse Consequences, Part III*, ONLABOR (Aug. 4, 2016), <https://onlabor.org/ban-the-box-and-perverse-consequences-part-iii> [<https://perma.cc/QNM9-K6WZ>]. See generally Eva Rosen, Philip M.E. Garboden, & Jennifer E. Cossyleon, *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits To Screen Tenants*, 86 AM. SOCIO. REV. 787, 800–02 (2021) [hereinafter Rosen et al., *Racial Discrimination in Housing*] (documenting the research finding that Ban-the-Box policies have negative impacts for Black applicants).

26. This argument is made in connection to *informal* collateral consequences specifically, not formal collateral consequences.

27. See, e.g., Chin, *supra* note 12, at 1806–14; Gabriel J. Chin, *Collateral Consequences*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 1, 1–3 (2017).

28. See generally, e.g., Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) (describing the consequences of misdemeanor convictions); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) [hereinafter NATAPOFF, PUNISHMENT WITHOUT CRIME] (critiquing the U.S. system for the way misdemeanors are adjudicated).

29. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1215–27 (2016).

30. See, e.g., Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 2 (2018); Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 524–25 (2020).

31. For a discussion of what qualitative methods in particular can contribute to research, see *infra* Part II. This Article does not directly address the question of why Ban-the-Box laws have resulted in more Black men being excluded from employment opportunities.



novel understanding of how federal, state, and local laws that restrict certain types of data use,<sup>32</sup> including the Fair Housing Act,<sup>33</sup> operate on the ground. The data show how decision-makers understand the law and adjust their behavior to accommodate it, and how their behavior varies by organizational structure and size.

The empirical case is tenant screening in the U.S. rental housing market, where landlords and property managers review criminal records, eviction histories, credit scores, credit reports (which include bankruptcies), civil court records, and tenant-screening scores (often a compilation of various metrics) to evaluate tenant risk and ultimately exclude some individuals from housing opportunities.<sup>34</sup> The data consist of interviews with seventy-eight landlords, property managers, and rental company executives in two U.S. metropolitan areas, and an additional ten interviews with current or former tenant-screening company executives.<sup>35</sup>

The interdisciplinary, multistate research team leveraged comparisons across various types of landlords—from smaller landlords and property managers to large companies that own and manage multiunit buildings across the country. The study also leverages an important distinction between the two field sites for the study. Several cities in California have implemented Ban-the-Box laws that apply to landlords.<sup>36</sup> There have been such proposals in many of the cities where landlords in the California sample operated and in the state

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32. See, e.g., Associated Press, *Oakland Bans Criminal Background Checks on Potential Tenants*, L.A. TIMES (Jan. 21, 2020, 10:53 PM), <https://www.latimes.com/california/story/2020-01-21/oakland-bans-criminal-background-checks-on-potential-tenants> [<https://perma.cc/N8EL-U2QX>]; Natalie Orenstein, *Landlords Can't Conduct Criminal Background Checks in Berkeley Anymore*, BERKELEYSIDE (Mar. 11, 2020, 4:15 PM), <https://www.berkeleyside.org/2020/03/11/landlords-cant-conduct-criminal-background-checks-in-berkeley-anymore> [<https://perma.cc/C3CC-BZER>].

33. Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2006).

34. See *infra* Part III.

35. This research study was approved by the Institutional Review Boards (“IRBs”) of Duke University and Stanford University. The approval required strict confidentiality measures to be taken and all names and identifying information to be changed. Both measures have been taken for the data presented in this Article. Thus, we assigned pseudonyms to all respondents. Accordingly, the names used in this Article are not the real names of the respondents and some other identifying information was changed. Furthermore, specific interviewer names are not included in interview citations in order to provide respondents with the highest level of confidentiality. All data—voice recordings and transcriptions—were securely stored, as required by the IRBs.

36. See *supra* note 32 and accompanying text.

legislature.<sup>37</sup> California also has robust Ban-the-Box laws aimed at employers.<sup>38</sup> In North Carolina, such housing-related Ban-the-Box proposals had not surfaced at the time of the interviews.

Most of the extant—and limited—literature that focuses on the application of collateral consequences to housing imagines a world of clear-cut rental applications where those with negative records are competing against those without negative records.<sup>39</sup> In such a zero-sum game, the concern is that landlords will pick those without negative records, leaving those with negative records without a resource. Indeed, many of the most prominent audit studies that focus on how negative records might lead to collateral consequences over a range of opportunities—employment, housing, et cetera—recreate such a world. Researchers send applications with and without criminal records and then examine the data comparing outcomes for those with and without negative records.<sup>40</sup> The existing data allow us to understand whether landlords, or employers, might differentiate between those with or without a negative record and thus, to some degree, how collateral consequences play out for those with negative records. However, in the rental housing market, negative records come in many different varieties,<sup>41</sup> and thus these audit studies do not recreate the real world in which most rental applications operate.

Moreover, as the landlords in this study explained, most housing units are marketed toward certain populations. Many landlords even classify their units as Class A, Class B, and Class C, and they market

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37. Thomas Ahearn, *California Bill Would Make Asking Rental Candidates About Criminal Records a Discriminatory Practice*, CLEARSTAR (Feb. 25, 2022), <https://www.clearstar.net/california-bill-rental-candidates-criminal-records-discriminatory> [<https://perma.cc/D8QZ-4C7ZZ>].

38. STATE OF CALIFORNIA C.R. DEP'T, FAIR CHANCE ACT: CRIMINAL HISTORY AND EMPLOYMENT (2022), [https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/Fair-Chance-Act-FAQ\\_ENG.pdf](https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/11/Fair-Chance-Act-FAQ_ENG.pdf) [<https://perma.cc/9L98-NM38>].

39. See generally, e.g., Rosen et al., *Racial Discrimination in Housing*, *supra* note 25.

40. See generally, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939 (2003) (using an audit approach to test the effects of criminal records on employment opportunities) [hereinafter Pager, *Mark of a Criminal Record*]; DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) [hereinafter PAGER, MARKED] (same); GREATER NEW ORLEANS FAIR HOUS. ACTION CTR., LOCKED OUT: CRIMINAL BACKGROUND CHECKS AS A TOOL FOR DISCRIMINATION (2015), [https://lafairhousing.org/wp-content/uploads/2021/12/Criminal\\_Background\\_Audit\\_FINAL.pdf](https://lafairhousing.org/wp-content/uploads/2021/12/Criminal_Background_Audit_FINAL.pdf) [<https://perma.cc/Q9P4-PYQV>] (same).

41. See Reosti, *supra* note 11, at 626.

each of these levels to a certain profile of applicant.<sup>42</sup> Those marketing to lower-income applicants do not expect only “clean” records.<sup>43</sup> Instead, many of their applicants have some kind of negative record, and often more than one.<sup>44</sup> Thus, they must differentiate between different types of negative records to ultimately pick a tenant.

One insight that surfaced from this study is that often the discussion of collateral consequences in legal scholarship is too narrow. Most legal scholarship focuses on the collateral consequences of one type of negative record—a criminal record.<sup>45</sup> But this study finds that landlords often overlooked criminal records, at least in certain circumstances. Instead, other negative records that attract less attention in the collateral consequences literature—eviction case records, which have received some recent attention,<sup>46</sup> and debt collection cases, which have received almost no attention—were viewed as more problematic than criminal records and led landlords to deny the economic resource of rental housing.<sup>47</sup>

Further, the study finds that the way collateral consequences of each type of negative record play out is generally far less automated and predetermined than scholars have previously imagined.<sup>48</sup> Although much attention has been paid to how big data has changed the nature of allocating economic resources such as housing,<sup>49</sup> few legal scholars have focused on how cultural understandings interact with

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42. See, e.g., *What is the Difference Between Class A, B, and C Properties?*, FELDMAN EQUITIES, <https://www.feldmanequities.com/education/what-is-the-difference-between-class-a-b-and-c-properties> [<https://perma.cc/XQ4B-P6AG>].

43. This finding is consistent with other studies of landlords. See Rosen et al., *Racial Discrimination in Housing*, *supra* note 25, at 795.

44. *Id.* at 808–11.

45. See *supra* notes 27–31 and accompanying text (citing sources that describe the collateral consequences of criminal convictions).

46. See *supra* note 13 (citing sources that discuss the collateral consequences of eviction case records).

47. See *infra* Part III.

48. See, e.g., CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* 142–55 (2016) (arguing that the proliferation of electronic credit scoring algorithms has resulted in a more automated process); Pager, *Mark of a Criminal Record*, *supra* note 40, at 960 (“[M]ere contact with the criminal justice system, in the absence of any transformative or selective effects, severely limits subsequent employment opportunities.”).

49. See, e.g., O’NEIL, *supra* note 48, at 142–60; Barbara Kiviat, *The Art of Deciding with Data: Evidence from How Employers Translate Credit Reports into Hiring Decisions*, 17 SOCIO-ECON. REV. 283, 283 (2017) [hereinafter Kiviat, *Art of Deciding with Data*]; Rosen et al., *Racial Discrimination in Housing*, *supra* note 25, at 795–97.

legal understandings and the availability of big data to ultimately allocate resources.

The data are unique in that they allow us to understand *how* and *why* landlords and property managers differentiate between different types of negative records and ultimately settle on an imperfect but “better than others” applicant. And because the study includes interviews with executives at large firms, as well as executives at tenant-screening companies (something we believe no other research team has done), the study helps shed light on how big companies understand legal constraints and how their understandings of these constraints are operationalized into their organizational structure and ultimately impact who does and does not get housing.

More specifically, the data demonstrate how and why collateral consequences in the housing market might be more significant for some types of negative records than for others. The data also demonstrate why the collateral consequences of certain types of negative records might be more—or less—significant depending on the organizational size and structure of the landlord an applicant applies to—for example, a landlord who owns one unit versus a large national corporation that owns thousands of rental buildings across the United States.

The data shed light on how these different types of landlords understand and process specific types of negative records, with a particular focus on how these understandings and processes are shaped by legal constraints.<sup>50</sup> Ultimately, this Article provides important data-driven clues about how to design effective law and policy to increase access to housing for those with negative records.

The findings have significant theoretical and normative implications. First, the study finds that as landlords and property managers assessed records, they sorted the type of risk records presented into two types: *financial risk*, which entailed tenants failing to pay the rent on time or ending a lease owing money, and *social risk*, which involved tenants being disruptive or dangerous neighbors.<sup>51</sup> Landlords and property managers took credit and eviction records to be indicators of financial risk, and criminal records to be markers of

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50. See *infra* Part IV.

51. These categories of risk are analytic terms that were developed through analysis of interview data. Respondents did not necessarily use this exact language when describing their processes and procedures of tenant selection.

social risk.<sup>52</sup> They then applied unique cultural understandings to each type of risk. The study finds surprising consistency among landlords and property managers of all sizes when it came to what cultural archetypes they invoked when considering different types of records and the risks they presented.<sup>53</sup>

These archetypes came from a larger cultural understanding of poverty, debt, and fault in the United States. These cultural understandings, mapping the classic American Dream ideal,<sup>54</sup> follow the logic that if you work hard you can and should pay basic bills and if you cannot it is your fault—the Horatio Alger—esque image of what it means to be a successful and financially responsible citizen.<sup>55</sup> Part of this ideal involves repaying debt, for debt in arrears is viewed with suspicion and as a moral failure. This cultural archetype runs deep. Anthropologist David Graeber notes, “Since colonial days, Americans have been the population least sympathetic to debtors . . . . [I]t’s a country where the idea that morality is a matter of paying one’s debts runs deeper than almost any other.”<sup>56</sup> What makes such ideas *cultural* is that they are broadly recognizable in the contemporary United

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52. See *infra* Part III.

53. See *infra* Part III.

54. See John Swansburg, *The Self-Made Man*, SLATE (Sept. 29, 2014, 11:45 PM), [https://www.slate.com/articles/news\\_and\\_politics/history/2014/09/the\\_self\\_made\\_man\\_history\\_of\\_a\\_myth\\_from\\_ben\\_franklin\\_to\\_andrew\\_carnegie.html](https://www.slate.com/articles/news_and_politics/history/2014/09/the_self_made_man_history_of_a_myth_from_ben_franklin_to_andrew_carnegie.html) [<https://perma.cc/5THH-VQKR>].

55. See *id.* Horatio Alger, born in 1832, wrote novels about men who were born into poor, struggling, families but managed to lead financially secure lives as adults and did so “through pluck and hard work.” ALISSA QUART, *BOOTSTRAPPED: LIBERATING OURSELVES FROM THE AMERICAN DREAM* 39 (2023). Now largely debunked as unrealistic myths, Alger’s stories of “rags-to-riches” men continue to perpetuate beliefs embedded in American culture. See *id.* at 40 (“Today . . . the Alger conceit continues at full force.”); Matthew Wills, *The Creepy Backstory to Horatio Alger’s Bootstrap Capitalism*, JSTOR DAILY (Oct. 15, 2020), <https://daily.jstor.org/the-creepy-backstory-to-horatio-algers-bootstrap-capitalism> [<https://perma.cc/245C-VG8H>]. A sizeable number of U.S. residents believe that people who are poor are poor because they do not work hard enough. PEW RSCH. CTR., *EMERGING AND DEVELOPING COUNTRIES MUCH MORE OPTIMISTIC THAN RICH COUNTRIES ABOUT THE FUTURE* 13 (Oct. 8, 2014), <https://www.pewresearch.org/wp-content/uploads/sites/2/2014/10/Pew-Research-Center-Inequality-Report-FINAL-October-17-2014.pdf> [<https://perma.cc/2MT7-W3NJ>]; Roberto A. Ferdman, *One in Four Americans Think Poor People Don’t Work Hard Enough*, WASH. POST (Oct. 9, 2014, 2:42 PM), <https://www.washingtonpost.com/news/wonk/wp/2014/10/09/one-in-four-americans-think-poor-people-dont-work-hard-enough> [<https://perma.cc/2GWB-7SGY>].

56. DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 16 (2014).

States—part of a shared meaning structure—even if not universally held by all people under all circumstances.<sup>57</sup>

And consistent with this cultural archetype, many unpaid debts resulted in the collateral consequence of being denied housing. Landlords adopted the view that those who take on debt are subsidiary to or lesser than people who make their way without taking on debt in the first place. Overall, virtue and thrift are noble qualities, whereas overspending and taking on debt indicate risky behavior and morally questionable judgment.

But the data also uncover how other cultural narratives take hold when a person experiences perceived acts of God, like illness that results in substantial medical debt, or takes on admirable financial risk, like educational debt. To landlords, those types of debts should be forgiven.<sup>58</sup> Though the allocation of rental housing on its face appears to be a largely mechanical and predetermined process, the study finds that culture matters, and a very specific, and very American, cultural understanding of finances and debt determines which records do and do not result in the collateral consequence of being denied housing.

When it came to social risk, however, several landlords rejected the traditional archetype that criminal pasts indicate continued danger, and instead adopted more contemporary cultural notions of crime and forgiveness. Many landlords said they did not think those with criminal records should be burdened with the additional collateral consequence of being denied housing because they “served their time.”<sup>59</sup> Thus, the landlords wanted to avoid “double jeopardy.”<sup>60</sup> Many of the cultural archetypes they invoked mirrored the arguments motivating the Ban-the-Box laws that have received widespread attention across the country, particularly in California. Notably, landlords in California—where such laws and policies are more often in the public discourse,

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57. See generally, LYN SPILLMAN, *WHAT IS CULTURAL SOCIOLOGY?* (2020) (examining how people make meaning); see also Brian Steensland, *Sociology of Culture*, OXFORD BIBLIOGRAPHIES (July 27, 2011), <https://www.oxfordbibliographies.com/display/document/obo-9780199756384/obo-9780199756384-0055.xml> [<https://perma.cc/E8SP-ZRHP>]. Sociologists often consider culture to refer to “beliefs that people hold about reality, the norms that guide their behavior, the values that orient their moral commitments, or the symbols through which these beliefs, norms, and values are communicated.” *Id.*

58. This view of debt is consistent with other extant studies. See, e.g., Laura M. Tach & Sara Sternberg Greene, *Robbing Peter to Pay Paul: Economic and Cultural Explanations for How Lower-Income Families Manage Debt*, 61 *SOC. PROBS.* 1, 1–5 (2014).

59. Interview with Participant No. 1214 (Nov. 16, 2020) (on file with authors).

60. Interview with Participant No. 5280 (Feb. 8, 2021) (on file with authors).

adopted as laws, or on the ballot<sup>61</sup>—were more likely than landlords in North Carolina to believe criminal records were of little utility when it came to rental decisions.

The second key theoretical insight from this study is that the law structures not just whether, but also *how*, landlords use records, which varies by organizational structure and size. The data show that this happens differently for smaller and larger landlords because they operate in different organizational milieu, where different aspects of the law are more or less salient.

This difference is particularly evident when it comes to how different sized landlords process applicants with borderline disqualifying records. Indeed, most landlords have implemented their own mechanisms to allow certain borderline applicants a chance, but this varies by organizational structure. These differences are connected to different notions of fairness and different understandings of the law.

For smaller landlords, fairness often meant understanding the circumstances that gave rise to a person's records. When smaller landlords see records that they view as borderline risky, they value reaching out to the applicant to gain an understanding of the story behind the negative record. Their understanding of the Fair Housing Act and relevant state and local laws is generally that they are permitted to ask about individual stories so long as they apply consistent principles and values to each type of story. If the applicant connects with the decision-maker and tells a story that is culturally salient to them, such that the decision-maker understands the explanation for the negative record to be morally and culturally acceptable, the decision-maker is much more likely to allow that applicant to rent, despite the existence of borderline negative records. However, if the decision-maker views the explanation of the negative record as consistent with their understanding of irresponsible or risky behavior, then they are unlikely to give the applicant access to the unit. Because sociological theory provides that "social position shapes cultural know-how, like how to tell convincing stories,"<sup>62</sup> this finding

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61. In California, Berkeley, Oakland, and Richmond have limited the use of criminal records. See BERKELEY, CAL., MUN. CODE tit. 13, ch. 13.106.040 (2020) (limiting the use of criminal history information in housing decisions); OAKLAND, CAL., MUN. CODE tit. 8, ch. 8.25 (2020) (same); RICHMOND, CAL., MUN. CODE art. II ch. 2.65.010 (2013) (same).

62. Kiviat, *Art of Deciding with Data*, *supra* note 49, at 286–87 (citing Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner & Alice Motes, *The Sociology of Storytelling*, 37 ANN. REV. SOCIO. 109, 118 (2011)); see also Annette Lareau, *Cultural Knowledge and Social Inequality*, 80 AM. SOCIO. REV. 1, 1, 2 (2015).

suggests significant implications for mobility and persistent inequality. An applicant's ability to employ cultural capital to connect with a landlord and give culturally salient and sympathetic explanations for negative records, to reach what we call "cultural connection," can be key to gaining access to housing.

For landlords that operate in larger and more complex organizations, making fair decisions and complying with the law generally meant something quite different: treating all applicants exactly the same. This structures their use of records and the impact of such use on collateral consequences. Indeed, large decision-makers understand the Fair Housing Act and relevant state and local laws as making it too risky to allow any individual story to change the outcome for a particular tenant. Often, their entire organizational models are built around avoiding such situations.

However, these organizations still have a process by which those with borderline negative records may still access housing—if such applicants have the financial capital to pay additional money for the security deposit, often double the typical amount, then they are able to rent the unit. Given the well-documented significant racial differences and constraints on wealth accumulation throughout history,<sup>63</sup> this process indicates that certain groups of borderline applicants may be more likely to be able to access housing than others, despite the organizational commitment espoused by many of these companies to avoid favoring one group of people over another when making resource allocation decisions.

These findings highlight an important point: Variation in organizational size and structure, and thus record processing, contributes to how different types of capital help applicants gain access to units when landlords perceive them to be on the border of qualifying for those units. There are two key pathways through which borderline applicants can avoid the potential collateral consequences of their negative records and still gain access to housing—cultural capital<sup>64</sup> and

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63. See generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2022) (chronicling racism in the U.S. taxation system); MEHRSA BARADARAN, *THE COLOR OF MONEY* (2017) (studying the policies and operation of Black banking in relation to Black communities and a segregated economy); O'NEIL, *supra* note 48 (examining how algorithms reinforce discrimination).

64. The concept of "cultural capital" was first developed by sociologists Pierre Bourdieu and Jean-Claude Passeron to "analyze how culture and education contribute to social reproduction." Michele Lamont & Annette Lareau, *Cultural Capital: Allusions, Gaps and*



financial capital.<sup>65</sup> But the type of landlord they are dealing with determines which type of capital will function to avoid the collateral consequence.

The implications of this study are significant. At a time when the housing crisis in the United States shows no sign of improvement, it is vital to understand the process by which housing is allocated to understand which groups may be disproportionately excluded and why. This understanding, in turn, can help shape policy interventions aimed at increasing housing access. This study's findings around culturally construed understandings of risk and legal constraints can have broad implications for access to housing. When considering legal interventions to promote access to housing, policymakers must consider these cultural understandings as an important lever for connecting intervention to change. Targeted policies that mitigate perceived risk of potential renters may go a long way to increasing access to housing for a range of potential renters, including those traditionally excluded from economic resources, such as most rental housing.

This Article proceeds as follows. Part I describes extant research and shows how this study adds a needed qualitative dimension to existing knowledge of collateral consequences. Part II discusses in more detail the methods and data used for this study, explaining how certain methodological decisions were made and the limitations of this study. Part III provides a short history of tenant screening in the United States and provides general details about the current practices of tenant screening in the United States. It then introduces the tools of cultural sociology while detailing key findings from this study. It documents differences and similarities in how landlords of different sizes think about and process financial, housing, and criminal records, and how the collateral consequences of each type of record take shape. It also discusses the findings, showing how landlords invoke different

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*Glissandos in Recent Theoretical Developments*, 6 SOCIO. THEORY 153, 153 (1988). Since that time, the definition of cultural capital has evolved, and scholars use the term in different ways. *Id.* In this paper, we draw on Pierre Bourdieu's definition of "embodied cultural capital," which refers to the knowledge that is "consciously acquired and passively inherited" through "socialization to culture and tradition," leading to a common shared understanding with others—in this case, among landlords. Pamela Hampton-Garland, *The Influence of Embodied Cultural Capital on the Retention and Matriculation Adults Entering College*, ADULT EDUC. RSCH. CONF. (2015). This cultural know-how can translate into a financial end: here, being able to rent a place to live.

65. In this Article, "financial capital" refers to money and other forms of funding that result in wealth and access to funds.

cultural archetypes depending on what type of risk they believe a given record presents. This, in turn, affects housing allocation. Part IV considers how the law structures landlord record use, detailing differences in the law's influence depending on the organizational structure and size of the landlord. Finally, we conclude by discussing the implications of our findings.

#### I. THE LANDSCAPE OF COLLATERAL CONSEQUENCES AND TENANT SELECTION STUDIES

Much of the extant literature on collateral consequences focuses on the collateral consequences of criminal records.<sup>66</sup> This attention is warranted given that one in three people in the United States has a criminal record.<sup>67</sup> As leading collateral consequence scholars have noted, while incarceration itself was once the primary punitive concern of those involved in the criminal justice system, the impact of a criminal conviction now goes much further. One researcher calls these sanctions “invisible punishments,” defining them as “the punishment that is accomplished through the diminution of the rights and privileges of citizenship and legal residency in the United States.”<sup>68</sup>

More recently, other researchers raise the important point that those who are convicted of and imprisoned for crimes are not the only ones who suffer from the collateral consequences associated with a criminal record.<sup>69</sup> Those involved in the mass misdemeanor system—

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66. See, e.g., JEREMY TRAVIS, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15–16 (2002); NATAPOFF, *PUNISHMENT WITHOUT CRIME*, *supra* note 28, at 28–29; Jain, *supra* note 29, at 1115–27; Pager, *Mark of a Criminal Record*, *supra* note 40, at 939.

67. See Jaboa Lake, *Preventing and Removing Barriers to Housing Security for People with Criminal Convictions*, *CTR. FOR AM. PROGRESS* (Apr. 14, 2021), <https://www.americanprogress.org/article/preventing-removing-barriers-housing-security-people-criminal-convictions> [https://perma.cc/4NME-XP6T].

68. TRAVIS, *supra* note 66, at 15–16.

69. See generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2019) (discussing New York City's “Broken Windows” policing theory that expanded police enforcement against low-level offenses); NATAPOFF, *PUNISHMENT WITHOUT CRIME*, *supra* note 28 (examining how that the misdemeanor system exacerbates inequality). Additionally, Professor Eisha Jain has observed that prosecutors can and do exercise discretion to influence collateral consequences, particularly in the context of plea bargaining. See Jain, *supra* note 29, at 1200.

even those who are only arrested but not actually convicted of a crime—also suffer collateral consequences.<sup>70</sup>

The employment context is where there has been the most research about informal collateral consequences, particularly criminal-related collateral consequences.<sup>71</sup> One groundbreaking audit study shows that criminal records significantly impact hiring decisions, with the mark of a criminal record making it harder to get a job or even a callback interview.<sup>72</sup> The effect is even greater for Black applicants.<sup>73</sup> Another study seeks to understand whether employers are generally using criminal records “as a valuable source of information that enables rational risk management,” or whether “employers have a general bias against or stigma associated with a criminal record.”<sup>74</sup> The authors conclude that although reputation risk explains some degree of employer aversion to hiring individuals with criminal records, such risk aversion cannot fully explain employer hiring decisions and stigma also plays a role in resistance to hiring those with criminal records.<sup>75</sup>

A few studies on the employment side have examined how other types of negative records might play out in the employment context, though such research is limited. One such study interviewed fifty-seven hiring professionals and sought to understand how these professionals make sense of credit reports. The study finds that a process of moral storytelling takes place in which employers infer stories about a person’s life from their credit report, imbuing credit reports with social meaning. This process, the study finds, can result in people with bad credit being denied jobs.<sup>76</sup>

The limited extant work on landlord decision-making focuses almost exclusively on low-tier housing markets, particularly Section 8 landlords, and on smaller landlords owning few units and

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70. See KOHLER-HAUSMANN, *supra* note 69, at 159–72 (discussing the potential for collateral consequences after convictions for misdemeanors and noncriminal violations due to the “marking” of the defendant’s record).

71. See, e.g., *infra* notes 72, 74, 76 and accompanying text.

72. Pager, *Mark of a Criminal Record*, *supra* note 40, at 957–58.

73. *Id.*

74. DALLAS AUGUSTINE, NOAH ZATZ & NAOMI SUGIE, UCLA INST. FOR RSCH. ON LAB. & EMP., WHY DO EMPLOYERS DISCRIMINATE AGAINST PEOPLE WITH RECORDS? STIGMA AND THE CASE FOR BAN THE BOX 4 (2020), <https://irle.ucla.edu/wp-content/uploads/2020/07/Criminal-Records-Final-6.pdf> [<https://perma.cc/RX9J-R7LX>].

75. *Id.* at 4–7.

76. Kiviat, *Art of Deciding with Data*, *supra* note 49, at 283; see also Rourke L. O’Brien & Barbara Kiviat, *Disparate Impact? Race, Sex, and Credit Reports in Hiring*, 4 SOCIUS 1, 1 (2018).

independently making tenant-screening decisions.<sup>77</sup> This research generally seeks to explain the role discrimination plays in housing decisions. For example, one important article studied how landlords construct the race of tenants in racially homogenous, affordable housing markets.<sup>78</sup> The authors find that landlords often socially construct the race of tenants and are inclined to rent to tenants who defy unfavorable racial stereotypes held by landlords.<sup>79</sup> In other words, the more a certain Black applicant defied a landlord's negative stereotypes of Black people, the more likely that individual was to get the housing unit.<sup>80</sup>

Another important study seeks to show how two new, specific fair housing laws in Seattle, Washington affected tenant screening in the area.<sup>81</sup> This study, which includes interviews with eleven small and mid-sized independent landlords, shows how these landlords tended to adopt fairly subjective standards to determine who to rent to,<sup>82</sup> and concludes that the new fair housing laws “imposed few meaningful restrictions on how [these] landlords select[ed] tenants.”<sup>83</sup> There is also a study employing the Amazon Mechanical Turk, a crowdsourcing platform—resulting in the sample comprising almost exclusively small landlords managing under ten units—which showed landlords various researcher-made tenant-screening reports with varying criminal records and eviction histories.<sup>84</sup> This study finds that the small

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77. See, e.g., Rosen et al., *Racial Discrimination in Housing*, *supra* note 25, at 818; Reosti, *supra* note 11, at 618, 629–30; Meredith Greif, *Regulating Landlords: Unintended Consequences for Poor Tenants*, 17 CITY & CMTY. 658, 658 (2018) [hereinafter Greif, *Regulating Landlords*]; MEREDITH GREIF, COLLATERAL DAMAGES: LANDLORDS AND THE URBAN HOUSING CRISIS 3 (2022) [hereinafter GREIF, COLLATERAL DAMAGES].

78. Rosen et al., *Racial Discrimination in Housing*, *supra* note 25, at 788.

79. *Id.* at 814.

80. See *id.* at 81 (stating that prospective tenants who have “maintain[ed] a certain financial history and who are willing and able to perform ‘respectability’ to potential landlords—by showing deference, jumping through administrative hoops, managing their children to unreasonable expectations, and subjecting themselves to invasive home visits—can find housing more easily than their socioeconomic peers”).

81. See Reosti, *supra* note 11, at 618.

82. See *id.* at 630, 636–42 (describing the various screening processes that the landlords utilized).

83. *Id.* at 620.

84. Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, 33 HOUS. POL’Y DEBATE 1484, 1485 (2022). For a full discussion of the limits of the sample in this study, see *id.* at 1494 (“[O]ne specific limitation is that the recruited sample was disproportionately representative of small-scale landlords. In the sample of this paper’s study, 87% of the sampled landlords managed fewer than 10 units. The underrepresentation of large-scale landlords in this study can be attributed to the fact that MTurk workers are individuals.”).

landlords use “blanket screening policies” and “conflate the existence of tenant records with outcomes.”<sup>85</sup>

Finally, there have been numerous accounts in legal and social scientific scholarship about how big data, broadly speaking, reproduces inequality,<sup>86</sup> but these articles generally do not shed light on the specifics of how decision-makers interpret such data.

During a period of acute crisis in the affordability and availability of rental housing, more research is needed to better understand how landlords at all market levels and all sizes understand, interpret, and ultimately utilize data that reveal negative records. This study provides this much-needed insight and, in turn, informs a range of housing law and policy debates.

## II. DATA AND METHODS

Our research team interviewed landlords and property managers to learn about how those respondents understood and processed data—and ultimately, decided who to rent to. Our interview sample consisted of both individual landlords who own the property they rent out and individuals who work at companies that own or manage rental properties.<sup>87</sup> We decided to conduct interviews rather than distribute a survey because interviews are particularly helpful for “learning how people understand the world around them and how those

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85. *Id.* at 1484.

86. See, e.g., Ifeoma Ajunwa, *The Paradox of Automation as Anti-Bias Intervention*, 41 CARDOZO L. REV. 1671, 1671 (2019) (“The paradox, however, is that in some instances, automated decision-making has served to replicate and amplify bias.”); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 857 (2017) (stating that data-mining techniques “may further exacerbate inequality”); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671, 671 (2016) (“Unthinking reliance on data mining can deny historically disadvantaged and vulnerable groups full participation in society.”); Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1076 (2019) (“In the policing context, the unthinking use of algorithmic instruments will reinforce historical race-based patterns of policing.”); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 8 (2014) (“Evidence suggests that what is supposed to be an objective aggregation and assessment of data—the credit score—is arbitrary and has a disparate impact on women and minorities.”); Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1257 (2020) (claiming that “modern algorithms [may] result in ‘proxy discrimination’”).

87. This sample includes both owners of housing that manage it themselves and third-party property managers. Third-party property managers typically oversee tenant selection for their clients. Property managers work in many different kinds of organizations—some are real estate agents who also manage rental units, some are firms specializing in managing “mom-and-pop” properties, and some are firms specializing in managing properties owned by large corporate clients. In this Article, anyone making a rental screening decision is referred to as a “landlord.”

understandings guide action.”<sup>88</sup> Existing interview research shows that how landlords and property managers assign meaning to information shapes leasing decisions,<sup>89</sup> making interviews the best methodological choice for our research goals despite the limitations of qualitative methodology.<sup>90</sup>

We confronted a challenging decision about how to create a sample of landlords and property managers to interview. Scholars who study landlords and the U.S. rental housing market more broadly face the lack of a systematic and thorough public dataset.<sup>91</sup> In light of the lack of an extant dataset, scholars have generally relied on three different methods to study landlords. First, some qualitative scholars have relied on their relationships with individual landlords and landlord organizations and then expanded their samples through snowball sampling.<sup>92</sup> However, this approach may introduce selection

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88. See Barbara Kiviat, Sara Sternberg Greene & Hesu Yoon, *Going Against the Record: How Algorithms Shape the Way Landlords Make Exceptions for Bad Background Checks*, 18 (Aug. 28, 2023) (unpublished manuscript) (on file with authors) [hereinafter Kiviat et al., *Going Against the Record*]; see, e.g., Michele Lamont & Ann Swidler, *Methodological Pluralism and the Possibilities and Limits of Interviewing*, 37 QUALITATIVE SOCIO. 153, 159 (2014) (stating that interviewing “can reveal emotional dimensions of social experience that are not often evident in behavior”); ROBERT S. WEISS, *LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUD.* 2–3 (1994). Further, qualitative research is particularly useful in “explor[ing] micro-social phenomena . . . [and] the cultural understandings actors bring to social experience, interactions, and institutions.” MICHELE LAMONT & PATRICIA WHITE, NAT’L SCI. FOUND., *WORKSHOP ON INTERDISCIPLINARY STANDARDS FOR SYSTEMATIC QUALITATIVE RESEARCH* 10 (2005). Qualitative methods are also useful for “unraveling the mechanisms underlying causal processes.” *Id.*

89. See *supra* note 77.

90. There are important limitations to qualitative methodology. As Mario Luis Small has written, “Generally, the [qualitative] approaches call for logical rather than statistical inference, for case rather than sample-based logic, for saturation rather than representation as the stated aims of research.” Mario Luis Small, “*How Many Cases Do I Need?: On Science and the Logic of Case Selection in Field-Based Research*,” 10 ETHNOGRAPHY 5, 28 (2009). Thus, this Article does not and cannot make claims about the *prevalence* of any particular cultural understanding of negative records. The research is meant to show the cultural mechanisms behind processes that quantitative data have already identified—that applicants with negative records are denied economic opportunities at higher rates than those without such records. See *supra* notes 72, 74 and accompanying text.

91. See Geoff Boeing & Paul Waddell, *New Insights into Rental Housing Markets Across the United States: Web Scraping and Analyzing Craigslist Rental Listings*, 37 J. PLAN. EDUC. & RSCH. 457, 457 (2017) (claiming that current data on housing fail to convey the true nature of the rental market); Garboden & Rosen, *Talking to Landlords*, *supra* note 11 (generally same).

92. See Matthew Desmond & Nathan Wilmers, *Do the Poor Pay More for Housing? Exploitation, Profit, and Risk in Rental Markets*, 124 AM. J. SOCIO. 1090, 1097 (2019) (explaining that the authors relied on local rental reports in conducting their study); Eva Rosen, *Rigging the*

bias, representing a particular section of landlords rather than fully illustrating the heterogenous universe of various types of landlords.<sup>93</sup>

Second, other scholars have utilized already existing lists of landlords who registered their rental unit with the city.<sup>94</sup> This approach is feasible only when there is publicly available property ownership data for a given city, which is not always the case for U.S. cities, including our study sites—San Jose, California and Durham, North Carolina.

Third, scholars have turned to using online rental listings to construct a more representative sample of landlords.<sup>95</sup> Online rental listings are an emerging source of data that address the aforementioned limitations. Today, most rental properties are posted and advertised on websites,<sup>96</sup> which enables researchers to collect systematic and detailed data of rental listings.<sup>97</sup> Because these listings often contain the contact information of landlords and property managers, they are useful for constructing a sampling frame, especially when the listing of landlords is rare and often unavailable.<sup>98</sup>

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*Rules of the Game: How Landlords Geographically Sort Lo-Income Renters*, 13 CITY & CMTY. 310, 310 (2014) [hereinafter Rosen, *Rigging the Rules*] (stating that the author relied on interviews with landlords and residents).

93. See Garboden & Rosen, *Talking to Landlords*, *supra* note 11, at 283 (“When possible, is [sic] vastly preferable to select 100 respondents with stratified random selection than to introduce the bias associated with convenience, venue, or snowball sampling.”).

94. Professors Matthew Desmond and Nathan Wilmers, for instance, relied on the existing sampling frame of the representative sample of tenants—the Milwaukee Area Renters Survey—and matched it with the public record—the Milwaukee Master Property Record—to identify the corresponding ownership and owner address data. Desmond & Wilmers, *supra* note 92, at 1099; see also Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 FED. PROB. 20, 22 (2007) (“Surveys were mailed to landlords who had registered their rental units with the City of Akron . . .”).

95. See Philip M.E. Garboden, Eva Rosen, Stefanie DeLuca & Kathryn Edin, *Taking Stock: What Drives Landlord Participation in the Housing Choice Voucher Program*, 28 HOUS. POL’Y DEBATE 979, 985 (2018) [hereinafter Garboden et al., *Taking Stock*]; Rosen, *Rigging the Rules*, *supra* note 92, at 315.

96. Boeing & Waddell, *supra* note 91, at 457 (“Today, much of the rental listing activity that once occurred in the classified section of local newspapers has moved online to web sites specializing in housing advertisements.”).

97. An earlier study selected landlords and property managers from the “rentals” section of the Sunday edition of the *Seattle Times/Post-Intelligencer*, a local newspaper, using systematic random sampling. Jacqueline Helfgott, *Ex-Offender Needs Versus Community Opportunity in Seattle*, 61 FED. PROB. 12, 14 (1997). Collecting online rental listings is a contemporary version of the same practice.

98. See Garboden & Rosen, *Talking to Landlords*, *supra* note 11, at 283 (finding that constructing a sampling frame is “complicated by property management companies, who do not appear as the owner of record, but hold key information regarding the management of particular units”).

We used a combination of random and purposive sampling to contact landlords and property managers for interviews. Random sampling helped us avoid sampling bias. Meanwhile, purposive sampling helped us recruit types of respondents who are often difficult to find.<sup>99</sup>

We drew our initial sample from rental housing websites, searching for listings in the Durham and San Jose metropolitan areas. These two field sites provided important macroeconomic variation. San Jose is an expensive housing market and Durham a more affordable one.<sup>100</sup> They also provided important variation in Ban-the-Box laws aimed at landlords, with California a leader in housing Ban-the-Box initiatives and North Carolina lacking in such laws or proposals.<sup>101</sup>

In order to include all segments of the rental housing market—that is, those catering to more and less affluent renters—in our sample, we used three websites. One website focuses on more affordable rental options, and the other two include a broader range of properties, including more expensive properties. Most extant scholarship on rental

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99. Scholars have advocated for designing sampling frames tailored to the particular study in question, rather than using the same model for every study. *See, e.g.*, Small, *supra* note 90, at 28 (arguing that researchers “should pursue alternative epistemological assumptions better suited to their unique questions, rather than retreat toward models designed for statistical descriptive research”).

100. According to the American Community Survey 2018–2022 (five-year-estimates), the median gross rent in the San Francisco-Bay Area is \$2,248 and the median gross rent in the Durham-Chapel Hill area is \$1,249. The median household income in the San Francisco-Bay Area is \$124,452 and the median housing income in the Durham-Chapel Hill area is \$76,040. In the San Francisco-Bay Area, 41.6 percent of housing units are renter occupied, and in the Durham-Chapel Hill area 33.5 percent of units are renter occupied. AMERICAN COMMUNITY SURVEY (ACS) 2018-2022 (5-YEAR-ESTIMATES), accessed through Social Explorer. The sample consisted of forty respondents from the San Francisco-Bay Area and thirty-eight from the Durham-Chapel Hill area. Beyond differences in how respondents thought about criminal records, as discussed *infra* Part III.D., the study found few meaningful differences in how respondents in these two locations considered records.

101. *Compare California Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing> [<https://perma.cc/UXW9-DVHK>] (noting that California’s Ban-the-Box law “significantly limits” applicant discrimination), *with North Carolina Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/north-carolina-restoration-of-rights-pardon-expungement-sealing> [<https://perma.cc/9SDB-KVB3>] (noting that “North Carolina law does not provide any general fair employment protections” in its section discussing criminal records inquiries in employment application forms).



housing studies affordable and government-subsidized units,<sup>102</sup> leaving out the over half of U.S. renters who are not poor.<sup>103</sup> Our sampling frame allowed us to understand better how negative records function to create collateral consequences across a range of economic housing dimensions and how such negative records interact with upward mobility in the housing market.

We created a list of properties and individuals associated with the properties by using a random number generator to pinpoint ten listings per day, per website. We went through this process for seven days in October 2020 and did it separately for the two metropolitan areas. Once we compiled our lists, PhD students at Stanford University and Duke University contacted the individuals associated with each listing and asked if they would be willing to be interviewed for our study.<sup>104</sup> We included some referrals from our initial randomly drawn respondents in our sample. This was to make sure our sample included respondents who might not list their properties on the internet and other such difficult to research respondents. When respondents were initially contacted, they were told that the study focused on how landlords find good tenants and make other decisions.

The interview guide included questions about many different aspects of property management. However, there was a particular focus on tenant screening, or the types of information the respondent requires to screen tenants, and how the respondent employed the data they received. We were conscious of the fact that respondents may try

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102. See Stefanie DeLuca & Eva Rosen, *Housing Insecurity Among the Poor Today*, 48 ANN. REV. SOCIO. 343, 343 (2022) (“In the past decade, there has been a surge of scholarship in an emerging sociology of housing that focuses on housing insecurity, forced moves, landlords, shared housing arrangements, and the stratification effects of housing policy.”). For examples of such work, see generally DESMOND, *supra* note 1 (chronicling eight families’ housing struggles and explaining how evictions are a cause of poverty); see also Garboden et al., *Taking Stock*, *supra* note 95, at 979 (studying Housing Choice Voucher program participation among landlords in three cities); Greif, *Regulating Landlords*, *supra* note 77, at 658 (stating that the paper’s general purpose is to address “vulnerable renter households”); GREIF, *COLLATERAL DAMAGES*, *supra* note 77 (studying sixty landlords serving low- and moderate-income residents in Ohio).

103. Laurie Goodman & Bhargavi Ganesh, *Low-Income Homeowners are as Burdened by Housing Costs as Renters*, URB. INST. (June 15, 2017), <https://www.urban.org/urban-wire/low-income-homeowners-are-burdened-housing-costs-renters> [<https://perma.cc/3935-N9UK>]. See generally Aurand et al., *The Gap: A Shortage of Affordable Homes*, NAT’L LOW INCOME HOUS. COAL. (Apr. 2022), [https://nlihc.org/sites/default/files/gap/Gap-Report\\_2022.pdf](https://nlihc.org/sites/default/files/gap/Gap-Report_2022.pdf) [<https://perma.cc/TP9X-59T6>].

104. The initial plan was to conduct interviews in person. Given the continuation of the COVID-19 pandemic, all interviews were conducted via video conferencing software or telephone.

to tell us what they thought we wanted to hear, rather than their actual practice, a common concern with qualitative interviewing. Thus, the interview guide noted that when a respondent mentioned a general practice in how they process applicants, interviewers were to ask them for a specific example of a time they employed such a practice. For example, if a respondent said they rent to people with certain types of felonies, we asked them to tell us about when they had last rented to such an applicant and what the specifics of the case were.

In the course of collecting data, we saw that particularly at larger companies, individuals who are on the ground meeting with tenant applicants are not the people who have power to make tenant-screening decisions. Thus, we recruited senior-level executives at larger firms to be a part of our sample. In order to know who might be able to provide us information about tenant-screening and record-use processes at each company, we employed a business intelligence database. We used a variety of methods to contact these individuals, ranging from email to phone to social media messages to personal introductions. Several of these individuals were willing to be interviewed, and thus our final sample included not only respondents who work with tenants on a day-to-day basis, but also senior-level executives who manage tenant screening, often from several states away. Common positions for such executives included regional manager, regional vice president, senior vice president, senior director, vice president of operations, president, and chief executive officer. As far as we know, there is no other study of tenant screening that includes interviews with executives, thus adding to the novel findings in our study. The study offers insight into the decision-making processes, not just of individuals who work directly with tenants, but also of higher-ups in major real estate and property management companies. Because on-the-ground workers in large companies often have little to no discretion or information regarding tenant selection, this information is crucial for understanding how negative records are processed and considered in tenant-screening decisions.

It became clear during data collection that tenant-screening companies play a major role in attaching consequences, or a lack thereof, to various negative records. In addition to selling data, tenant-screening companies help implement algorithms used by large companies and craft data to be used in these algorithms.<sup>105</sup> Essentially, these companies are the masters of creating—or reducing—the

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105. See Kiviat et al., *Going Against the Record*, *supra* note 88, at 27–30.

collateral consequences associated with different types of negative records. We thus contacted executives at tenant-screening companies to be a part of our sample. We contacted executives both at companies that respondents in our sample noted they employed and companies that have recently been highlighted in the news. It was challenging to land these interviews—not surprisingly, given how these companies have recently come under fire and several major lawsuits are pending against several such tenant-screening companies.<sup>106</sup> Thus, in addition to using a wide range of methods to contact such executives (phone, email, personal contacts, online professional websites, and social media), we also sought out individuals who had recently left the industry in hopes that those individuals would no longer feel constrained in discussing their practices and outlook. We also know of no other study that includes interviews with multiple executives at tenant-screening firms—another way our study contains data and perspectives unique from past work.

Ultimately, our final sample included seventy-eight landlord or property manager respondents and ten current and former executives from tenant-screening companies for a total of eighty-eight interviews. All of the interviews took place between October 2020 and April 2021, and most ran over one hour in length. We stopped interviews once additional interviews yielded little additional insight, or what researchers call saturation—a standard technique in qualitative

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106. See, e.g., Complaint at 1, *Louis v. SafeRent, LLC*, No. 1:22-cv-10800-AK (D. Mass. May 25, 2022) (“Plaintiffs . . . seek to vindicate the rights of low-income, minority housing voucher-holders who are effectively blackballed from rental housing by Defendant SafeRent Solutions, LLC based on credit histories and other information which bears little to no relationship to the risk that their rent will not be paid.”); *Practice Area: Civil Rights and Employment, Connecticut Fair Housing Center, et al. v. CoreLogic Rental Property Solutions*, COHEN MILSTEIN, <https://www.cohenmilstein.com/case-study/connecticut-fair-housing-center-et-al-v-corelogic-rental-property-solutions> [https://perma.cc/8MTV-FQMT] (providing an overview of law firm Cohen Milstein’s representation of Carmen Arroyo and the Connecticut Fair Housing Center in a Fair Housing Act claim). In *CoreLogic*, the district court held that the tenant-screening company did not violate the Fair Housing Act, but found that

CoreLogic’s evidence that someone who has been arrested once is more likely than others to be arrested again [is] unconvincing, as it “only demonstrates that whatever characteristics are associated with being arrested likely persist over time—and many characteristics, including implicit bias, cultural incompetence, race and place of residence, persist over time.”

*Id.* (quoting *Conn. Fair Hous. Ctr. v. CoreLogic Rental Prop. Sols.*, 478 F. Supp. 3d 259, 299 (D. Conn. 2020)). The Connecticut Fair Housing Center has appealed the ruling. Georgia Kromrei, *Fair Housing Group Appeals CoreLogic Screening Tool Ruling*, LAW360 (Aug. 7, 2023, 6:45 PM), <https://www.law360.com/articles/1708292/fair-housing-group-appeals-corelogic-screening-tool-ruling> [https://perma.cc/T8LZ-EKJG].

research.<sup>107</sup> The first two Authors read transcripts of interviews as they were conducted to determine when we reached that point. Details about the sample are included in Table 1.<sup>108</sup> Our sample includes landlords and property managers from sixty-four different companies or sole proprietorships. At some companies, we interviewed more than one person to get the perspectives of employees working with tenants as well as those of managers with higher levels of responsibility.

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107. Benjamin Saunders, Julius Sim, Tom Kingstone, Shula Baker, Jackie Waterfield, Bernadette Bartlam, Heather Burroughs & Clare Jinks, *Saturation in Qualitative Research: Exploring Its Conceptualization and Operationalization*, 52 *QUAL. QUANT.* 1893, 1895 (2018).

108. This table also appears in Kiviat et al., *Going Against the Record*, *supra* note 88, at 23.

Table 1. Sample Description

<b><i>Number of Respondents</i></b>	
Landlords and property managers	78
Current and former executives of tenant screening companies	10
	<i>Percent of landlords/property managers (N=78)</i>
<b><i>Location of enterprise</i></b>	
CA-only	35%
NC-only	37%
Multiple states	28%
<b><i>Type of Organization</i></b>	
Individual owner-operator	26%
Real estate agency with property management services	12%
Property management company catering to individual owners	19%
Large corporate owner-operator	3%
Property management company catering to individual owners	8%
Midmarket owner-operator	24%
Property management company catering to large corporate owners	9%
<b><i>Respondent role</i></b>	
Property level/direct tenant interaction	78%
Executive level	22%

Our data analysis process followed standard procedures for analyzing qualitative data. To find patterns in our data, we followed a three-step process that involved both memo writing and coding of

transcripts.<sup>109</sup> Step one involved reading transcripts and writing memos that identified processes, themes, similarities, and differences between different respondents. After doing so, we held team meetings to discuss the memos. The second step of our process was developing a collection of qualitative codes. We coded each transcript using Dedoose, a qualitative coding software package. The third step of our analysis involved looking for patterns by reading within codes across all transcripts. We wrote memos about our findings and met as a team to discuss them and then coded additional themes that emerged. We checked for intercoder reliability by employing multiple coders on the same task, including an outside research assistant not involved in other aspects of the project.

### III. COLLATERAL CONSEQUENCES “ON THE GROUND”: FINANCIAL, HOUSING, AND CRIMINAL RECORDS

This Part provides a brief overview of the evolution of tenant screening over time. It then explains that current tenant-screening practices vary by landlord size. Specifically, this Part discusses how smaller and larger landlords understand and process three different types of records—financial, housing, and criminal. Landlords perceive these three different types of records as presenting different types of risk. Financial and housing records are thought of as presenting financial risk, while criminal records are thought of as presenting social risk. Depending on the type of record and thus the perceived type of risk, landlords of all sizes invoke surprisingly similar cultural archetypes when considering such records. This Part describes these similarities but also highlights key differences that follow differences in organizational structure and size. Finally, the last Section describes in more detail how the data show the importance of culture in landlords’ understanding of different types of records.

#### A. *The Evolution of Tenant Screening Over Time and Current Practice*

As discussed in Part II, this study includes a wide range of landlords and property managers, from smaller owner-operators who own just one or two units to executives from companies that own or

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109. See MATTHEW B. MILES & A. MICHAEL HUBERMAN, *QUALITATIVE DATA ANALYSIS* 61–99 (Sage Publ’n 2d. ed. 1994); JOHN LOFLAND, DAVID A. SNOW, LEON ANDERSON & LYN H. LOFLAND, *ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE OBSERVATION AND ANALYSIS* 195–219 (2022).

manage tens of thousands of units across the country. While this study finds interesting similarities between how these respondents viewed specific negative records, there were, not surprisingly, key differences that varied by firm size in how landlords ultimately operationalized data. Historically, almost all landlords evaluated tenants by gathering information interpersonally.<sup>110</sup> By speaking with applicants, as well as those who knew them well—particularly prior landlords—it was possible to form predictions about how the applicant would behave as a tenant in the future.<sup>111</sup> We call this type of screening “interpersonal.”

Beginning in the mid- to late 1800s with the advent of consumer credit bureaus, landlords also gained access to another sort of knowledge: written records from organizations that had had interactions with applicants in the past.<sup>112</sup> With information from credit bureaus and the other sorts of data brokers that have followed, like tenant-screening companies, landlords can make predictions about how tenants will behave in the future without directly interacting with those tenants or people with opinions about them based on personal relationships.<sup>113</sup> This method of evaluation is notably different in two other ways. First, it provides standardized accounts of how people have behaved in the past. Records essentially include series of simplified checkboxes—for example, whether a person had paid their credit card bill this month or not<sup>114</sup>—rather than stories and context-rich

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110. See Robert W. Benson & Raymond A. Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 LOY. L.A. L. REV. 301, 304 (1979) (“Traditionally, landlords have depended on their own formal or informal procedures to investigate applicants.”); *Tech, Bias, and Housing Initiative: Tenant Screening*, TECH EQUITY (Feb. 23, 2022), <https://techequity.us/2022/02/23/tech-bias-and-housing-initiative-tenant-screening> [<https://perma.cc/8LJJ-C3NX>] (“In its early days, tenant screening was a business transaction between landlord and tenant. Before the advent of automated tenant screening, landlords typically vetted tenants by having them submit their own records and references from previous landlords or others who could vouch for their trustworthiness.”).

111. See *Tech, Bias, and Housing Initiative: Tenant Screening*, *supra* note 110.

112. For a history of consumer credit bureaus, see JOSH LAUER, CREDITWORTHY: A HISTORY OF CONSUMER SURVEILLANCE AND FINANCIAL IDENTITY IN AMERICA 1–25 (2017). Using administrative records to select tenants was not common until the late 1980s to early 1990s. *Id.* at 255–56. It was at that time that technological advances allowed for efficient and financially feasible widespread sharing and use of personal records. *Id.*

113. See Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal To Protect Public Records*, 116 YALE L.J. 1344, 1346–47 (2007) (describing the growing usage of tenant-screening reports by landlords in the first stage screening process for tenants); Paula A. Franzese, *A Place To Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 669 (2018) (explaining that landlords can purchase tenant-screening data without ever having to interact with tenants).

114. Kiviat, *Art of Deciding with Data*, *supra* note 49, at 285–86.

descriptions. Second, because screening companies gather records from credit bureaus and courts,<sup>115</sup> the information carries the gravitas of those institutions. It is seen as official and authoritative, and it is “legible” to other organizations.<sup>116</sup> This type of screening is “formal.”

In this sample, nearly all respondents used formal screening. Table 2<sup>117</sup> highlights the use of the three most popular types of formal records used: credit reports, criminal records, and eviction histories. That said, there was great variation in *how* respondents used these formal records. Some landlords, generally larger and bureaucratically organized landlords, screened *solely* with formal records, including official paystub data to capture income. Others, generally those with smaller organizational structures, relied on a mix of formal and interpersonal screening. Many respondents described talking to applicants, as well as people who knew them personally, such as past landlords. The distinction between formal-only screening and formal-plus-interpersonal screening depended largely on firm size. The larger the firm at which a respondent worked, the more likely they were to describe exclusively formal screening criteria.

Table 2. *Formal Record Use*<sup>118</sup>

	<b>Yes</b>	<b>No</b>	<b>Don't Know</b>
<b>Credit Report</b>	96%	4%	n/a
<b>Criminal Record</b>	73%	17%	10%
<b>Eviction History</b>	88%	6%	5%

Within the formal screening category, the study saw two distinct pathways that respondents took to process the contents of background check documents—formal screening aids—especially credit reports, criminal records, and eviction histories. These pathways varied by

115. Franzese, *supra* note 113, at 667–68; Benson & Biering, *supra* note 110, at 301.

116. See Kiviat, *Art of Deciding with Data*, *supra* note 49, at 292 (“Credit reports thus functioned as an institutionally legible mode of establishing trustworthiness.”); see also Barbara Kiviat, *Credit Scoring in the United States*, 21 *ECON. SOCIO.: EUR. ELEC. NEWSL.* 33, 36 (2019) [hereinafter Kiviat, *Credit Scoring*] (“Credit scores contributed to [the mortgage lending] system by acting as highly legitimate, easy-to-articulate signals of loan quality . . . credentials, essentially.”).

117. This table also appears in Kiviat et al., *Going Against the Record*, *supra* note 88, at 23.

118. The eviction history percentages do not add up to 100 percent because we rounded to the nearest whole number.



organizational size and were connected to notions of fairness. Although it is true that individual owner-operators almost always employed formal and interpersonal methods, so did real estate agents and other credentialed professionals working at smaller firms. More so than professional status, what mattered was firm size. The larger the firm at which a respondent worked at, the more likely they were to describe screening criteria that were exclusively formal. This trend makes sense in light of organizational theory, which observes that larger firms are more likely to adopt formal procedures, in part because they are much more likely to be bureaucratically organized.<sup>119</sup> This means that large organizations tend to have specialized roles and offices, like those dedicated to tenant screening, and that they use formal rules for coordinating activities across areas of specialty.<sup>120</sup> In the sample, there was no hard-and-fast cutoff in terms of size between firms using formal or formal-plus-interpersonal methods, but generally speaking, once a firm had hundreds of units under management, and certainly close to a thousand, its employees were likely to prioritize formal screening methods over interpersonal ones. Tenant screening necessarily involves marking certain negative records as disqualifying for receiving rental housing. As the Authors' previous work reflects, most landlords could not simply disqualify *all* negative records, because there were not enough applicants with perfect records and the economic consequences of unfilled units are substantial.<sup>121</sup>

Below, the study data show that there were striking commonalities among landlords in the sample in how they understood the risk various sorts of records represented and how perceptions of these risks operated through moralized cultural archetypes. That said, there was also a key difference between how smaller and larger organizations technically processed the contents of records. Like prior scholars have pointed out, larger landlords are more likely to use sets of codified rules—often referred to as “algorithms”—to sort disqualifying from nondisqualifying records.<sup>122</sup> Indeed, such algorithmic methods have received substantial attention in recent years from both scholars and

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119. See Heather A. Haveman & Rachel Wetts, *Organizational Theory: From Classical Sociology to the 1970s*, 13 SOCIO. COMPASS, Mar. 2019, at 3–4 (describing sociologist Max Weber's ideal-typical bureaucracy as one with “specialization in training and a clear division of labor,” among other attributes).

120. *Id.*

121. See Kiviat et al., *Going Against the Record*, *supra* note 88, at 18.

122. See *id.* at 1; Reosti, *supra* note 11, at 634; Rosen et al., *Racial Discrimination in Housing*, *supra* note 25, at 803.

legal advocates.<sup>123</sup> This difference in how records are processed is significant in some contexts, as will be discussed later in the Article when we consider the Fair Housing Act and other laws.<sup>124</sup> But in acknowledging this difference, it is also important not to overlook ways in which landlords of all sorts actually think quite similarly about background check records and what consulting them accomplishes for the business of renting out housing units. The *mechanics* of using personal records may differ, but the *motivation* for doing so is largely consistent. It is with this similarity that this Article starts.

*B. Financial Records: Credit Reports and Credit Scores*

Almost all respondents in this study obtained and considered formal credit records. Credit records are perhaps the broadest category of records because so many aspects of one's financial life is captured in them, including a host of potential negative records.<sup>125</sup> Credit records themselves are confusing documents, and there are different types of such records landlords may use to assess potential tenants.<sup>126</sup> Credit *reports* and credit *scores* are different. Credit reports are long, complex documents that are often many pages long.<sup>127</sup> They contain information about credit cards, such as cards opened, cards closed, and payment history, as well as payment history on a host of other debts such as mortgages, student loans, and car loans.<sup>128</sup> They also can contain information on certain delinquencies, such as overdue utility bills, overdue medical expenses, and unpaid rent. These delinquencies

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123. See *supra* note 86 and accompanying text.

124. See *infra* Part IV.

125. See Sara Sternberg Greene, *The Bootstrap Trap*, 67 DUKE L.J. 233, 259–60 (2017) (discussing the various forms of negative information on a credit report).

126. See *id.* (describing the different reports that landlords may use).

127. *Id.* at 259.

128. Kiviat, *Art of Deciding with Data*, *supra* note 49, at 284.

generally only show up on a credit report if they are reported to a debt collector.<sup>129</sup> Credit reports also show past and current bankruptcies.<sup>130</sup>

Landlords can also obtain credit *scores*.<sup>131</sup> Before credit scores, there was widespread discrimination in lending—often the judgments of individual loan officers determined whether an individual would get a loan, and Black applicants were disproportionately denied loans.<sup>132</sup> After World War II, advocates began arguing that a different system was needed to determine loan qualification—one that was automated, because, as historian Louis Hyman wrote, they believed “increasing automation of decision making, [by] moving credit evaluation out of the hands of discriminatory loan officers and into the algorithms of objective quantitative credit lending models,”<sup>133</sup> would combat discriminatory lending decisions. Institutions such as the National Organization of Women and civil rights groups advocated for change, and in the 1970s Congress first took serious action on discrimination in lending.<sup>134</sup> However, it was not until the late 1980s to early 1990s that utilizing the credit scores employed today became widespread, though the idea for such scores surfaced much earlier.<sup>135</sup>

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129. Stefan Lembo Stolba, *Can Utility Bills Appear on Your Credit Report?*, EXPERIAN (Mar. 11, 2019), <https://www.experian.com/blogs/ask-experian/can-unpaid-utility-bills-appear-on-your-credit-report> [https://perma.cc/4X7J-4KGQ]; *Have Medical Debt? Anything Already Paid or Under \$500 Should no Longer be on your Credit Report*, CONSUM. FIN. PROT. BUREAU (May 8, 2023), <https://www.consumerfinance.gov/about-us/blog/medical-debt-anything-already-paid-or-under-500-should-no-longer-be-on-your-credit-report> [https://perma.cc/MP55-PZT5]; Ben Luthi, *Can Late Rent Payments Hurt My Credit Score?*, EXPERIAN (May 6, 2023), <https://www.experian.com/blogs/ask-experian/can-late-rent-payments-hurt-my-credit-score> [https://perma.cc/3YVU-HZY N].

130. Jennifer White, *Judgments No Longer Appear on a Credit Report*, EXPERIAN (Apr. 25, 2022), <https://www.experian.com/blogs/ask-experian/judgments-no-longer-included-on-credit-report> [https://perma.cc/R7ZT-WYSX].

131. Kiviat, *Credit Scoring*, *supra* note 116, at 39.

132. See Donncha Marron, “*Lending by Numbers*”: *Credit Scoring and the Constitution of Risk Within American Consumer Credit*, 36 *ECON. & SOC’Y* 103, 105–06 (2007); Greene, *supra* note 125, at 255–58; Abbye Atkinson, *Borrowing Equality*, 120 *COLUM. L. REV.* 1403, 1413–14, 1414 n.40 (2020); Jamela Adam, *What is Credit Discrimination?*, *BUS. INSIDER* (July 19, 2024), <https://www.businessinsider.com/personal-finance/credit-score/what-is-credit-discrimination> [https://perma.cc/WMN9-QPNX] (detailing historical instances of lending discrimination).

133. See LOUIS HYMAN, *DEBTOR NATION* 192 (2011).

134. See *id.* at 200, 204, 206.

135. See Greene, *supra* note 125, at 258 (“[T]he first general-purpose FICO score was released in 1989, and mortgage companies . . . began using FICO scores to help determine mortgage qualification in 1995. Currently, the three main credit-reporting agencies use FICO scores as a basis for their credit score models.”).

Indeed, the idea that statistical methods could be used to predict who would repay loans emerged through a few different outfits in the mid-1940s.<sup>136</sup> And in 1956, the Fair, Isaac and Company (“FICO”) was founded by engineer William Fair and mathematician Earl Isaac.<sup>137</sup> Fair and Isaac sought to devise a model to evaluate the risk that an individual would default on a loan, based only on a borrower’s finances, rather than character assessment.<sup>138</sup> FICO scores have evolved over time<sup>139</sup> and today are derived from credit reports and range from 300 to 850.<sup>140</sup> Currently, the main credit-reporting agencies, TransUnion, Experian, and Equifax use FICO scores as a basis for their main credit score models.<sup>141</sup> Each credit bureau reports a slightly different score because their models are slightly different.<sup>142</sup> These agencies also produce credit reports, which provide similar information across the three companies but have some company-specific variation.<sup>143</sup>

1. *Smaller Landlords.* Researchers in this study asked landlords how they considered and used credit records and the specific information contained within each, as well as other financial information such as income. In general, smaller decision-makers

136. Kiviat, *Credit Scoring*, *supra* note 116, at 34; Martha Poon, *Scorecards as Devices for Consumer Credit: The Case of Fair, Isaac & Company Incorporated*, 55 SOCIO. REV. 284, 284 (2007).

137. See *About Us*, FICO, <https://www.fico.com/en/history> [<https://perma.cc/Z9T6-Q9BK>]; Kiviat, *Credit Scoring*, *supra* note 116, at 36–38. See generally EDWARD M. LEWIS, AN INTRODUCTION TO CREDIT SCORING (1992) (providing general background on the development of credit-scoring models).

138. Greene, *supra* note 125, at 258; see Kiviat, *Credit Scoring*, *supra* note 116, at 34; O’NEIL, *supra* note 48, at 142.

139. Poon, *supra* note 136, at 293–300. Vantage Score is a company created collaboratively by the three main credit bureaus and is now a competitor to FICO. *Are Scores from FICO and VantageScore Different?*, EQUIFAX, <https://www.equifax.com/personal/education/credit/score/articles/-/learn/difference-between-fico-scores-vantagescore> [<https://perma.cc/U2W5-9C7T>].

140. *What’s in my FICO Scores?*, MYFICO, <https://www.myfico.com/credit-education/whats-in-your-credit-score> [<https://perma.cc/DZ3B-MZVC>]; Louis DeNicola, *What Is a Good Credit Score?*, EXPERIAN, <https://www.experian.com/blogs/ask-experian/credit-education/score-basics/what-is-a-good-credit-score> [<https://perma.cc/LTW2-4JHR>]

141. See *FICO Scores Versions*, MYFICO, <https://www.myfico.com/credit-education/credit-scores/fico-score-versions> [<https://perma.cc/A3XL-2J5X>]; CONSUMER FIN. PROT. BUREAU, ANALYSIS OF DIFFERENCES BETWEEN CONSUMER- AND CREDITOR-PURCHASED CREDIT SCORES 4 (2012), [https://files.consumerfinance.gov/f/201209\\_Analysis\\_Differences\\_Consumer\\_Credit.pdf](https://files.consumerfinance.gov/f/201209_Analysis_Differences_Consumer_Credit.pdf) [<https://perma.cc/4MUA-4GTM>].

142. CONSUMER FIN. PROT. BUREAU, *supra* note 141, at 2.

143. Greene, *supra* note 125, at 259.

primarily use credit records to try to gauge whether a tenant would pay the rent and pay it on time. Although most respondents also considered current income, which provides an important window into whether a potential tenant *can* pay rent, they knew that just because a tenant *can* pay the rent does not mean that they *will*—one reason why nearly all respondents also paid close attention to instances of delinquent or unpaid debts as reported on credit reports.

Most smaller respondents considered credit scores, but like most quantified scores, they tended to view them with suspicion, noting the limitation of such a mechanical evaluation. Relying solely on credit scores did not allow respondents to make a nuanced evaluation, something most smaller decision-makers valued. One respondent, Mike, who owns and manages about 120 units, said of credit scores:

I mean that 650 score tells you something about a person and them earning three times the rent tells you about a person, but it may not tell you whether the person [is] going to pay the rent and stay there for a long time and not damage the property, which is probably the biggest concerns [sic] of most property owners . . . . [S]o I will glance at the score . . . but it's not the story that I want to understand.<sup>144</sup>

Another respondent, Addy, summed up her use of credit scores by noting:

If they have above 600 that would be good, but some people have like 500 something. 500 something doesn't mean that I'm going to reject their applications, it just [means] I take into consideration . . . other factors besides just the numbers . . . . But again those [credit scores] are not entirely the main factor.<sup>145</sup>

She continued:

[T]he credit score in the past will give some indications of . . . that applicant . . . . But again, I use the screening, the credit report along with interview, along with references. So that's part of it. It's not the main focus of whether you want to select this applicant or reject this applicant."<sup>146</sup>

Several respondents talked about the credit score not being the “main factor” or “main focus.”

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144. Interview with Participant No. 1214, *supra* note 59.

145. Interview with Participant No. 1650 (Jan. 16, 2021) (on file with authors).

146. *Id.*

Another respondent, Renee, was also suspicious of credit scores. She explained she had pulled up two credit reports on the same day and

[o]ne person had a, like 720 or 722 or something. They had just filed for bankruptcy, I mean like, last week. And the other person had a 650 credit score and they paid all their bills on time, and so I called the credit bureau and I said, “Why is that?” They go, “Oh, well they don’t have that many credit accounts opened.”<sup>147</sup>

Because of situations like this, Renee further explained her feelings about credit scores as follows:

So I think it’s very shortsighted to just look at a number. See that comes back to my education with science, okay? It’s, you can’t, I don’t think you need to dumb down this job to the point where you let someone shoot out a number to you and you just accept that. You’ve gotta look at the whole picture because every one of us has things in our lives that happen, and depending on when it is, so what do I do?<sup>148</sup>

Some respondents who work for smaller companies that required a minimum credit score voiced frustration with the reliance on such quantified data, which took away discretion. One property manager, Carrie, who worked at a smaller company noted that in her apartment complex, the credit score cutoff is 500.<sup>149</sup> She said, however, that “credit scores are so misleading.”<sup>150</sup> When asked for an example, she said, “You could have someone who’s Hispanic that has limited credit and their credit score is 450 and now they don’t qualify for the property because they don’t believe in credit cards or they were never given them. Credit really shouldn’t be an indication.”<sup>151</sup> Carrie continued, noting that people “get denied because we’re using this magic credit score that means nothing right[?] Credit I think is designed to hurt people.”<sup>152</sup> She believes credit systemically harmed certain communities:

A lot of times, people who are low income just don’t have the same opportunities or even race. You may not get established credit or your

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147. Interview with Participant No. 7272 (Jan. 10, 2021) (on file with authors).

148. *Id.*

149. Interview with Participant No. 2094 (Jan. 25, 2021) (on file with authors).

150. *Id.*

151. *Id.*

152. *Id.*

parent took it out before you turned eighteen[,] and your credit[] was screwed up long before you even knew what to do with it.<sup>153</sup>

Many decision-makers did, however, use a credit score cutoff, whether they were smaller companies like the one Carrie worked for or small individual owner-operators who owned just one or two units. This cutoff varied substantially by the segment of the market a respondent operated in, from a low of 450 to a high of 700. Most credit score cutoffs fell between 580 and 650. At a certain point, many respondents felt that a very low score—however defined—indicated financial irresponsibility severe enough to reject a potential tenant. Leanne, for example, explained that she tried to work with tenants with relatively low scores, but at a certain point, she would no longer consider doing so:

You know, they'll say, "Oh, I think my score is like in the high fives." I'm like, "Okay. Well great, let's, let's go ahead and apply. We can probably work with you . . . . And then, the score will come in and it's a 520. Now, as a 520, I don't know if you've ever looked at these reports, but you have to work really hard not to pay your bills. Like, you have to ignore every letter that comes to your house, not put a check in the mail, bounce a lot of checks, have a lot of collections and judgments. So we won't rent to them."<sup>154</sup>

Beyond credit scores, however, most smaller respondents told us they looked carefully at credit *reports*, making meaningful distinctions between the types of debt documented on the reports. Many respondents said paying bills on time was key. Renee summed up how credit reports were more useful to her than credit scores and why paying bills on time matters:

I have had a lot of really good tenants who had bad things happen to them. And when you look at their credit report, you can see there was a period of time they did great, a very short period of time something went wrong, maybe a death in the family or a loss of a job or an illness. And then [in] the . . . years since that they've gone back to being good, so a credit score is good but what I'm really looking at is habits . . . . So if they have always paid bills late, . . . they're gonna pay their rent late. If they had a period of time where they were late [and] before and after they had been fine, then I just, I just wash that away.<sup>155</sup>

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153. *Id.*

154. Interview with Participant No. 3012 (Dec. 14, 2020) (on file with authors).

155. Interview with Participant No. 7272, *supra* note 147.

Several respondents pinpointed credit card debt as particularly problematic. Like Addy said, “[I]f you cannot pay your credit cards, then when it come to the rent you’re not going to pay on time. Just same thing. It’s a habit. It’s just part of life that you have . . . just like you’re brushing your teeth, you have to do every day.”<sup>156</sup> She went on to say:

You have to put on your schedule, you have to pay the credit cards or any payment: utility payment, phone payment on time. If you cannot do that it become[s] a habit for you and then when it comes to rent or anything. Just like if you go to work and you don’t show up on time, you come to work late all the time, become[s] a habit. It’s part of [their] character[.].<sup>157</sup>

Many respondents talked about some bills as “core bills,” verses other types of bills or debt they considered “noncore.” For example, Carrie stated, “I could see why companies do pay attention to if you owed a utility bill, because those are one of your core bills. If you can’t pay your lights, that makes sense.”<sup>158</sup> Respondents brought their own cultural understandings of responsible financial behavior to the equation, attributing credit card debt specifically as being a sign of reckless financial behavior. As Liam said, he would screen out someone if they are “just obviously an abuser of credit. Well, you know, that, that becomes pretty obvious if they have lots of credit cards and car loans that they just don’t pay.”<sup>159</sup>

Bruce presented both a culturally informed moral understanding of certain types of debt with a practical assessment of why applying his moralistic view made sense:

[Y]ou don’t have to have cable and you don’t have to have a cell phone. Yeah, maybe in this world you do, but those are more optional expenses. And if you can’t pay your discretionary bills, then you’re not going to be able to pay your rent . . . . So if your electric is getting turned off, you’re guaranteed to be late on your rent. It’s not even a question, it will happen . . . . And so it tells me immediately when I see those types of collections, especially if they’re recent, that I’m not

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156. Interview with Participant No. 1650, *supra* note 145.

157. *Id.*

158. Interview with Participant No. 2094, *supra* note 149.

159. Interview with Participant No. 7298 (Jan. 15, 2021) (on file with authors).



going to approve that person as a tenant because there's no chance that they're not going to be late with their rent.<sup>160</sup>

Yet respondents did not simply care about whether applicants paid debt on time, but also which types of debts were not paid on time. While nonpayment of utility bills and credit card bills was generally perceived as red flags that indicated a potential tenant may be an "abuser of credit," most respondents described making exceptions often for applicants who had trouble paying off medical debts and, to a slightly lesser extent, student loans. Respondents making such allowances understood these debts, as well as an inability to pay them off on time, as beyond applicants' control.

Bruce, who had made clear overdue utility and credit card bills were red flags for him, said, "I'm looking for nonmedical and non-student loan related collections . . . . [I]f you have a bunch of cable bill, phone bill, electric collections, that tells me more about what you're going to be like as a tenant than if you have some medical collections or some student loan collections."<sup>161</sup> When the interviewer probed him about *why* he makes that distinction, he said, "Well, there's a difference between things that you have to do and things that you choose to do."<sup>162</sup> He first focused on medical debt, noting, "[Y]ou have to go to the doctor if you're sick. . . . [N]o, one's going to worry about what it costs to go to the doctor if their child breaks their legs. So you have to do that."<sup>163</sup> Bringing his own culturally informed view of education into his exception to student loan debt, he said, "You have to improve your station in life. So trying to get an education is something that everyone is going to do."<sup>164</sup> Bruce made no mention of the fact that someone might have credit card debt or unpaid utility bills because they got sick, through no fault of their own, and lost their job, thus using credit cards to get by and letting other bills, like utilities, go unpaid for a period of time.

Fault was a common theme among respondents who discounted medical debt, and it went beyond the nature of the trigger event for the debt. Some respondents talked about the nature of the industry and how unfair it is. Carrie, in justifying her overlooking medical debt, said:

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160. Interview with Participant No. 6906 (Oct. 28, 2020) (on file with authors).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

It just happens to anybody. Like think how many times you've probably had a medical bill that hit collections and your insurance should have paid for it . . . . For you to dispute with an insurance company. There's just a lot of things that are . . . it's easy to put things on people's credit. It's hard to remove things off someone's credit.<sup>165</sup>

This view that medical debt and student loan debt are “common” and “can happen to anybody” pervaded respondent views. One respondent, Darren, who works at a smaller real estate firm that does property management and tenant selection for individual landlord owners, lamented landlords whose views on these types of debts did not align with his. He said:

[Y]ou know, it's difficult sometimes with certain owner[s] that . . . don't budge on kind of small things. Like, you know, student debt or—or medical debt . . . it's frustrating when, you know, it's—it's an every day life kind of thing. Everyone . . . anyone could have it. . . . [A]nd it's not like a non-payment of rent kind of thing. It's just medical bills (laughs) are expensive and school bills are expensive and . . . life happens.<sup>166</sup>

Darren sees medical debt and student loans as “small things,” and his frustration with landlords who do not share that view was salient in his response. Like many other respondents, Darren categorized these debts as “understandable” debt and thus worthy of a pass in a way that other debts are not.

Addy, who was committed to overlooking medical bills, explained that when she looks over credit reports, small collections amounts often worry her more than larger amounts, because the larger amounts are more likely to be medical bills. As she put it, her first step is to “look at the numbers that . . . go into collection.”<sup>167</sup> She went on to say, “[I]f it's like few hundred dollars and they're not able to pay it, to let it go into collections that will tell you something.”<sup>168</sup> Larger amounts, however, were a different story:

But if their collection amount is like \$5,000, \$10,000, sometimes because of the medical bill, [and] somehow they don't have insurance and they end up going to hospital, they end up with a big medical bill and they're not able to pay the bill, that will be a different case . . . .

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165. Interview with Participant No. 2094, *supra* note 149.

166. Interview with Participant No. 1867 (Dec. 18, 2020) (on file with authors).

167. Interview with Participant No. 1650, *supra* note 145.

168. *Id.*

“Oh because I have a surgery,” or something like that. But if it was coming from like Comcast bill for just or mobile phone, you didn’t pay. It’s only \$100 or \$200 and you let it go into collection, that will tell me something about this person.<sup>169</sup>

When asked what that would tell her, she said:

It tells you if you cannot afford to pay the bill, just \$100 or \$200, how you going to pay the . . . [\$]2,500[ rent]? You see. That’s a common sense. Or that tell[s] you this person is not good with paying the bill . . . [b]ecause something that [is] going to collection . . . like Comcast. They call you several time[s]. They want you to pay the amount, the overdue payment several time before it go into collection. So why does person let something happen like that? So that mean[s] this person is not my potential candidate because I want somebody paying the rent on time.<sup>170</sup>

Notably, \$2,500 per month over twelve months is \$30,000, closer to the large medical bills Addy was referring to rather than the small cable bills. But Addy’s culturally informed assessment of such situations is that prioritizing small bills makes sense, and not paying them tells her something about the financial life of a potential applicant that having large debts in arrears does not.<sup>171</sup>

The widespread notion that medical debt and student loans should be discounted was one of the reasons some respondents did not put much stock in credit scores. Like one property manager, Denise, said, “I hate a credit score.”<sup>172</sup> When asked to explain why, she attributed her distaste to her belief that medical debt and student loans unfairly bring down scores of otherwise worthy potential tenants. She said:

I do not believe in the credit score because I think they’re misleading, I think they’re false. And let me tell you why. Because . . . a good number of people have medical bills, they have student loans, and it will destroy someone’s credit to give them a crappy number and it’s held against them. Because unfortunately, everybody sees the level of credit that we see and understands their car payment was on time,

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169. *Id.*

170. *Id.*

171. How people prioritize repayment of debt does not always follow “rational” economic predictions. *See* Tach & Greene, *supra* note 58, at 2 (finding that “families’ debt management strategies are influenced by their desire to promote a financially responsible, self-sufficient social identity”); *see also* Francesca Polletta & Zaibu Tufail, *The Moral Obligations of Some Debts*, 29 SOCIO. F. 1, 2 (2014) (finding that whether debt settlement clients view repayment of debt as a moral obligation depends on the client’s relationship with the creditor).

172. Interview with Participant No. 2761 (Jan. 4, 2021) (on file with authors).

their rental history's amazing, their credit card's paid on time. But they got five medical bills because their child had to go to the hospital one night and it destroyed them because they couldn't pay the \$5,000 bill, whatever. . . . It breaks my heart.<sup>173</sup>

Ali, who owns a smaller property management firm, agreed, noting that she discounts credit scores for a similar reason:

So the problem is because I look at [the] score, it could be a 599 because of medical issues[.] . . . They've got bad credit 'cause of medical[.] . . . Or it could be 599 because they've had a car repossessed and they don't pay their cable bill, and they don't do these other things.<sup>174</sup>

Mike similarly connected his own distrust of how student loans and medical bills are processed and recorded to his decision to discount credit scores:

If they have a collections, I want to see . . . who the collections was from and why, and if they've paid it or not, and if they haven't paid it in what amounts . . . there's certain things that will drop a credit score down really low without necessarily being a negative in my mind.<sup>175</sup>

Mike went on to discuss how he saw student loans and medical bills unfairly bringing down scores:

[S]tudent loans, as well as medical bills sometimes will get posted in numerous, numerous times, you might have one medical incident. . . . [A]nd that a medical bill[] will be on your credit report, but there'll be like half a dozen . . . medical bills and some in collections and some in good standing . . . and it may all be tied into one medical incident because of how that billing industry works.

[B]ut you might also have a student loan[]. You might have half a dozen student loans, but really it's because you took a little bit of money in one semester and you took a little bit of money in the next semester and it gets posted over and over and over and over . . . . So, no, I don't use the score as much. A lot of times I find myself saying things when I'm justifying an applicant . . . I actually think they deserve higher because of these reasons, because they have all their accounts are pending.<sup>176</sup>

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173. *Id.*

174. Interview with Participant No. 1523 (Dec. 15, 2020) (on file with authors).

175. Interview with Participant No. 1214, *supra* note 59.

176. *Id.*

Respondents similarly drew on their culturally embedded understandings of fault and responsibility when describing their decision whether to grant housing to those with bankruptcies on their records. People who had filed for bankruptcy often fell into the category of being worthy of understanding, or, at a minimum, worthy of a second chance. Many respondents said they discounted bankruptcies, or at least consider applicants with past bankruptcies, if these bankruptcies were not very recent or active. Darren's response was typical of respondents' answers when asked about bankruptcies:

I mean . . . we've rented to a ton of people that have, you know, 7, 11, or like a 13 chapter bankruptcy, but they[']ll be upfront, "Hey, this is gonna be on my record." . . . [A] lot of them it was in the past, so their credit's like rebounded to a good amount . . . since then . . . [S]o bankruptcy's not an automatic decline in any way.<sup>177</sup>

Carrie summarized the views of several respondents when she discussed why she is lenient about bankruptcies:

You know, I'm forgiving of them because I know it's messy. Like a bad car accident could get someone in bankruptcy. A messy divorce could get someone a bankruptcy. It's not always like, oh, you went and bought a bunch of furniture and clothes and defaulted on your bills. It's not always what people think it is or a business that went bad and now it affects your personal credit. I'm forgiving because I can see all the reasons why that would happen to someone. And I think actually our industry, I don't know that I've seen people get denied for bankruptcies.<sup>178</sup>

Like many other respondents, Carrie understands credit card use as an indicator of financial irresponsibility, and that people are likely using credit cards for unnecessary luxury goods. Existing research suggests, however, that people often use credit cards to cover necessary expenses like food and clothing and to replace an almost nonexistent public safety net when they experience financial shocks, such as job loss, medical problems, or divorce.<sup>179</sup>

2. *Larger Landlords.* Larger corporate landlords also had to decide which records to include in their screening process, and, in many

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177. Interview with Participant No. 1867, *supra* note 166.

178. Interview with Participant No. 2094, *supra* note 149.

179. Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 523 (2013); Abbye Atkinson, *Rethinking Credit as a Social Provision*, 71 STAN. L. REV. 1093, 1103 n.38 (2019).

ways, these decisions mirrored smaller landlords. These larger landlords demonstrate similarly culturally informed notions of acceptable and unacceptable debt playing into their decisions. For example, past-due credit card payments and utility bills were usually considered negative markers by larger landlords, as well as other debts owed, and executives from these companies gave similar rationales to smaller landlords when explaining why such bills were included. However, larger landlords were much more focused on considering whatever objective scores were available rather than interpreting them. Credit scores were almost always part of the equation, with hard cutoffs that meant any score below a certain number would be denied. One respondent noted, “And then the credit score . . . you need to have a 600 and higher.”<sup>180</sup> The exact number varied, and some companies had different cutoffs and other criteria for different buildings they owned, depending on whether the building was Class A, Class B, or Class C—that is, the type of market in which the building operated.

But medical bills and student loan debt in arrears were often excluded from larger landlords’ decision-making process, just like smaller decision-makers told us they usually overlooked such debt. In our previous work on this topic we find that the common request of larger landlords to discount medical debt was not rooted in statistical knowledge of its lack of predictive value.<sup>181</sup> One respondent, an executive at a tenant-screening company, said his company’s data suggested that such debt could, in fact, have predictive value for who might not pay rent, but even when he told his clients that, they insisted on still excluding such debt from the tenant score calculation.<sup>182</sup> Specifically, he said that his company had a “data scientist” who found that there was some predictive value of such debt, and so when interfacing with landlords the respondent would say to them, “Hey, I know you’re saying medical debt doesn’t matter, but our numbers feel differently.”<sup>183</sup> He would tell them “trust our score, we know.” But the landlord companies would say, “Okay, that’s cool, but make sure you don’t count medical debt.”<sup>184</sup> This is notable because it speaks to the role of culturally informed views steering decisions about which debt to include and not to include in decision-making.

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180. Interview with Participant No. 6553 (Dec. 8, 2020) (on file with authors).

181. See generally Kiviat et al., *Going Against the Record*, *supra* note 88.

182. Interview with Participant No. 9617 (Mar. 4, 2021) (on file with authors).

183. *Id.*

184. *Id.*

Several landlord respondents explained to us why they exclude medical and student loan debt using culturally informed justifications. Paula, one such respondent, told us, “We don’t really look at student loans, medical bills. That’s not part of our criteria.”<sup>185</sup> Paula justified the practice as follows:

Well . . . I think certainly medical bills . . . it can come upon people without their knowledge. Right? You know, I mean, you can, get sick, you can have an accident . . . . And it[s], . . . not necessarily always in control of, of what you have and or, you know, what, what you, expect.<sup>186</sup>

The unexpected nature of medical bills seemed to sway Paula and her company. Although, like many smaller decision-maker respondents, she did not acknowledge that credit cards, for example, may be used to pay unexpected expenses resulting from an unexpected medical problem. Paula’s company did focus on “collections” beyond medical and student loans, “utilities,” and “rent payments.”

Courtney informed us that her company “forgive[s] medical bills and student loans.”<sup>187</sup> When asked why, Courtney also had a justification very similar to many smaller landlords. Her own culturally informed notions of morally acceptable and unacceptable debt are quite evident in her description of the policy, which included her views about how hard it is to pay off medical bills:

[F]or the medical bills we have forgiven those because we all know how hard it [was], you know, it has changed it, you know, under Obamacare. But there was a time when getting health insurance benefits . . . were [sic] really difficult unless you worked for an employer that provided them. And then, what would happen is, you know, let’s say you had an emergency situation where you didn’t have any medical bills. Now, you’re stuck with a hundred thousand dollars, like you’re never gonna pay that hundred thousand dollars off.<sup>188</sup>

Courtney went on to talk about how, for many people, the medical bill is an outlier, not a commentary on how financially responsible they are:

If everything else in your life is going pretty well, and you’re paying your credit cards, and you’re paying you know, your everyday debt

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185. Interview with Participant No. 2349 (Feb. 17, 2021) (on file with authors).

186. *Id.*

187. Interview with Participant No. 8278 (Mar. 1, 2021) (on file with authors).

188. *Id.*

that . . . we feel like you had control over, we felt like medical bills you don't always have control over . . . . So that's why the decision was made there.<sup>189</sup>

The idea of control was particularly important to Courtney. She went on to give a specific example: "I mean, let's face it. If you have to have an emergency appendectomy, you didn't have any control over that[] (laughs)."<sup>190</sup>

When talking about student loans, Courtney noted that the decision to discount them was made in just the past two years. She said:

[W]hat we found was we just had . . . some people who had such large student loan debt, and they were trying to work with the student loan company to either lower it, but . . . that huge payment they had, sometimes prevented them from being able to get a place to live. And how does someone be homeless (laughs) . . . . So, what, what we felt like was, by forgiving the student loan debt and not considering that, maybe this gave them the opportunity to be in housing, where they had a job where they could start paying their student debt again.<sup>191</sup>

To Courtney, those with large student loan debts were not irresponsible, and, in fact, deserved a chance to have housing, which, in turn, might help them start paying back their loans.

Larger landlords also shared views on bankruptcy similar to smaller decision-makers. Bankruptcies were not always forgiven, but often they were, especially those that were more than one year old:

Bankruptcy, no . . . we will decline who's had a bankruptcy within the last 12 months, depending on if they filed for Chapter 7 or Chapter 13. . . . [A]nything over one year, we don't look at, as long as . . . everything that shows delinquent on their credit report was included in the bankruptcy. So in other words, they didn't then get more credit after bankruptcy and still not pay it[] (laughs).<sup>192</sup>

The study reveals that while larger landlords are more focused on objective measures of evaluation, such as credit scores, both smaller and larger landlords bring their own culturally informed views of acceptable and unacceptable financial circumstances. These views were markedly similar across landlords of varying sizes, landlords that catered to different socioeconomic applicant pools, and landlords of

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189. *Id.*

190. *Id.*

191. Interview with Participant No. 8278, *supra* note 187.

192. *Id.*



varying demographics themselves. These cultural views tracked long-standing American views about financial fault and notions of acceptable and unacceptable debt. Thus, respondents of all organizational sizes deemed similar negative financial records as worthy of being overlooked and forgiven, and others as unworthy and indicative of perhaps irreparable financial irresponsibility.

*C. Housing-Related Records: Rent Arrears and Eviction Records*

Almost universally, eviction records or any past-due amounts to landlords were deemed extremely high-risk and were described as an “automatic decline.”<sup>193</sup> Evictions are, of course, some of the most direct evidence a landlord can access as to whether a tenant might be a financial risk, so, in many regards, it is not surprising that landlords viewed past housing-related debt with suspicion. What was perhaps more surprising, however, was the moralistic tone some landlords took when talking about those with evictions. For most landlords, no matter the cause of the eviction, such applicants were unworthy of a nuanced evaluation.

Landlords of all sizes invoked culturally informed views that deemed renters who had prior problems paying rent as unworthy and too risky to be given a second chance. Indeed, even when tenant-screening companies provided larger landlords with statistically validated data suggesting that eviction records more than a few years old were not predictive of a further eviction or a lease ending with rent in arrears, larger landlords eschewed implementing such data into their screening decisions and instead excluded all tenants with prior evictions, following their own culturally informed views about such tenants.<sup>194</sup> However, even when it came to evictions, this study finds that some smaller landlords were willing to put aside their general policy and rent to someone with a past eviction in cases where the applicant was able to tell a culturally salient story explaining the past eviction, ultimately making a cultural connection with the decision-maker.

1. *Smaller Landlords.* Renee, a landlord with just a few properties, was quite clear in her policy regarding rent in arrears and evictions: “[I]f they are chronically late paying their rent I’m not gonna rent to

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193. Interview with Participant No. 1867, *supra* note 166.

194. See Kiviat et al., *Going Against the Record*, *supra* note 88, at 13, 29 (describing landlord reluctance to rely on statistically validated eviction data over their own intuitions).

them . . . . And if they've been evicted I'm not gonna rent to them."<sup>195</sup> Cynthia, another respondent, explaining why she does not rent to those with past evictions said, "[C]ause I really don't wanna rent to anyone that's been evicted somewhere else 'cause I don't want that headache to come to me."<sup>196</sup> Cynthia believed that prior evictions predicted future evictions "[n]ine times out of ten."<sup>197</sup> She worried that those who have been evicted essentially learned the system, and thus would be more likely to take advantage of her or make her life difficult, saying, "I mean, they've been through the system already. They kinda know what they can and can't do, so, I would just rather not deal with them."<sup>198</sup> Roseanne, who worked for a firm that screens tenants for landlords, said that though it is ultimately the owner's decision, "[W]e don't want to mess with anybody who has, has had previous evictions or maybe even has in the collection or outstanding balances to another rental company or apartment community."<sup>199</sup> Mike, another smaller landlord, spent a lot of time talking about how he does not have hard-and-fast rules for credit and many other criteria, and looks at the potential tenant as a whole. The only exception to this? Evictions. And he said:

[S]o there's a ton of reasons why I reject people. . . . [B]ut . . . they're not so easy just to put in writing as much as if you have an eviction, you know, don't bother. [S]o everything else is like, I wanna be the judge of that. [A]nd so I don't put out really hard and fast criteria [except evictions].<sup>200</sup>

When explaining why she does not accept people with eviction records, Ali focused on what the tenant had put another landlord through: "If they've got any eviction, which means they had to go to court, the Sheriff had to come most likely and drag them out of the place . . . if that happens, we don't want them. . . . They can go away. They've already totally screwed over an owner."<sup>201</sup>

Some smaller landlords, when pushed by the interviewer after denying ever renting to someone with a past eviction, admitted that they do, very rarely, rent to people with evictions on their record. In

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195. Interview with Participant No. 7272, *supra* note 147.

196. Interview with Participant No. 7590 (Dec. 10, 2020) (on file with author).

197. *Id.*

198. *Id.*

199. Interview with Participant No. 5792 (Dec. 5, 2020) (on file with authors).

200. See Interview with Participant No. 1214, *supra* note 59.

201. See Interview with Participant No. 1523, *supra* note 174.

almost every instance, it was a case where the applicant was able to tell a relatable or sympathetic story of domestic violence or divorce. For example, Susannah, a landlord who owns just one unit, said she “would not rent to anyone that’s been evicted”<sup>202</sup> but then qualified the statement saying, “I might inquire about it to see.”<sup>203</sup> She said, “[E]verybody has hardships”<sup>204</sup> and “sometimes people are in domestic violence . . . and that’s different. But if they have a habitual history of not paying rent and things of that nature I wouldn’t rent to them.”<sup>205</sup> In every case, the landlord sought out additional information that spoke to their culturally construed sense of a morally understandable “hard time” — a hard time that was out of the control of the applicant and thus not really their fault. Monica, another smaller owner-operator, told another specific story of a time she rented to someone with an eviction record:

Yeah, one time, I rented to one family, where the husband left the house that time. You know, they were going through a divorce and this woman, had one problem of multiple sclerosis, so she was recently diagnosed, and . . . I think she was working with some local organization, I think it was a church or some organization . . . [S]o I took a chance on her. She was evicted, but, she had so many people telling me that you know, she was going through really tough time during that time, she had no place to go, so I, I took a chance on her.<sup>206</sup>

In general, though, Monica did not rent to people with evictions and said they were particularly “important” records because “when someone gets evicted, they don’t pay the rent. It’s a huge loss to the landlord.”<sup>207</sup> Darren, a property manager at a real estate firm that helps private landlords with tenant selection, noted, “[U]sually eviction’s an automatic decline.”<sup>208</sup> But every once in a while,

if in the odd case, say, you know, there was a partner situation, husband, wife, or whomever, and there was an eviction on their record, but it was due to like, you know, this person was abusive, or this person wasn’t paying the bills . . . if there was an issue or there’s someone out of their control, where someone else contributed to that

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202. Interview with Participant No. 7385 (Jan. 11, 2021) (on file with authors).

203. *Id.*

204. *Id.*

205. *Id.*

206. Interview with Participant No. 5124 (Feb. 6, 2021) (on file with authors).

207. *Id.*

208. Interview with Participant No. 1867, *supra* note 166.

decision . . . then I can, you know, bring it to my boss, or bring it to the owner, “Hey, look, this is what happened in the past. This is why this happened.”<sup>209</sup>

For the most part, however, most of the other smaller decision-makers in our sample automatically denied those with eviction records, making the collateral consequences of such records quite severe in the housing context. It was rare that applicants were able to tell culturally salient stories about their evictions, with only small pockets of potential for such stories as described above. And perhaps Renee summarized how many landlords operate, responding to why evictions are always automatic denials: “Yeah, yeah, evict, because by the time you actually evict a tenant, usually they have been such a problem tenant. It’s our way of blacklisting people, and I hate to say that . . . . But, the vast majority of people, if they’ve been evicted, it’s deserved.”<sup>210</sup> Renee’s morally construed view of those who are evicted is consistent with the cultural archetype landlords of all sizes brought to understanding housing records.

*2. Larger Landlords.* For larger decision-makers, recent evictions almost universally meant an automatic rejection, and owing money to past landlords usually did as well. The only possibility of overlooking a past eviction, for a few companies, was when the eviction was more than a certain number of years old. One respondent who had worked at several different firms said, “Most management companies are gonna say no evictions, you can’t owe other places . . . . All the companies I’ve worked for, they have the same type of system as, like . . . they’re all just trying to protect their assets.”<sup>211</sup> An executive who works in tenant screening at a very large company said, when asked what puts someone in an automatic denial bucket, that “rental debts, eviction records are, are primarily what we see.”<sup>212</sup> When asked what might make for an automatic decline, Ingrid, who had described so clearly why her company forgives past-due student loans and medical debt, said, “And I would say definitely an eviction . . . . We’re not gonna forgive that.”<sup>213</sup>

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209. *Id.*

210. Interview with Participant No. 7272, *supra* note 147.

211. Interview with Participant No. 5280, *supra* note 60.

212. Interview with Participant No. 1532 (Apr. 6, 2021) (on file with authors).

213. Interview with Participant No. 8199 (Mar. 4, 2021) (on file with authors).

Matthew, who worked at a company with multistate holdings, said, “Some automatic red flags for denial . . . evictions, outstanding balances with other apartment communities. Any of those come up, it doesn’t matter the income or the credit ratio, those would be automatic denial.”<sup>214</sup> However, Matthew’s company, like some others, discounted old evictions. If they were over seven years old, they were completely forgiven.<sup>215</sup> As Matthew said, “[A]fter that time period’s over, then we, I think it’s no longer . . . a factor in the screening report.”<sup>216</sup> But anything more recent than that bumped someone out from consideration entirely, with no room for explanation.

Christopher, a California-based property manager who said his company never rents to people with past evictions, lamented that “we don’t get very many tools . . . to use,”<sup>217</sup> referring to restrictions on the types of records landlords may look at, and that thus, looking at evictions is key because “what you’ve done in the past may be a very good judgment of what you’re going to do in the future.”<sup>218</sup>

#### D. Criminal Records

Seventy-three percent of respondents considered applicants’ criminal records. Respondents who did *not* consider criminal records generally fell into two groups. The first group was comprised of almost all California respondents who believed the law either did not allow them to consider such records or was ambiguous enough that it *might* not allow them to consider such records. This is in contrast to credit and eviction records. Respondents did not believe they were violating or potentially violating any laws when they considered those records. Particularly salient to these respondents were a series of local laws in some cities such as Berkeley, Oakland, and Richmond restricting at least some criminal record use.<sup>219</sup> These respondents were focused on avoiding any type of penalty associated with violating these bans and did not want to be accused of breaking the law. Notably, however, California respondents were also less likely to think criminal records

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214. Interview with Participant No. 6553, *supra* note 180.

215. *Id.*

216. *Id.*

217. Interview with Participant No. 7669 (Dec. 21, 2020) (on file with authors).

218. *Id.*

219. See *supra* note 61 and accompanying text (discussing limitations on the use of criminal history information in housing decisions).

were a good indicator of future problems, raising interesting questions about how law on the ground influences beliefs.

The second group of respondents who did not check criminal records fell across both geographies. Respondents in this group did not check criminal records because they did not believe such records are relevant to whether someone would be a good tenant. These respondents often expressed the view that people pay for their crimes through the formal criminal system and should not be penalized a second time when it came to acquiring housing.

For respondents who did consider criminal records, there was significant variation in the types of records they considered red flags, though there were certain crimes, like sexual offenses, that almost always were disqualifying. This variation persisted across smaller and larger respondents—the key differences between the two groups were whether they make exceptions for established rules regarding criminal records for certain applicants, and how external pressures influenced larger landlords to check criminal records in certain cases.

1. *Smaller Landlords.* Smaller decision-makers who did *not* check criminal records often had, as one respondent put it, a “personal philosophy”<sup>220</sup> about crime and criminal records. For this particular respondent, that philosophy focused on the idea that if someone had been in jail or prison, they had served their time and did not deserve further consequences. He said if an applicant is “out of jail, . . . that [person] can be okay . . . [T]hey’ve served their time.”<sup>221</sup> Similarly, another respondent, when asked about criminal records, said, “[T]hat doesn’t really bother me. . . . Like in my opinion it’s kind of like, ‘You’ve served your time,’ whatever, you know?”<sup>222</sup> Monica explained that she has generally had a good experience with people who had criminal records and saw it as doing good for society to allow such recordholders a place to live. She said, “[I]nitially when we were renting, because the rent was low, the kind of people we were getting, some had, you know, criminal records, but they were good paying people.”<sup>223</sup> She went on to describe how these tenants had few options:

They did not want[] trouble. There were . . . not many places that would rent to them, so they knew that when they come to me they

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220. Interview with Participant No. 1214, *supra* note 59.

221. *Id.*

222. Interview with Participant No. 6534 (Dec. 1, 2020) (on file with authors).

223. Interview with Participant No. 5124, *supra* note 206.

don't have much choice. So they were good payers, they paid properly, I never had any issue. So that is why I have not [checked criminal records] yet.<sup>224</sup>

This idea that criminal records did not relate to how good of a tenant someone would be was common among smaller landlords who did not check criminal records. One respondent, when asked why he does not check criminal records, said, “[B]ecause I think if they have a steady income, they have good report, credit report, I mean that would be okay.”<sup>225</sup> If someone managed to pass the other financial tenancy requirements while having a criminal record, that was good enough, because those are the factors that affect rent payment.

Other smaller landlords did not check criminal records because they believed they were not allowed to, or because they did not know exactly what the law was, and they did not want to potentially violate the law. Unlike larger companies who often had full legal departments checking on compliance, smaller landlords were more likely to go on instinct, or a sense that checking criminal records *may* violate the law. One respondent, Ali, said, “California is questionable on criminal backgrounds . . . . So we don't run that.”<sup>226</sup>

Another respondent, Nicholas, discussed the costs of checking criminal records, noting his impression that it would be more expensive than checking credit and eviction records. His view of the Fair Housing Act and other antidiscrimination laws also came into play when he decided not to check criminal records at all.<sup>227</sup> He said, “I'm trying to remember what . . . the expense was, but it was, you know, it was more expensive, but one thing I was counseled was that . . . if you run a criminal check on one tenant . . . you need to run them on all. Otherwise the person may feel as though they're being discriminated

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224. *Id.*

225. Interview with Participant No. 8397 (Nov. 7, 2020) (on file with authors).

226. Interview with Participant No. 1523, *supra* note 174.

227. Although justice involvement is not a protected class, the U.S. Department of Housing and Urban Development has issued guidance stating that

[c]laims that a housing provider has used criminal records or other criminal history information to discriminate intentionally in violation of the Act should be investigated in a manner similar to other allegations of intentional discrimination. Criminal records or other criminal history information may be a pretext for unequal treatment of individuals because of race, color, national origin, disability, or another protected characteristic.

Memorandum from Demetria L. McCain, Principal Deputy Assistant, Sec'y for Fair Hous. & Equal Opportunity to Office of Fair Hous. & Equal Opportunity, Fair Hous. Assistance Program Agencies & Fair Hous. Initiatives Program Grantees 3 (June 10, 2022) (on file with authors).

against.”<sup>228</sup> Nicholas agreed with the work he believed the law was doing, noting that otherwise “I would . . . when I do a profile and look and say, ‘Oh, you know this person looks kind of sleazy[.]’ or . . . you know, whatever . . . . [S]o I, I chose to take that advice and not run criminal check[s].”<sup>229</sup> The combination of cost and Nicholas’s understanding of the law drove him to refrain from checking any applicant’s criminal record.

Among smaller respondents who *do* use criminal histories, criteria typically varied by the type of crime and length of time that had passed since the conviction. Respondents were most concerned with violent crimes, those related to property damage, and those committed within the past few years. Several landlords indicated that applicants with a felony on their record were automatically denied housing. But when it came to misdemeanors, smaller landlords generally considered each type of record individually, and there was significant variation in which types of crimes they deemed potentially disqualifying—some cared about driving under the influence charges, for example, while others did not. This depended in part on *why* they paid attention to the particular record. Smaller respondents who checked criminal records generally fell into one of two groups.

The first group included most respondents, who believed that having committed a crime in the past indicated some type of risk going forward. Many respondents articulated what they perceived as largely a social risk—tenants being disruptive or dangerous neighbors. One respondent, Nancy, said, “We do have a lot of people that reside in these apartments with families and kids and we just don’t wanna make anybody feel uncomfortable or put anybody in danger.”<sup>230</sup> For Nancy, the type of crime mattered. She explained that if the crime were “something simple . . . something we can work with,” then she could talk with the applicant and “see what we can do.”<sup>231</sup>

Examples of such crimes included things like DUIs or other traffic-related tickets, but even in those cases “they will most likely have to get that cleared as well and pay off the balance if they owe money.”<sup>232</sup> But “assault or rape and battery”<sup>233</sup> were usually

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228. Interview with Participant No. 1426 (Jan. 28, 2021) (on file with authors).

229. *Id.*

230. Interview with Participant No. 7066 (Feb. 24, 2021) (on file with authors).

231. *Id.*

232. *Id.*

233. *Id.*



nonstarters. Nancy said, “It was too recent, and anything that involves weapons or if it’s more than one case that is open or they did plead guilty for, we do not work with them.”<sup>234</sup> But just like most other smaller decision-makers, Nancy almost always wanted to talk to the applicant before making a decision. She said:

[W]e’ll try and get some more information to see what exactly happened, why it happened, and if we do see or feel like the person is maybe an honest, changed person, we’ll most likely rent to them. But if it seems like they’re just gonna be causing trouble or they have more than one charge on their account, we most likely won’t accept them here.<sup>235</sup>

Respondents who fell into this group varied in the types of crimes they deemed risky, but it was usually connected in some way to the risk they articulated, such as putting other families at risk. Like Nancy, Maria noted that she looked at criminal background checks because she wants to “maintain a safe environment for all tenants . . . . [Y]ou know, I don’t want to have people who are violent criminal offenders living with people who are not.”<sup>236</sup> She was concerned that other tenants would “just not wanna stay longer if there were issues . . . . I’m just seeking to avoid, any sort of like, subpar living environment.”<sup>237</sup> But she gave an example of two applicants who had speeding tickets, “30 miles an hour over the speed limit.”<sup>238</sup> She noted she “had a conversation with them, asking them what it was about.”<sup>239</sup> She felt satisfied after the conversation, noting, “I’m okay with that,”<sup>240</sup> because such behavior did not seem risky to other tenants. Notably, Maria was not concerned about the potential for tenants to look up other tenants with criminal histories and move because of these histories—a concern raised by several larger landlords—but instead voiced concern that those with criminal records might actually create a “subpar living environment.”<sup>241</sup>

Several respondents in this group voiced some internal conflict over criminality. One smaller landlord said that if a potential tenant

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234. *Id.*

235. *Id.*

236. Interview with Participant No. 7970 (Jan. 7, 2021) (on file with authors).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

“did something violent obviously I’m not going to rent to them.”<sup>242</sup> But he noted it is a tricky situation because “[u]nfortunately, it’s kind of . . . okay, they paid their dues to society but . . . are they a different person?”<sup>243</sup> There were some risks he was willing to take, depending on the crime, but violent crime was a nonstarter for him.

The second, much smaller group of respondents that checked criminal records often articulated a direct or indirect belief that a criminal past in and of itself says something about the type of person someone is, and they would rather not have such people in their orbit. For these respondents, it is the criminality itself, rather than a specific articulated risk, that prevented them from renting to the potential tenant. In other words, to these respondents, a criminal record was a moral failure that they did not want to be a part of, and, in many cases, they had trouble connecting the criminal record with any *specific* worry about future tenant behavior.

Of note, smaller decision-makers in both groups discussed diverging from their own rules about criminal records, and many took each situation on a case-by-case basis. One landlord, Carrie, explained that she had rented to someone with prostitution charges, even though she ordinarily would not. Carrie said that the woman was “now a mom with kids and I don’t think whatever that was like then is the case now.”<sup>244</sup> Carrie, in particular, like many landlords, was concerned with how much time had passed since a crime was committed, noting that people are often very different twenty years later, such as “drug addicts that had tons of drug charges and now are sober.”<sup>245</sup>

In another case, one respondent, Renee, described how sometimes having very positive financial records can outweigh even severe criminal records. She tries to take a holistic view, understanding the whole picture of who an applicant is, and she trusts her process:

I have also figured out how to not evict people and to give everybody a fair shake. I mean I rented a house, this, this family came in, and now I do pull criminal because I wanna know if you’re a sex offender, right? I wanna know if you’ve just been convicted of selling drugs to school kids and there’s a school right across the street, so I do pull a criminal. I had never seen this before, this guy has spent twenty years in central prison for murder . . . . And I thought, whoa, I mean that’s,

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242. Interview with Participant No. 2287 (Jan. 5, 2021) (on file with authors).

243. *Id.*

244. Interview with Participant No. 2094, *supra* note 149.

245. *Id.*

that's pretty bad. I mean, you know? Then I looked at his whole picture, he had a 825 credit score, he'd never even had a parking ticket since he got out of prison . . . I mean, he has rented from me for over two years, they are perfect tenants.<sup>246</sup>

Renee's process is antithetical to how most larger landlords operated. She does not let any one piece of data act as an automatic denial or acceptance, but instead looks carefully at the whole applicant. She concluded that story by saying, "You can't take one piece of data and draw a conclusion."<sup>247</sup>

2. *Larger Landlords.* Like smaller data users, there were some larger landlords who did not check criminal records at all. For larger landlords, this decision was almost always tied to legal and logistical constraints, though some also voiced personal beliefs about the lack of utility of criminal records. California has a particularly strong set of state and local laws limiting criminal record use, and larger landlords who refrained from using criminal records generally operated properties in California.

Several larger landlords *do* check criminal records in most states where they operate, but *not* in California. One executive who works at such a company explained that there are many new laws and rules in California and that "ten, twenty years ago, it used to be state law" that would restrict criminal background checks, but "now you have all these local rules that are out there, and they're starting to come into the equation."<sup>248</sup> Another respondent said of criminal record checks in California, "[I]t's getting to be a very dicey subject. And I don't know if you're . . . involved nationally or just in California, but there's a whole lot of . . . in California ban-the-box kind of legislation."<sup>249</sup> This legislation drove many companies to the same conclusion: "[W]e do not do criminal in California."<sup>250</sup>

When it came to criminal records, larger respondents were much more likely to talk about their legal departments being involved in the decision about whether to check criminal records and which records would be included. One respondent, Mary, told us that her company has an entire operations team devoted to making sure the company

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246. Interview with Participant No. 7272, *supra* note 147.

247. *Id.*

248. Interview with Participant No. 5675 (Mar. 23, 2021) (on file with authors).

249. Interview with Participant No. 4518 (Dec. 28, 2020) (on file with authors).

250. Interview with Participant No. 5280, *supra* note 60.

complies with laws and noted that this practice is “comparable to what other management companies . . . are doing in the area. I mean, I think we all kind of share that information amongst each other.”<sup>251</sup> At her company, criminal-screening parameters “come[] from our operation team . . . . [T]hey will be the ones to set that in accordance with law, and you know, just what are our, our unique standards.” Further, she noted that

there are a lot of things that according to the law, we can’t do, like we can’t screen for criminal in certain areas . . . . [T]hose are all factors that change all of the time that we have to take into account, but the majority of it is set up by our operation team and our legal team.<sup>252</sup>

Original choices about what to include regarding criminal activity have changed, and are checked by the legal departments, in light of new laws. Mary also noted that her company only screens for criminal records in some geographies:

For some geographies . . . . It is guided by local laws obviously because if we wanna pull that, that’s definitely always like the first step. Right[?] So we wanna pull criminal . . . at this community. Okay. Is it allowed? And if it’s allowed, then, you know, we’ll make the decision on whether or not we want to or not, but . . . it’s definitely guided by what we’re allowed to do.<sup>253</sup>

Jesse described his company’s understanding of California law as follows: “In California . . . we’re not allowed to consider the criminal record, so we don’t.”<sup>254</sup> He went on to explain:

Double . . . jeopardy, yeah. We’re not allowed to punish them for their criminal record. . . . So—double jeopardy says—at least this is our interpretation of this; there might be other companies that feel differently—our interpretation of the law in California is that . . . it is not lawful for us to penalize somebody who has served the criminal sentence.<sup>255</sup>

While Jesse seemed to be referring to people who have “served” time in jail or prison, and there are, of course, individuals with criminal records who have not been incarcerated, his company has a blanket

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251. Interview with Participant No. 2884 (Mar. 30, 2021) (on file with authors).

252. *Id.*

253. *Id.*

254. Interview with Participant No. 5280, *supra* note 60.

255. *Id.*

policy of not screening criminal records, which applies to all applicants.<sup>256</sup>

In some cases, cost also was a factor in whether companies decided to screen for criminal records. One executive, Ingrid, explained:

[I]t really varies by state, and the reason why is, let's say, here in California . . . California is very difficult as we don't have a state . . . system for checking for checking backgrounds. So . . . if you live in the Bay area . . . and you have been convicted of a crime in Santa Clara County, I will probably not find that on your history unless I specifically check Santa Clara County.<sup>257</sup>

Ingrid further said, "So, what happens is, outside of California, most other states have a universal system where it checks all . . . they all report to one place, criminal history, and so it's very easy for us to gather that information."<sup>258</sup> In contrast to California, in Arizona, for example, "they have a state system . . . it's cost effective, quick, and, and doesn't cost us a lot of money. Whereas in the State of California, we have to pay for every county to do the research and it takes a long time . . . . And it's more costly."<sup>259</sup>

Courtney, an executive at a large property management firm, similarly said her company avoids checking criminal records, especially in California, for all clients unless the client specifically requests that they conduct such a check:

And so in order to get criminal information, you have to go to every county where this person potentially live[d], which means I'm relying on them to tell me where they lived . . . . So we just don't feel that criminal screening is particularly accurate in California because of that. It's also very slow in terms of giving a response. So we're not inclined to use it, but we do have some clients who absolutely believe in it and in those few cases, we do also do criminal screening.<sup>260</sup>

Some respondents who work at companies who do not screen criminal records expressed ambivalence about the changes in the industry toward discounting criminal records. Such cases demonstrate how legal constraints can trump cultural inclinations. Carrie explained:

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256. *Id.*

257. Interview with Participant No. 8199, *supra* note 213.

258. *Id.*

259. *Id.*

260. Interview with Participant No. 8278, *supra* note 187.

There's sometimes I see things that get approved and I think, wait, "[t]his is a lot of criminal backgrounds on here. Is this person going to repeat it?" I mean, I do have that hesitation sometimes, but I can't do anything. If it's approved, it's approved. There are some that I think, "Wait, that was a lot of criminal background. I don't know that . . ." I mean, that is a little dangerous. I have kids and women at this property and you had five assaults on a female. I'm going to get a little concerned. But at the same time, they got approved credit wise. I can't touch it.<sup>261</sup>

When asked to discuss an example of one such time, Carrie explained that just the other day an applicant had "so many assaults on a female."<sup>262</sup> She distinguished such a record from someone who had just one citation, noting, "You have one, could have been a strange situation."<sup>263</sup> Carrie continued that it was a different story when there were a number of citations: "But if you got fifteen of them, I'm pretty sure you're the problem . . . . You probably don't respect women some way or whatever."<sup>264</sup> Overall, Carrie thought, "There's certain charges that you kind of let go and there's ones that you're like, 'Wait, wait, wait. This is . . . you've had fifteen over the last ten years. I don't know what would have changed for you?' I don't know."<sup>265</sup>

Carrie did not believe that everyone with a criminal record should be denied housing. She made sure to follow up this story by saying that she was "glad our industry is a little bit more lenitive on felonies and misdemeanors only because I see the flip side where people do have charges that . . . probably weren't accurate or they didn't have the money for an attorney to fight it. I'm glad we did it, but . . . it's tricky."<sup>266</sup> Much like smaller data users, she distinguished between various criminal records. Only in Carrie's case, she was constrained by hard rules about whether to consider such records, and she had no power to distinguish between certain types of records.

Larger landlords who consider criminal records had to make broad decisions about which categories of offenses would be considered in advance because the algorithmic processes they employ do not leave room for the evaluation of individual cases after the fact.

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261. Interview with Participant No. 2094, *supra* note 149.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

For many companies, this meant automatically denying applicants with felony records—sometimes only recent felony records—and then setting parameters to consider only misdemeanors that executives believe relate to tenancy.

For example, Ingrid, who works at a large company, explained that the third-party software would “check[] the last five to seven years’ worth for felony records.”<sup>267</sup> When it came to misdemeanor records, however, she noted the company only looked at some: “[I]f you have a misdemeanor for assault, we would consider that, but if you have a misdemeanor for public intoxication, we’re probably not going to consider that.”<sup>268</sup> She further described the process for selecting which crimes to consider as follows:

[Y]ou have, like, a list of . . . offenses that would count as something that’s going—[y]eah, it’s like a twelve-page list that we have, and so what we have to do, we have to . . . . When you set up this screening with this third-party company, you have to go through this twelve pages and make a decision do you count this, [do] you not count this . . . then we usually have an attorney review it as well to make sure that we’re not violating any criminal or we’re not violating any Fair Housing issues or any other issues that might relate.<sup>269</sup>

Another larger data user similarly described her company distinguishing between misdemeanors and felonies. Mary said:

[T]here are a lot of things that we just don’t look at. . . . [Y]ou know, certain misdemeanors and, and things like that. . . . I know that one of the ones that across the board, we look at, you know, is like sex offender history or something, or any sort of felony, those kinds of things, but misdemeanors that are, you know, certain misdemeanors we . . . don’t look at it.<sup>270</sup>

Like many smaller data users, whether or not the crime was potentially related to tenancy was relevant. Christopher’s company, for example, focused only on crimes related to tenancy. He said he was concerned with

[w]hether or not they’ve committed . . . violent felonies . . . . I mean, if they, you know, if it’s drunk driving . . . . That’d be stupid, that’s a stupid mistake they made, and they are probably paying, you know?

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267. Interview with Participant No. 8199, *supra* note 213.

268. *Id.*

269. *Id.*

270. Interview with Participant No. 2884, *supra* note 251.

It's not my job to judge them on their stupid mistake. It's my job to use that stupid mistake, whether or not they're gonna pay rent or not . . . Or be a nuisance to the rest of the community.<sup>271</sup>

Almost all larger data users whose companies considered criminal records in some cases stressed that legal compliance was at the top of their minds when it came to criminal records. Mary, who above described the operations team at her company, explained that the operations team also worked to determine what is or is not legal to screen for in cases where screening takes place. When asked how the company makes those determinations, she said:

[O]ur operational leader, leadership team and legal . . . [A]nd when I say operational leadership team, it's not that they're like deciding, okay, we don't want these kinds of criminals, but they're working with our legal team to see what is allowed. And they, they're discussing that amongst each other obviously to say, okay, yes, we . . . agree with those and we wanna make sure that we're compliant. . . [A]nd so it . . . I would say is heavily based on what we're allowed to [screen].<sup>272</sup>

Ingrid also expanded on the formalized process at her company when it came to considering criminal records and what drove her company to seek legal guidance about criminal records specifically:

[R]eally, you get a lot of legal guidance from your attorneys and there's [sic] a lot of laws in places that tell you like, "You can and can't look at." . . . [W]e've seen a lot of lawsuits in the industry about discrimination against somebody who's paying their dues to society, and so . . . it's really just consulting with people who are much smarter than me (laughs).<sup>273</sup>

The policies at some companies were more straightforward, screening only for felonies. For example, at Matthew's company, "[w]e only screen for felonies. . . . And if they do [have a felony], it's automatic denial."<sup>274</sup> However, his company does not screen for misdemeanors at all.<sup>275</sup> This was less common in our larger landlord respondent pool, but what was consistent was the wide range of views about what was, and was not, an acceptable criminal record.

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271. Interview with Participant No. 7669, *supra* note 217.

272. Interview with Participant No. 2884, *supra* note 251.

273. Interview with Participant No. 8199, *supra* note 213.

274. Interview with Participant No. 6553, *supra* note 180.

275. *Id.*



Some respondents—primarily those working at larger companies—were not wedded to the idea that criminal records were a good indicator of future behavior or said much about the morality of the offender, but nonetheless used criminal records to conform to the expectations, or perceived expectations, of other parties. In these cases, criminal background checks were understood, at least in part, to be a way of performing due diligence, as well as a way of signaling to various stakeholders—including other prospective tenants—that screening had been rigorous. Ingrid explained, “I think that it’s driven by the consumer and the customers. So I think that what happens is . . . we live in a society today where people, . . . it’s careful culture, right?”<sup>276</sup> She went on to explain that she believes that

[p]eople are very picky about, . . . where you’re paying a lot of your incomes towards rent, you want to know that you’re in a place where you feel safe and . . . you feel like that you can[.] . . . I mean, let’s face it. When we’re looking for an apartment, the first thing we think for ourselves is, “Is this a safe community? Is this a great place to live?”<sup>277</sup>

Given these concerns, she said the decision to check criminal records

was really driven by our consumer and our customers because what would happen is, word would get out on the street that “So-and-so in apartment 15, guess what they did? I’m moving out because you know, blah, blah, blah.” Now, it’s all over social media, your ratings and reviews are going down. So, I think it’s really just . . . I don’t think I was, really had anything to do with us, it had everything to do with making sure our customers felt good.<sup>278</sup>

Christopher, whose company was generally lenient about many crimes, did not personally believe a criminal record was in and of itself problematic. Nonetheless, he drew lines for certain types of offenses because of the potential that other tenants would find out. He said he would not rent to someone who was released from jail or prison or is on parole for murder because “if people find out they’re going to move.”<sup>279</sup>

Ultimately, the study saw the most variation among and between groups of respondents with respect to criminal records, in large part

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276. Interview with Participant No. 8199, *supra* note 213.

277. *Id.*

278. *Id.*

279. Interview with Participant No. 7669, *supra* note 217.

because of the many and changing laws regarding criminal record use. Larger landlords were on the whole much more attuned to changes in the law in specific ways, whereas smaller landlords were only more generally aware of such changes. This is not surprising, given that larger companies are more bureaucratically complex and hierarchical, often with legal teams devoted to compliance. This awareness affected how they responded to the law. As more local and state laws are enacted to restrict criminal record use, there may be more changes coming in this area. One executive at a large property management company predicted that criminal record checking would continue to become less and less common given the changes in the legal landscape, noting, “[I]f I had to guess, I think that in the next five years or so, it’ll probably be industry standard to do either no criminal screening at all, or, you know, limit just to, like, a sex offender search and some of the more serious offenses.”<sup>280</sup> When asked how his clients have reacted to the changes, he discussed the same differences in philosophies that arose among all respondents in this study, irrespective of organizational size or structure:

[I]t’s really a mixed bag. . . . [W]e have some clients that . . . very much have the philosophy of, you know, how can we remove barriers to give more people housing, and they’re very much on board with, you know, taking away things like . . . a criminal check in order to, you know, be in line with that philosophy. And then we have other clients, who are . . . concerned that if we did stop doing criminal screening, then, you know, that that could be perceived as . . . putting their, the residents of that community in harm’s way. . . . I think that both, both concerns, you know, both philosophies are certainly valid, but it, it really is a, kind of a . . . mixed bag in terms of the outlook there.<sup>281</sup>

*E. Data Analysis: Perceptions of Risk and Resulting Cultural Archetypes Shape Housing Allocation and Collateral Consequences*

The data help show the mechanisms by which cultural understandings and moral meaning making shape the allocation of housing—and whether a specific negative record results in the collateral consequence of being denied housing. As the data show and as discussed in other work,<sup>282</sup> this is true for landlords of all sizes.

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280. Interview with Participant No. 1532, *supra* note 212.

281. *Id.*

282. See Kiviat et al., *Going Against the Record*, *supra* note 88, at 30–34.

Landlords of all sizes were attached to these cultural understandings. Even though smaller landlords have access to and generally utilize a vast array of relatively objective data points and records about potential renters, they employ their understandings of acceptable or good debt, housing history, and criminal history to make sense of records and ultimately make decisions about whom to rent to.<sup>283</sup>

Indeed, some smaller landlords noted that they knew packages were available from companies that would provide them with specific recommendations about whether to rent to specific applicants. But they chose not to purchase such packages, eschewing such services and instead preferring to rely on their own understanding of records to make final decisions. Other respondents even explained that the packages they bought in order to obtain various records automatically came with such recommendations, but the respondents ignored them and employed their own judgments about the data to come to a decision. This process of employing their own judgments and meaning making to records is consistent with studies in the employment context, where individuals make decisions about whom to hire and similarly employ their own understandings of records to make these decisions.<sup>284</sup> Larger landlords *also* employ these understandings when they decide which records to include in the scoring systems they purchase.<sup>285</sup>

What was particularly interesting is *which* cultural archetypes landlords of all sizes employed in making rental decisions. To begin, it is important to distinguish between two sorts of risk that landlords perceived: financial risk and social risk. When it comes to financial risk, landlords are driven by economic logic. They want to make sure they will receive the rent. Financial records, such as credit scores and information contained in credit reports, and housing-related records,

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283. This categorizing of debt (though not including criminal records) has been recognized in other contexts. See Lucie Kalousova & Sarah A. Burgard, *Debt and Foregone Medical Care*, 54 J. HEALTH & SOC. BEHAV. 204, 205 (2013) (assessing whether holding various types of debts affects access to medical care); Frederick F. Wherry, *Relational Accounting: A Cultural Approach*, 4 AM. J. CULTURAL SOCIO. 131, 152 (2016) (positing a theory of “relational accounting” where “meaning systems, moral concerns and meanings about time” affect willingness to take on debt or otherwise spend money); Rachel E. Dwyer, Laura McCloud & Randy Hodson, *Debt and Graduation from American Universities*, 90 SOC. FORCES 1133, 1136 (2012) (“Education is . . . increasingly seen as an investment in the future which warrants indebtedness.”); Tach & Greene, *supra* note 58, at 5 (analyzing how families coped with various types of debt).

284. See Kiviat, *Art of Deciding with Data*, *supra* note 49, at 284.

285. See generally Kiviat et al., *Going Against the Record*, *supra* note 88 (explaining how landlords utilize both statistical data and traditional methods of personal judgment to assess risk).

such as rent arrear and eviction records, were viewed primarily as financial risks.

And in the context of evaluating financial risk, the consistency of the cultural archetypes that were employed by decision-makers across the board, independent of the organizational structure or size of the organization they worked in, was striking. When evaluating risks of this sort, respondents demonstrated a reconstruction of a just worldview playing out in the housing market, invoking cultural interpretations that have persisted since colonial times in the United States. This view involves a distinction between, on the one hand, a domain of economic life where people are taken to essentially get what they deserve—if you work hard, you should be able to pay bills, avoid credit card debt, and pay your rent. On the other hand is the idea that perceived acts of God, like unexpected debt from medical bills, and admirable risk, such as education debt, should be forgiven. They demonstrate a nuanced theory of personal responsibility that has its limits playing out in how landlords evaluate records.

To understand why these cultural archetypes have influenced landlord screening, it is important to consider the history of debt and poverty in the United States. First, debt has long been moralized, even before the American Revolution.<sup>286</sup> One important critic of debt in the early 1700s was Samuel Moody, a “creditors’ minister.”<sup>287</sup> Moody had little tolerance for any sort of debt, noting that “God himself frequently referred to sin, ‘the worst thing in the World,’ by the name debt.”<sup>288</sup> But even Moody, one of the harsher critics of debt, like many of the respondents in the sample, made moral distinctions between certain types of debt.<sup>289</sup> Moody distinguished between debtors who were “[d]iminished and brought Low by the Holy Providence of God; who are Chargeable, neither with Slothfulness nor Prodigality,” on the one hand, and debtors who “have made themselves Poor by hearkening to Satan[’]s Temptations, following after vain Persons, living in Pride and Luxury; running into Debt.”<sup>290</sup> Moody said that those in the first category were perhaps worthy of charity, but those in the second category “were ‘Double Debtors’—in debt both to their temporal creditors and to God—whose souls would be cast into the debtors’

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286. See BRUCE H. MANN, *THE REPUBLIC OF DEBTORS* 34–38, 42–43 (2002).

287. *Id.* at 36.

288. *Id.* at 37.

289. *Id.*

290. *Id.*

prison of hell.”<sup>291</sup> Indeed, throughout U.S. history, those in financial distress were generally viewed as blameworthy, going all the way back to the colonial period. As Professors Joel Handler and Yeheskel Hasenfeld note, “During the Colonial period, several themes are noted that will endure throughout welfare history. Despite significant adverse structural conditions—wars, depression, accidents, disease, sickness—the poor were judged as morally blameworthy.”<sup>292</sup>

By the late nineteenth century, the poor were generally categorized into those who were “deserving” of help versus those who were “undeserving” recipients when it came to determining who would receive help.<sup>293</sup> At that time, women who were widows were some of the few in the “deserving” category—the idea was that their financial situation was not their fault, and thus, they deserved economic resources.<sup>294</sup> These views of “deserving” and “undeserving” have persisted, and landlords followed in many ways a similar logic when deciding which types of negative records might be overlooked, and which types would exclude applicants from housing. For example, landlords almost universally denied housing to those with past evictions and talked about such applicants as financially irresponsible and in a sense undeserving of a second chance at housing because the eviction was “deserved.” But the one exception for those smaller landlords who allowed applicants to explain their negative records was women who were victims of domestic violence or involved in a divorce situation. Similar to widows of the late-nineteenth century, these circumstances were seen as beyond women’s control and thus they were deemed worthy of help from economic resources.

There was more variation in the types of cultural archetypes landlords adopted when making decisions about which records they would and would not excuse when it came to social risk, mostly through

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291. *Id.*

292. JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 154 (2007).

293. EZRA ROSSER, *HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY* 2 (2019) (“Until the New Deal, assistance to the poor was traditionally a local matter . . . [T]he colonies, and later the states, distinguished between the deserving and undeserving poor and provided different forms of relief depending on that classification.”); *see also* Margaret R. Somers & Fred Block, *From Poverty to Perversity: Ideas, Markets, and Institutions over 200 Years of Welfare Debate*, 70 *AM. SOCIO. REV.* 260, 276 (2005) (arguing that economist Thomas Malthus “convert[ed] the poor from a structural position to a behavioral choice” based on “personal behavior and a lack of biological restraint”).

294. *See* HANDLER & HASENFELD, *supra* note 292, at 155–56 (noting that most states limited excluded mothers who were not widowed or were of color from government welfare programs).

criminal records. As highlighted in Part III.D, it was notable the degree to which many landlords spoke about people having “served their time” in jail or prison, and thus not wanting to punish them a second time. In many ways, the cultural narratives about the Ban-the-Box movement and the need to give those with criminal records a second chance seem to have penetrated landlords’ cultural archetypes. Lending further credence to this point was the finding that landlords in California across all sizes and organizational structures not only were more likely to altogether exclude criminal records from decision-making—not surprisingly, given the many laws in California requiring their exclusion—but also were more likely to believe that such records were not important. As public discussions, laws, trainings, and workshops implement policies based on such views, people’s cultural views begin to shift.<sup>295</sup>

While many landlords themselves did not think criminal records were particularly important in assessing risk, several of them, particularly larger landlords, checked them anyway because they were concerned that *external audiences* cared about criminal records. These landlords thus felt they needed to essentially “perform” risk management to quell what they believed others cared about. So, while their own cultural understandings of criminal records told them one thing, they believed that most potential applicants held different views and cared about catering to these applicants.

#### IV. ORGANIZATIONAL STRUCTURE, FAIR HOUSING, AND TALKING AND BUYING YOUR WAY OUT OF COLLATERAL CONSEQUENCES

When housing advocates, scholars, and government officials consider legal and policy interventions to increase access to housing, “landlords” are often lumped into one group. However, landlords, of course, can and do vary from owner-operators who own just one rental property to large, multistate, and even multinational, corporations. The previous Part discussed the similarities in how cultural understandings shape how all types of landlords make decisions about whom to rent to. However, the data also reveal that when it comes to applicants who are borderline—that is, those who have some negative records that *might* result in their denial of housing but are not automatic red flags—there are important differences in how smaller

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295. See generally PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998) (analyzing the way people with diverse backgrounds use and experience the law).

and larger landlords ultimately decide whether such an applicant will gain access to housing. These differences stem in part from different understandings of, and reactions to, the Fair Housing Act and other applicable laws, which, in turn, lead to different processes for sorting borderline applicants. Those processes employed by smaller landlords favor those with cultural capital, while the processes employed by larger landlords favor those with financial capital. What these findings ultimately show is that the law structures not just whether, but also *how*, landlords use records.

#### A. *Smaller Landlords*

For smaller landlords, fairness often meant understanding the circumstances that gave rise to a person's negative records. These decision-makers tended to ask applicants for explanations of their negative records. Essentially, they allow the applicant the opportunity to talk their way out of the record. As Susannah said, "I can't really say that I have any deal-breakers 'cause I typically . . . would talk to people and listen to like . . . what the situation was, so I don't know."<sup>296</sup>

The cultural salience of the explanation given made all the difference in whether the applicant was ultimately given the housing unit. In other words, for smaller decision-makers, whether a borderline negative record is ultimately overlooked depends in large part on whether the explanation the applicant gives resonates with the landlord as morally legitimate. Smaller decision-makers apply their sense of what counts as fault and core responsibility when it comes to finances, eviction, and criminality to come to an ultimate decision. They voiced the importance of the explanation for borderline records again and again. What Denise, a smaller owner-operator landlord, said was typical:

You got to hear what someone's situation is, you've got to hear what their credit is, you've got to hear what their history is, you've got to be open-minded and see what works for you. . . . But it comes down to human contact, human situations, human history, and it's not just a numbers game.<sup>297</sup>

And, as described in Part III, how landlords related to and understood the "human situations and human history" that applicants described was what determined who got housing and who was denied

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296. Interview with Participant No. 7385, *supra* note 202.

297. Interview with Participant No. 2761, *supra* note 172.

housing. Landlords told us that applicants who were able to tell a compelling story, to reach a “cultural connection” with a landlord, were allocated housing. Because “social position shapes cultural know-how, like how to tell convincing stories,”<sup>298</sup> this process has implications for who is able to overcome negative records and who is not, and thus who is ultimately able to access housing and who is not. Those with the cultural capital to know how to tell convincing and culturally salient stories can overcome records in a way that those lacking that cultural capital may not. This core aspect of housing allocation has been largely overlooked by scholars and policymakers, yet understanding this process has important theoretical and normative significances.

For smaller landlords, existing laws and regulations played little or no role in the process by which they decided to allocate housing to those with borderline records.<sup>299</sup> Many smaller decision-makers had vague notions about how the Fair Housing Act worked or constrained them, but none mentioned the Fair Housing Act as potentially constraining their ability to ask applicants questions about their records and make decisions based on the stories they were told.

The smaller landlords who did have something to say about the Fair Housing Act focused on their belief that it restricts their ability to adequately deal with problem tenants once they are already renting units to them. When asked about the Fair Housing Act, Mitch, for example, was direct and said, “[S]ome of it sucks.”<sup>300</sup> After confirming “I’m not identified in this, right?”<sup>301</sup> Mitch went on to tell the story of a situation in which he believed the Fair Housing Act constrained him:

Okay, so like some of it’s not worth fighting. I just had a guy move out; this is just a great example. [W]e didn’t give him his security deposit back because he was Hispanic, is what he called and said to the Fair Housing. I was racist, duh-duh-duh-duh-duh. Little does he know, my children are adopted from a Hispanic country. . . . [M]y fiancé is Hispanic. There’s just no way. However, as a company, it’s not worth fighting those claims over his \$550 security deposit.<sup>302</sup>

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298. Kiviat, *Art of Deciding with Data*, *supra* note 49, at 286–87 (citing Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner & Alice Motes, *The Sociology of Storytelling*, 37 ANN. REV. SOCIO. 109, 118 (2011)); *see also* Lareau, *supra* note 62, at 2.

299. This finding is consistent with Reosti, *supra* note 11, at 646 (“[I]ndependent landlords and property managers defended their perceived rights to assess and choose tenants in the manner they see fit so long as it is not demonstrably discriminatory.”).

300. Interview with Participant No. 1794 (Feb. 16, 2021) (on file with authors).

301. *Id.*

302. *Id.*



Beyond this specific situation, Mitch has the sense that the Fair Housing Act has gotten stricter over time, constraining, again, how to deal with problem tenants he already has, rather than tenant selection. He said:

I think Fair Housing has really changed here lately . . . [T]his was just presented at my last training,<sup>303</sup> and I was like, holy shit, you know. . . . And some of them are one-off's, and that's what's crazy, is we have to remember those. We have to remember those one-off's in our . . . you know, 'cause we can get sued.<sup>304</sup>

All respondents were asked about the Fair Housing Act, and most smaller respondents gave vague responses that it is good because it prevents discrimination. Few thought it constrained them in their current screening processes, and any complaints about it were for the most part similar to Mitch's, focusing on decision-making process constraints after the decision to rent.<sup>305</sup> The only instance when existing laws affected how smaller landlords screened applicants was the case of criminal screenings in California, where some smaller landlords said they did not screen for criminal records because they believed the law did not allow them to, or might not allow them to.

### *B. Larger Landlords*

For larger landlords who operate in more complex organizational structures, making fair decisions and complying with the law meant intentionally avoiding the ability of any individual story to make a difference in housing allocation. In other words, these landlords understood the Fair Housing Act and other relevant state and local laws as restricting any individual story or understanding of such a story from changing the outcome for a particular tenant, or at least allowing such stories to impact the outcome for particular tenants. Doing so would be putting their organization at risk of violating the law. This risk is why larger companies relied on sets of rules, or algorithms, for implementing background screening standards. While cultural

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303. Mitch was referring to a training on Fair Housing he attended put on by a local nonprofit agency. *Id.*

304. *Id.*

305. Some of the smaller respondents are exempt from the Fair Housing Act because they rent out "owner-occupied buildings with no more than four units," they rent out "single-family housing . . . without the use of a broker," or they rent out "housing operated by organizations and private clubs that limit occupancy to members." U.S. DEP'T OF HOUS. & URB. DEV., FAIR HOUSING: EQUAL OPPORTUNITY FOR ALL 1 (2011). None of the respondents, however, discussed the fact that they were exempt or might be exempt.

understandings shaped what these standards were, the technical implementation of these standards was consistent and, in fact, nearly always automated by a computer. Indeed, the entire organizational models of these companies are built around avoiding situations that might be seen as showing partiality. Many respondents who work at larger companies see this sort of automation, which often produces scores that are difficult to interpret, as fair. Nathan described it this way:

We don't have any constraints. I think that the constraints we do have are valid. We screen through the screening company and they're either approved or denied. There's nothing that we can do about that. And we do explain that to tenants, and we tell them like, "Hey, we use the screening company so that we're not biased towards your application." Not that we would be but even accidentally, just looking at, "Oh, you're \$10 short on income." The screening company's going to flag it and say, "No. Not approved." So whereas we might say, "Oh, \$10, it's not a big deal. You get one hour of overtime; you've met that \$10." So I don't think we're constrained, and if we are, it's for the right reasons . . . . And that's fair enough but I definitely don't think that we're constrained either by certain acts or laws that go into place. . . . What's passed is perfectly fine. It's just to give everybody an equal opportunity, the same housing. So if you meet the qualifications, so be it. You can live here.<sup>306</sup>

Larger companies tended to set up their score-based systems so that ground-level employees did not have power to override decisions, even if they wanted to. Nathan explained:

Well, we have our standards that our management company sets but . . . all our screening guidelines come from BetterNOI. We screen every applicant through them. Our system is set up to where we can't actually approve people in the system unless they're screened through BetterNOI and either approved or conditionally approved. Even if they come back denied through BetterNOI, we can't approve them and move them in in our system. It's just defaulted that way.<sup>307</sup>

In Nathan's case, he believed this lack of discretion made sense:

We as the property managers don't really have much control over picking who the tenants are which is probably a good thing because everybody's different and everybody has their, "Oh, I don't like that

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306. Interview with Participant No. 5682 (Jan. 26, 2021) (on file with authors).

307. *Id.*

person so . . . [.]” And their gut feeling about certain people which is exactly why they enacted the Fair Housing laws or discrimination laws so that we couldn’t use our guts so to say if that makes sense.<sup>308</sup>

In many cases, larger landlords described situations exactly like the ones that smaller landlords had described, listening to stories and making exceptions as examples of why they absolutely *had* to keep to their score-based systems that did not allow individual stories to matter. One executive at a larger company, Robert, explained:

Because if . . . the property manager did look at the screen, and then say, “Well, you know what? You owe that property money from ten years ago. I don’t wanna hold that against you. You have a great job now. I know you can pay the rent. I’m gonna approve you.” And then, someone else comes in and they owe, you know, a property money from ten years ago, but their job is a little, you know, they’re just making enough, or the property manager doesn’t think that, you know, they’ll . . . be someone to pay the rent, and she might say, “Well, I’m . . . not gonna approve that application. It’s already denied. We’re gonna leave you denied.” At that point it’s not fair. You know? That’s putting in our own personal feelings and kinda trying to . . . make up statistics that we can’t do. So that’s why we use the screening system, so that we’re not doing that, and we’re not left with . . . having to take on that additional stress, or having to make anyone feel bad, or assuming who can pay or who will be a good tenant. The system is gonna tell us if the tenant is approved.<sup>309</sup>

While almost all executives and many ground-level employees agreed with Robert that rigid systems prevent problems, some employees expressed more conflicted feelings, noting that they felt sorry for applicants with culturally salient stories. For example, Maryanne said:

[It] really weighs on you if someone comes to you and says, . . . “I left an abusive relationship. I don’t have any money. I have all of this debt. I have two kids. I don’t know what to do . . . .” That, like, it’s so hard. And I have been in the position where I’ve had to tell them, “You know, as much as I feel for you and your circumstance, because of Fair Housing laws, I have to screen you the same as everyone else.” And that’s just so that we don’t, you know, we don’t fall against Fair Housing laws. So we always say, “You know, there are so many options for you.” Like the mom and pops places. They have that

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308. *Id.*

309. Interview with Participant No. 5709 (Dec. 4, 2020) (on file with authors).

flexibility . . . . So I was renting my house. I don't have to adhere by certain Fair Housing laws. You know, I could say, "I'm so sorry that you're going through that. Like let me rent you my house."<sup>310</sup>

Notably, Maryanne felt that her company's size meant that they had to focus more than smaller companies on Fair Housing compliance because of the potential for lawsuits. She explained:

[B]ut yeah, to answer the question, we do have to screen them in accordance with our policy, especially because of how big our company is. Smaller companies may be able to get away with it, but we couldn't . . . . [S]o other companies that are smaller, they are not as vulnerable to potential lawsuits as we may be and so, and sometimes people are, we encounter, you know, opportunists that are just looking for us to slip so they can say, "You did that, but you didn't do it for me." Right. And because of the size of our company, we tend to be a bigger target for that kind of stuff, whereas at smaller companies, that, that's normally not the case.<sup>311</sup>

These algorithmic decisions were rarely pliable. Generally, companies were resistant to making exceptions or informally loosening criteria because of the fear of a Fair Housing lawsuit if they did. Carrie explained, "Most companies I've worked for, we need screen criteria, we stick with it and don't waver, because they're so afraid of a Fair Housing audit and like, 'wait, you took this person, not this person. There was some kind of discrepancy.'"<sup>312</sup> Like some ground-level employees, Carrie felt conflicted about this rigidity, in her case even questioning its merits:

I don't think we're pushing people through. I wish I could push people through because I think they deserve to live here [but] . . . they did not establish enough credit to be able to live here. Their culture doesn't believe in credit cards, . . . I'm like, "Wait, these residents would be great." But I have to tell them no. That's more what I get mad about, or someone does have a past eviction and we don't take housing debt, but I could see on their . . . you can just tell that . . . the situation didn't match what I'm seeing now. They didn't deserve this to happen to them. I mean not that anyone deserves it, but it wasn't their fault.<sup>313</sup>

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310. Interview with Participant No. 6007 (Mar. 30, 2021) (on file with authors).

311. *Id.*

312. Interview with Participant No. 2094, *supra* note 149.

313. *Id.*

Unlike smaller decision-makers, who rarely brought up the law or being sued unless interviewers asked them specific questions about the law, for larger companies, the law loomed large. As one tenant-screening representative said, one of the main reasons larger companies purchased his tenant-screening algorithmic product was to “avoid litigation and discrimination claims.”<sup>314</sup> He explained:

There’s a fear of being sued for any kind of discrimination. You know, an underwriting algorithm that’s run by a . . . computer . . . is color blind, gender blind, it’s everything blind. So . . . someone can’t sue you for saying you discriminated against me because I’m fill in the blank right? A minority or whatever.<sup>315</sup>

Larger landlord respondents confirmed this view, saying again and again that Fair Housing was a key reason their companies stuck strictly to algorithmic decision-making with no room for flexibility. Nakita said of algorithmic decision-making:

But the most important reason for this other than risk management is you do not wanna get charged with Fair Housing. So another reason to do this is that it takes away that risk, so when, if the housing authority comes in and says, “Why did you turn that person down?” And you go, “We had three applications, here’s this, this and this.” They look at it and they’re gonna go, “Oh, okay, you didn’t violate Fair Housing.”<sup>316</sup>

In some cases, respondents questioned the merits of the law, and saw it as actually hindering their organization from helping those in need of housing. Aviva said:

You worry about being sued all the time. You worry about someone saying, “Wait, you discriminated,” “Wait, no, that was never, never, no.” Yeah. I worry about if there was ever an audit, like I think actually Fair Housing has scared more than helped because it’s like, wait, you’re trying to do something good and you’re so worried that your good deed is going to go be punished if you ever get an audit.<sup>317</sup>

Aviva went on to explain her view of legal constraints, noting:

Legal constraints, treating everyone fair. Like that’s the rule, fair. But I think fairness and discrimination are very different sentences. There

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314. Interview with Participant No. 8007 (Mar. 30, 2021) (on file with authors).

315. *Id.*

316. Interview with Participant No. 3047 (Jan. 13, 2021) (on file with authors).

317. Interview with Participant No. 1983 (Jan. 7, 2021) (on file with authors).

are plenty of practices in our industry that are very unfair and no one's caught them yet. Yeah, it happens all the time. You're running a risk of like, do I do this favor? If I do this favor for someone because I know it's the right thing to do, will it come back and haunt me and hurt me? Like if I had a filing audit, I still have to report to the real estate commission, I still have to report to HUD. I mean, there's a lot of things.<sup>318</sup>

Like Aviva, Cammy had a similar view of the constraints of Fair Housing, and noted some constraints of the Fair Housing Act that she viewed as problematic. Cammy noted specifically that because of Fair Housing requirements, now that she works at a large organization that employs algorithmic tenant selection, she can never look at the nuances of each individual case when it comes to evictions. She explained she thinks "there's a lot of case-by-case situations with evictions that it wasn't their fault. It was a bad situation, and then they're hurt for life over it."<sup>319</sup>

Cammy blames the Fair Housing Act for this situation, saying, "We overcorrected with the whole Fair Housing thing."<sup>320</sup> She acknowledges the origins of Fair Housing, noting, "I'm sure Fair Housing was originally designed because people have discriminated and would discriminate."<sup>321</sup> But she believes that "now, unfortunately, you've taken it so far that you're hurting humanity . . . . I think that there are plenty of reasons why someone has an eviction that shouldn't be there, and now they can't get housing again."<sup>322</sup>

Despite the inflexible process larger decision-makers employ to choose tenants in part due to their concerns about violating the Fair Housing Act, these organizations still have a process through which those with borderline negative records may still access housing. If such applicants can pay additional money for the security deposit, often double the typical amount, then they are given the unit. Algorithms mark the applicants who are entitled to such a deal, often marking the decision as yellow instead of green (yes) or red (no). Or, as one respondent explained, "I get either accepted, denied, or accepted with

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318. *Id.*

319. Interview with Participant No. 5854 (Jan. 18, 2021) (on file with authors).

320. *Id.*

321. *Id.*

322. *Id.*

conditions. Conditions means they were questionable on something.”<sup>323</sup>

As indicated in each of the data sections in Part III larger landlords often allowed increased security deposits to compensate for financially questionable records, and, in a few instances, criminal records that were deemed borderline. On the other hand, evictions and housing debt almost always resulted in an automatic denial. For these landlords, this conditional process is a way to compensate for whatever increased risk they deem these borderline applicants to pose, while keeping the process standardized and “treating everyone the same.”

In some ways, this conditional process is similar to the process that smaller respondents employ when they see borderline negative records, in that there is a process for potentially allowing applicants with such records to still rent units. With smaller landlords, an applicant’s use of cultural capital allows them to tell convincing stories and may get them over the line. But with larger landlords, the parameters of the borderline records that qualify for special consideration are set in advance, and the only way to get over the hump is to have the financial capital to overcome the “conditional acceptance” and pay the increased security deposit.

Thus, applicants with financial capital are more likely to be able to overcome negative records than those without such capital if they apply to housing units that are allocated by algorithmic decision-making. Given the established significant racial differences and constraints on Black applicants regarding the ability to accumulate wealth, this process too has implications for the reproduction of racial and socioeconomic inequality.<sup>324</sup>

## CONCLUSION

This Article raises several critical theoretical and normative issues. At the onset, it is important to reiterate that due to the qualitative nature of the data, this Article is not making claims about the *prevalence* of any particular cultural understanding or process related to negative records.<sup>325</sup> Instead, the research is meant to show

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323. Interview with Participant No. 2094, *supra* note 149.

324. See generally BROWN, *supra* note 63 (chronicling racism in the U.S. taxation system); BARADARAN, *supra* note 63 (studying the policies and operation of Black banking in relation to Black communities and a segregated economy); see also O’NEIL, *supra* note 48, at 149 (examining how algorithms reinforce discrimination).

325. See *supra* note 90 (describing the limits of qualitative methodology).

the mechanisms behind processes that quantitative data has already identified—that applicants with negative records are denied economic opportunities at higher rates than those without such records.<sup>326</sup> The data in this study suggest that type of risk and culture matter for both smaller, less bureaucratically complex and larger, more bureaucratically complex decision-makers, and using logical inference to consider the data leads to the conclusion that the study’s findings are not atypical.<sup>327</sup>

The findings from this study invoke an obvious and immediate question—is the current state of decision-making in rental housing problematic? On the one hand, perhaps the current system of rental decision-making is, in fact, reassuring. Landlords spoke very clearly about trying to apply the same rules to everyone in order to prevent discrimination. Even though smaller and larger decision-makers did this in different ways, most respondents were *trying* not to discriminate against certain groups of people, and they had systems in place to try to prevent discrimination.<sup>328</sup>

On the other hand, when it comes to financial risk, the study revealed long-standing cultural archetypes play out among landlords of all sizes that ultimately dictate who can and cannot access housing. These cultural understandings draw on persistent myths about those who struggle financially. Certain types of struggle mean someone is not financially responsible and thus unworthy, while other types of struggle are relatable and either not one’s fault (for example, medical debt) or admirable (for example, student loan debt).<sup>329</sup> Those with this latter type of debt are worthy.<sup>330</sup> Thus, the housing-related collateral consequences of certain types of records are severe, while the consequences of other types of records are much less severe—and these outcomes are connected to cultural archetypes that are not supported by data. Indeed, the data overwhelmingly show that many

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326. See *supra* notes 40, 48, 66, 67, and 69 and accompanying text.

327. See Small, *supra* note 90, at 22–23. See generally ROBERT K. YIN, CASE STUDY RESEARCH AND APPLICATIONS (2017) (describing the design, use, and application of case study research, which incorporates logical inference); IDDO TAVORY & STEFAN TIMMERMANS, ABDUCTIVE ANALYSIS (2014) (discussing abductive analysis, a form of logical inference).

328. This is not to say that intentional housing discrimination does not exist, but rather noting that the majority of landlords in our sample worked to try to prevent discrimination, in part because of their understanding of federal and state law and their desire to steer clear of breaking the law.

329. See *supra* Part III.B.

330. *Id.*



U.S. residents who work still struggle to pay their bills and still have debt in arrears.<sup>331</sup>

To curb individual discretion in interpreting records and thus potential discrimination or unjust collateral consequences, an increasingly common approach has been to restrict record access or use for decision-makers—for example, by banning the use of criminal records in tenant screening, as some localities in California have done.<sup>332</sup> While this approach minimizes the potential for collateral consequences to stem from the particular type of record in question, the challenge is that, as existing research suggests,<sup>333</sup> landlords will likely shift to other screening measures. These other measures can produce unintended negative consequences for certain groups of candidates—potentially consequences that are even worse for the very groups the original law was trying to protect.

These unintended consequences are in part why it is so important to understand what landlords think each sort of record is doing for them in their screening process—why the results of this study are crucial. From there, policymakers who want to increase access to housing for certain groups of people can better meet landlords where they are while avoiding some of the pitfalls of blanket record-access bans. The data from this study show that landlords ultimately are focused on mitigating risk—and they use records as tools to do this. For this reason, simply taking away the tool—a certain type of record—means that landlords will find another way to mitigate the risk. Thus, it may be more promising for policymakers to shift to thinking about tools that landlords may be able to use to mitigate perceived risk.

This study helps surface findings upon which such tools can be built, tools that could make a difference in increasing access to housing. First, a broad point. When scholars and policymakers consider “landlords” while creating new laws and policies aimed at increasing access to housing, it is important for them to continue to distinguish between different *types* of landlords. The process of applying to and securing housing with a smaller owner-operator is fundamentally different from applying for a housing unit with a large corporate

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331. See, e.g., KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 43 (2015); Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Portraits of Bankruptcy Filers*, 56 GA. L. REV. 573, 613–15 (2022).

332. See *supra* note 61 and accompanying text (listing the localities in California that have banned the use of criminal records in tenant screening).

333. See *supra* note 23 and accompanying text (discussing research on the efficacy of Ban-the-Box laws).

landlord. While there are similarities in processes, the differences can lead to different outcomes for candidates with negative records, depending on the organizational structure of the landlord involved.

Connected to this point, scholars and policymakers could focus on pathways through which borderline applicants are able to overcome their negative records and access housing. By considering the potential roles that both cultural and financial capital play in either including or excluding those with borderline negative records, progress can be made.

For example, with smaller landlords, being able to explain one's past records in culturally salient terms, leading to a cultural connection, can make a difference. Thus, nonprofit organizations could help certain applicants apply to smaller landlord operations by counseling them to reach out to those landlords proactively to explain their records—and generally, nonprofits can help by providing applicants assistance in effectively communicating with landlords.<sup>334</sup>

For applicants applying to larger landlords, the type of help nonprofits and even governmental agencies could provide is even more straightforward. Because we know that larger landlords increase the security deposits required for borderline applicants, either governmental agencies or nonprofits could create an emergency “Securing Home” fund. This fund would be available to those who would otherwise not be able to afford the increased security deposit required of them by larger landlords due to records these landlords deem borderline risky.

This Article also brings to light the need for a broader discussion and understanding of collateral consequences in legal scholarship. The vast majority of the collateral consequences literature focuses on the collateral consequences of *criminal* records and arrests,<sup>335</sup> but as the data in this Article make clear, there are many types of records, ranging from debt in collections to debt collection court cases to evictions, that carry collateral consequences. Exploring the interconnectivity of the collateral consequences of a range of negative records is crucial to fully

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334. In his study of public housing authorities, Professor Brian McCabe found that small landlords are often more lenient than larger landlords “when it comes to overlooking blemishes” on an applicant’s record. Brian J. McCabe, *Ready to Rent: Administrative Decisions and Poverty Governance in the Housing Choice Voucher Program*, 88 AM. SOCIO. REV. 86, 103 (2023). Additionally, McCabe found that public housing agency officials direct their clients to the landlords with more lenient screening criteria. *Id.*

335. See *supra* notes 27–30 and accompanying text (summarizing the existing scholarship on the collateral consequences of a criminal conviction).

understanding the dynamics of economic inclusion and exclusion in the rental housing market and beyond. This is particularly true in a context where personal data are used to determine outcomes across a range of domains. Data that are recorded and compiled for one purpose, by credit bureaus and courts, for example, are then compiled and shared with other organizations for other purposes, such as with landlords for rental housing determinations. In such an interconnected world, we need to better understand the collective collateral consequences of a host of different negative records.

These considerations would necessarily include broadening the Ban-the-Box debate to potentially encompass a wider variety of records. It would also involve consideration about how banning one type of box may put an emphasis on other “boxes.” Ban-the-Box discussions generally focus on the “criminal” box,<sup>336</sup> but other “boxes,” not always literal boxes, may then take over in systematically denying housing to specific groups of people. For example, corporate landlords regularly incorporate credit data into their housing applicant algorithms. Black applicants are more likely than other racial groups to have lower credit scores, differences that stem in part from practices such as targeted predatory lending and redlining.<sup>337</sup> Thinking through the collateral consequences of *all* of the various records that landlords and other decision-makers, such as employers, consider will allow for a more nuanced discussion about Ban-the-Box policies.

Related to this point about collateral consequences and Ban-the-Box laws, a broader point that this project brings up is that there are trade-offs when considering housing policy. Better understanding how and why landlords make housing decisions is vital to designing better laws and policies, or at a minimum understanding the trade-offs involved when new laws are passed. For example, one way policymakers have targeted making housing more affordable is through security deposit limits. In California, for example, Governor Gavin Newsom signed Assembly Bill 12 into law on October 11, 2023.<sup>338</sup> Assembly Bill 12 requires that security deposits be capped at one month’s rent. Although this bill makes housing more affordable

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336. See *supra* notes 19–23 and accompanying text.

337. BD. GOVERNORS FED. RSRV. SYS., REPORT TO THE CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT S-2 (2007) <https://www.federalreserve.gov/boarddocs/rptcongress/creditscore/creditscore.pdf> [<https://perma.cc/G98E-DR8G>].

338. Assemb. 12, 2023–2024 Assemb., Reg. Sess. (Cal. 2023).

because it caps security deposits, it will prevent companies from increasing security deposits for applicants with borderline negative records, and thus prevent such applicants from getting housing. Most likely, when the state introduced Assembly Bill 12, they were not even aware that increased security deposits allow access to housing for some groups of people with negative records. This is why it is so important to understand housing allocation practices before enacting laws.

Ultimately, by helping to understand how conceptions of risk, culture, and law work together in the allocation of rental housing, this Article provides several new pathways of potential intervention.