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From Habitability to Equal Opportunity: Navigating the Crossroads to Housing That Is Both Fair and Habitable

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FROM HABITABILITY TO EQUAL OPPORTUNITY: NAVIGATING THE CROSSROADS TO HOUSING THAT IS BOTH FAIR AND HABITABLE

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Fair housing is an inherently intersectional issue. Housing that is equally accessible to members of any protected status means little if that housing is uninhabitable. Housing laws, however, have generally failed to effectuate equal access to habitable housing.

Part of this systemic failure can be attributed to the long-standing doctrine of caveat emptor, which passed all risks onto the renter, requiring them to take a dwelling "as is." As more members of racially and ethnically marginalized groups managed to secure housing, property owners handed over keys to dwellings that were primarily segregated and disproportionately unsafe. Accordingly, the push for equal opportunity in housing—including the right to habitable housing—occurred within this context.

Though laws promise tenants habitable housing, unique features of the housing market make enforcement of those rights challenging. However, policy interventions can be effective in this space, and local governments are beginning to show the way. By way of example, this article examines one such intervention in the City of Madison, Wisconsin. The article first provides the broader history of housing movements that have impacted housing policies over the last sixty years. Subsequently, the article examines how local efforts to address the issue of habitability faced resistance, false starts, and more recently, success. Although the City of Madison, Wisconsin became a national leader in developing habitable and fair housing rights, it remained a laggard in providing habitable housing to all. Nonetheless, following a recent equity analysis, the City of Madison reformed its local rent abatement procedures in an attempt to make habitable rental housing a more attainable reality for all. Studying the path the City of Madison has taken may help other governments and policy makers navigate the crossroads to housing—i.e., fair and habitable housing.

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I. INTRODUCTION

Giselle Garcia[1] had just returned home on a frigid February evening, after driving a snowplow from work in Madison, Wisconsin. When she opened her apartment door, the cold hit her, allowing her to see her own breath inside her apartment. She immediately texted both her property management company and her neighbor, Jose Rodriquez, with the same message: "No heat AGAIN, pls help!" Garcia went straight to her kitchen to turn on the oven, then to her bedroom to turn on the space heaters, including one that the property manager had dropped off the previous year.

For the last two years, the heating system for Garcia and other residents in the apartments at 3550 North Washington Avenue in Madison, Wisconsin, had been failing. Garcia's neighbor, Jose Rodriquez, was a bilingual social worker at the nearby public school for the last fifteen years. It was through this position that he learned about the heating problems experienced by families in the neighborhood. Rodriguez always listened and attempted to locate resources to resolve or alleviate such issues that impacted students'ability to concentrate and succeed in school. Every year, he helped organize winter clothing drives to provide warm coats and hats for students and their family members, provided information about local programs, and interpreted some conversations for parents—including Garcia—who were not fluent English speakers.

When Rodriguez saw Garcia's message about the lack of heat

1. Names and identifying information have been changed or removed to protect confidentiality; the introductory narrative is an aggregate of multiple true events.

in the apartment complex, he remembered hearing that the city had recently updated its laws to—purportedly—better-protect renters. He called Garcia, gave her the city building inspector's contact information, and tried to be optimistic. After the call, however, he wondered to himself whether the city's new laws would actually help, or prove themselves to be yet another example of a well-meaning but inequitable law that has promised, but failed, to deliver basic legal rights to everyone.

Internationally, governments have long-declared that all individuals should have equal access to habitable[2] housing.[3] In stark contrast, habitable rental housing in the United States remains segregated, despite decades of declarations at all levels of government. The most recent national study of racial discrimination by the Department of Housing and Urban Development ("HUD") found that "[white people] are more likely to own their homes, to occupy better quality homes and apartments, and to live in safer, more opportunity-rich neighborhoods."[4]

Garcia's phone buzzed with the all-too-familiar automated text response from her property management company: "Thank you for reporting your maintenance concern to Mega Property Management, one of our maintenance techs should be over to address your concern within forty-eight hours. If there is a fire or other life-threatening emergency, please call 911." Garcia had received more than a dozen of these messages in response to her own reports regarding the lack of heat during the previous months.

Garcia called the number Rodriguez provided for the city building inspector's office and left a message about the lack of heat

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2. This Article uses the term "habitable" to describe the suitability of housing, while other laws and reports use terms including "adequate" or "quality." The terms "inferior" or "dilapidated" are sometimes used to describe unsuitable housing.

3. The United Nations recognizes that "adequate" "housing" is a basic right. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948). The U.N. reiterated the importance of that right later: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection . . . ." *Id.* at art. 7. The U.N. has defined adequate housing as habitable: "Habitability: housing is not adequate if it does not guarantee physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards." UNITED NATIONS, FACT SHEET NO. 21, THE HUMAN RIGHT TO ADEQUATE HOUSING 4 (2009), www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf [perma.cc/64PL-UMD3] [hereinafter FACT SHEET]; *see also* G.A. Res. 217 (III) A, *supra* note 3; *see also* G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 11 (Dec. 16, 1966).

4. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 2 (2013).

in her apartment. Already using the oven to provide some heat, Garcia cooked a frozen pizza for dinner and settled in for another restless night under a pile of blankets with a couple of space heaters surrounding her bed.

The next day, a city building inspector came to Garcia's apartment and used a device to measure and record the temperature: it was fifty-four degrees *inside* the apartment. The inspector explained that he would give the building owner 24 hours to fix the heat and would return the day after next to reinspect. When the building inspector returned, he found the same temperature and told Garcia that she would be receiving paperwork letting her know how much rent she could withhold.

Before the week was over, Garcia received a letter from the city informing her that she could withhold 95% of her rent—about $38 per day, based on her monthly rent of $1,200[5]—from the day the building was inspected until the owner fixed the heat and the building inspector certified the heating system was up to code. The letter also explained that she could get a retroactive reduction in rent if she could prove that she had given notice to the property manager about the problem before the building inspector's visit.

"Will I be evicted for not paying this rent?" Garcia wondered. She took the letter to Rodriguez and asked him the same question. Rodriguez told her that there were laws making it illegal for property owners to retaliate against renters. He added, "you should take a picture of this letter and be careful—there are also laws that make it illegal for people to drink and drive, but people still do it."

Later, Rodriguez would share this story with others in his office—the new local law was actually effective! Garcia's success in withholding rent and recovering payments for the months during which the heating system was faulty had compelled the property owner to finally replace it. Rodriguez remarked that this was one of the most significant advances in rental housing health and safety he had witnessed. The local law did more than simply promise equal access to habitable housing; it actually helped deliver it.

Part II of this article provides an overview of habitable housing rights, ranging from feudalism to present day. Additionally, Part II identifies several practical challenges that make habitable housing rights uniquely difficult to enforce. Part III offers an overview of fair housing rights and identifies substantive and procedural issues

5. For Fair Market Rents for the Madison, Wisconsin Metro area, *see FY 2024 Fair Market Rent Documentation System*, U.S. DEP'T OF HOUS. & URB. DEV., [perma.cc/2JZ2-FMX7] (last visited July 2, 2024) (providing fair market rents for the Madison, Wisconsin metro area).

that have led to challenges in enforcing those rights. Part IV proposes a way forward by identifying and detailing methods to dismantle the barriers that have limited such enforcement of housing rights. Finally, Part V provides a detailed examination of the City of Madison's enforcement procedures, including recent revisions to its rent abatement law and procedures. This article concludes with actionable steps that local governments can take in forging a path forward to affirmatively further fair *and* habitable housing for all.

II. THE LONG AND CONTINUING ROAD TO HABITABLE HOUSING RIGHTS

Throughout the course of history, renters were required to pay full rent even if essential health or safety issues arose in their homes.[6] It was the renter's responsibility to maintain and repair everything they rented.[7] This only started changing in the 20th century as building codes shifted some responsibility onto the rental-property owners. In the 1960s, the Fair Housing Act outlawed housing discrimination, and courts ruled that renting out uninhabitable homes was illegal.[8]

Government agencies, including the Consumer Product Safety Commission ("CSPC"), Food and Drug Administration ("FDA"), United States Department of Agriculture ("USDA"), and National Highway Traffic and Safety Administration ("NHTSA"), regulate goods to ensure their safety for consumers. Building codes mandate safe and functional rental housing. However, rental housing differs from clothing and cars: rental homes are not as easy to inspect, return, or repair. To address these challenges, renters need different solutions that are carefully designed to enforce existing building codes—namely, an accessible rent abatement process.

A. From Caveat Emptor to the Implied Warranty of Habitability

Some scholars maintain that an implied warranty of habitability was not recognized by any court until a 1970 court

6. *See* discussion *infra* Section II.A. (stating that in the past, if a heating system failed, a tree fell on the roof, or the plumbing stopped working, the renter still had to pay full rent).

7. *See* discussion *infra* Section II.A.

8. *See* discussion *infra* Section II.A.

decision from the District of Columbia.[9] The Wisconsin Supreme Court, however, had recognized that rental housing leases include an implied warranty of habitability nearly a decade prior to that decision.[10] The court explained the basis for this bold declaration and its departure from the old rule:

> [B]uilding codes, and health regulations, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, *caveat emptor*. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.[11]

Historical context reveals that the Wisconsin Supreme Court's decision in *Pines* marked a profound change.[12] The history of legal rights related to habitable rental housing can be subdivided into four periods, as summarized below.[13]

1. Feudalism (9th to 15th Centuries in Europe)

During the feudalistic time period—i.e. 9th to 15th century Europe—warlords and wealthy families (collectively "lords") used economic and physical power to assert control over land, including

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9. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 159 (2020) (asserting the first court to recognize the implied warranty of habitability was Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970)).

10. Pines v. Perssion, 111 N.W.2d 409, 412-13 (Wis. 1961); *see also* Lemle v. Breeden, 462 P.2d 470, 472 (Haw. 1969) (recognizing an implied warranty of habitability for residential leases one year prior to *Javins*); Reste Realty Corp. v. Cooper, 251 A.2d 268, 273 (N.J. 1969) (recognizing an implied warranty of habitability in a commercial lease one year prior to *Javins*).

11. *Pines*, 111 N.W.2d at 412-13.

12. *See* discussion *infra* Sections II.A.1-4.

13. The historical summary which follows provides some context for the recent changes in the U.S., but it is not an exhaustive historical account.

homes and individuals on that land.[14] This control evolved into a systemic one, once these lords appointed one of their own as a monarch.[15] The appointed monarch claimed a superior or divine right to all the lands.[16] In a scheme to maintain control over the lords and their military forces, the monarch granted them fiefdoms, i.e., the right(s) to use and/or profit from some of the monarch's lands.[17] These powerful lords, in turn, granted lesser lords certain right(s) to use portions of their land.[18] This structure existed from the ruling family, to its close and powerful allies, then to lesser nobility, and eventually, funneling down to common farmers and laborers.[19] Similar to the way in which renters today *lease* rather than buy an apartment, the granting of any land-use rights during this period did not relinquish the monarch's or lord's ownership rights; rather, a mere right to *use* of the lands and income resulting therefrom was granted.[20] Notably, lords and others who granted that right were under no duty to maintain the land or structures on the land.[21] If someone like Garcia had rented a property during this time period, the law and customs would have afforded her no rights or remedies for the lack of a functioning heating system in her home.

2. Dilapidated Rentals and Discrimination Explicitly Allowed by Housing Laws (16th to 20th Centuries)

During the Renaissance period—first with agrarian and mercantile economies, and later with the industrial revolution—more people began asserting ownership rights over land, diverging from the previous norm that had limited such ownership to the monarch and powerful lords.[22] These people were predominantly wealthy, white men.[23] Additionally, some farmers were given the

14. 2 JOHN N. TAYLOR, THE AMERICAN LAW OF LANDLORD AND TENANT (Legare St. Press 2023) (Henry F. Buswell, ed. 1904).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 1:1 (1980 & Supp. 2021); *see also* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 506-17 (1982)*; see generally* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY §§ 2:17, 6:10, 6:32 (3d ed. 2000) (summarizing changes in the law starting in the 16th century that created more rights for renters).

23. *See* SCHOSHINSKI, *supra* note 22; *see also* STOEBUCK & WHITMAN, *supra*

right to use the land in exchange for services, while others paid rent for its use.[24] In most circumstances, there was little to no legal recourse if a home displayed issues with heating, plumbing, or structural safety.[25] Those who rented land, including any home or apartment, had two major responsibilities: (1) to pay rent when due, and (2) to return the property to the lord in the same general condition as when the lease commenced.[26] The "landlords," which now included merchants in addition to lords, had one responsibility to the renters: not to interfere with the renter's use and enjoyment of the leased property, so long as the renter fulfilled its own responsibilities.[27] During this time, discrimination in private rental housing was explicitly allowed.[28] If a person like Garcia had rented a property during this period, the law would have explicitly imposed the responsibility of fixing the faulty heating system on her. The prevailing legal doctrine was one called *caveat emptor* or *caveat lessee*, which held that renters assumed all risk and responsibility relating to the proper and safe function of the rented property.[29]

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note 22, §§ 1.6-1.7, 2 (describing developments in ownership rights in the law through time).

24. Glendon, *supra* note 22; *see* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 Wayne L. Rev. 135, 149 (2000); *see also* SCHOSHINSKI, *supra* note 22, at §§ 1:1, 3:10.

25. *See* Spector, *supra* note 24, at 149, 167 (explaining how common law traditions between the 1600s and 1900s imposed no duties on the land owners regarding the condition of the premises and that renters were responsible for repairs during the lease term); *see* TAYLOR, *supra* note 14, at 396-404 (summarizing express and implied duties of land owners in the early 1900s and stating that without an express agreement that the owner would repair, the common law placed the burden of repairs on the renter); SCHOSHINSKI, *supra* note 22 (stating that a renter took the premises as they found them, and the owner implied no warranty of habitability).

26. Sheldon F. Kurtz & Alice Noble-Allgire, *The Revised Uniform Residential Landlord and Tenant Act: A Perspective From the Reporters*, 52 REAL PROP., TR. & EST. L.J. 417, 419 (2018); *see* SCHOSHINSKI, *supra* note 22, at §§ 3:10, 5:18; *see also* Glendon, *supra* note 22.

27. Kurtz & Noble-Allgire, *supra* note 26; Spector, *supra* note 24 (citing 5 THOMPSON ON REAL PROPERTY, § 40.23(b) (David A. Thomas ed., 1994)); SCHOSHINSKI, *supra* note 22, § 3:10.

28. *See* United States v. Stanley, 109 U.S. 3, 26 (1883) (holding that the 1875 Civil Rights Act was unconstitutional and finding that the government could not stop private individuals from discriminating against others).

29. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984); Spector, *supra* note 24, at 149, 167 (citing THOMPSON ON REAL PROPERTY, *supra* note 27 and SCHOSHINSKI, *supra* note 22, § 3:13); *see also* Glendon, *supra* note 22.

3. The Rise of Rental Housing Rights (20th Century)

In the 20th century, national, state, and local governments in the United States began declaring that renters had, at least to a limited extent, a right to habitable housing and housing, free from discrimination.[30] Building codes were enacted to ensure that residential properties met minimum safety and sanitation standards. In the 1960s, courts and legislatures in some jurisdictions declared and/or codified an Implied Warranty of Habitability and enacted numerous fair housing laws.[31] The 1960s marked a revolutionary period for rental housing rights. Prior to the 1960s, landlords had little to no duty to maintain their properties, and could legally discriminate against potential tenants for almost any reason, including ethnicity, gender, or race. While tenants gained important rights in the 1960s and 1970s, enforcing those proved to be more difficult. If a person like Garcia rented an apartment during this period, the law would promise her fair and habitable housing, but failed to provide her with the necessary tools to navigate this new, complex, and lengthy legal process, so as to

30. *See, e.g.*, Glendon, *supra* note 22, at 505 (demonstrating how moving toward a model of public regulation and away from a private-only ordering of the owner-renter relationship – including the codification of habitability rights – was a key transformation in rental housing law); *see* Rabin, *supra* note 29, 553 (explaining that in the context of habitability rights, *Javins* and *Pines* stood specifically for the proposition that duties imposed by a housing code could be enforced by renters); *see* Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 NEB. L. REV. 703, 706 (1998) (summarizing the groundbreaking case law and legislative reforms in rental housing law during the 1960s and 1970s, including the recognition of the implied warranty of habitability through both case law and statutes); *see* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 399, 439 (2011) (detailing the varied and sometimes conflicting goals behind the renters' rights revolution and demonstrating how establishing the right to habitable housing was critical to furthering each of those goals); *see also* Kurtz & Noble-Allgire, *supra* note 26, at 419-23 (describing significant reforms by courts and legislatures in the 1960s and 1970s that established minimum housing quality standards via building codes and the warranty of habitability); *see also* Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 21 (2015) (noting that the District of Columbia and all states, except Arkansas, now recognize the warranty of habitability, either through legislation or case law); *see also* Ginny Monk, *Renter protections set to start in Arkansas this fall*, ARK. DEMOCRAT GAZETTE (June 1, 2021, 7:10 AM), www.arkansasonline.com/news/2021/jun/01/renter-protections-set-to-start-this-fall/ [perma.cc/B8AY-B9HG] (summarizing Arkansas' rental housing standards law that finally passed in 2021, and noting housing and renters' rights advocates' criticisms of the law as lacking certain standards and protections required to make it a "true 'warranty of habitability'"); *see also* discussion *infra* Sections III.A-B.

31. *See infra* Part III.

enforce her rights.

4. Affirmatively Furthering Fair and Habitable Housing (Present Day)

Informed and empowered by (1) declarations from the United Nations ("UN"), and (2) mandates from the Fair Housing Act ("FHA") to affirmatively further fair housing, state and local governments can take steps to deliver on the promises made in the 1960s and 1970s—i.e., that rental housing should be fair and habitable. In particular, the 1968 FHA requires the Department of Housing and Urban Development ("HUD") and any recipients of federal funds from HUD to affirmatively further the policies and purposes of the FHA, also known as "Affirmatively Further Fair Housing" ("AFFH").[32] This obligation compels HUD fund recipients to affirmatively further fair housing by taking meaningful action, beyond merely combating discrimination, to overcome patterns of segregation, and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.[33]

Government agencies and other advocates have made (and are continuing to make) these important rental housing rights more widely known. For example, in the 1970s and 1980s, renters who were unaware of their rights to fair and habitable housing would have had a relatively harder time discovering these then-new legal protections. Over the years, resources such as books, pamphlets, presentations, and more recently, countless internet articles about these rights have made it easier for tenants to learn about the rental housing rights, which they did not possess 70 years ago. Moreover, as detailed in Parts IV and V, governments have created–and continue to refine—enforcement procedures that make it easier for individuals to access and experience their rights to fair and habitable rental housing. Today, things are still far from perfect for many tenants. Even so, those like Garcia, who live in cities or states with local housing laws designed to further fair and habitable housing, can now more easily and effectively enforce their rights.

Despite the FHA and building codes existing for decades, housing discrimination *and* unsafe rental homes continue to be a

32. For a detailed summary of the Fair Housing Act's statutory mandate to Affirmatively Further Fair Housing, *see Affirmatively Furthering Fair Housing (AFFH)*, U.S. DEP'T HOUS. & URB. DEV., www.hud.gov/AFFH [perma.cc/FR4M-SJGR] (last visited July 24, 2024).

33. *Id.*

reality for many families today. This is especially true for low-income families of color, who are more likely to be tenants than homeowners. Although housing discrimination and rental housing habitability are often viewed as separate issues, this article demonstrates that they overlap. Discrimination is not limited to instances where a family is denied a home or charged higher rent due to the color of their skin or their membership in one or several protected classes. Discrimination also occurs when building owners rent uninhabitable homes to families based on protected class(es). This type of discrimination can be systemic when state and local governments provide building code enforcement procedures that are not easily accessible to all people.

B. The Unique Problem Associated with Providing Habitable Rental Housing

In 2024, many United States residents are likely to take for granted that when they pay for something, it will be safe to use and function as advertised. Someone who buys food expects it to provide nutrition and be safe to eat. Someone who buys a raincoat expects that it will provide protection from the rain. Someone who buys or leases a car expects that the car will start, move from place to place, and have essential, legally-required safety functions like the brakes, headlights, and wiper blades. These expectations are grounded in a reliance on regulatory protection.[34] These expectations for basic function and safety extend beyond our food, clothing, and transportation to shelter. When individuals buy a house, lease an apartment, or book a hotel, they expect it to provide protection from the elements and include basic functioning features like plumbing, heating, and electrical systems.

Legal regulations for food production and labeling help ensure that food is safe for consumption.[35] The Federal Trade Commission ("FTC") and U.S. Customs and Border Protection ("USCPB") regulate apparel so that it may be safely and appropriately used.[36]

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34. *See, e.g.*, Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1756 (2024) (providing an in-depth account of the development of regulatory reliance in U.S. history and describing the common thread in views around reliance is that that "individuals and entities [can] plan their affairs around some set of future expectations that are grounded in past promises made by others, and these past promises need to be properly accounted for" if they are to be changed or taken away).

35.COMM. TO ENSURE SAFE FOOD FROM PROD. TO CONSUMPTION, INST. OF MED. & NAT'L RSCH. COUNCIL, ENSURING SAFE FOOD: FROM PRODUCTION TO CONSUMPTION 17-18 (1998).

36. *Textile and Apparel Products*, U.S. CUSTOMS & BORDER PROT. (Mar. 6,

National Highway Traffic and Safety Administration ("NHTSA") regulations require that cars are equipped with various safety features and operate within acceptable limits.[37] Similarly, building codes require that buildings meet essential function and safety requirements.[38]

The problem is generally not a lack of regulations codifying consumer rights to basic functionality and safety standards. Rather, this article argues that the problem lies within the enforcement of basic functionality and safety requirements. Accessing and enforcing rights to fair and habitable rental housing poses unique challenges for tenants—ones that consumers of other goods and services do not face. Unlike rental housing, the concentrated, mass production of food, clothing, cars, and other consumer goods made it possible for federal regulatory agencies to create and enforce nationwide standards.[39] In addition to private lawsuits or regulatory agency enforcement, class action lawsuits can be used to enforce safety requirements of mass-produced products–something not typically available for rental housing.

When it comes to rental housing, the Implied Warranty of Habitability demands that any residential apartment or home in

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2024), www.cbp.gov/trade/nafta/guide-customs-procedures/provisions-specific-sectors/textiles [perma.cc/2XRA-8TA5]; *e.g.*, 16 C.F.R. § 423 (2024).

37. Federal Motor Vehicle Safety Standards, 88 Fed. Reg. 65149, 65149 (Sept. 21, 2023); *see also, e.g.*, 49 C.F.R. § 571 (2024) (listing the Federal Motor Vehicle Safety Standards written and enforced by the NHTSA).

38. *E.g.*, MADISON, WIS. CODE § 29.02 (2024); *see also, e.g.,* L.A., CAL., MUNICIPAL CODE ch. XVI, art. 1, div. 1, § 161.102 (2024) (stating that it is in the public interest for the city "to protect and promote the existence of sound and wholesome residential buildings").

39. For example, by inspecting and testing products at a relatively few production facilities, the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) can ensure that the food and drug producers, as well as meat processors are following regulations that ensure foods and drugs are safe to consume. Similarly, the National Highway Traffic and Safety (NHTSA) can ensure that mass-produced cars all meet operational and safety requirements by testing only a few of them that come off the same production line. Moreover, when safety issues arise with mass-produced goods, such as lettuce being contaminated with bacteria, or a particular model of car having airbag problems, product recalls can be issued and relatively quickly force the removal of unsafe products from store shelves or highways. In contrast, safety issues with rental homes cannot as easily be identified because they are not mass-produced. Moreover, it is much easier to remove bags of contaminated lettuce from stores than it is to remove unsafe rental housing from the market.

the United States meet functional and safety requirements.[40] However, rental housing is not mass-produced in a factory. Rather, it is built unit by unit at millions of different sites, often over an extended period, while exposed to the elements, and often with various changes in the homes' final finishes.[41]

Moreover, homes last much longer than typical consumer goods or food products, and during that long time period, issues with a rental home's functionality and safety can develop unevenly, depending on factors such as use or location.[42]

Rental housing also differs from other long-lasting consumer goods, such as cars, due to the infrequency of regularly required inspections and maintenance.[43] Homeowners are more likely than renters to have their homes professionally inspected, maintained,

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40. The implied warranty of habitability requires either compliance with municipal housing codes, or conformance with general community standards of occupancy suitability. SCHOSHINSKI, *supra* note 22, § 3:17; *see, e.g.*, *Javins*, 428 F.2d at 1082 (determining that local building codes would set the standard for the warranty of habitability); *see Lemle*, 462 P.2d at 476 (holding that a breach of the warranty of habitability would be determined in light of the particular circumstances of each case); *see also* Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972) (requiring consideration of several factors in addition to compliance with applicable housing code). Where the implied warranty has been codified, it is often part of a more comprehensive legislative scheme to regulate residential rental property that requires compliance with the jurisdiction's implied warranty and housing codes (arguably in such jurisdictions, the implied warranty incorporates the housing code). SCHOSHINSKI, *supra* note 22, § 3:34; STOEBUCK & WHITMAN, *supra* note 22, § 6:39 (summarizing for various jurisdictions – depending on the order that the implied warranty, statutes, and/or housing codes were recognized – what compliance with the implied warranty of habitability means).

41. Finishes such as type of paint, flooring, or appliances might initially seem inconsequential to habitability, but paint that prematurely peels, or appliances that fail could conceivably lead to significant health, safety, and basic functionality issues.

42. For example, a 2-bedroom apartment built 30 years ago that has been rented by a different group of four rowdy undergraduate college students every year might incur more wear and tear than a neighboring 2-bedroom apartment that has been rented the entire time by a single adult. The former apartment might need a number of repairs to function properly and safely.

43. Regardless of whether a person purchases or leases their automobile(s), almost everyone periodically takes their car(s) to professionals for inspection, maintenance, and repairs. When a professional replaces a vehicle's oil, tires, or brakes, they will often inspect other parts of the vehicle that are essential to its functioning and safety. Auto service and maintenance providers advertise to everyone, including those who lease vehicles. In contrast, scheduling regular professional inspections, maintenance, and repair of one's rental home is not something renters typically do. Similarly, home repair and maintenance services are marketed to owners of rental properties, not renters, which is appropriate given that the IWH makes it the owner's responsibility to maintain the habitability of rental homes.

and repaired. When purchasing a home, it is a commonly recommended practice to hire a private home inspector to issue a written report regarding the home's condition. Homeowners can build equity in their home if it is well-maintained and improved, which effectively creates a financial incentive to provide maintenance services and make home-quality improvements that will provide not only short-term benefits, but also long-term ones for when the time comes for them to sell the home. Home equity lines of credit, cash-out mortgage refinances, and home-insurance proceeds provide homeowners access to the financial resources necessary to make safety updates or repair damages. Finally, when homeowners undertake major repair projects or renovations, they often need to obtain one or more permits, and subject the work to an inspection to ensure it is safe and up to code.

In contrast, renters of residential properties rarely hire a private inspector to issue a report detailing potential safety concerns with the home they intend to rent. Renters generally do not build equity in their apartments as homeowners do, so they do not have the same financial incentives or resources for repairs. For example, renters cannot access home-equity lines of credit or mortgage refinancing. Even if a renter does report maintenance and repair concerns to the property owner or manager, and those concerns are addressed, any maintenance and repair work that is done could be done with a lesser degree of care. Rental property owners run what they hope will be a money-making business; accordingly, rather than invest in the same level of updates and repairs that they might put into their own personal home, rental-property owners are financially incentivized to defer maintenance, do as little maintenance as possible, and to do it as cheaply as possible—so long as they can continue to command the same rent from the property.[44]

In general, when someone buys or leases consumer goods such as food, clothing, or cars, and it makes them ill or does not function properly, the person can return the item for a refund or have it repaired under warranty. Policies that allow for easy refunds or

44. There is a shortage of affordable rental housing, which means that renters might have to pay a relatively high price for apartments even though those homes have functional or safety issues. NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 6-8 (2024), nlihc.org/gap [perma.cc/8Q8W-QU7S]; *see also, e.g.*, CITY OF MADISON, WI, 2023 HOUSING SNAPSHOT REPORT 21-22 (2023), www.huduser.gov/portal/sites/default/files/pdf/City-of-Madison-Housing-Snapshot-Report-2023.pdf [perma.cc/U84Z-DKFF] [hereinafter MADISON HOUSING REPORT].

warranty repairs might initially seem costly for businesses; however, studies have shown that prompt refund policies and repair warranties are good for business because they generate trust and encourage increased consumer spending.[45]

Rental homes often have a written lease contract between the owner and the renter. The basic structure of all contracts, including leases, requires four elements: offer, acceptance, payment or other consideration, and performance. In a rental-housing lease contract, a rental property owner offers a residential apartment—which is reasonably expected to function properly and safely—for a specific rent payment every month. The renter accepts this offer and pays rent (consideration). However, if the apartment floods every time it rains or the heat fails to keep the apartment warm, then the owner has breached the contract by failing to perform their obligation to continuously deliver to the renter the habitable home that they paid for. When a person does not receive what they paid for, they are entitled to a refund.

When food, clothing, or vehicles do not function properly or safely, one can often and relatively easily return, exchange, or have the manufacturer repair them. However, when it comes to rental housing that fails to function properly or safely, one cannot easily return or exchange their apartment. Housing is not easily interchangeable. Moving—if one can find a comparable and available place to rent at all—is time-consuming, disruptive, expensive, and can have negative health impacts. A 2024 study of over a million adults found that those who moved more than once between the ages of ten and fifteen were 61% more likely to suffer from depression in adulthood compared with their counterparts who had not moved, even after controlling for a range of other factors.[46]

Prompt repairs, rent reductions, or both, might be solutions to rental housing's fungibility problem. Because inoperable or unsafe rental housing cannot easily be returned or exchanged, renters need functional, health, and safety issues in their homes promptly addressed. Moreover, since a renter's decision to lease a home is based upon the expectation that the home will function properly and

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45. Narayan Janakiraman et al., *The Effect of Return Policy Leniency on Consumer Purchase and Return Decisions: A Meta-analytic Review,* 92 J. RETAILING 226, 233 (2016); D.N.P. Murthy et al., *New product warranty: A literature review*, 79 INT'L J. PROD. ECON. 231, 233 (2002) (recognizing the repair warranty as an important marketing tool which signals product quality and reliability to consumers).

46. Clive E. Sabel et al., *Changing Neighborhood Income Deprivation Over Time, Moving in Childhood, and Adult Risk of Depression*, 81 JAMA PSYCHIATRY 919 (2024), www.ncbi.nlm.nih.gov/pmc/articles/PMC11255978/ [perma.cc/N3XA-C89F].

safely, a reduction in rent seems appropriate if or when the home fails to meet these expectations. While providing prompt repairs and/or reductions in rent is simple in theory, obtaining them for unsafe housing is legally and practically difficult for any renter, and especially for those from racially and ethnically marginalized groups. As detailed in Parts IV and V, several steps can be taken to enforce building codes, thereby bringing communities closer to the promised destination: a place where fair and habitable housing is a reality for everyone.

III. THE LONG AND CONTINUING ROAD TO FAIR HOUSING RIGHTS

Like habitable housing rights, fair housing rights are a recent historical development. Until the 1960s, housing discrimination was both unbridled and flagrant: institutionalized by federal, state, and local policies, and reinforced by the private sector. The second part of this article describes the housing movements that impacted federal, state, and local policies and culminated in the passage of fair housing laws. It then examines how these laws have failed, perpetuating systemic inequities by forcing racially and ethnically marginalized communities to live in segregated, disproportionately unsafe housing, and failing to effectuate equal access to habitable housing.

A. Nationwide: The Fair Housing Act ("FHA")

Since the United States' inception, structural policies have embedded racial inequities into the fabric of society, and housing policies have been no exception.[47] In fact, housing has always been

47. *E.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) [hereinafter AMERICAN APARTHEID]; THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT (Gregory D. Squires ed., 2017) [hereinafter FIGHT FOR FAIR HOUSING]; RICHARD BROOKS & CAROL ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013); MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2d ed. 2016); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019);

used to maintain America's racial hierarchy and oppress marginalized communities.[48] Until the passage of the Fair Housing Act ("FHA") in 1968, housing discrimination in the United States—particularly against Black people—was unbridled and flagrant.[49]

Charles M. Lamb, *Congress, the Courts, and Civil Rights: The Fair Housing Act of 1968 Revisited*, 27 VILL. L. REV. 1115, 1119-20 n.28 (1982) (describing limitations on pre-Fair Housing Act "protections"); Wilhelmina A. Leigh, *Civil Rights Legislation and the Housing Status of Black Americans: An Overview*, 19 REV. BLACK POL. ECON. 5 (1991), link.springer.com/content/pdf/10.1007/BF02895335.pdf [perma.cc/U3A2-EM9Y] (detailing the major legislation and judicial decisions from Reconstruction through the 1980s that have institutionalized and perpetuated racial discrimination and segregation in housing); Paula A. Franzese & Stephanie J. Beach, *Promises Still to Keep: The Fair Housing Act Fifty Years Later*, 40 CARDOZO L. REV. 1207, 1209-11 (2019) (describing the Federal Housing Administration and the U.S. Housing Act's roles in establishing and perpetuating racially segregated poverty zones in the 1930s and beyond); Bill Dedman, *The Color Of Money*, ATLANTA J.-CONSTITUTION (May 1-4, 1988), www.powerreporting.com/color/ [perma.cc/SQB3-VBYD] (uncovering that Atlanta's banking and loan institutions in the 1980s continued to refuse to lend in middle-class and more affluent Black neighborhoods); Bill Dedman, *Blacks Turned Down for Home Loans from S&Ls Twice as Often as Whites*, ATLANTA J.-CONSTITUTION (January 22, 1989), www.powerreporting.com/color/53.html [perma.cc/YMC7-5LSF] (expanding on previous reporting to demonstrate how findings in Atlanta reflected a nationwide trend, suggesting redlining had actually increased since the 1970s); Douglas S. Massey et al., *Riding the Stagecoach to Hell: A Qualitative Analysis of Racial Discrimination in Mortgage Lending*, 15 CITY & CMTY. 118 (2016) (demonstrating that racial discrimination was institutionalized in the U.S. mortgage lending industry leading up to the Great Recession, causing disproportionate rates of foreclosure and drastic wealth loss for Black and Hispanic families); *see also* Civil Rights Act of 1866, 42 U.S.C. § 1982 (1866) (providing housing discrimination victims with a private right of action to challenge discriminatory practices, but the Act was designed in such a way as to make it functionally ineffective by requiring disenfranchised Black people – facing violent opposition without resources – to carry the burden of enforcing the law against local, state, and federal governments); Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (establishing the "separate but equal" doctrine, which was also used to justify excluding Black people from neighborhoods where white people lived); Corrigan v. Buckley, 271 U.S. 323, 332 (1926) (upholding the use of private restrictive covenants); *see generally* The Civil Rights Cases, 109 U.S. 3 (1883) (stating that private racial discrimination does not confer an inferior status on Black Americans).

48. *See, e.g.*, works cited *supra* note 47; *see The Civil Rights Cases*, 109 U.S. at 20 (affirming that the Thirteenth Amendment, ratified in 1865, empowered Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery"). *But see* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-43 (1968) (despite the above language from the Supreme Court in the Civil Rights Cases, it was not until 1968, over 100 years after ratification of the Thirteenth Amendment, that the Court recognized racialized housing discrimination between private parties as a "badge" of slavery).

49. *See, e.g.*, ROTHSTEIN, *supra* note 47; FIGHT FOR FAIR HOUSING, *supra* note 47, at 245.

Various federal, state, and local government-sanctioned or mandated policies both institutionalized and perpetuated racially-segregated housing and communities.[50] These policies included explicit racial zoning, exclusionary zoning, racially-restrictive covenants, redlining, blockbusting, urban renewal, and racial violence, which were not only sanctioned, but often openly enforced by policing institutions.[51]

With the passage of the FHA in 1968, housing discrimination finally became illegal across the nation.[52] But this came only after continuous pressure from the Civil Rights Movement activists in the 1950s and 1960s.[53] As pervasive and entrenched racial inequities hit a tipping point, Black Americans took to the streets, organizing and protesting in over one hundred cities, with rallying cries for social justice.[54] Their efforts forced the nation to reckon with its central role in creating starkly racialized poverty, inadequate schools, high unemployment, and the housing crisis—namely, segregated and substandard housing caused by vast, targeted government disinvestment in segregated communities.[55]

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50. *See, e.g.*, ROTHSTEIN, *supra* note 47; FIGHT FOR FAIR HOUSING, *supra* note 47, at 245; Franzese & Beach, *supra* note 47 (describing the Federal Housing Administration and the U.S. Housing Act's roles in establishing and perpetuating racially segregated poverty zones).

51. *See, e.g.,* ROTHSTEIN, *supra* note 47, at 39-48 (detailing federal, state, and local policies that created and maintained racially segregated housing throughout the United States); *see* FIGHT FOR FAIR HOUSING, *supra* note 47, at 191-93; *see* Franzese & Beach, *supra* note 47; *see* Leigh, *supra* note 47.

52. *See* Fair Housing Act of 1968, 42 U.S.C. §§ 3604-3605.

53. FIGHT FOR FAIR HOUSING, *supra* note 47; *see also* Franzese & Beach, *supra* note 47, at 1211.

54.Franzese & Beach, *supra* note 47, at 1211; NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter KERNER COMMISSION REPORT]; FIGHT FOR FAIR HOUSING, *supra* note 47; Craig Flournoy, *The Fair Housing Act: Enacted Despite the Mainstream Media, Neutered by the Federal Government's Unwillingness to Enforce It*, 40 CARDOZO L. REV. 1101, 1102-10 (2019) (highlighting the difference in news coverage of the uprisings between white newspapers and Black newspapers and demonstrating how the mainstream media's attempt to frame systemic problems as individual failures made the push for fair housing "infinitely harder").

55. *E.g.*, ROTHSTEIN, *supra* note 47; Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015, 1:26 PM), www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law [perma.cc/675S-TH64]; AMERICAN APARTHEID, *supra* note 47, at 3; FIGHT FOR FAIR HOUSING, *supra* note 47, at 191-93; KERNER COMMISSION REPORT, *supra* note 54, at 257-60; Franzese & Beach, *supra* note 47; Flournoy, *supra* note 54, at 1105; Maren

However, the first pillar of civil rights legislation, the Civil Rights Act of 1964, excluded housing, considering it "as a uniquely contentious area considered the realm of private action."[56] Although the second pillar of legislation, the Voting Rights Act, was passed in 1965, the FHA—the most contentious of the civil-rights-era legislation—would be repeatedly blocked by Northern and Southern senators alike for another three years.[57]

Congress finally revived and passed the FHA of 1968, the third pillar of civil rights legislation, after two shocking developments. First, in 1968, the Kerner Commission came to its "searing conclusion" that the housing crisis had caused the uprisings, and recommended the enactment of a federal fair-housing law.[58] Second, days later, an assassin murdered Dr. Martin Luther King, Jr. in Memphis, Tennessee, inciting profound upheaval in Black communities across more than one hundred and twenty-five cities, where they erupted into widespread protests and demonstrations.[59] Johnson used the shock over King's assassination to urge Congress to finally pass the FHA—the most filibustered bill in history—as a

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Trochmann, *Identities, Intersectionality, and Otherness: The Social Constructions of Deservedness in American Housing Policy*, 43 ADMIN. THEORY & PRAXIS 97, 107 (2021).

56. Trochmann, *supra* note 55; Lamb, *supra* note 47, at 1122.

57. Lamb, *supra* note 47, at 1118-27; AMERICAN APARTHEID, *supra* note 47, at 191-94; FIGHT FOR FAIR HOUSING, *supra* note 47, at 28-36; Hannah-Jones, *supra* note 55. Similarly, elected officials in the city of Milwaukee, the city of Madison, and the state of Wisconsin blocked the first attempts to pass fair housing laws at those levels. *See* Chris Foran, *Open Housing Marches in Milwaukee Reached 200 Straight Days – And Kept On Going – In 1968*, MILWAUKEE J. SENTINEL (March 13, 2018, 11:22 AM), www.jsonline.com/story/life/green-sheet/2018/03/13/open-housing-marches-milwaukee-reached-200-straight-days-and-kept-going-1968/411612002/ [perma.cc/UMJ4-Y52P]; Chris Foran, *Milwaukee Gets a Strong Open-Housing Law, a Surprise to All But The Woman Who Fought For It*, MILWAUKEE J. SENTINEL (April 25, 2018, 9:38 AM), www.jsonline.com/story/life/green-sheet/2018/04/24/milwaukee-finally-gets-strong-open-housing-law-1968-vel-phillips-king-assassination-discrimination/530476002/ [perma.cc/7RT9-PL84]; *Madison Makes Civil Rights History*, WORT-FM 89.9 (Dec. 12, 2023), www.wortfm.org/madison-makes-civil-rights-history [perma.cc/9WXY-HS6A]; John Wyngaard, *Fair Housing Bill is Key Achievement of Knowles' Term*, APPLETON POST CRESCENT, Nov. 7, 1965, at A12; John Wyngaard, *State's Open Housing Law Major Decision*, LA CROSSE TRIB., Nov. 10, 1965, at 15.

58. Hannah-Jones, *supra* note 55 (citing KERNER COMMISSION REPORT, *supra* note 54) ("What white Americans have never fully understood – but what the Negro can never forget – is that white society is deeply implicated in the ghetto…. White institutions created it, white institutions maintain it, and white society condones it."); AMERICAN APARTHEID, *supra* note 47, at 3-4; KERNER COMMISSION REPORT, *supra* note 54, at 263.

59. Hannah-Jones, *supra* note 55.

tribute to King.[60] Just seven days later, Johnson signed the bill into law, stating, "[w]e have passed many civil rights pieces of legislation, but none more important than this."[61]

Broadly, the FHA prohibited discrimination in the sale, rental, and financing of housing based on race, color, religion, and national origin, later adding sex (including gender identity and sexual orientation), disability, and familial status to the list of protected categories.[62] But the FHA also went a step further, mandating that the HUD "affirmatively" further fair housing—i.e., affirmatively foster integration and take action to overcome the "historic lack of access to opportunity in housing."[63] In sum, the FHA proclaimed it would promote equal-housing opportunities for all.[64]

B. Case Study: A Fair Housing Ordinance's Origin Story in Madison, Wisconsin

Until 1963, housing discrimination was legal in the City of Madison, Wisconsin.[65] That year, only about 27% of Madison's rental units and 12% of the houses for sale were available to Black and Brown people.[66] As in other areas across the United States, government-sanctioned or mandated policies in Madison both institutionalized and perpetuated racially-segregated housing, and were accompanied by targeted disinvestment.[67] For example,

60. *Id.*; Lamb, *supra* note 47, at 1126.

61. The President's News Conference of April 10, 1968, 1 PUB. PAPERS 504 (Apr. 10, 1968).

62. *See* 42 U.S.C. §§ 3604-3605; Housing and Community Development Act of 1974, 42 U.S.C. § 5309.

63. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42272 (July 16, 2015); *see also* 114 CONG. REC. 3422 (1968) (quoting Senator Walter Mondale, who explained that the FHA's goal was to bring about "integrated and balanced living patterns"); *see also* Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8516 (Feb. 9, 2023).

64. 42 U.S.C. §§ 3604, 3608(e).

65. *Madison Makes Civil Rights History, supra* note 57; Stu Levitan, *Madison Made Civil Rights History in 1963 by Adopting the First Fair Housing Ordinance in the State,* CHANNEL3000.COM (Jan. 29, 2021), www.channel3000.com/madison-magazine/city-life/madison-made-civil-rights-history-in-1963-by-adopting-the-first-fair-housing-ordinance-in/article_2986059b-3ab2-5850-ab9e-373e34cbaf4e.html [perma.cc/YQZ8-3EYE].

66. *Madison Makes Civil Rights History, supra* note 57; Levitan, *supra* note 65.

67. BILL FRUHLING ET AL., CITY OF MADISON HISTORIC PRESERVATION PLAN

Madison's Redevelopment Authority maintained and circulated a list of rental properties that were open to renting to anyone—not just white individuals.[68] Policies such as redlining, racial steering, blockbusting, restrictive zoning ordinances, racially restrictive covenants, and urban renewal were prevalent.

However, on December 12, 1963, the City of Madison became a national leader by enacting a fair housing ordinance—the first in the state, and five years before its federal counterpart.[69] This ordinance made it illegal to refuse to sell, rent, lease, or finance housing based on race, color, creed, or ancestry, and came ten long years after the city council had defeated the activists' first proposed fair housing ordinance.[70]

Like the nationwide efforts that led to the FHA of 1968, citizen activism was the key to Madison's historic adoption of this ordinance in the face of fierce opposition.[71] The longstanding tenacity of Lloyd Barbee and Marshall Colston, the NAACP's state president and local chair, respectively, was pivotal; without them, Madison would not have acted when it did—if at all.[72] Powerful opponents, including alders on the council and leaders in the real estate industry, asserted that "homeowners should be able to

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20-22 (2020), www.cityofmadison.com/dpced/planning/documents/Madison%20HPP%20Final%202020_r.pdf [perma.cc/6UPJ-D82Z] (describing housing segregation, exclusionary redlining, urban renewal, raids and assaults, and widespread prejudice and discrimination across the 1900s).

See also NAACP MADISON BRANCH, NEGRO HOUSING IN MADISON 6, 9-10, 22 (1959) (finding through an exhaustive survey of Black households in Madison that though there were Black families living in thirteen of Madison's twenty-one neighborhoods, 76% of Madison's Black population were confined to two of those twenty-one neighborhoods). Those families who had successfully moved out of the two neighborhoods had done so through "almost exclusively personal contacts", and 71% of all survey respondents reported that certain neighborhoods were not open to Black people. *Id.* In the two primary neighborhoods where Black people resided, respondents reported that the neighborhoods were run down and congested, nearby industrial facilities polluted the area with smoke and odors, and the City's public services in those neighborhoods were poor. *Id.* The city did not maintain the streets, its bus services were poor, and the schools were located too far for children to walk.

See, e.g., MURIEL SIMMS, SETTLIN': STORIES OF MADISON'S EARLY AFRICAN AMERICAN FAMILIES 199-214 (2018) (describing how Madison's urban renewal efforts in the 1950s and 1960s destroyed multicultural communities, including the Greenbush neighborhood, displacing its Black, Italian, and Jewish residents; also describing institutional obstacles endured by Black Americans who attempted to buy homes in Madison in the 1940s).

68. '*Open' Housing List Rejected,* WIS. STATE J., Nov. 13, 1963, at 17, [perma.cc/SMK4-JRPX].

69. *Madison Makes Civil Rights History, supra* note 57.

70. *Id.*

71. *Id.*

72. *Id.*

sell—or not sell—to anyone they choose, that the NAACP was a "malicious force," and that constituents, many of whom rented rooms to University of Wisconsin-Madison students, would never stand for opening their homes to people "of all races and colors where they would have to share the same bathroom."[73] The ordinance narrowly passed with a twelve-to-eleven vote after hours of intense debate, which included concessions that nearly caused supporters to withdraw the matter entirely.[74]

After the ordinance passed, Madison's conservative mayor appointed members to the newly-created Equal Opportunities Commission to enforce it.[75] While the mayor did include certain fair-housing advocates, he excluded other trailblazers, such as Colston.[76]

C. Failed Promises: Limitations of Fair Housing Laws

1. The Current State of Affairs

Fair housing laws have now been on the books for over half a century, but ignorance about their scope and impact perpetuates the harmful, false narrative that these laws have solved, or are solving, our country's deeply-entrenched inequities. This narrative is particularly dangerous: the illusion of "fairness under the law" not only causes people to ignore ongoing systemic inequities, but also exacerbates those inequities by refusing to acknowledge or examine the problem altogether. For example, after the passage of the FHA, policymakers declared the problem of housing discrimination "solved"—effectively, dropping the issue of residential segregation from the national agenda.[77] For decades, the government, policymakers, and agencies failed to take meaningful affirmative action to reverse the century's worth of policies that

73. *Id.*

74. *Id.*

75. *Id.*; Levitan, *supra* note 65.

76. *Madison Makes Civil Rights History*, *supra* note 57; Levitan, *supra* note 65.

77. AMERICAN APARTHEID, *supra* note 47, at 1, 4, 7-8, 14 (highlighting how during the 1970s and 1980s, the word segregation "disappeared" from the vocabulary of American policymakers, scholars, journalists, and the public). Instead, the dominant narrative returned to blaming poor Black people for their impoverished communities, ignoring that it was the structural conditions of segregation, and accompanying targeted disinvestment by the government, that brought about and perpetuated concentrated, racialized poverty. *Id.*

promoted and perpetuated segregation.[78]

Currently, despite the existence of fair housing laws, housing discrimination and segregation persist, particularly for Black Americans. In fact, progress in desegregating our nation's apartheid housing system has been uneven at best, and nonexistent in many areas.[79] For example, while the average white individual in metropolitan America lives in a neighborhood that is a 75% white, the average Black person lives in a neighborhood that is only up to 35% white and as much as 45% Black—approximately the same level of segregation that existed in 1940.[80] Black people are often hyper-segregated in the urban cores of cities, and the degree of segregation within hyper-segregated cities has changed very little.[81]

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78. *Id.* at 14, 186-216 (describing how public policies tolerated and even supported the perpetuation of segregation in American urban areas); *see* discussion and notes *infra* Section IV.C.2 (discussing enforcement failures of FHA and how it was not until 2023 that HUD finally took action to implement the Fair Housing Act's mandate to affirmatively foster integration and overcome the historic lack of access to opportunity in housing).

79. *E.g.*, AMERICAN APARTHEID, *supra* note 47, at 60-82; ROTHSTEIN, *supra* note 47, at vii-xv; FIGHT FOR FAIR HOUSING, *supra* note 47, at 2, 245-46; Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century?*, 11 DU BOIS REV. 205, 211, 221 (2014) (finding high levels of continued housing segregation, along with older housing stock, in metropolitan areas with large Black populations); JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2 (2011), s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf [perma.cc/YQD6-75AW]; William R. Tisdale, *On Milwaukee, Segregation and Pain Made Visible*, MILWAUKEE NEIGHBORHOOD NEWS SERV. (Aug. 17, 2016), milwaukeenns.org/2016/08/17/on-milwaukee-segregation-and-pain-made-visible/ [perma.cc/R8YF-TK4Z] (describing how systemic factors operate to maintain metropolitan Milwaukee, WI as the most racially segregated metropolitan region in the United States).

80. Bernadette Atuahene, "*Our Taxes are Too Damn High": Institutional Racism, Property Tax Assessments, and the Fair Housing Act*, 112 NW. U. L. REV. 1501, 1516 (2018) (citing LOGAN & STULTS, *supra* note 79); Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOCIO. 167 (2003); Douglas E. Mitchell et al., *The Contributions of School Desegregation to Housing Integration: Case Studies in Two Large Urban Areas*, 45 URB. EDUC. 166 (2010); *see* Aaron Williams & Armand Emamdjomeh, *America Is More Diverse Than Ever-But Still Segregated*, WASH. POST (May 10, 2018), www.washingtonpost.com/graphics/2018/national/segregation-us-cities/?noredirect-on&utm-term-.lda5f839cf4e [perma.cc/U8PC-V4D3].

81. Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373 (1989) (defining hypersegregation as metropolitan areas where Black people experience high levels of segregation across multiple dimensions, which includes living in neighborhoods that are all or almost entirely Black; in areas isolated from amenities, opportunities, and resources;

While Asian and Hispanic individuals are less segregated from white individuals, their levels of segregation have remained unchanged since 1980.[82] Additionally, a 2012 HUD report using testers to study race-based discrimination found that equally-qualified Black individuals were routinely less informed about and shown significantly less homes that were on the rental market compared to white individuals.[83] Moreover, while 13.5% of the population lived in extreme poverty census tracts in 2014, only 5.5% of white individuals lived in such tracts, compared to the 25.1% of Black and 17.6% of Hispanic individuals.[84] Half of all Black individuals have lived in the poorest quartile of urban neighborhoods for at least two consecutive generations, compared with just 7% of white individuals.[85]

Discrimination and segregation are not only pervasive when accessing housing, but the predominantly-segregated housing into which Black and Brown individuals are then funneled is

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and in areas located in cities' cores, where housing is often older); Douglas S. Massey & Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52 DEMOGRAPHY 1025, 1030 (2015) (finding that as of 2010, roughly one-half of all Black metropolitan residents lived in highly segregated or hypersegregated areas).

82. LOGAN & STULTS, *supra* note 79; John R. Logan, *The Persistence of Segregation in the 21st Century Metropolis*, 12 CITY & CMTY. 160, 160, 163 (2013).

83. TURNER ET AL., *supra* note 4, at 1-3 (stating that even though testing is uniquely effective in uncovering illegal behavior by owners, the report's findings still likely understate the total amount of discrimination occurring in the marketplace).

84. Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, BROOKINGS INST. (Mar. 31, 2016), www.brookings.edu/articles/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/ [perma.cc/PT5A-JRMQ].

See also ROTHSTEIN, *supra* note 47, at 186-87 (finding that young Black people are ten times as likely to live in poor neighborhoods as young white people; that is 66% of Black people, compared to 6% of white people). And, 67% of Black families who lived in the poorest quarter of neighborhoods a generation ago continue to live in such neighborhoods today, compared to only 40% of white families. *Id.*

See also Tracy Hadden Loh et al., *The Great Real Estate Reset*, BROOKINGS INST. (Dec. 16, 2020), www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/ [perma.cc/LM7S-FXME] (finding that nationwide, "over 80% of low-income Black people and three-quarters of low-income Latino or Hispanic people live in communities that meet the federal statutory definition for "low-income" communities."). "This is in contrast to just under half of low-income white people." *Id.*

85. PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY 21 (2013).

disproportionately unsafe and more costly. Numerous studies have shown that renters in communities of color are not only more likely to live in units with unsafe or unhealthy conditions but also more likely to pay more for that substandard housing.[86] The racial inequities among renters in subsidized housing are even more pronounced: Black and Latiné renters—who live in neighborhoods that whose makeup, on average, consists of 70% Black and Brown individuals—pay 17-25% more per month than white renters for disproportionately unsafe, lower-quality units.[87] This means that over a half-century after passage of the FHA and billions in federal spending later, Black and Brown individuals still live in separate and unequal housing—in units, buildings, and neighborhoods vastly inferior to those that federal housing dollars provide to white individuals.[88]

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86. *See, e.g.*, Elizabeth Korver-Glenn et al., *Displaced and Unsafe: The Legacy of Settler-Colonial Racial Capitalism in the U.S. Rental Market*, 4 J. RACE, ETHNICITY & CITY 113 (2023); Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 HARV. L. & POL'Y REV. ONLINE S1 (2017), journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2013/11/BenferGold.
pdf [perma.cc/TP4G-49L5] (demonstrating that substandard housing is still most concentrated in poor communities of color); Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. POVERTY L. & POL'Y 97 (2019) (highlighting the gap between the established right to safe housing and the lived reality experienced primarily by communities of color); James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, *in* URBAN HEALTH: READINGS IN THE SOCIAL, BUILT, AND PHYSICAL ENVIRONMENTS OF U.S. CITIES 106 (H. Patricia Hynes & Russ Lopez eds., 2009) (finding that Black people are 1.7 times more likely to live in homes with severe conditions issues).

87. Junia Howell et al., *Still Separate and Unequal: Persistent Racial Segregation and Inequality in Subsidized Housing*, 9 SOCIUS: SOCIO. RSCH. FOR DYNAMIC WORLD 1 (2023) (finding that Black and Latiné subsidized renters live in units with more unsafe conditions than white subsidized renters, but are simultaneously paying more, both raw dollar amount and relative to income, than white counterparts). Asian subsidized renters have comparable unit quality as white counterparts but pay considerably more. *Id.* Indigenous subsidized renters live in lower-quality units with the most unsafe and unhealthy conditions than other racial groups, but pay less in raw dollars and income proportion, than all other racial groups. *Id.*

88. *E.g.*, Florence Wagman Roisman, *Keeping the Promise: Ending Racial Discrimination and Segregation in Federally Financed Housing*, 48 HOW. L.J. 913, 916 (2005); *see also* Franzese & Beach, *supra* note 47, at 1216-21, 1223-26 (describing the pervasiveness of unsafe, uninhabitable housing conditions and explaining that since Black, Indigenous, and other people of color remain at disproportionately lower incomes than white people, that the absence of affordable housing in more affluent cities and towns achieves many of the same

Unsafe rental housing conditions also give rise to significant negative health effects, particularly within communities of color, which already combat systemic oppression on multiple fronts. Common examples of such conditions include rodent and insect infestation, mold contamination, broken and leaking plumbing, defective wiring causing fire risks, aging or broken furnaces, lead paint, lack of heat or hot water, lack of running water, damaged windows, broken doors, and other structural dangers.[89] These hazardous conditions cause or contribute to the development of significant health issues for residents, including the following: lead poisoning, asthma and other respiratory complications, heart disease, neurological disorders, developmental delays, rashes, infections, allergic reactions, and risk of physical injury or even death, in addition to psychological impacts.[90] Moreover, low-income Black and Hispanic neighborhoods have relatively high rates of pollution and are often in proximity to trash incinerators or other noxious facilities, further exacerbating health risks.[91] For these reasons, inadequate housing has been named a public health crisis.[92]

Furthermore, we know these impacts do not fall evenly. The combination of inadequate, unaffordable housing and insufficient

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results as explicit racial zoning); Hannah-Jones, *supra* note 55 (explaining how HUD, who administers the FHA, has delivered billions to communities in the form of block grants and tax subsidies, but that littlework was done to ensure those communities were identifying obstacles to fair housing, maintaining records of efforts to overcome those obstacles, and not discriminating). Particularly, records show that HUD sent grants to communities even after courts had found they were promoting segregated housing. *Id.*

89. *E.g.*, Franzese & Beach, *supra* note 47, at 1216-21, 1223-26; Winne Hu & Nate Schweber, *Trapped at Homes in the Pandemic With Mold and a Leaky Roof*, N.Y. TIMES (Aug. 5, 2021), www.nytimes.com/2020/12/15/nyregion/nyc-public-housing-coronavirus.html?searchResultPosition=3 [perma.cc/V2WS-2MUM]; Cary Spivak & Kevin Crowe, *Tenants Pay the Price When Landlords Don't Keep Properties Up to Code*, MILWAUKEE J. SENTINEL (Apr. 23, 2016), archive.jsonline.com/watchdog/watchdogreports/tenants-pay-the-price-when-landlords-dont-keep-properties-up-to-code-b99696740z1-376774681.html [perma.cc/9SYK-97VC] [hereinafter *Tenants Pay the Price*].

90. *See, e.g.*, Abraham Gutman et al., *Health, Housing, and the Law*, 11 NE. U. L. REV. 251, 257-59 (2019); Desmond & Bell, *supra* note 30, at 20; Sabbeth, *supra* note 86, at 105-06*; Tenants Pay the Price*, *supra* note 89.

91. *See, e.g.*, Gutman et al., *supra* note 90, at 256; Desmond & Bell, *supra* note 30, at 22; ROBERT BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (Routledge 3d ed. 2000) (1990).

92. Desmond & Bell, *supra* note 30, at 20 (citing Samiya A. Bashir, *Home is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733 (2002)).

fair housing protections cause compounding effects on individuals with intersectional identities. Intersectionality theory explains that interlocking forces of oppression—such as racism, sexism, classism, disability, familial status, and other forms of inequality—shape peoples experiences of the world and create heightened social inequalities.[93] This means that inequalities are not caused by social statuses or identities alone, but by multiple, intersecting, socially constructed systems of oppression. Intersectional research emphasizes that impacts of intersecting barriers are greater than the sum of their parts.[94] Without the lens of intersectionality, dominating perceptions of disadvantage (which view disadvantage as occurring discretely across categories) erase those with intersectional identities, further marginalizing those who are multiply burdened, while obscuring the causes of the harm they suffer.[95] Without incorporating intersectionality, no solution can sufficiently address the particular manner in which multiply-burdened people are subordinated.[96] In the context of housing policy, Black women, and Black single mothers in particular, often bear the brunt of proposed solutions that fail to reflect these intersecting barriers.[97]

Like the rest of the nation, segregation in Madison remains deeply entrenched, with little change, particularly for its Black residents. In Dane County, which houses Madison, the median Black household income is 45% of the median white household income.[98] Unsurprisingly, over 85% of Black residents must rent due to lack of homeownership—nearly double of the national

93. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politic*s, 1989 U. CHI. LEGAL F. 139, 140.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1245-46 (1991) [hereinafter *Mapping the Margins*] (explaining how the racially discriminatory housing practices Black women face are compounded by gender and often class oppression); *see also* Yvette N.A. Pappoe, *The Scarlet Letter "E": How Tenancy Screening Policies Exacerbate Housing Inequity for Evicted Black Women*, 103 B.U.L. REV. 269, 277-82 (2023) (detailing how Black women and Black single mothers, who face disproportionately high rates of eviction compared to all other demographic groups, suffer compounding collateral consequences due to intersectional oppression).

98. WILL MAHER, POVERTY FACT SHEET: RENTAL HOUSING AFFORDABILITY IN DANE COUNTY 2 (2019), morgridge.wisc.edu/wp-content/uploads/sites/4/2019/05/Factsheet-18-2019-Rental-Housing-Affordability-DaneCo.pdf [perma.cc/BUL3-RXJP].

average—compared to only 37% of white residents in the county.[99] These income disparities are also closely linked to disparities in access to and affordability of rental housing.[100] Illustrative of this issue is that Black households in Dane County are disproportionately more likely to face housing-related hardships, including unaffordable rent, overcrowding, incomplete kitchen facilities, incomplete plumbing, pests, mold, and ongoing maintenance or condition issues due to unresponsive property management.[101] Moreover, because the median Black household in Madison cannot afford median rent in the City, residents remain segregated, with Black and Brown renters concentrated in just two or three neighborhoods with low-quality, unsafe housing.[102]

From a fair housing perspective, the current state of housing is bleak, and a close examination of the status quo reveals the urgent need for solutions. But with the development of fair housing laws over fifty years ago—designed to address the multitude of aforementioned issues[103] by preventing discrimination and promoting integration—how did we get here? To craft meaningful solutions, stakeholders need to understand why fair housing laws

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99. KIDS FORWARD, RACE TO EQUITY 10-YEAR REPORT: DANE COUNTY 18 (2023), kidsforward.org/assets/Race-to-Equity-10-Year_Economic-Well-being.pdf [perma.cc/E4P4-7WRX].

100. MAHER, *supra* note 98.

101. *Id.*; KURT PAULSEN, HOUSING NEEDS ASSESSMENT: DANE COUNTY AND MUNICIPALITIES 38 (2015), dpla.wisc.edu/wp-content/uploads/sites/1021/2017/06/Dane-County-Housing-Needs-Assessment-Final.pdf [perma.cc/A7EL-F8RD]; Nicholas Garton, *How Two Madison Affordable Housing Projects Took a Turn for the Worse*, THE CAP TIMES (June 14, 2023), www.captimes.com/news/community/how-two-madison-affordable-housing-projects-took-a-turn-for-the-worse/article_7195d9b0-e808-5df3-94ca-3d9a385eaefb.html [perma.cc/WCR5-N5NU]; Eric Murphy, *Housing Complaints Jump in Madison*, ISTHMUS (Mar. 15, 2024, 3:00 PM), www.isthmus.com/news/news/housing-complaints-jump-in-madison/ [perma.cc/QVD3-CTCT]; Emilie Heidemann, *Surge in housing complaints prompts action from Madison's Equal Opportunities Commission*, WIS. STATE J. (Mar. 16, 2024), www.madison.com/news/local/government-politics/housing-complaints-madison-equal-opportunities-commission/article_40fee644-e155-11ee-8366-3f6f29bdac5c.html [perma.cc/PQE2-C623].

102. MADISON HOUSING REPORT, *supra* note 44; J. R. Sims, *Racialized Housing Submarkets of High Insecurity and Poor Quality*, HOUS. THEORY & SOC'Y (forthcoming) (2024); *see also* Jamie Perez, *Redlining Madison: Expert Describes How Cities Were Designed to Put People of Color at Disadvantage*, CHANNEL3000.COM (June 16, 2020), www.channel3000.com/news/local-news/redlining-madison-expert-describes-how-cities-were-designed-to-put-people-of-color-at-disadvantage/article_509ba8e4-f4c4-5d34-8085-e2c90b1cec29.html [perma.cc/5XFU-ZJKF].

103. *See supra* Section III.C.1.

have failed.

2. How We Got Here, Despite Fair Housing Laws

Laws that claim to create equal opportunities in buying and renting housing can easily fail to deliver fair housing outcomes. For example, housing is not fair when marginalized populations disproportionately live in unhealthy and uninhabitable housing. In this way, fair housing laws have failed to ensure equal opportunities for protected populations. No one should have to pay more for rental housing based on a protected class, let alone for housing that is unhealthy and uninhabitable.

We know that not everyone has equal access to safe, decent, and affordable housing in the United States.[104] Unfortunately, while fair housing laws were developed to eliminate housing discrimination, a person living in unhealthy, uninhabitable housing faces significant barriers in effectuating a fair housing remedy for this harm. This is due to substantive and procedural limitations and enforcement failures in existing fair housing laws.

The creation of fair housing laws in the 1960s provided an opportunity to establish holistic housing protections, including clear habitability requirements that would apply both before and after acquisition of housing. Although civil rights activists drew attention to starkly substandard housing conditions in communities of color, the drafters of fair housing laws never explicitly incorporated habitability protections into the legislation.[105] Given the fraught history of the Fair Housing Act's passage, many scholars argue that Congress intended the Act to be weak and unenforceable as a compromise to legislators who were blocking its passage.[106] The Act's original language limited HUD's enforcement powers to "conference, conciliation, and persuasion," and gave the Department of Justice limited power to bring suits in federal court.[107] This left private lawsuits as the main engine of enforcement.[108] Even now, unless renters bring disparate impact claims—which require significant resources—housing discrimination is notoriously difficult to enforce without testers.[109] As a result, any shortcomings of patchwork habitability protections

104. *See supra* Section III.C.1.

105. 42 U.S.C. §§ 3601-3619; FIGHT FOR FAIR HOUSING, *supra* note 47, at 30.

106. *E.g.*, AMERICAN APARTHEID, *supra* note 47, at 14-15, 195; CHARLES M. LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS (2005); FIGHT FOR FAIR HOUSING, *supra* note 47, at 33-36.

107. LAMB, *supra* note 106, at 47-48.

108. *Id.* at 48.

109. *Id.*

that existed at various state and local levels were left untouched by a unifying federal umbrella, to be further developed—or not—on a state-by-state or locality-by-locality basis.[110]

Meanwhile, the federal government has failed to vigorously enforce the Fair Housing Act's affirmative integration requirement. Even as HUD has delivered billions in the way of block grants and tax subsidies to over a thousand communities, a 2008 presidential commission found that HUD required no evidence of affirmative actions as a condition of funding, and took no adverse action if jurisdictions were found to be involved in discrimination or failing to affirmatively further fair housing.[111] In this way, the federal government has continued to promote segregation by failing to take affirmative action. It was not until 2023—over fifty years after the Fair Housing Act became law—that HUD finally proposed a rule to implement the Act's mandate to affirmatively further fair housing.[112]

Extensive litigation has taken place over the issue of whether the Fair Housing Act encompasses post-acquisition discriminatory conduct generally—which could then include poor housing conditions occurring during a renter's tenancy.[113] Eventually, federal regulations enforcing the Fair Housing Act were developed to encompass discrimination in the provision of maintenance or repairs.[114] However, regulations are more susceptible to challenge and change.[115]

Madison's fair housing ordinance has also been interpreted expansively to clearly include post-acquisition discriminatory

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110. *See, e.g.*, Glendon, *supra* note 22, at 518, 521-28; Kurtz & Noble-Allgire, *supra* note 26, at 419-23; Rabin, *supra* note 29, at 551; Desmond & Bell, *supra* note 30; Monk, *supra* note 30.

111. Hannah-Jones, *supra* note 55; *see also* FIGHT FOR FAIR HOUSING, *supra* note 47, at 195-96 (describing how in the 1970s and 1980s, HUD actively supported local housing authorities that were being sued for furthering segregation in public housing, and supported local authorities accused of implementing practices or policies furthering segregation).

112. Affirmatively Furthering Fair Housing, 88 Fed. Reg. 8516, 8516 (Feb. 9, 2023).

113. Atuahene, *supra* note 80, at 1521-24; Spencer Bailey, *Winning the Battle and the War against Housing Discrimination: Post-Acquisition Discrimination Claims under the Fair Housing Act*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 223, 224-25, 234-45 (2019).

114. 24 C.F.R. § 100.65(b)(2) (2016) (prohibiting actions including "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of race, color, religion, sex, handicap, familial status, or national origin").

115. *E.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (overruling Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)); Damon-Feng, *supra* note 34.

conduct.[116] The ordinance, however, fails to explicitly incorporate habitability protections into its language, aside from retaliation protections against building code complainants.[117]

Despite the existence of some habitability protections within fair housing laws, such laws may also be weaponized by property owners against municipalities to circumvent any duty to provide safe housing to renters. Specifically, owners have attempted to use fair housing laws to prevent municipalities from enforcing housing codes against properties housing lower-income renters.[118] These renters are more likely to belong to racially marginalized groups and tend to most commonly suffer from uninhabitable housing.[119] Owners have argued that when a city enforces its housing code, it increases business costs, thereby reducing the supply of affordable housing, which in turn has a disparate impact on Black Americans, who are disproportionately low-income renters.[120]

Moreover, a significant gap remains in the promise of "equal opportunities": such protections are procedurally difficult to access. This difficulty creates additional barriers to those already harmed and places unfair burdens on their shoulders.[121] While litigation against those who discriminate can help advance the promise of fair housing laws, it is no panacea. Instead, it is largely reactive—i.e., only useful *after* people have experienced harmful discrimination. There are also significant barriers to accessing justice through litigation.[122] Litigation is costly and time-consuming, and the difficulties and distrust involved in accessing lawyers and courts to

116. *See, e.g.*, Ossia v. Rush, Case No. 1377 (Equal Opportunities Comm'n, Madison, Wis. June 7, 1988), www.cityofmadison.com/civil-rights/documents/digest/01377.pdf [perma.cc/PME5-L9DD]; Williams v. Sinha, Case No. 1605 (Equal Opportunities Comm'n, Madison, Wis. Dec. 23, 1996), www.cityofmadison.com/civil-rights/documents/digest/01605.pdf [perma.cc/FQV5-9AVP]; Pollard v. Rohy, LLC, Case No. 20151168 (Equal Opportunities Comm'n, Madison, Wis. Apr. 28, 2020), www.cityofmadison.com/civil-rights/documents/digest/20151168-BlankNotice-31941.pdf [perma.cc/P25F-MRPQ].

117. MADISON, WIS. CODE § 39.03(4)(a), (d) (2022).

118. *See* Steinhauser v. City of St. Paul, 595 F. Supp. 2d 987 (D. Minn. 2008), *aff'd in part, rev'd in part sub nom.* Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *reh'g* and *reh'g en banc denied*, 636 F.3d 380 (8th Cir. 2010), *cert. granted*, 565 U.S. 1013 (2011), and *cert. dismissed*, 565 U.S. 1187 (2012).

119. *Gallagher*, 619 F.3d at 834-35.

120. *Steinhauser*, 595 F. Supp. 2d at 995-997.

121. *See infra* Section IV.B.

122. *See infra* Section IV.B. For example, the author's Westlaw review of cases bringing 24 C.F.R. § 100.65(b)(2) claims in federal court identified only eighteen such cases in the thirty-five years since the regulation's enactment in 1989.

enforce one's legal rights are well-documented.[123] Procedural barriers to accessing habitability protections perpetuate discrimination and remain a lasting problem today.

In its current state, fair housing law cannot account for the significant barriers that injured persons face in effectuating their right to safe housing. These gaps and barriers continue to harm already-marginalized groups by perpetuating discrimination and segregation. Thus, despite activists' efforts, the problems they identified–systemic problems requiring systemic solutions–still remain. This only adds urgency to the need for a more holistic, systems change approach: one that will bring us closer to fulfilling the promise of fair housing laws.

IV. NAVIGATING THE CROSSROADS TO THE AFFIRMATIVE FURTHERANCE OF FAIR AND HABITABLE HOUSING AT A LOCAL LEVEL

The third part of this article proposes a lens by which to approach the intractable problem of attaining fair and habitable housing, and then examines the barriers that must be dismantled so that everyone can enforce their right to habitable housing. It then turns to an overview of several legal avenues that governments have created in their efforts to enforce building codes.

A. Where to Go From Here? Identifying a Path Toward Housing Equity

Access to safe, stable, and affordable housing is a basic human need. It is a foundation for accessing and achieving opportunities such as education, health, employment, and civic participation. Lack of access to such housing, then, acts as a barrier against stability in these–among other–areas of life.

Given the current state of fair housing, how can governments

123. *E.g.*, Martha Minow, *Access to Justice*, 2 AM. J.L. & EQUAL. 293 (2022); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. & THE HAGUE INST. FOR INNOVATION OF LAW, JUSTICE NEEDS AND SATISFACTION IN THE UNITED STATES OF AMERICA (2021), iaals.du.edu/sites/default/files/documents/publications/justice-needs-and-satisfaction-us.pdf [perma.cc/WK62-P4Q] [hereinafter JUSTICE NEEDS]; LEGAL SERVICES CORPORATION, THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [perma.cc/4UB5-533K] [hereinafter JUSTICE GAP]. *See also Gallagher*, 619 F.3d at 834-35; *Steinhauser*, 595 F. Supp. 2d at 995-97; *infra* Section IV.B.

address the "historic lack of access to opportunity in housing"? As explained above, failing to explicitly include safe, healthy, and affordable housing as a component of fair housing is a harmful compartmentalization that fails to acknowledge the compounded effects of these issues on the lived experiences of marginalized people and communities.[124] Continuing in this way could lead to future policies and practices that are similarly limited in vision and reach. Instead, examining these seemingly intractable issues through a broader, systems or equity lens makes way for imaginative problem-solving. So, moving forward, what is the goal? One approach to understanding—or perhaps redefining—the goal is to briefly examine the discourse on housing in other arenas, e.g., human rights law and publish health law.

Human rights laws, for example, have addressed this very issue. In 1948, the United Nations declared "adequate housing" to be a universal human right.[125] The UN stated that, adequate housing must be as follows, at a minimum: accessible (equal and nondiscriminatory); affordable; habitable; and located in areas that are not polluted, dangerous, or cut off from employment opportunities, healthcare services, schools, childcare, and other social services and facilities.[126] Thus, adequate housing encompasses two sides of the same coin: (1) nondiscriminatory and equitable access to housing itself, and (2) once access is gained, a minimum guarantee of housing quality.[127]

A similar concept also exists in public health and public health law: "health equity in housing" or "healthy, integrated housing."[128] This concept, like adequate housing, recognizes that a decent dwelling is necessary for health and well-being, but not sufficient on its own.[129] Also necessary for health and well-being is a surrounding community with access to transportation, supportive schools, shops, parks, socioeconomic diversity, social capital, and economic opportunity, with a goal of fostering and maintaining diverse, equitable neighborhoods.[130] Health equity in housing

124. *See supra* Section III.C.1-2.

125. FACT SHEET, *supra* note 3, at 3, 15-19 (defining the right to adequate housing as the right to live somewhere in security, peace, and dignity).

126. *Id.* at 8-9 (defining affordable, habitable, and accessible as: guaranteeing physical safety, providing adequate space, protecting against elements and other threats to health and structural hazards; requiring access to adequate services such as safe drinking water, energy for cooking, heating, lighting, sanitation and washing, etc.; accounting for the specific needs of disadvantaged and marginalized groups).

127. *Id.*

128. Gutman et al., *supra* note 90, at 254-55.

129. *Id.*

130. *Id.*

emphasizes that housing is crucial to health and health equity, and highlights the synergistic relationship between housing hazards, affordability, stability, and neighborhood effects on health.[131]

Within the realm of fair housing, these concepts help clarify the goal of fair housing: (1) to reflect what marginalized communities identify as essential equity issues and (2) to create remedies grounded in this view—two steps which, in tandem may work to advance racial, economic, class, gender, health, and other forms of equity.[132]

To progress toward this goal, efforts must begin by addressing the needs and problems of those most disadvantaged by intersectional forms of oppression, and restructure the law–either substantively, procedurally, or both–as necessary.[133] This approach benefits less disadvantaged people, while ensuring that marginalized people are at its focal point–thus, effectively resisting efforts to compartmentalize experiences.[134]

History has brought us to a point where fair housing rights and habitable rental housing rights exist in writing. Yet, families still experience housing discrimination and live in uninhabitable homes. Local governments concerned with improving this reality have acted as though they face a fork in the road, having to focus their efforts exclusively on fair housing rights or habitable housing rights. Progress requires the government to understand that this fork in the road is unnecessary. Moving forward, local governments need to merge their fair housing efforts with their habitable housing ones. Fair housing for all is not attainable unless all housing is habitable, which means that habitability requirements must be equally enforceable.

B. Dismantling Barriers to Accessing and Effectuating the Right to Habitable Housing

Granting renters legal rights to habitable housing means little

131. *Id.* at 257.

132. *E.g.*, Crenshaw, *supra* note 93, at 151; PEW RSCH. CTR., ON VIEWS OF RACE AND INEQUALITY, BLACKS AND WHITES ARE WORLDS APART 51-52 (2016), www.pewresearch.org/wp-content/uploads/sites/20/2016/06/ST_2016.06.27_Race-Inequality-Final.pdf [perma.cc/B6SL-HSMV]; Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581 (2019).

133. Crenshaw, *supra* note 93, at 151.

134. *Id.*

if barriers prevent renters from exercising those rights.[135] Many factors impact whether the power to effectuate one's rights is meaningfully within reach—from knowing that the right and accordant process exist, to having access to the information necessary to properly engage with that process, to facing other structural barriers that hinder completing the process.[136]

To progress toward the goal of housing equity, it is essential to meaningfully identify, and actively dismantle, the barriers to access. This must be guided by an equity lens that (1) considers how intersecting forms of oppression affect access, (2) prioritizes the needs and problems of those most disadvantaged, and (3) puts the onus on local governments to dismantle the barriers they created in the first place.[137] The following section identifies barriers renters face in securing their right to habitable housing and discusses potential strategies for local governments to dismantle such barriers.

1. Barriers to Awareness of the Right and the Process to Enforce the Right

Courts boldly departed from years of historical precedent by declaring that every residential lease contain an implied warranty

135. This is often described in studies and scholarly works as a "lack of access to justice." For the purposes of this Article, it is a subtle yet important shift to explicitly recognize that this well-documented "lack of access" is more accurately understood as structural barriers, created by decisionmakers and governing bodies, that disproportionately exclude those from marginalized communities from participating in or meaningfully engaging with processes that would allow them to effectuate their rights. Like Professor Bezdek's article, this is less about resurrecting renters' substantive rights, and more about "expos[ing] the fallacies underlying the granting of 'rights' to subordinated people" and that "functionally, rights are not rights where they cannot be spoken or heard." Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 538 n.14, 600 (1992). *See also* Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 LOY. L.A. L. REV. 869, 872 (2009) (explaining that a common tendency in bar discussions on access to justice is to treat the provision of legal services as the end in itself). However, many factors affect the justness of legal processes apart from legal assistance, including the substance of rights and remedies, the structure of the legal processes, attitudes of judges and court personnel, and resources, expertise, and incentives of parties. *Id.* at 873.

136. *See* discussion *infra* Section IV.B.1-2.

137. *See* Wallat, *supra* note 132 (asserting that we must redefine the meaning of equal access to justice, and that it should: (1) reflect how people experience and think about their problems, rather than how attorneys do; (2) provide what people say they actually need, rather than what attorneys focus on providing; and (3) incorporate a structural lens toward the issues of poverty and inequality).

of habitability.[138] Legislatures and administrative agencies have enacted statutes declaring—though in tiny font—that any lease that attempts to waive the implied warranty of habitability is void.[139] Despite this, renters may not be aware of their right to a habitable rental home. To address the barrier to awareness, governments should make the warranty of habitability an explicit part of all residential leases. By requiring this warranty to be stated clearly and simply in every residential lease, renters are more likely to be aware of this important right. For example, Wisconsin law requires that all rental agreements include notice about domestic violence protections.[140] Additionally, federal law requires rental agreements be accompanied by a notice about lead paint hazards.[141] The warranty of habitability could—and should—be treated the same way.

Despite Wisconsin's courts,[142] legislatures,[143] and administrative agencies[144] recognizing that renters have an unwaivable right to habitable housing, none of these branches of government have required rental property owners or renters to be informed explicitly about the warranty of habitability.[145] When the warranty of habitability was first recognized by the courts, it was reasonable to call it an *implied* warranty of habitability because it was not contained in the written rental agreement the court was examining. However, courts, legislative bodies, and administrative agencies miss an important opportunity to promote awareness of the right to habitable housing by failing to require that all residential leases include an *explicit* warranty of habitability. To its credit, the City of Madison once had a law requiring rental property owners to inform renters of their rights.[146] Nonetheless, in 2013, former Wisconsin Governor Scott Walker signed a bill preempting any ordinance requiring rental property owners to provide any

138. *Pines*, 111 N.W.2d at 412-13; *Lemle*, 462 P.2d at 470; *Javins*, 428 F.2d at 1071.

139. WIS. STAT. § 704.07(1) (2022); WIS. ADMIN. CODE ATCP § 134.08(8) (2022).

140. WIS. STAT. § 704.14 (2022).

141. 42 U.S.C. § 4852d; 24 C.F.R. § 35 (2024).

142. *Pines*, 111 N.W.2d at 412-13.

143. WIS. STAT. § 704.44(8) (2022).

144. WIS. ADMIN. CODE ATCP § 134.08(8) (2022).

145. In contrast to the lack of awareness of rental housing habitability, consider that transportation regulations require informing roadway users of the maximum (and sometimes minimum) speed that is allowed every few miles, and food labeling regulations require that consumers be informed of the ingredients of any food product.

146. MADISON, WIS. CODE §32.06(2) (2003).

information to renters unless required by state or federal law.[147]

To dismantle this awareness barrier, local governments should carry the responsibility of ensuring that both rental property owners and renters of residential housing are informed about the warranty of habitability.[148] Applying an equity lens to the process reveals that the local government—through both action and inaction—has created the barriers and should thus be responsible for dismantling them. One simple step in that direction could be to require rental property owners to provide renters with an annual, written copy of the warranty of habitability.

Additionally, local governments should require every rental property owner to provide every renter with instructions on how to make a warranty claim. Even if the warranty of habitability were explicitly stated, it is of little use if a renter is unaware of the process to enforce that right. The instructions should clearly outline that every renter has the right to habitable housing, provide examples of problems that constitute "health and safety issues," and provide a step-by-step guide of the complaint process. It is also important to recognize that renters seek assistance for tenancy issues from a wide range of sources, including maintenance staff, non-emergency police, churches, housing counselors, social workers, and their elected representatives.[149] These resources, however, may not always connect the renter to the appropriate entity to make a claim. Therefore, the instructions should also provide the contact information of the appropriate entity (e.g., Building Inspection Office in Madison) and advise the renter to contact that entity directly.

To address knowledge barriers, local governments should also ensure that renters are aware of the remedial powers of making a habitability claim. Specifically, not only that landowners must make repairs, but also, that renters are entitled to a rent reduction when their home has uncorrected code violations. This knowledge might encourage renters who have been systematically excluded from processes and may otherwise be resigned to their living conditions[150] to consider the process worthwhile to pursue–despite

147. WIS. STAT. § 66.0104(2)(d)1.a (2013).

148. No training or license is required to rent residential property in Wisconsin. As a result, many rental property owners have no idea that their leases contain implied warranties, and are quite shocked to learn that some of their leases, which explicitly purport to waive the warranty of habitability, are void. WIS. STAT. §§ 704.07(1), 704.44 (2022).

149. Rebecca L. Sandefur, *What We Know and Need to Know about the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016).

150. For example, WIS. STAT. § 704.07(2)(bm) (2022), permits a rental property owner to rent a unit that has existing building code violations, so long

reasonable and warranted distrust of government systems and processes.

2. Other Structural Barriers to Engaging With or Completing the Process

Process reforms aimed at increasing equity and dismantling access barriers must also account for other structural barriers that have systematically excluded renters from marginalized communities from meaningfully engaging in legal processes. These barriers include information and language accessibility, cost burdens, time and unnecessarily complex processes, and other powerful barriers, such as fear of housing loss and learned distrust of the system.

a. Information and Language Accessibility

From an equity standpoint, it is the responsibility of local government to ensure information accessibility to the public, with a specific aim to bridge resource gaps and dismantle literacy or language barriers that the governing body has previously institutionalized. Importantly, this requires a critical paradigm shift: from one that lays blame on an individual person for "failing" to insist on their rights in the legal process, to one that recognizes the systemic structures in place that have effectively prevented those from socially subordinated groups from fully engaging in the process and effectuating their rights.[151] Empowering individuals to engage in these processes includes providing multiple easy modes of access to the resources they need. For example, this can include creating processes with simple and clear legal requirements; providing access to those requirements, as well as to any documents and procedures, through various vehicles and modes of delivery; and targeting those resources to ensure they meet the community's needs, particularly those most vulnerable or disadvantaged (e.g., affirmatively identifying language needs and producing accessible materials accordingly).[152] More specifically, resources should aim to bridge existing resource gaps between renters and owners. This is because legal processes largely support the interests of those with more power, in turn augmenting the advantages of

as the rental property owner discloses the violation prior to entering into the lease.

151. Bezdek, *supra* note 135, at 567-68.

152. Rhode, *supra* note 135.

repeat players, which in effect, prevents marginalized people from using that system to make meaningful demands.[153]

b. Costs

Local governments should address cost barriers to the legal process. Renters seeking to enforce building codes through civil lawsuits may face significant costs, including filing and service fees.[154] Those who are forced to live in homes with habitability issues due to financial limitations, likely struggle to pay filing fees and service fees to initiate a case. These are significant barriers to entry for a renter, and local governments could remove them by eliminating many of the costs and absorbing the rest.

c. Time and Unnecessarily Complex Processes

Time is another burden unfairly shouldered by a renter forced to live in substandard, unhealthy housing—and this is especially compounded by unnecessarily complex processes and other resource challenges. To effectuate a habitability claim, renters must typically engage in a time-consuming, multi-step process that could last weeks or even months before any relief is possible.[155] If a renter fails to follow any given step in the process, they often forfeit their right to continue with the claim. Unfortunately, as these processes are often unnecessarily complex, the likelihood of failure high.[156]

Moreover, even if the renter succeeds in engaging in the required process to effectuate a habitability claim, the unnecessary obstacles prolong the time that must be spent before a remedy and

153. Bezdek, *supra* note 135; Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability,* 126 YALE L.J. F. 458, 474 (2017); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 104 (1974) (demonstrating how the legal system and processes augment the advantages of repeat players).

154. *See, e.g.*, WIS. STAT. §§ 801-847 (2022) (exemplifying how Wisconsin's civil procedure and practice statutes make clear that it is the plaintiff who initiates a civil action, shouldering its own costs and fees, as well as meeting the burden of proof); Sabbeth, *supra* note 86, at 120 (summarizing the traditional rule in the United States, that each party in civil litigation must pay its own costs, which operates as a barrier to renters with low incomes).

155. *E.g.,* MADISON, WIS. CODE § 32.04(4) (2003); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1315 (2016); *see* Sabbeth, *supra* note 86, at 121; *see also* Spector, *supra* note 24, at 174-77 nn. 172-73 (providing examples of complex procedures that operate as additional barriers to renters enforcing habitability rights in various jurisdictions).

156. Greene, *supra* note 155; *see also* Spector, *supra* note 24, at 174-77 nn.172-73.

relief can be achieved from unsafe housing conditions. Even if the process were clear, the rent abatement remedy is ultimately ineffective if the process itself is slow.[157] While awaiting for a remedy to be effectuated, renters would be forced to live in mold or bug infested apartments that deteriorate their health[158]–all while managing other challenges such as employment demands, mobility issues, and caregiving responsibilities. To dismantle these barriers, local governments should critically review and streamline their procedures to reduce time until resolution, eliminate unnecessary steps and obstacles, and automate remedies.

d. Fear of Loss of Housing

The fear of losing one's housing serves as a significant barrier to the ability of renters to assert their right to habitable housing. The entrenched power differential between owners and renters means that renters must contend with a very real danger if they report conditions issues: they risk losing their housing, either due to retaliation by their home's owner or because a building inspector may determine that the conditions are so poor that the renter cannot remain.

Retaliation by owners frequently results in eviction.[159] Common forms of retaliation by an owner that lead either immediately, or eventually, to a renter losing their housing include the following: self-help eviction via changing the locks, filing an eviction action, terminating the renter's lease, raising the rent, calling or threatening to call immigration enforcement on undocumented renters, or taking other actions to induce the renter to move.[160] Although Wisconsin (among other states), by statute,

157. Jane Ault Phillips & Carol J. Miller, *The Implied Warranty of Habitability: Is Rent Escrow the Solution of the Obstacle to Tenant's Enforcement?*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 26 (2018).

158. *Id.*

159. *E.g.*, Eric Murphy, *Housing Complaints Jump in Madison*, ISTHMUS (Mar. 15, 2024, 3:00 PM), www.isthmus.com/news/news/housing-complaints-jump-in-madison/ [perma.cc/3PQ5-H6LP] (recounting how in 2024, Madison residents attending a community listening session to complain about poor housing conditions stated that they feared retaliation by their owners for complaining; furthermore, the city's equal opportunities division manager noted that after a previous meeting where attendees had publicly aired their housing complaints, attendees were served with eviction notices); DESMOND, *supra* note 47, at 398-99 (describing how tenants who fell behind in rent were unable to call a building inspector for fear of eviction).

160. Super, *supra* note 30, at 408; Sabbeth, *supra* note 86, at 99. A

prohibits retaliatory conduct by owners, that same statute nonetheless permits an owner to bring an eviction claim if the renter has not paid their rent in full.[161] In other words, renters who have not—or cannot—pay are unprotected from retaliatory conduct, despite needing protection the most.[162]

Even with improved retaliation protections—such as creating a presumption that any adverse action taken by the rental property owner against the renter within six months of a complaint to the building inspector is retaliatory—renters still contend with significant risk. Renters not only face the possibility of eviction, but also the additional risk of being "blacklisted," which almost guarantees they will be denied future affordable rental opportunities.[163] Renter blacklisting involves placing renters named in eviction proceedings—regardless of the outcome—into registries or reports compiled by "tenant reporting services" or "tenant screening bureaus."[164] These reports, often purchased by rental property owners, contain a range of information—not always

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systematic literature review has also confirmed that forced moves damage physical and mental health. Hugo Vásquez-Vera et al., *The Threat of Home Eviction and Its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199, 205 (2017).

161. WIS. STAT. § 704.45(1) (2021). A rental property owner, "may not increase rent, decrease services, bring an action for possession of the premises, refuse to renew a lease," or threaten to do any of those things if a preponderance of the evidence suggests that the owner is retaliating against the renter for making a "good faith complaint" about the premises or "[e]xercising a legal right relating to residential tenancies" more generally. *Id. See also* Dickhut v. Norton, 173 N.W.2d 297, 301 (Wis. 1970) (accepting retaliatory eviction as a defense when an owner attempted to evict a renter for the sole reason that the renter filed a complaint with the city building code office). The prohibition on evicting renters in retaliation for exercising their lawful rights also exists in other states. *See, e.g.,* Edwards v. Habib, 397 F.2d 687, 700-01 (D.C. Cir. 1968) (holding that an owner may not attempt to evict a renter in retaliation for reporting housing code violations); Barela v. Superior Ct., 636 P.2d 582, 587 (Cal. 1981) (finding that an owner may not evict a renter in retaliation for complaining to police about an owner's allegedly criminal behavior). However, in practice, so long as a Wisconsin rental property owner can allege some other basis for the eviction (such as nonpayment of rent), the authors have found that retaliation protections are typically ineffectual. *See* WIS. STAT. § 704.45(2) (2022) ("notwithstanding sub. (1), a landlord may bring an action for possession of the premises if the tenant has not paid rent . . . .").

162. *See* Phillips & Miller, *supra* note 157, at 28 (explaining how "deficiencies in the process are exacerbated by the fact that habitability issues arise most often with low-income households"); DESMOND, supra note 47, at 398-99 (recounting how tenants who fell behind on rent could not call a building inspector for fear of eviction, and could not withhold rent to incentivize repairs to be made).

163. *E.g.,* Franzese & Beach, *supra* note 47, at 1221-23.

164. *Id.*; Spector, *supra* note 24, at 181-86.

reliable or up-to-date—ranging from the renter's rental payment history and credit report, to their criminal history and any prior involvement in eviction proceedings.[165] The widespread use of registries or reports by owners to screen prospective renters is well-known.[166] In most states, owners are generally free to use reports of prior "eviction" to deny housing to a renter applicant.[167] For this reason, these reports have been criticized as susceptible to abuse.[168] Particularly, as they pertain to evictions, these reports can be misleading, even if technically accurate, because they often fail to report the outcome of an eviction filing.[169] For instance, renters might remain in possession of their unit after a dismissal or settlement agreement, or may have moved voluntarily for various reasons, such as to avoid harassment—details often not included in such reports.[170] Use of these reports has severe and often long-term negative effects on renters, including those who may have never had an eviction judgment filed against them, impacting their ability to secure future rental housing.[171] Importantly, these effects are not evenly distributed. For example, Black mothers are the marginalized group most likely to be evicted—and consequently, blacklisted—exacerbating their risk of homelessness.[172]

The practical reality is that renters often act or refrain from acting due to fear of retaliation, loss of housing, and subsequent difficulty in securing new housing. So, to the extent that renters anticipate retaliation by the rental property owner, they are less

165. Spector, *supra* note 24, at 181-86; Pappoe, *supra* note 97, at 282-87 (detailing how renter screening reports are inaccurate, incomplete, and biased).

166. *See, e.g.,* Spector, *supra* note 24, at 181-86; Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661 (2018); Sandra Park, *Unfair Eviction Screening Policies Are Disproportionately Blacklisting Black Women*, AM. C.L. UNION (Mar. 30, 2017), www.aclu.org/news/womens-rights/unfair-eviction-screening-policies-are-disproportionately [perma.cc/4V38-49BX]; Kim Barker & Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters With Little Recourse*, N.Y. TIMES (Aug. 16, 2016), www.nytimes.com/2016/08/17/nyregion/new-york-housing-tenant-blacklist.html [perma.cc/EV5Q-5R83].

167. *See, e.g.*, Spector, *supra* note 24, at 181-86; Franzese & Beach, *supra* note 47, at 1221-23.

168. Spector, *supra* note 24, at 181-86.

169. *Id.*; Franzese & Beach, *supra* note 47, at 1222; Franzese, *supra* note 166.

170. Spector, *supra* note 24, at 181-86.

171. *Id.*

172. Pappoe, *supra* note 97, at 280, 294; Park, *supra* note 166; *see also supra* note 97 and accompanying text.

likely to assert their legal rights.[173] Relatedly, poorly-written policies may enable a building inspector, who declares a unit unsafe for habitation, to force the renter out.[174] Thus, renters face fear on multiple fronts when trying to assert their rights: the fear of losing their housing and the uncertainty of what may follow.

e. Learned Distrust of the System

Lastly, learned distrust of the system acts as a powerful barrier that can prevent renters from asserting their rights to habitable housing. To escalate a habitability issue from an informal grievance to a formal dispute, there has to be an expectation that a remedy may be obtained by making a claim.[175] The assumption that simply knowing one's rights grants the power to enforce them is not only false, but harmful—particularly to those who have been disproportionately impacted by the system.[176] Moreover, studies show that people living in poverty are more likely than those with higher income to suffer negative consequences from the experience of civil justice situations, such as lost income, fear, and poor health.[177]

For example, people from marginalized communities report that their past experiences with public institutions were negative – that they felt " 'disrespected,' 'pathetic,' 'shameful,' ' lost,' and unsure how to navigate the system," directly impacting their desire to engage in future legal or institutional processes.[178] Even negative experiences in the criminal legal system affect decisions to seek help for civil legal problems; to those disproportionately impacted, the two systems are one and the same, wholly unjust and to be avoided.[179] These experiences can lead people from marginalized communities to conclude that seeking help from legal processes is likely futile–that outcomes are predetermined, that legal processes or settings are yet another

173. Super, *supra* note 30, at 408; PrincessSafiya Byers, *Why Wisconsin Renters Feel Powerless in Landlord Disputes*, WIS. WATCH (May 12, 2023), www.wisconsinwatch.org/2023/05/wisconsin-renters-landlord-disputes-milwaukee/ [perma.cc/F7TY-UYD5].

174. *See* discussion *infra* Section IV.B.2.

175. Bezdek, *supra* note 135.

176. *Id.* at 590-92.

177. REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES SURVEY 5 (2014), www.americanbarfoundation.org/wp-content/uploads/2023/04/sandefur_accessing_justice_in_the_contemporary_usa._aug._2014.pdf [perma.cc/P5CM-KDX6].

178 Greene, *supra* note 155, at 1267.

179. *Id.*

arena where others will have the say.[180] To contend with this significant barrier–short of implementing extensive structural changes to our society–will require significant measures to be taken at the local level, in order to earn and build trust of marginalized groups.

C. Removing Barriers to Enforcement of Building Codes

Whenever a law is not enforced, it is reasonable to expect a relatively low compliance rate. As previously explained, creating legal rights that are available only to those who possess a certain level of privilege or resources–in the form of information, education, time, or other supportive resources–to access those rights, renders those legal rights inequitable. In turn, this fosters a growing distrust of the legal system. State and local governments that fail to enact speedy and accessible enforcement procedures are likely to fail in delivering fair housing to their residents and fair markets[181] to their businesses. Unfortunately, enacting such enforcement procedures has proven to be easier said than done. The following sections briefly detail several approaches that governments have previously taken to enforce rental housing building codes.

1. Criminal Sanctions

One way local governments have attempted to enforce building codes is through criminal penalties. However, a criminal system of rental housing code enforcement has rarely, if ever, been implemented successfully, which is the case for several reasons.[182] Government enforcement agencies are typically understaffed, resulting in selective enforcement at the administrative level.[183] Regarding fair housing, many renters choose to rent rather than own, due to their resources. Moreover, women and renters of color, who have historically been treated unfairly by the legal system, might be hesitant or skeptical about reaching out to a government

180. *Id.* at 1266-67; Bezdek, *supra* note 135, at 590-92.

181. When building codes are not enforced, the owners of residential rental property who comply with the law must deal with an uneven playing-field against other businesses who may offer lower rents by way of not properly maintaining their buildings.

182. Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability*, 1975 WIS. L. REV. 19, 41-42.

183. *Id.*

official, e.g., at a building inspection office, for help.[184] This concern is especially salient given that anyone who complains to the building inspection office is effectively inviting a government inspector into their home to look for code violations.

Criminal prosecutions of rental property owners who fail to provide their renters with habitable homes can address hundreds or even thousands of violations at once.[185] However, when such prosecutions are taken, they are rarely prompt,[186] and renters can be evicted long before a criminal case ever gets filed or resolved.[187]

A review of early attempts to impose criminal penalties for code violations in rental housing found that at the end of a lengthy process, *if* any conviction was obtained, jail sentences were almost never imposed, and the typical fine was $15 to $30.[188] This is consistent with recent research showing that most property crimes go unreported, and only 19% of reported property crimes are solved or "cleared," i.e., closed through arrest, charging, or referral for prosecution.[189] The crime of failing to maintain a habitable rental

184. *E.g.*, Rachael Vasquez, *Was Your Wisconsin Community a 'Sundown Town'?*, WIS. PUB. RADIO (May 24, 2022), www.wpr.org/diversity-and-inclusion/was-your-wisconsin-community-sundown-town [perma.cc/S69B-PPKQ]; Jessica Jill, *Fact Check: Post Detailing 9 Things Women Couldn't Do Before 1971 is Mostly Right*, USA TODAY (Oct. 28, 2020, 2:56 PM), www.usatoday.com/story/news/factcheck/2020/10/28/fact-check-9-things-women-couldnt-do-1971-mostly-right/3677101001/ [perma.cc/UTZ3-R5HG]; GLENN R. SCHMITT, LOUIS REEDT, & KEVIN BLACKWELL, UNITED STATES SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT (2017).

185. Cary Spivak, *Judge Strips Milwaukee Landlord Elijah Rashaed's Control Over his Central City Properties*, MILWAUKEE J. SENTINEL (Mar. 28, 2018, 6:54 AM), www.jsonline.com/story/news/investigations/2018/03/27/judge-strips-milwaukee-landlord-elijah-rashaeds-control-over-his-central-city-properties/462754002/ [perma.cc/46NQ-JTP6]; Cary Spivak, *Wisconsin DOJ Sues Landlord Berrada, Owner of Milwaukee Rental Empire, Citing Repeated Abuses of Tenants*, MILWAUKEE J. SENTINEL (Nov. 16, 2021, 5:45 PM), www.jsonline.com/story/news/2021/11/16/josh-kaul-sues-landlord-berrada-violations-landlord-tenant-law/6401781001/ [perma.cc/W646-VDKE].

186. Cary Spivak & Kevin Crowe, *'He'll Evict You in a Minute.' Landlord Quietly Becomes a Force in Milwaukee Rental Business…And Eviction Court*, MILWAUKEE J. SENTINEL (July 19, 2018, 11:41 AM), www.jsonline.com/story/news/investigations/2018/07/13/hell-evict-you-minute-milwaukee-landlord-amasses-empire/698406002/ [perma.cc/8VVC-JCTF].

187. PrincessSafiya Byers, *Why Odds Are Stacked in Favor of Bad Landlords in Wisconsin*, MILWAUKEE NEIGHBORHOOD NEWS SERV. (May 3, 2023), www.milwaukeenns.org/2023/05/03/why-odds-are-stacked-in-favor-of-bad-landlords-in-wisconsin/ [perma.cc/CV62-RSAX].

188. Love, *supra* note 182.

189. John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RSCH. CTR. (Mar. 1, 2017), www.pewresearch.org/short-reads/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/ [perma.cc/P4TR-E6E3].

property falls within the broad definition of "white collar" crime, and is less likely to be addressed at the same rate as violent crimes like murder or assault.[190] Criminal sanctions are without a doubt an important tool to enforce building codes. However, the data on code violation crimes and non-violent crimes generally indicates that criminal sanctions alone are unlikely to lead to prompt resolutions for families living in uninhabitable homes.

2. Civil Sanctions

Another approach local governments have taken to enforce building codes is through civil sanctions, e.g., fines, fees, and civil injunctions. These civil sanctions, whether used in addition to or in place of criminal prosecutions and criminal penalties, are designed to create an economic incentive for rental property owners to comply with building codes. Imposing a fine, fee, or a civil injunction on rental property owners when they fail to comply with the building code increases their costs and thereby decreases their income. Rental property owners seeking to maximize profits would therefore be incentivized to keep their properties habitable to avoid such fees. Governments have employed numerous sanctions including, but not limited to the following: (1) ordering a building to be vacated until necessary repairs are made;[191] (2) entering an injunction prohibiting any new tenants until repairs are made;[192] (3) appointing a receiver or creating an escrow account to collect rents and possibly use those funds for repairs;[193] (4) having the government make repairs and take a lien on the property for the

190. *Id.*; *see* James B. Stewart, *Why We Let White-Collar Criminals Get Away With Their Crimes*, N.Y. TIMES (Sept. 29, 2020), www.nytimes.com/2020/09/29/books/review/big-dirty-money-jennifer-taub.html [perma.cc/M7HY-HP6Q]; *White-Collar Crime Prosecutions Continue 20-Year Decline*, THE CRIME REPORT (Aug. 10, 2021), www.thecrimereport.org/2021/08/10/white-collar-crime-prosecutions-continue-to-decline/ [perma.cc/V4HW-KTSA].

191. An obvious problem with this option is that it would have a chilling-effect on renter reports of code violations because such reports might result in the renter and their neighbors becoming homeless. Love, *supra* note 182, at 43.

192. In an apartment building with little to no renter turnover, such injunctions would have little to no impact. *Id.*

193. Appointing a receiver or creating escrow accounts could add administrative costs and reduce an owner's liquidity or ability to obtain the financing needed to make the necessary repairs. *Id.*; MADISON, WI, CODE § 32.06 (2024) (Created by Ordinance 6268 June 1, 1978).

expenses;[194] and (5) imposing daily fines that increase daily for ongoing code violations.[195]

A common problem with the civil sanctions mentioned above is that they fail to compensate, and sometimes even harm, renters living in and paying for homes with serious code violations.[196] First, when a rental property owner pays a civil sanction, such as a fine or a fee, that payment goes to the government that imposed the sanction, rather than to the renter whose family is struggling to live in an unhealthy or unsafe home. Second, when such sanctions are imposed by a government, some building owners react by evicting the impacted renters.[197] In this way, the imposition of civil sanctions on rental property owners can create additional stress and difficulties for renting families. Consider whether you would report building code violations in your apartment to the authorities or advise another renter to do so if it might lead to your or their family becoming homeless or facing eviction. While living in an apartment with serious building code violations is unsafe and/or detrimental to a family's health, living on the street is an even worse alternative which many families cannot risk.

3. Authorizing Private Actions

A third method state and local governments have employed in an effort to enforce building codes is by authorizing renters to bring private lawsuits.[198] However, allowing renters to file their own

194. Governments that have enacted this civil sanction have rarely used it due to lack of funds and a reluctance to serve as the repairman. Love, *supra* note 182, at 44.

195. *E.g.*, MADISON, WIS. CODE § 27.11 (2004) ("Each day or portion thereof such violation continues shall be considered a separate offense."). While escalating fines theoretically would create a strong economic incentive, such fines would be another order imposed on property owners who have already failed to comply with building codes, failed to comply with orders to timely correct violations. Love, *supra* note 182, at 44.

196. Neil Johnson, *Tenants Face Eviction as Janesville Landlord Embroiled in Federal, Local Lawsuits Over Sex Harassment, Property Code Violations*, WCLO (Feb. 12, 2024), www.wclo.com/2024/02/12/tenants-face-eviction-as-janesville-landlord-embroiled-in-federal-local-lawsuits-over-sex-harassment-property-code-violations/ [perma.cc/MTU5-YU7T]; Cary Spivak, *Wisconsin Appellate Court Rules Against Mega-Landlord Berrada in Eviction Case*, MILWAUKEE J. SENTINEL (May 15, 2023, 5:12 AM), www.jsonline.com/story/money/business/2023/05/15/tenant-beats-giant-milwaukee-landlord-berrada-in-eviction-case/70208715007/ [perma.cc/64LR-BRR3].

197. *E.g., supra* notes 187-89.

198. Laws empowering private persons to bring suit to enforce various laws is sometimes referred to as creating private attorneys general. Love, *supra* note 182, at 44.

lawsuits implicates at least three fair-housing concerns. First, there is a well-documented lack of access to justice.[199] The lack of access to justice means that people who have suffered economic discrimination often lack the resources to hire legal counsel or to navigate the process of filing a lawsuit on their own.[200] Second, even if most renters had enough time, money, and knowledge to access legal counsel or file a lawsuit on their own, their private lawsuits would only provide individual remedies.[201] Renters who lack resources to file their own lawsuit would be excluded from any court-ordered compensation that their neighbors might obtain through their private lawsuit.[202]

Third, private lawsuits can be slow, risky, and inequitable.[203] For example, after a lawsuit is filed and properly served on the correct defendants, weeks will pass before an answer needs to be filed, and afterwards, it often takes months for a case to resolve before the renter might find any relief.[204] During the lawsuit, the renter could face counterclaims and expensive, intrusive discovery through depositions and inspections.[205] If a habitability claim ever reaches trial, the renter bears the burden of proof, as the plaintiff in the case. To meet this burden, renters may offer testimony and other evidence about the conditions in their homes. Renters living in unsafe housing might be able to describe what they have seen and experienced in their home; however, many may lack the training to understand and testify why, for example, their electrical

199. *E.g.*, Minow, *supra* note 123; JUSTICE NEEDS, *supra* note 123; JUSTICE GAP, *supra* note 123; *see also supra* notes 119-21 and accompanying text.

200. Minow, *supra* note 123; JUSTICE NEEDS *supra* note 123; JUSTICE GAP, *supra* note 123, at 44, 49-52; *see supra* Section IV.B.

201. *Cf.* Sabbeth, *supra* note 86, at 132 (explaining that, unlike private attorneys, government agencies are empowered to serve the broader public good but cannot obtain individual relief).

202. In contrast to private remedies Madison's rent abatement law allows every family in a building to recover some of their rent when an uncorrected common-area code violation is cited in a multi-unit apartment building. MADISON, WIS. CODE § 32.04 (2024).

203. Sabbeth, *supra* note 86, at 103, 121.

204. For example, in Wisconsin, Defendants must file an Answer within 28 days of a small claims case being filed, and for large claims cases the Answer is not due until 20 or 45 days later under WIS. STAT. § 799.05, and § 801.09(2)(a)3.b (2024). The *Age at Disposition* report issued by the Wisconsin Court System shows that 22% of contested small claims cases took more than 120 days to resolve. *Age at Disposition, Report Period: 1/1/2022 thru 12/31/2022*, WISCONSIN COURT SYSTEM: CIRCUIT COURT STATISTICAL REPORTING (Feb. 10, 2023, 12:22 AM), www.wicourts.gov/publications/statistics/circuit/docs/agedispostate22.pdf [perma.cc/5XDW-ZAV2].

205. *E.g.*, WIS. STAT. §§ 804.05, 804.09, 802.07 (2022).

outlets were emitting sparks and emitting crackling noises. In contrast, rental property owners, along with their managers or repair workers, often have more experience with electrical wiring in apartments. They might confidently testify that the issues the renter described were just minor inconveniences that did not diminish the value or use of the rental home.[206]

Thus, while the implied warranty of habitability provides renters with the legal right to sue in court, effectuating that right is difficult for most renters, especially those with limited resources.[207] Private actions in courts of general jurisdiction come with these risks, which can have an inequitable impact. Renters with resources are more likely to know their rights and afford legal counsel, while those same resources help them endure less overbroad and burdensome discovery and defend against counterclaims.

4. Specialized Single-Issue Procedures

The final way that some governments have attempted to enforce building codes is by creating specialized legal complaint procedures. Unlike courts of general jurisdiction which were created to process all types of legal cases, some governments have created specialized procedures to enforce their building codes. By designing these specialized procedures around a single issue or type of case, the system can be simplified in contrast to courts of general jurisdiction. Moreover, specialized procedures can be tailored to address the needs of those most impacted and allow for adjustments to address unanticipated inequities over time. For example, Wisconsin has specialized procedures for unemployment claims,[208] workers compensation claims,[209] and discrimination claims.[210]

206. Owners and their agents might also allege that the renter's family caused the code violation(s), and ask the court to enter a judgment against the renter.

207. *See* Summers, *supra* note 9 (emphasizing that entrenched power differentials between property owners and renters, along with court cultures that privilege property owners while stigmatizing renters, act as significant barriers to the effectiveness of a warranty of habitability court claim). Summers also found through empirical analysis that the overwhelming majority of renters with meritorious warranty of habitability claims (between 91 and 97.65%) do not benefit at all from the law. *Id. See also* Sabbeth, *supra* note 86, at 119-28 (highlighting the private enforcement gap between the established doctrine and the lived reality of millions); *see also supra* note 42 (demonstrating the varied and sometimes complex nature of the meaning of non-compliance with the warranty of habitability across jurisdictions).

208. WIS. ADMIN. CODE DWD § 140 (2024).

209. WIS. ADMIN. CODE DWD § 80 (2024).

210. WIS. ADMIN. CODE DWD § 218 (2024).

Similarly, local governments have developed a number of different specialized procedures to address issues related to uninhabitable rental property, including: (1) repair and deduct laws, which authorize a renter to make repairs and deduct their cost from their rent if the owner fails to timely make repairs;[211] (2) rent-withholding or rent-suspension laws, which authorize rent to be withheld and usually paid into an escrow account until repairs are made;[212] and (3) rent abatement or reduction laws, which authorize renters to abate or reduce the rent amount while habitability issues exist.[213]

The City of Madison has attempted to enforce building codes using all of these specialized procedures–i.e., imposing criminal and civil sanctions, authorizing private lawsuits, and designing specialized single-issue procedures. This article now turns to an examination of the efforts made by the City of Madison to dismantle the barriers hindering enforcement of rental-housing building codes, in order to make habitable housing equally accessible to everyone.

V. CASE STUDY: HOW ONE CITY'S REFORMS AFFIRMATIVELY FURTHER FAIR AND HABITABLE HOUSING

Building codes require that residential housing be constructed to meet minimum standards of quality.[214] Legislatures took

211. *E.g.*, MADISON, WIS. CODE § 32.04 (2024); Love, *supra* note 182, at 46. Problems with repair and deduct include renters lacking the requisite skill, ability, and access needed–renters may lack the skills to make repairs on their own, the money to hire a professional, and/or the physical access to have many repairs done since many repairs may require physical access to a building's roof, basement, or neighboring units. Moreover, "repair and deduct" eliminates one benefit of renting: that renters do not have to undertake the time and expense of repairing their home's heating, plumbing, structural and other essential services.

212. *E.g.*, MADISON, WIS. CODE § 32.06 (2024) (Created by Ordinance 6268 June 1, 1978). Rent withholding laws have been problematic because they usually require action by the courts to permit rent withholding, an escrow account needs to be setup, and the property owner has little incentive to promptly repair because they will get all of the withheld rent payments eventually when the repairs are made, thus turning the escrow accounts into a kind of trust account with the delinquent property owners as beneficiaries. Love, *supra* note 182, at 46 n.142.

213. *E.g.*, MADISON, WIS. CODE § 32.04 (2024).

214. *See, e.g.*,*International Building Code*, INT'L CODE COUNCIL, Preface (2021), codes.iccsafe.org/content/IBC2021P1/preface [perma.cc/N4AM-3R2Z]

important steps toward providing habitable housing for everyone when they enacted building codes and created building inspector positions to verify codes are followed.[215] Courts further advanced these efforts by recognizing a right to habitable housing.[216] However, despite building codes, building inspectors, and an implied warranty of habitability, many rental homes remain uninhabitable today.[217] Moreover, as discussed above, racially and ethnically marginalized populations are more likely to live in low-quality, uninhabitable rental homes.[218]

The City of Madison began dismantling some barriers to enforcement of building codes with a 1978 rent withholding law. It continued these efforts with a revised rent abatement law adopted in late 1986. Following a recent equity analysis, Madison reformed its rent abatement law and procedure. The path that Madison took is one from which other local governments and policy-makers can learn. Studying these reforms reveals that governments can create specialized procedures and refine them to be more accessible and efficient for everyone, thereby affirmatively furthering fair and habitable rental housing.

A. Madison's Specialized Procedure and Recent Reforms

Wisconsin has enacted laws allowing government prosecutions and criminal sanctions against rental property owners who provide uninhabitable rental homes.[219] The state has also authorized private lawsuits by renters to enforce building codes.[220] In addition to these statewide enforcement measures, the City of Madison can

("The IBC is a model code that provides minimum requirements to safeguard the public health, safety and general welfare of the occupants of new and existing buildings and structures."); MADISON, WIS. CODE § 27.02(1) (2024).

215. *See, e.g.*, Kurtz & Noble-Allgire, *supra* note 26, at 420 (identifying the widespread enactment of housing codes in the late 1960s and 1970s – for the purpose of establishing a minimum standard of housing quality – as a key component of the rental housing revolution that occurred throughout the 1960s and 1970s); Rabin, *supra* note 29, at 551 (observing that "[b]y 1956, approximately fifty-six communities had housing codes, but by 1968 the number had grown to 4,904 communities, not including statewide housing codes).

216. *See, e.g.*, Kurtz & Noble-Allgire, *supra* note 26, at 420; *see also* discussion *supra* Section II.A.

217. David Ray Papke & Mary Elise Papke, *Rights & Remedies: Rental Housing for Low-Income Households in the United States,* 25 MARQ. BENEFITS & SOC. WELFARE L. REV. 1 (2023).

218. TURNER ET AL., *supra* note 4.

219. WIS. STAT. § 100.26(3) (2024); State v. LaPlant, 555 N.W.2d 389, 391-92 (Wis. Ct. App. 1996).

220. WIS. STAT. § 100.20(5) (2024); WIS. ADMIN. CODE ATCP § 134 (2024).

seek civil sanctions against rental property owners with uncorrected building code violations.[221] Finally, Madison also has a rent abatement ordinance that, as noted in the introduction, has been refined to more effectively ensure that all renters have equal opportunities to recover overpaid rent or withhold rent during periods when their homes have uncorrected code violations. The ordinance has undergone several updates over the years, with the most recent revisions, following an equity analysis, aimed at dismantling some of the barriers discussed above.[222]

Reviewing Madison's previous rent abatement law and procedure is necessary to fully understand and appreciate the improvements in the current law and process. Moreover, examining the changes made to Madison's law may prove helpful to those looking to draft or improve a rent abatement law in their own jurisdiction.

1. 1978: Rent Withholding

The City of Madison first enacted an ordinance on rent withholding in 1978.[223] The law was passed with four stated intents: (1) "to insure the proper repair and maintenance of residential buildings," (2) "to prevent deterioration and neglect," (3) to ensure "protection of the health and safety of the people of Madison," (4) and "to further enforcement of and compliance" with the building codes.[224]

The 1978 ordinance granted the city's Building Inspection Superintendent authority to allow renters to withhold their rent payments if a residential rental property owner failed to comply with an order to correct a code violation that affected a renter's health or safety.[225] Notably, renters who were authorized to withhold rent were required to place those payments into an escrow account, rather than keeping the rent themselves.[226] Since renters living in homes with uncorrected code violations did not actually retain their monthly rent, this rent withholding law operated similarly to a government-imposed civil sanction by temporarily putting financial pressure on the building owner to correct the

221. MADISON, WIS. CODE §§ 27.02; 27.11; 32.04; 32.14 (2024).

222. *See* discussion *supra* Sections IV.B-C.

223. MADISON, WIS. CODE § 32.06 (2024) (Created by Ordinance 6268 June 1, 1978).

224. *Id.* § 32.06(1)

225. *Id.* § 32.06(1) & (2).

226. *Id.*

violations.[227]

2. 1986: Rent Abatement

In November 1986, Madison repealed and refashioned its rent withholding ordinance, enacting new procedures for renters to enforce building codes. Specifically, it eliminated escrow accounts and introduced percentage rent reductions.

Under the late 1986 reforms, renters living with uncorrected building code violations could recover a percentage of the rent they had overpaid, as well as keep a percentage of rent payments going forward (provided they completed all the required steps).[228] The 1986 rent abatement law built upon the 1978 rent withholding law in several important ways. First, it removed the burdensome requirement of setting up escrow accounts and closing them when repairs were made. Second, unlike escrow accounts where the building owner could receive all withheld rent after making repairs, rent abatement allowed the renter who lived with uncorrected code violations to permanently keep the portion of rent that was abated under the new law. This change provided a financial incentive for renters to participate in the code enforcement process. Third, instead of deferring to city officials to determine the amount of rent to be withheld for each code violation, the new law adopted a preset schedule to streamline the process. The city code added a rent abatement schedule listing various building code violations for which an owner could be cited, as well as the corresponding percentage of monthly rent that a renter could abate and keep. For example, a renter with a *non-functioning* sink could abate 10-25% of their rent, while a renter with *no* heat could abate anywhere from 25-95%.[229] Renters living in homes with multiple code violations could add or stack the specified percentage of rent abatement allowed by the statutory guidelines for each code violation, capped at 95% if they remained living in the home.[230]

The importance of a rent abatement schedule becomes clear when compared to the alternative process of determining the appropriate amount of rent to withhold or abate. In a jurisdiction without a predetermined rent abatement schedule, a renter living with several code violations would have to demonstrate, through

227. *Supra* Section IV.C.2.

228. MADISON, WIS. CODE § 32.04 (1993) (Created by Ordinance 9011 Nov. 28, 1986), *superseded by* MADISON, WIS., CODE § 32.06 (Created by Ordinance 6268 June 1, 1978).

229. MADISON, WIS. CODE § 32.06(4)(d) (Amended by Ordinance 9752 Apr. 4, 1989).

230. MADISON, WIS. CODE § 32.04(4)(d) (2024).

testimony or other evidence, exactly how each code violation affected their family. They would then need to argue the specific amount of rent they should be allowed to abate for each code violation, based on that evidence.[231] Finally, the government official(s) charged with determining the amount of rent abatement would have to spend time calculating the appropriate reduction for every violation—for each individual case. Without a rent abatement schedule, the resulting determinations could display inconsistencies from one case to another.

For example, one ought to consider the following two hypothetical code violations involving unsafe electrical wiring. In one case, the renter offers compelling and articulate testimony about the hazardous electrical code violation. In the other, the renter's testimony is less articulate and less detailed. Although both renters experienced the same code violation, the city official(s) might authorize more withholding for the renter whose testimony was more persuasive and detailed. Further, without a schedule to follow, other biases could manifest through disparate decisions that authorize more or less rent abatement based *not* on the nature and severity of the code violation, but rather, on the renter's perceived identity or other characteristics.

Finally, the law strengthened statutory retaliation protections by establishing an explicit presumption of retaliation.[232] Specifically, the law asserts that any action or attempt to evict the renter, increase their rent, or otherwise harass or retaliate against the renter is presumed retaliatory if done within six months of the renter's complaint to the building inspector.[233] While this explicit presumption does not entirely dismantle or eliminate the barrier that renters face in choosing to contact the building inspector, it does communicate to renters: "we know you may be scared to report issues to the building inspector for fear of retaliation, so we will protect you by holding building owners accountable to prove that their actions lacked retaliation."[234]

The 1986 rent abatement laws improved upon the 1978 rent escrow system, and with relatively minor modifications, remained

231. Renters outside of the City of Madison's jurisdiction must bear this evidence-intensive burden in court. WIS. STAT. § 704.07(4) (2022).

232. MADISON, WIS. CODE § 32.04(4) (2024).

233. *Id.*

234. But it fails to explicitly incorporate habitability protections into its language, aside from retaliation protections for building code complainants. MADISON, WIS. CODE §§ 39.03(4)(a) & (d) (2024).

in place for the next 35 years.[235] Despite implementing this improved specialized procedure for building-code enforcement, data shows that Madison's Black and Hispanic neighborhoods were more likely to have code violations.[236] Ethnoracial concentration in Madison's neighborhoods was a statistically significant predictor of code violations.[237] While Madison's specialized rent abatement procedure undeniably helped provide renters with safe, healthy, habitable homes by improving building code compliance,[238] racially and ethnically marginalized residents continued to disproportionately live in uninhabitable rental homes.[239]

3. 2021-2022: Equity Analysis Recommendations and Reforms

In 2013, Madison established a Racial Equity and Social Justice Initiative to address racism in city policies, plans, programs, and budgets.[240] This initiative developed a process whereby city departments and committees were to conduct an equity analysis of the laws and policies within their purview.[241] In 2021, the city committee responsible for rental housing began an equity analysis

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235. *Compare* MADISON, WIS. CODE § 32.04 (1993) (Created by Ordinance 9011 Nov. 28, 1986), *with* MADISON, WIS. CODE § 32.04 (2024) (Amended by Ordinance 22-00030 Apr. 7, 2022) (showing very few substantive changes between the 1993 and 2021-2022 versions of this ordinance).

236. Sims, *supra* note 102.

237. *Id.*

238. *"Rent withholding plan is working — quietly"*, THE CAP. TIMES, Mar. 16, 1979, at 1 (noting that after enacting specialized procedures, unresolved building code violations that needed to be referred to the city attorney's office for further prosecution dropped from 40-75 per month to 26 per month).

239. Sims, *supra* note 102.

240. CITY OF MADISON, RACIAL EQUITY & SOCIAL JUSTICE INITIATIVE: STRATEGY GUIDE FOR CITY AGENCIES (2014), www.cityofmadison.com/civil-rights/documents/RESJstrategy.pdf [perma.cc/HA9A-AKDF] [hereinafter STRATEGY GUIDE FOR CITY AGENCIES]; CITY OF MADISON, RACIAL EQUITY & SOCIAL JUSTICE INITIATIVE: TIMELINE, LEGISLATION, TOOLS, AND RESULTS (2018), www.cityofmadison.com/civil-rights/documents/RESJI_briefing_book.pdf [perma.cc/396R-K8YR] [hereinafter TIMELINE, LEGISLATION, TOOLS, AND RESULTS]; CITY OF MADISON, CITY OF MADISON EQUITY INITIATIVES (2014), www.cityofmadison.com/mayor/documents/Equity2014.pdf [perma.cc/B7L2-SSKC] [hereinafter EQUITY INITIATIVES]; NATIONAL LEAGUE OF CITIES, CITY PROFILE ON RACIAL EQUITY: MADISON, WISCONSIN (2017), www.nlc.org/wp-content/uploads/2017/10/Madison20City20Profile20Racial20Equity.pdf [perma.cc/8HQW-DJDN] [hereinafter CITY PROFILE].

241.STRATEGY GUIDE FOR CITY AGENCIES, *supra* note 240; TIMELINE, LEGISLATION, TOOLS, AND RESULTS, *supra* note 240; EQUITY INITIATIVES, *supra* note 240; CITY PROFILE, *supra* note 240.

of the rent abatement law.[242] This equity analysis involved multiple meetings with the public and stakeholders[243] through which a number of issues and recommendations were identified.[244] With the list of issues and recommendations from the equity analysis process, the committee began discussing the recommendations, and subsequently drafting potential avenues of reform. Eventually, the committee drafted and agreed on reforms that were then sent to the mayor and city council for consideration. The following paragraphs list and explain several of the recommendations from the equity analysis and detail the reforms that were eventually enacted into law by the city council.

> **Recommendation(s)**: *Accelerate the process to shorten its duration,*[245] *and automatically activate rent abatement after repairs are not completed promptly.*[246]

These two recommendations are grouped together because both were addressed by the reforms drafted by the committee. To understand them, one must carefully examine the process that existed from 1986 until recent reforms in 2021-2022. For those 35 years, renters living in homes with code violations had to navigate a series of lengthy steps before they could abate any rent:

1. The renter was to contact the building inspection office to report a health or safety issue within their home;
2. The renter was to ensure someone was home to allow the inspector to complete the inspection;
3. If code violations are found, the inspector was to document them and issue a deadline for the property

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242. Landlord & Tenant Issues Comm., *Meeting Minutes – Draft*, CITY OF MADISON, WIS. (Jan. 21, 2021), www.madison.legistar.com/View.ashx?M=M&ID=833963&GUID=CC92A05F-1434-486E-A5EE-F18388FAF438 [perma.cc/CUK7-PL5Z]; *Legislation Details*, CITY OF MADISON, WIS. (July 22, 2020), www.madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=4599000&GUID=ACF10410-BA16-4B66-951E-CC7CB447B2F5&Extra=WithText&Title=Legislation+Details+(With+Text) [perma.cc/UD4M-UW3P].

243. *Legislation Details*, CITY OF MADISON, WIS. (Apr. 9, 2021), www.madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=4907698&GUID=85E8C78D-1596-4D5C-B36E-71FBF391FA62&Extra=WithText&Title=Legislation+Details+(With+Text) [perma.cc/UW4E-JV3Y]; *RESJI Analysis*, CITY OF MADISON, WIS., www.madison.legistar.com/View.ashx?M=F&ID=9474880&GUID=6816E8BB-755D-4B31-85F6-C7F1087B09E7 [perma.cc/4PG5-QE6W] (last visited Sept. 12, 2024).

244. *RESJI Analysis*, *supra* note 243.

245. *Id.*

246. *Id.*

owner to correct the violations;[247]

4. The renter was to again arrange for someone to be present for the reinspection of their home, usually scheduled for the day after the deadline to correct the violations;
5. If any of code violations remained uncorrected by the time of the reinspection, the renter was to complete a written application for rent abatement, file it, and pay a $10 filing fee;
6. Upon receiving the fee and application for rent abatement, the City was to schedule a hearing—typically three to six weeks later—before a contract worker serving as a Rent Abatement Hearing Examiner on Tuesday evenings at a single central location;[248]
7. The renter was to attend the hearing and provide testimony.[249] If the renter failed, his or her application for rent abatement was dismissed. If the renter did appear, the renter was to testify that he or she did not cause any of the code violations at issue and did not obstruct the owner from making repairs;
8. Within three weeks of the hearing, the hearing examiner was to issue a written decision determining whether the renter was eligible to abate rent and, if so, the percentage of rent that could be abated for each code violation;[250]
9. If the renter was authorized to abate a percentage of his or her rent, the decision specified that the abatement could start from the date on which the building inspector first identified the code violations (as outlined in Step 3) and continue until a city building inspector certifies that the code violations have been corrected. At that point, the renter was to be

247 Based upon the Author's experience, the deadline to correct the code violation generally ranges from 24 hours to 30 days, depending on the nature of the code violation.

248 An author of this article served as a Rent Abatement Hearing Examiner in the City of Madison from 2021-2024; *see supra* note *.

249 Property owners are notified of the hearing, and they may attend or send an agent on their behalf. Both renters and owners may be represented by counsel if they can afford to hire one.

250 Building Inspectors may document numerous code violations and order that they all be corrected, but only violations which could impact health, safety, or substantially impact the usage of the home can result in a reduction of rent. WIS. STAT. § 704.07(5)(2022).

notified that they could no longer abate rent.[251]

Reform: *Elimination of Inefficient and Inequitable steps.*

Acting upon the input from the equity analysis, the City of Madison implemented significant reforms to its rent abatement procedures. Under the new law, the steps were changed as described below:

1. The renter is to contact the building inspection office to report a home-related health or safety issue.[252] Interpreters are available for renters who call, and a brochure explaining the process is available in English, Español, and Hmoob;[253]
2. The renter must ensure someone is home to allow the inspector to complete an inspection if the reported concerns are indoor;
3. If the inspector finds code violations, they are documented, and a written "Official Notice" is sent to the property owner with a deadline to correct the code violations;[254]
4. The renter is to again arrange for someone to be present for the reinspection of their home, which is usually scheduled for the day after the deadline;[255]
5. If any of the code violations are not corrected by the time of the reinspection, the City sends notice to both the renter and the owner that the renter can immediately begin abating a specified percentage of rent, starting from the date that the building inspector first identified the code violations, and continuing until a city building inspector certifies that the code violations have been corrected.[256]

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251. MADISON, WIS. CODE § 32.04(4)(d) (2024).

252. Renters can do so by calling the building inspection office or completing an online form. *Services*, CITY OF MADISON DPCED BUILDING INSPECTION, www.cityofmadison.com/dpced/bi/services/3393/ [perma.cc/3LDM-GNTM] (last visited July 28, 2024).

253. *Rent Abatement Ordinance & Procedures*, CITY OF MADISON DPCED BUILDING INSPECTION, www.cityofmadison.com/dpced/bi/rent-abatement-ordinance-procedures/97/ [perma.cc/YN5L-VBTV] (last visited July 28, 2024).

254. *Id.*; MADISON, WIS. CODE § 32.04(2)(a) (2024).

255. MADISON, WIS. CODE § 32.04(2) (2024); *Rent Abatement Ordinance & Procedures*, *supra* note 253.

256. MADISON, WIS. CODE § 32.04(2) & (4)(a) (2024); *Self-Help Repairs*, CITY OF MADISON DPCED BUILDING INSPECTION,

The comparison of the old and new procedures reveals that the recent reforms accelerated the process by eliminating certain steps.[257] Under the procedure in place between 1986 and the 2021-2022 reforms, Madison renters had to complete an application, pay a fee, and attend a hearing.[258] If a renter failed to attend the hearing, their case was dismissed.[259]

The inequity of these burdensome requirements is illustrated by the following account of the author's experience while working as a hearing examiner:

One Tuesday evening, I was scheduled to preside over two rent abatement hearings. The first was for Apartment 1 at 5801 Hamilton Street, and the second was for Apartment 2 of the same building.[260] The building code violation at issue involved a problem with the shared entry door to the building. The first renter appeared, testified, and was awarded rent abatement for this issue consistent with the statutory guideline amount. The renter for the second hearing, however, did not appear. That renter had neither called nor written to reschedule, nor did he contact the office afterward to explain his absence and request a possible re-hearing. As a result, the second renter's claim for rent abatement was dismissed.

Two renters lived in the same building and suffered through the exact same code violation. They both completed multiple steps to obtain rent abatement, but only one had the resources to complete the final two, formerly required steps of attending a hearing and testifying. As the hearing examiner presiding over both cases, I was required to enforce the law, knowing the stark disparity

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www.cityofmadison.com/dpced/bi/documents/RentAbatementBrochure.pdf [perma.cc/TVU5-2P7F] (last visited July 28, 2024).

257. MADISON, WIS. CODE § 32.06(4)(e)1 (1986); MADISON, WIS. CODE § 32.04(4)(e)1 (2021); *see also Rent Abatement*, TENANT RES. CTR., www.tenantresourcecenter.org/rent_abatement [perma.cc/Z3TJ-4QAU] (last visited July 28, 2024) (explaining the rent abatement process prior to the reforms).

258. MADISON, WIS. CODE § 32.06(4)(e)1 (1986); MADISON, WIS. CODE § 32.04(4)(e)1 (2021); *see also Rent Abatement*, *supra* note 257 (describing rent abatement procedures prior to the implemented reforms).

259. MADISON, WIS. CODE § 32.06(4)(e)3 (1986); MADISON, WIS. CODE § 32.04(4)(e)3 (2021); *see also Rent Abatement Ordinance*, CITY OF WAUSAU, WIS., www.wausauwi.gov/home/showpublisheddocument/2107/638144255651200000 [perma.cc/274D-KM9Y] (last visited July 28, 2024) (explaining that under the City of Wausau's rent abatement process–which largely mirrored the City of Madison's former process– renters have to complete an application, pay a fee, and attend a hearing where they must prove they are entitled to abate any rent).

260. Cases can be searched by address, therefore addresses have been changed to protect confidentiality.

that would result: one renter was awarded rent abatement, while the other's identical claim was dismissed. For me, this outcome served as a vivid and visceral example of structural racism and structural inequity in action. In that moment, there was nothing I could do to change the law; my role was to apply and follow the law as it existed. However, attorneys, and those with judicial roles, are allowed to—and *should*—advocate for improvements in the inequitable aspects of legal systems alongside those impacted by these systems and other policymakers.[261]

Madison' s recent reforms, however, did more than simply speed up the process by eliminating unnecessary steps. Today, when an inspection reveals any common-area code violations, such as a non-functioning front entry door, the City sends notices to all the impacted apartment residents, informing them that they can *all* automatically abate the same rent percentage. Rent abatement is no longer restricted to those with the resources to attend a hearing. Additionally, by allowing multiple renters in a building to obtain rent abatement without a hearing, the city can provide more renters with rent abatement without having to pay its hearing examiners to hold hearings, take evidence, and issue decisions.

By eliminating inefficient and inequitable steps, renters now receive notification of the amount of rent they can abate within 1 to 5 days of a reinspection. What was once a lengthy process that took 3 to 10 weeks, which inequitably excluded renters who struggled to fill out English-language forms, pay filing fees, or attend a hearing– is now a more equitable and efficient process for all parties involved.

Recommendation(s): *Use the earliest date a renter can prove a problem existed as the start date for rent abatement, rather than the date of the initial inspection.*[262]

Another recommendation from the equity analysis identified a troubling issue with the start date for rent abatement. Renters who are dealing with health, safety, or usability issues in their rental home might first contact the building owner, manager, or maintenance person before contacting the local government building inspection office. In theory, the owner and their agents should share the renter's interest in promptly resolving such issues since the renter wants a habitable home, an owner who promptly

261. *See* WIS. SCR 60.05(2), *Comment* ("As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law . . . ."); *see also* WIS. SCR 60.05(3)(b)-(c).

262. *RESJI Analysis*, *supra* note 243.

makes repairs avoids rent reduction,[263] and city officials conserve their limited resources. However, as explained in step nine above, under the 1986 law, any rent abatement would only start on the date the building inspector first identified and documented the code violations.[264] For 35 years, the city's rent abatement program penalized renters who attempted to resolve code violations through informal communications before calling the city inspector. Renters hoping to get their homes repaired might contact the building owner or maintenance person several times over the course of weeks or even months. If these attempts fail to resolve the issue, renters who then seek rent abatement through the city process may find that their abatement could have started sooner had they contacted the local government building inspection office sooner. Thus, under the system in place from 1986 to 2021, renters with code violations in their home were best-protected by contacting the building inspector at the same time that they contacted their building owner or maintenance person.

Reform: *Encourage communication and complete resolution with retroactive abatement.*

While the recent reforms eliminated the time and expense associated with a required hearing, the new process allows renters to request a hearing if they have testimony or evidence showing that they contacted the building owner or maintenance person about the code violations prior to contacting the city building inspector. If a renter can make such a demonstration, the new reforms allow the renter to obtain authorization for rent abatement retroactive to the date they first informed the owner or maintenance person about the problem. In cases where a renter proves they notified the owner weeks or months prior to contacting the building inspector, this reform could result in a significant increase in the amount of rent abatement, potentially by thousands of dollars.

Further, one ought to consider that under the old process, a building owner could ignore a renter's informal complaints and wait until the renter discovered (*if* the renter discovered, that is) that they could contact the city building inspector. The owner could do so because if a city inspector ever was called in and found code violations, that inspector would provide the owner with a deadline to make repairs and avoid any rent abatement. Moreover, under the old system, if the owner failed to meet the city-imposed deadline, the owner would only face rent abatement from the date of the city's inspection onward, with no retroactive abatement.

To illustrate the impact of this reform, one may consider a

263. *Id.*

264. *Supra* Section V.A.3.a.9.

family that complains to their apartment owner about a serious safety issue and continues living in the home for twelve months before finally contacting the building inspector, who orders the issue corrected within three weeks. The owner then takes four weeks to fix the issue. Under the old process, this family could obtain rent abatement for only one month, starting on the date of the city's inspection and continuing until the repair's completion four weeks later, i.e., one week after the deadline. Under the new process, the exact same set of facts could yield a result whereby the family could recover rent abatement for all thirteen months during which they suffered through the serious code violation, since the revised law allows rent abatement to start on the date the renter first complained to the owner about this code violation.

In summary, Madison was an early leader in creating rights to fair and habitable housing. Renters in Madison have technically had these rights since the 1961 Wisconsin Supreme Court decision in *Pines*[265] and the City's 1963 fair housing ordinance.[266] Without efficient and easily-accessible enforcement procedures, however, many renters were unable to realize or enjoy these rights. Madison took important steps to affirmatively further fair and habitable housing by enacting specialized enforcement procedures, including the 1978 rent withholding law and the 1986 rent abatement law. While these laws made it easier for renters to enforce their rights, the benefits were not equally enjoyed, with data showing that families in Black and Hispanic neighborhoods were more likely to be living in rental homes with serious code violations.[267] To address this disparity, Madison conducted an equity analysis of its rent abatement law, identified recommendations for improvements, and enacted reforms. These reforms are now working to dismantle many of the barriers to equal enforcement of building codes. In this way, Madison's recent reforms are an effective example of how local governments can affirmatively further fair and habitable housing.

B. Additional Concerns to Address in Implementing Reforms

Stakeholders in local governments looking to enact or improve a specialized building code enforcement procedure in their communities should be aware of common issues and concerns they

265. *Pines*, 111 N.W.2d at 412-13.
266. MADISON, WIS. CODE § 39.03 (2024); Levitan, *supra* note 65.
267. Sims, *supra* note 102.

may encounter when implementing reforms like those in Madison, in addition to dismantling the barriers identified above. First, there is a risk of agency capture, for local rental housing code enforcement agencies are not immune to bias and influence. Second, reformers must carefully address the risk of inspections resulting in orders for renters to vacate their homes. If renters fear eviction from uninhabitable properties, they may never report poor housing conditions in the first place. Third, policymakers will likely encounter concerns expressed about the purported impact of improved code enforcement on housing affordability. By recognizing and understanding these potential concerns, state and local governments can appropriately draft reforms to minimize or eliminate them.

1. Agency Capture

Agency capture is generally accepted as a risk inherent to regulatory bodies.[268] Capture occurs when a regulated entity succeeds in replacing the public policy agenda of the regulatory agency with its own private and self-serving agenda.[269] For example, the Minerals Managing Service ("MMS") was tasked with regulating the oil industry during the 2010 BP oil spill.[270] The MMS failed to effectively oversee the industry,[271] leading to a disaster that resulted in eleven deaths and became the worst environmental disaster in U.S. history.[272] In the aftermath, investigators found that the oil industry had driven the MMS policy decisions that contributed to the Deepwater Horizon disaster.[273] The MMS had been "captured" by the oil industry, and the agency began to view the industry entities as its constituency rather than the public.[274]

Similarly, local building inspection agencies may be vulnerable to outside influence. Although agency capture is most often discussed at the federal level, it can also occur locally.[275] Local agencies are generally more resistant to traditional forms of agency capture than their federal counterparts, but they may still favor the

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268. Mark C. Niles, *On the Hijacking of Agencies (and Airplanes): The Federal Aviation Administration, "Agency Capture," and Airline Security*, 10 AM. U.J. GENDER SOC. POL'Y & L. 381, 391-92 (2002).

269. *Id.* at 390.

270. Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 223 (2012).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. 1527, 1560 (2022).

interests of some at the expense of others.[276] Homeowners, for example, often wield disproportionate influence over zoning and health boards.[277] Local residents also routinely pressure local agencies into overregulating businesses seen as nuisances (e.g., tattoo parlors, bars, and smoke shops).[278] It follows, then, that there is no reason a similar risk of capture does not exist in building inspection offices. Building inspection offices may have a mandated public policy agenda, but remain susceptible to bias and influence from rental property owners and related businesses such as builders and real estate developers. These groups may resist procedural reforms, so reformers must be conscious of their influence when drafting and implementing them.

2. Risk of Eviction

Another risk policymakers must carefully address is the possibility that renters may be evicted, either incidentally or in retaliation by rental property owners.[279] Many of Madison's recent procedural reforms hinge on renters' willingness to contact their local building inspection office in the first place. However, procedural reform is rendered useless if renters are afraid to contact their building inspection office for fear of eviction.

Most jurisdictions have laws prohibiting the rental of condemned buildings.[280] When a building inspector deems a building unfit for habitation, the inspection office has the authority to order residents to vacate the building within a reasonable time.[281] Such orders have a disproportionate impact on socioeconomically disadvantaged individuals, as the housing market tends to allocate substandard, run-down buildings to low income renters. It may be more cost-effective for building owners to force renters out of their homes than it is to make repairs while renters are still living in them.[282] Thus, jurisdictions need to consider this risk when implementing new procedural reforms.

To minimize the risk that renters may underreport poor conditions to avoid eviction, jurisdictions could allocate funds for

276. *Id.* at 1561.
277. *Id.* at 1561-62.
278. *Id.*
279. *See* discussion *supra* Section IV.B.2.d.
280. *E.g.*, WIS. ADMIN. CODE ATCP § 134.09(1) (2024).
281. *E.g.*, MADISON, WIS. CODE § 27.08(3) (2024).
282. Eric Wills Orts, *Tenants' Rights in Police Power Condemnations Under State Statutes and Procedural Due Process*, 23 U. MICH. J.L. REFORM 105, 106 (1989).

renter relocation services to alleviate the financial burden of being forced to move—and require owners to bear some or all of that cost.[283] These funds could provide payments to induce voluntary removal, help with moving and redecorating expenses, and provide temporary housing for displaced renters.[284] While renters may still perceive displacement as a potential consequence of reporting poor living conditions to their local building inspection office, having a proper safety net in place—and ensuring renters are aware of it—can help minimize these risks and encourage more renters to report poor living conditions.

3. Impact of Additional Enforcement on Housing Affordability

A third concern policymakers must contend with is the potential impact of improved code enforcement on housing affordability. Since the creation of the implied warranty of habitability, there has been vigorous, long-standing debate about the costs and benefits of code enforcement and its correlation to rent increases.[285] Despite extensive debate, empirical evidence on the relationship between rising rents and housing quality is generally lacking.[286] However, available evidence indicates that despite steep rent increases in recent years, housing quality has generally stagnated.[287] Thus, this concern should not deter policymakers from action.

Moreover, this article does not advocate for *new* building code regulations, but rather, for more equitable and accessible enforcement of *existing* building codes. As a general matter, the existence of building codes does contribute to higher housing costs.

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283. *E.g.*, N.Y.C., N.Y., CODE § 26-301(1)(B) (2024).

284. *Id.*

285. *See* Desmond & Bell, *supra* note 30, at 21-22 (providing a systematic literature review of the debate around whether code enforcement helps or hurts impoverished renters and finding that little empirical research has actually been done that shows a relationship between rising rents and improved code enforcement); Gutman et al., *supra* note 90, at 287-88.

286. *See* Desmond & Bell, *supra* note 30, at 21-22 (citing Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1970) and Neil K. Komesar, *Return to Slumville, A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973)). *See also* Gutman et al., *supra* note 90, at 287-88; Summers, *supra* note 9, at 165 n.106 (observing that even comparing the limited studies that had been conducted, the overall impact of code enforcement on housing costs varied widely from study to study).

287. Desmond & Bell, *supra* note 30, at 21-22; *see also* Super, *supra* note 30, at 454-56.

For example, it would be cheaper to build homes without smoke alarms. Nevertheless, building code requirements exist, and they should ensure minimum housing safety for everyone.

Rejecting improved, equitable code enforcement is an intentional policy choice: doing so is congruent to the acceptance of continued underenforcement of housing standards and continued unequal access to safe and habitable housing. This is the antithesis to the principles of fair housing. More specifically, underenforcement is "a form of social divestment," reflecting judgments about "how much disorder, decay, and underenforcement poor communities should be required to tolerate."[288] Underenforced housing standards are "a classic case" of neglecting marginalized communities that historically, have not been seen as a political priority.[289] Moreover, continued underenforcement simultaneously deprives marginalized communities of support, while allowing rental property owners to extract profits by flagrantly violating the law.[290] Making code enforcement more accessible and equitable is a necessary step toward achieving fair housing and housing equity.

VI. CONCLUSION

It has been more than five decades since fair housing laws were enacted and the warranty of habitability was recognized, yet far too many families still lack equal access to habitable rental housing. Even in a relatively prosperous, progressive city like Madison, Wisconsin, Black and Hispanic families today are more likely to live in uninhabitable rental housing. Fair housing legislation and court recognition of an implied warranty of habitability were historical achievements; however, without equitably-accessible methods of

288. Sabbeth, *supra* note 86, at 130 (citing Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006)).

289. *Id.*

290. DESMOND, *supra* note 47, at 250 (recounting how the annual income of the property owner of the possibly worst trailer park in Milwaukee (the fourth-poorest city in America) was 30 times that of his tenants who worked full-time for minimum wage, and 55 times that of his tenants receiving welfare or SSI); Cary Spivak & Kevin Crowe, *River Hills Landlord Behind Handful of Problem Properties in Milwaukee*, MILWAUKEE J. SENTINEL (Jan. 6, 2017, 3:21 PM), www.jsonline.com/story/news/investigations/2016/12/04/river-hills-landlord-behind-handful-problem-properties-milwaukee/94577378/ [perma.cc/WGL7-99TX] (uncovering that a rental property owner lived in a $1.1 million home on a 5-acre estate, just ten miles from the apartment complex he owned that city building inspectors boarded up after declaring it "unfit for human habitation" due to roach infestations, sewage in utility rooms, and lack of heat in several units).

enforcement, those rights amount to unfulfilled promises. State and local governments are charged with the duty to affirmatively further fair housing, and doing so requires them to affirmatively further fair *and* habitable housing. By integrating fair housing reforms and habitable housing reforms, the U.S. can forge new paths that lead out of historically explicit discrimination and move on from facially-neutral, but structurally inequitable, policies. As local governments embark on these new paths toward fair and habitable housing, the steps they take—i.e., the policies, programs, and procedures they enact—must be closely studied. Just as the creation of fair and habitable housing rights did not immediately transport us to a world where everyone has equal access to those rights, neither will the enforcement policies created by local governments. However, through closer study of the paths taken by local governments we can learn from their struggles and successes as we continue to navigate the crossroads towards fair and habitable housing for all.