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## (Under)Enforcement of Poor Tenants' Rights

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Publication: *Georgetown Journal on Poverty Law and Policy*

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### Recommended Citation

Sabbeth, Kathryn A., "(Under)Enforcement of Poor Tenants' Rights" (2019). *Faculty Publications*. 466.  
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## **(Under)Enforcement of Poor Tenants' Rights**

Kathryn A. Sabbeth\*

*Millions of tenants in the United States reside in substandard housing conditions ranging from toxic mold to the absence of heat, running water, or electricity. These conditions constitute blatant violations of law. The failure to maintain housing in habitable condition can violate the warranty of habitability, common law torts, and, in some cases, consumer protection and antidiscrimination statutes. Well-settled doctrine allows for tenants' private rights of action and government enforcement. Yet the laws remain underenforced.*

*This Article demonstrates that the reason for the underenforcement is that the tenants are poor. While the right to safe housing extends to all tenants, poor people are the most likely to get stuck in substandard conditions, and the enforcement of their rights is undermined precisely because of their social position. The Article reveals significant limitations in current approaches to the enforcement of poor people's rights. The private legal market devalues poor tenants' cases due to class, race, and gender biases in the governing doctrine. Public actors also fall short: they disinvest in the agencies charged with enforcing housing standards, and, when agency lawyers do initiate enforcement, tenants do not control the litigation.*

*The Article envisions a new approach to enforcement of housing standards. It identifies specific ways to expand enforcement by market actors, government agencies, and non-profits. Given the relative strengths of the public and private sectors, a combination of the following approaches is likely to be most effective: (1) strengthening support for private enforcement through legislative reform that enhances fee-shifting and aggregation of claims; (2) increasing agency funds and shifting agency culture to promote zealous government enforcement; and (3) appointing counsel for tenants who wish to bring cases or intervene in suits brought by government actors.*

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\*Associate Professor of Law, University of North Carolina at Chapel Hill. For helpful conversations, I would like to thank Deborah Ahrens, Lisa Brodoff, Norrinda Hayat Brown, Brooke Coleman, Barbara Fedders, Charlotte Garden, Allyson Gold, Edward Josephson, Justin LaMort, Jake Linford, Martha McCluskey, Kish Parella, John Pollock, Matthew Quinn, Anna Roberts, Eric Sirota, Ron Slye, Nicole Summers, Aga Trojniak, David Udell, John Whitlow, Erika Wilson, and the participants in the FHA @ 50: Renewing Our Commitment to Housing Equity Symposium at the District of Columbia School of Law, Information Effects of Litigation Workshop at Washington and Lee University School of Law, ClassCrits XI Conference at West Virginia University School of Law, and Seattle University School of Law Faculty Workshop. For creative and diligent research assistance, I am grateful to Shi Chen, Melissa Hyland, Jasmine Jennings, Candace Speller, and Charles Truslow. © 2019, Kathryn A. Sabbeth.

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## I. INTRODUCTION

Millions of families in the United States reside in substandard conditions that resemble what you might expect to find in a much poorer nation.<sup>1</sup> Across rural and urban areas,<sup>2</sup> zones recognized as “blighted,”<sup>3</sup> and trendy neighborhoods flush

1. See Umair Haque, *Why America is the World's First Poor Rich Country*, EUDAIMONIA (May 23, 2018), <https://eand.co/why-america-is-the-worlds-first-poor-rich-country-17f5a80e444a> (“America is pioneering a new kind of poverty. . . . It’s not absolute poverty like Somalia, and it’s not just relative poverty, like in gilded banana republics. It’s a uniquely American creation.”).

2. See U.S. CENSUS BUREAU, AM. HOUS. SURVEY 2017, [https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s\\_areas=a00000&s\\_year=n2017&s\\_tableName=Table5&s\\_byGroup1=a1&s\\_byGroup2=a1&s\\_filterGroup1=t3&s\\_filterGroup2=g4&s\\_show=S](https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=a00000&s_year=n2017&s_tableName=Table5&s_byGroup1=a1&s_byGroup2=a1&s_filterGroup1=t3&s_filterGroup2=g4&s_show=S) (click “Get Table”) (presenting data on inadequate rental units in rural regions and metropolitan centers).

3. See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305, 306–15 (2004) (collecting and critiquing definitions of “blight”); Patricia Hureston Lee, *Shattering ‘Blight’ and the Hidden Narratives That Condemn*, 42 SETON HALL LEGIS. J. 29, 43–48 (2017) (examining history and etymology of “blight” terminology).

with the markers of gentrification,<sup>4</sup> landlords<sup>5</sup> rent out residential property that lacks heat, running water, reliable electricity, or stable flooring.<sup>6</sup> Toxic mold covers walls and ceilings.<sup>7</sup> At night, tenants and their children try to sleep with insects crawling over their skin and the sounds of rats gnawing on furniture.<sup>8</sup> Some landlords perform maintenance for white tenants but not tenants of color.<sup>9</sup> Some threaten to call immigration enforcement when undocumented tenants request repairs.<sup>10</sup> Landlords rent only to tenants too vulnerable to complain<sup>11</sup> or selectively ignore the tenants they deem undesirable.<sup>12</sup>

These conditions constitute blatant violations of law. The failure to maintain housing in habitable condition can violate the warranty of habitability, common law torts, and, in some cases, consumer protection and antidiscrimination

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4. See, e.g., Tarry Hum, *Illegal Conversions and South Brooklyn's Affordable Housing Crisis*, GOTHAM GAZETTE (Sept. 19, 2016), <https://www.gothamgazette.com/authors/130-opinion/6532-illegal-conversions-and-south-brooklyn-s-affordable-housing-crisis>.

5. The “landlord-tenant relationship” is that between “the lessor and lessee of real estate.” *Landlord-Tenant Relationship*, BLACK’S LAW DICTIONARY 1050 (11th ed. 2019). This Article will use the terms “landlord” and “owner” interchangeably. Some states define the term “landlord” more broadly, including not only an owner but also any rental management company or other agent responsible for maintaining a rental property in habitable condition. See, e.g., N.C. GEN. STAT. §§ 42-40(3), 42-42 (2018).

6. See *infra* Part II.A.1 and accompanying notes.

7. See *infra* Part II.A.1 and accompanying notes.

8. See *infra* Part II.A.1 and accompanying notes.

9. See, e.g., *United States v. Cochran*, 39 F. Supp. 3d 719, 733 (E.D.N.C. 2014) (finding evidence of a “systematic practice or policy to deprive black Americans of rights guaranteed under the Fair Housing Act,” including refusal to conduct maintenance and use of racial slurs in response to repair requests); see also *infra* pp. 116–18 and accompanying notes (describing claims for discriminatory failure to provide maintenance services).

10. See Gary Rhoades, *New California Law Provides Protections for Immigrant Tenants*, SANTA MONICA DAILY PRESS (June 13, 2018), <https://www.smdp.com/new-california-law-creates-protections-for-immigrant-tenants/166756> (explaining “landlords aware of the [ICE] crackdown see it as creating a new vulnerability so a tenant will never complain or assert her housing rights”). The interference of immigration enforcement with enforcement of civil and economic rights underscores that enforcement and underenforcement reflect political priorities. See Kathleen Kim, *The Trafficked Worker as Private Attorney General, A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 309 (critiquing “prioritization of immigration enforcement over the civil rights of undocumented workers”).

11. See Philip M.E. Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 641 (2019) (“Landlords understand that tenants who are behind on their rent are less likely to advocate for their legal rights regarding housing quality and code enforcement.”). Matthew Desmond describes the strategy of landlords who exploit poor neighborhoods. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 151–52 (2016). They purchase properties with depressed values, derive significant profits from rental income, and neglect upkeep without concern for the deleterious effects on the value of the real estate. *Id.* As one owner explained, “You don’t buy properties for their appreciative value. You’re not in it for the future but for now.” *Id.* at 152.

12. See, e.g., *Martinez v. Optimus Props., LLC*, No. 2:17-cv-03581-SVW-MRW, 2018 WL 6039875, at \*1, \*10 (C.D. Cal. June 6, 2018) (finding plaintiffs provided sufficient evidence that landlord denied services to Latinx families as part of harassment strategy “because [the landlord] wanted these tenants to move out”). While this Article focuses on substandard housing, the description of owners’ misconduct should not be interpreted to suggest that all owners engage in such activity. There are, of course, many decent landlords who attend to their tenants and properties with care. What has changed in the past half-century, however, is that the rental of property has grown from a side activity into big business, and the new model is driven by profit. See DESMOND, *supra* note 11, at 28 (describing how “housing had become a business”); *infra* note 180 and sources therein (describing regulation that encourages “financialization” of housing).

statutes.<sup>13</sup> Well-settled doctrine allows for tenants' private rights of action and government enforcement.<sup>14</sup> Yet the laws remain underenforced.

The gap between the right to safe housing and the reality of dangerous conditions has received relatively little attention. In the 1970s, when courts first recognized the implied warranty of habitability, a related literature developed,<sup>15</sup> but that discussion addressed social welfare and economic theory more than legal entitlements.<sup>16</sup> Since then, public health experts have documented the harms imposed by substandard housing,<sup>17</sup> and some legal scholars have articulated bold arguments for "health justice,"<sup>18</sup> but neither group has focused on enforcement of established legal rights. Several law review articles have considered the warranty of habitability as a subject for empirical study, particularly as a defense in eviction actions for nonpayment of rent.<sup>19</sup> They have not, however, framed the warranty of habitability as (just one in a set of claims) well-suited for affirmative enforcement litigation.<sup>20</sup> Prior consideration of the underenforcement of housing standards has highlighted failures of housing code enforcement agencies<sup>21</sup> or limits on the utility

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13. See *infra* Part II.B.1 (identifying causes of action); see also Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 417 (2011) ("[T]he fact that landlord-tenant relations, like many consumer protection regimes, are governed by an amalgam of contract, property, administrative, tort, and occasionally, constitutional law, makes them particularly difficult to study. . . .").

14. See *infra* Part II.B.1. This Article focuses on private, unsubsidized housing. Additional claims and mechanisms for enforcement are available in public housing and subsidized, private housing.

15. See Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 21–22 (2015) (noting that "scholarly attention regrettably has shifted away from code enforcement" since the 1970s).

16. See, e.g., 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 (1971); Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POL'Y 33, 40–41 (2006) (collecting literature and describing debates that followed Ackerman's article).

17. See Emily Benfer & Allyson 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. S1, S2-S15 (2017) (collecting literature).

18. See, e.g., Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U.L. REV. 275, 277–78 (2015); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. (forthcoming) (manuscript at 42–43, 484–49), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3350597](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350597) (summarizing "health justice" literature).

19. See Paula A. Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 29 RUTGERS U.L. REV. 1, 5 (2016) (describing empirical study of nonpayment actions and concluding that the warranty of habitability is rarely invoked); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. (forthcoming 2020) (manuscript at 5–6, 18–23), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3387752](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3387752) (documenting "warranty of habitability operationalization gap" through empirical study of nonpayment cases, and summarizing prior literature); cf. Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 62–64 (2015) (describing qualitative study of affirmative litigation by *pro se* tenants seeking repairs, and referencing prior studies); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Housing Court Experiment*, 42 LAW & SOC. INQUIRY 1058, 1060–63 (2017) (describing an informal, specialized court where *pro se* tenants can seek repairs but are jurisdictionally barred from seeking further relief).

20. Compare sources cited *supra* note 19, with *infra* Part II.B.1 (describing rights and remedies).

21. See *infra* notes 261–263 and accompanying text.

of the warranty of habitability.<sup>22</sup> This Article seeks to offer a broader theoretical analysis of underenforcement and the possibilities for correcting it.<sup>23</sup>

The Article proposes thinking about enforcement in a new way. It argues that the reason for the enforcement gap in substandard housing is that the tenants are poor.<sup>24</sup> While the right to safe housing extends to all tenants, poor people are the most likely to get stuck in dangerous housing,<sup>25</sup> and enforcement is undermined precisely because of their social position.<sup>26</sup>

The Article reveals significant limitations in current approaches to enforcement of poor people's rights. The private legal market devalues poor people's cases due to class, race, and gender biases in the basic doctrines of contracts and torts.<sup>27</sup> Public actors also fall short: they disinvest in the protection of poor people's interests,<sup>28</sup> and, when government lawyers do engage in enforcement, affected individuals do not control the litigation.<sup>29</sup>

The Article concludes by proposing a set of solutions.<sup>30</sup> It identifies specific ways to support enforcement by market actors and government agencies. It also offers an idea for a public-private hybrid: appointed counsel for affirmative representation of tenants.

Encouragingly, the current political environment appears ripe for such reform. Within the past three years, affordable housing has attracted significant interest

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22. See, e.g., David Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 392–97, 458–61 (2011) (analyzing the warranty of habitability as an example of the “failed” “legal revolutions” of the 1960s).

23. See generally Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006) (analyzing underenforcement of criminal laws).

24. Although some scholars use the terms “low-income” and “low-wealth,” this Article embraces the language of “poor people,” borrowing from poor people’s social movements. See, e.g., FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEEDED, HOW THEY FAIL* (1964); William Barber II & Liz Theoharris, *It’s Time to Fight for America’s Soul*, TIME (Dec. 5, 2017), <https://time.com/5048917/poor-peoples-campaign-martin-luther-king> (describing the “Poor People’s Campaign of 1968” and today’s “Poor People’s Campaign: A National Call for a Moral Revival”); see also Gawain Kripke, *Poor vs. Low-Income: Which Term Should We Use?*, OXFAM: THE POLITICS OF POVERTY (Jan. 15, 2015), <https://politicsofpoverty.oxfamamerica.org/2015/01/poor-versus-low-income-what-term-should-we-use> (“The use of the word [poor] sounds archaic, even medieval – rigidly classist and fatalistic. ‘The poor’ often denotes a great, undifferentiated mass. Something about it conveys the idea that poverty is immovable, like an historical legacy that we must endure, but never overcome. . . . But after a while, I started wondering, ‘What am I trying to hide?’). This Article defines poverty in terms of the financial inability to cover the necessities of modern life and manage unexpected emergencies without tumbling into dire circumstances. See Haque, *supra* note 1 (“It is something like living at the knife’s edge, constantly being on the brink of ruin, one small step away from catastrophe and disaster, ever at the risk of falling through the cracks.”). The definition intentionally includes some people above the federal poverty guidelines to account for the reality that the guidelines are extremely low when compared with costs of living. See *id.* (describing “massive inflation for the basics of life”); Louis Uchitelle, *How to Define Poverty? Let Us Count the Ways*, N.Y. TIMES (May 26, 2001), <https://www.nytimes.com/2001/05/26/arts/how-to-define-poverty-let-us-count-the-ways.html> (collecting definitions of poverty and critiques of federal guidelines).

25. See *infra* Part II.A.2.

26. See *infra* Part III.

27. See *infra* Part III.A.2.

28. See *infra* Part III.B.1.

29. See *infra* Part III.B.2.

30. See *infra* Part IV.C.

from policymakers and popular media. The “Movement for Black Lives”<sup>31</sup> and “Fight for \$15”<sup>32</sup> have highlighted rising rents,<sup>33</sup> while a new tenants’ rights movement has seized the attention of politicians and begun accumulating remarkable legislative victories.<sup>34</sup> The bestseller, *Evicted*,<sup>35</sup> spawned an exhibit at the National Building Museum,<sup>36</sup> a multi-part series on public radio,<sup>37</sup> and a crop of new scholarship.<sup>38</sup> Although housing policy in the United States has historically prioritized homeowners,<sup>39</sup> elected officials at the highest levels of government have started to take notice of rental housing.<sup>40</sup> Responding to tenants’ rights activism and buttressed by empirical evidence on the effects of eviction, local and state governments have initiated programs to appoint eviction defense lawyers.<sup>41</sup> The effort to address eviction is long overdue. Yet preventing formal displacement is only part of the story.<sup>42</sup> The law guarantees poor tenants not only procedural

31. See *About Us*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/about> (last visited Nov. 20, 2019).

32. See FIGHT FOR \$15, <https://fightfor15.org> (last visited Nov. 20, 2019).

33. See Gabrielle Gurley, *Black Lives Matter Plunges Into the Affordable Housing Crisis*, THE AM. PROSPECT (Sept. 2, 2016), <https://prospect.org/article/black-lives-matter-plunges-affordable-housing-crisis>; Fight for \$15, FACEBOOK (Mar. 30, 2019, 4:00 PM), <https://www.facebook.com/Fightfor15/photos/a.591503887546999/2400771719953531/?type=3&theater> (“Since 1960, our rent has more than doubled. Our incomes? Up only 5%.”).

34. See J. David Goodman et al., *Titans of Real Estate in ‘Shock’ Over New York Rent Law*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/landlord-rent-protection-regulation.html>; Sofie Kasakove, *The Tenants’ Rights Movement is Expanding Beyond Big Cities*, NEW REPUBLIC (May 17, 2019), <https://newrepublic.com/article/153929/tenants-rights-movement-expanding-beyond-big-cities>; Jimmy Tobias, *A New Housing-Rights Movement Has the Real-Estate Industry Running Scared*, THE NATION (Feb. 9, 2018), <https://www.thenation.com/article/a-new-housing-rights-movement-has-the-real-estate-industry-running-scared>.

35. See DESMOND, *supra* note 11.

36. *Evicted*, NAT. BLDG. MUSEUM, <https://www.nbm.org/exhibition/evicted> (last visited Nov. 19, 2019).

37. Virginia Prescott & La’Raven Taylor, *The New Scarlet Letter, E: NPR’s ‘On the Media’ Investigates America’s Eviction Crisis*, GEO. PUB. BROAD. (June 7, 2019), <https://www.gpbnews.org/post/new-scarlet-letter-e-nprs-media-investigates-americas-eviction-crisis>.

38. See Garboden & Rosen, *supra* note 11, at 658–61 (collecting literature).

39. See DAVID MADDEN & PETER MARCUSE, *IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS* 141 (2016).

40. See, e.g., Jacob Passy, *Where the 2020 Presidential Candidates, Including Elizabeth Warren and Bernie Sanders, Stand on Affordable Housing*, MARKETWATCH (Sept. 19, 2019), <https://www.marketwatch.com/story/heres-where-2020-presidential-candidates-including-elizabeth-warren-and-kamala-harris-stand-on-affordable-housing-2019-07-25> (describing presidential candidates’ proposals to reduce rent burdens, with some including funds for building affordable housing or appointing lawyers for tenants facing eviction).

41. See Kathryn A. Sabbath, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55 (2018) (describing and analyzing the nation’s first statutory right to eviction defense counsel); NAT’L COALITION FOR A CIVIL RIGHT TO COUNSEL, <http://civilrighttocounsel.org/map> (select “Eviction” from dropdown options) (last visited Nov. 20, 2019) (providing updates on state and local laws expanding the right to eviction defense counsel).

42. See Matthew Desmond, Carl Gershenson & Barbara Kiviat, *Forced Mobility and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 246, 253, 255–56 (2015) (describing displacement due to substandard conditions); see also Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 95 (2012) (explaining that “court records do not capture informal evictions—from illegal strong-arm lockouts to unofficial agreements”).

rights that serve to prevent the sudden loss of a home<sup>43</sup> but also substantive standards that ensure homes are fit for human habitation.<sup>44</sup>

This Article proceeds as follows. Part II.A presents the phenomenon of unsafe rental housing. It describes the harms imposed by substandard conditions, particularly the physical, emotional, cognitive, and economic damage to individuals, families, and communities. It then explains why people live in these conditions.

Part II.B introduces the framework of legal rights. Poor people's interests are often viewed as needs, which can be met voluntarily in the spirit of charity, rather than as rights that can be demanded.<sup>45</sup> Yet tenants' right to safe housing is clear.<sup>46</sup> Although there may not be a universal right to housing at government expense, people who occupy the status of "tenants" are entitled to habitable residences.<sup>47</sup> Part II concludes by responding to possible concerns that enforcing tenants' rights could be counterproductive.<sup>48</sup>

Part III turns to why the right to safe housing is underenforced. Part III.A examines the private market. Although some private, for-profit firms do engage in public interest litigation,<sup>49</sup> the private legal market has not supplied lawyers to enforce poor tenants' right to safe housing. This is for at least three reasons. First, poor tenants cannot pay lawyers to represent them at current market rates.<sup>50</sup> Second, poor tenants cannot rely on contingency fee mechanisms to attract private counsel because, under current approaches to the law of torts and contracts, damages are proportional to social position. The prevailing methods for calculating damages incorporate biases of class, race, and gender, and they underestimate the value of poor tenants' cases.<sup>51</sup> Third, although Congress has created fee-shifting statutes to support cases devalued in the private market, the Supreme Court has undercut the fee-shifting device.<sup>52</sup>

Part III.B shows why public agencies have also fallen short. First, the poor too often lack political power,<sup>53</sup> and so underenforcement of poor tenants' rights is the norm.<sup>54</sup> Second, even with gains in political power, government enforcement is limited as a means of access to justice because the tenant is not the client.<sup>55</sup> The

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43. A major goal of new laws providing appointed counsel in evictions has been the prevention of homelessness. See Sabbeth, *supra* note 41, at 86–89 (describing legislative history).

44. See also JOAN C. TRONTO, *CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE* ix (2013) (critiquing liberal democracies that offer "mere life").

45. See Deborah Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 743 (2002) (arguing that "justice [for poor people] is increasingly a function of charity rather than a right under the Rule of Law").

46. See *infra* Part II.B.1.

47. See *infra* Part II.B.2.

48. See *infra* Part II.B.3.

49. See *infra* notes 187–189, 193 and accompanying text.

50. See *infra* Part III.A.1.

51. See *infra* Part III.A.2.

52. See *infra* Part III.A.3.

53. See, e.g., Bertrall L. Ross II, *A Constitutional Path to Fair Representation for the Poor*, 66 U. KAN. L. REV. 921, 923–24 (2018).

54. See *infra* Part III.B.1 and sources cited therein.

55. See *infra* Part III.B.2.

agency lawyer represents a government entity or the people at large.<sup>56</sup> Government enforcement of housing standards does not generally obtain monetary relief for individual tenants, even though they may have paid rent and be entitled to recover it.<sup>57</sup> Tenants also do not direct the litigation.<sup>58</sup> They do not get to choose, for example, whether or not to pursue enforcement actions, even if those actions could result in the bulldozing of their homes.<sup>59</sup> In sum, the public and private sectors have left a gap in the enforcement of poor tenants' rights.

Part IV takes up the challenge of assessing the implications of this enforcement gap and offering solutions. Part IV.A demonstrates that the enforcement gap systematically excludes poor tenants from access to the legal system and "underdevelops"<sup>60</sup> the law in areas where it could protect them. Part IV.B argues that legislators can and should respond. First, governments possess moral duties and practical incentives to protect public welfare. Second, government actors have constructed the enforcement gap through legislative, executive, and judicial decisions, and therefore governments bear the responsibility of addressing that gap. Third, governments enjoy unique opportunities, and carry unique obligations, to protect the rule of law.

The Article concludes by offering policymakers a set of public and private approaches to filling the enforcement gap. These include: (1) a public approach of shifting agency culture and increasing agency funds to promote zealous government enforcement;<sup>61</sup> (2) a public-private hybrid of appointing counsel for tenants who wish to bring cases or intervene in suits brought by government actors;<sup>62</sup> and (3) a market-based approach of enhancing fee-shifting and aggregation of claims to support enforcement by for-profit actors.<sup>63</sup> Given the relative strengths and weaknesses of the public and private sectors,<sup>64</sup> adopting a combination of these approaches will be most effective.

## II. HOUSING VIOLATIONS

The phenomenon of dangerous housing is experienced primarily by poor people who lack alternatives. This Part explains why they get stuck in these circumstances and describes the injuries that result. It then turns to legal rights. Multiple sources of law forbid substandard housing conditions. Tenants are legally entitled to demand that their landlords conduct repairs and compensate them for any harm. Statutes also authorize various government actors to enforce housing standards. Yet too often poor tenants live in substandard housing without relief.

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56. See W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275, 301–02 (2017) (collecting literature defining client of government lawyer).

57. See *infra* Part II.B.2.

58. See *infra* Part III.B.2.; see also Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private "Clients" Under the Fair Housing Act*, 65 GEO. WASH. L. REV. 329, 338–40 (1997) (explaining that victims of housing discrimination do not control government enforcement because they are not the clients of agency lawyers).

59. See *infra* notes 131, 285 and accompanying text.

60. See *infra* Part IV.A (describing underdevelopment of law protecting poor tenants).

61. See *infra* Part IV.C.1.

62. See *infra* Part IV.C.2.

63. See *infra* Part IV.C.3.

64. See *infra* Part III.

### A. *Dangerous Homes*

According to the U.S. Census Bureau, more than 3.3 million families live in substandard rental units.<sup>65</sup> This subpart draws on prior research to describe the harms that result. It explains how substandard conditions damage the physical, emotional, cognitive, and economic well-being of individuals and communities.

#### 1. Substandard Life

The impact of residing in substandard conditions can be life-altering. Poor air quality leads to respiratory illnesses like asthma.<sup>66</sup> Absence of heat and running water necessary for washing spreads influenza, coughs, colds, and related illnesses.<sup>67</sup> Missing floor boards result in falls and broken bones.<sup>68</sup> Insect infestation and bites result in itchiness, rashes, and infections, and can cause severe allergic reactions like anaphylaxis.<sup>69</sup> Electrical fires have resulted in deaths.<sup>70</sup>

The cognitive and psychological impacts are no less troubling. With chronic coughing from air not fit to breathe,<sup>71</sup> the sounds of rodents gnawing and scratching furniture,<sup>72</sup> and insects crawling over occupants at night,<sup>73</sup> the victims of such conditions suffer from sleep deprivation.<sup>74</sup> Their concentration and performance at school and work falter.<sup>75</sup> Substandard conditions create an

65. See U.S. CENSUS BUREAU, AM. HOUS. SURVEY 2017, [https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s\\_areas=00000&s\\_year=2017&s\\_tablename=TABLE1&s\\_bygroup1=1&s\\_bygroup2=1&s\\_filtergroup1=1&s\\_filtergroup2=1](https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2017&s_tablename=TABLE1&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1) (last visited Nov. 20, 2019) (click “Get Table”) (documenting more than 3.3 million “severely or moderately inadequate” rental homes); see also *id.* app. at A17-A18, <https://www2.census.gov/programs-surveys/ahs/2017/2017%20AHS%20Definitions.pdf?#> (describing categories of housing adequacy and listing methods for categorizing housing as “severely inadequate” or “moderately inadequate”). This figure likely underrepresents the scale of the problem, because census data undercounts renters. See Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 257–58 (2018). Other sources estimate much higher numbers of families in substandard homes but do not distinguish between rentals and owner-occupied units. See TRACEY ROSS ET AL., CTR. AM. PROGRESS, CREATING SAFE AND HEALTHY LIVING ENVIRONMENTS FOR LOW-INCOME FAMILIES 1 (2016), <https://www.issuelab.org/resource/creating-safe-and-healthy-living-environments-for-low-income-families.html> (“[M]ore than 30 million housing units in the United States have significant physical or health hazards, such as dilapidated structures, poor heating, damaged plumbing, gas leaks, or lead.”).

66. See, e.g., David Mudarri & William J. Fisk, *Public Health and Economic Impact of Dampness and Mold*, 17 INDOOR AIR 227, 229, 232–35 (2007).

67. See U.S. DEP’T OF HEALTH & HUM. SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO PROMOTE HEALTHY HOMES vii (2009) [hereinafter SURGEON GENERAL CALL].

68. *Id.*

69. *Id.*

70. See, e.g., DESMOND *supra* note 11, at 199–201; MADDEN & MARCUSE, *supra* note 39, at 71–72.

71. See Mudarri & Fisk, *supra* note 66, at 227, 229, 232–35.

72. See SURGEON GENERAL CALL, *supra* note 67, at 31.

73. See generally U.S. CTRS. FOR DISEASE CONTROL & ENVTL. PROT. AGENCY, JOINT STATEMENT ON BED BUG CONTROL IN THE U.S. FROM THE U.S. CTRS. FOR DISEASE CONTROL (CDC) AND ENVTL. PROT. AGENCY (EPA) (2010), <https://stacks.cdc.gov/view/cdc/21750>.

74. *Id.* at 3 (explaining “bites usually occur when people are sleeping” and one potential consequence is “insomnia”).

75. See Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733, 733 (2002) (noting neurological, psychological, and behavioral problems caused by substandard housing); REBEKAH LEVINE COLEY ET AL., MACARTHUR FOUND., POOR QUALITY HOUSING IS TIED TO CHILDREN’S EMOTIONAL AND BEHAVIOR PROBLEMS, (2013),

environment uncondusive to productivity. They can also cause direct harm to human cognitive capacities. For example, exposure to lead paint can cause permanent injuries to a child's nervous system or brain.<sup>76</sup>

Living night and day<sup>77</sup> in substandard conditions is demoralizing. Residents in substandard housing experience shame and social isolation.<sup>78</sup> They develop anxiety and depression.<sup>79</sup> Home is supposed to be a place of comfort and safety.<sup>80</sup> Security in one's home is basic to a sense of self and a sense of place.<sup>81</sup> Given the emotional support that home is supposed to provide,<sup>82</sup> to experience anxiety and depression in one's home—precisely because of the condition of the home—can be deeply unsettling.<sup>83</sup>

Unsafe housing also results in economic harm. Out-of-pocket costs can include medical expenses;<sup>84</sup> replacement of furniture, clothing, and other possessions destroyed by mold or water damage;<sup>85</sup> and repair expenses.<sup>86</sup> Even more significant is the damage to academic and employment performance—school behavior, academic achievements, job qualifications, and work abilities—and the diminished earnings that result.<sup>87</sup>

These harms for individuals result in broader consequences for society. They restrict avenues to participate and succeed in civic life, which limits individuals' abilities to support their families and communities, as well as to thrive personally.

[https://www.macfound.org/media/files/HHM\\_-\\_Poor\\_Quality\\_Housing\\_Is\\_Tied\\_to\\_Childrens\\_Emotional\\_and\\_Behavioral\\_Problems.pdf](https://www.macfound.org/media/files/HHM_-_Poor_Quality_Housing_Is_Tied_to_Childrens_Emotional_and_Behavioral_Problems.pdf) (identifying emotional and behavioral problems in children and diminished academic skills in teens); Robert G. Healy, *Effects of Improved Housing on Worker Performance*, 6 J. HUM. RES. 297, 304 (1967) (suggesting work performance improved with improved housing conditions).

76. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 140 (2010).

77. See Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 60 (2016) ("People spend more time in their homes than in any other location.").

78. See Ernie Hood, *Dwelling Disparities: How Poor Housing Leads to Poor Health*, 113 ENVTL. HEALTH PERSP. A311, A313 (2005) (noting relationship between social isolation and substandard housing); Franzese et al., *supra* note 19, at 25–26 (describing social impact of bug infestation).

79. See DESMOND, *supra* note 11, at 199–201.

80. See Sabbeth, *supra* note 41, at 64–65 (summarizing literature).

81. *Id.*

82. While the sanctity of the home may be threatened by other causes as well, such as violent family members, police activity, or child welfare caseworkers, the ideal of the home as a sanctuary persists.

83. See MADDEN & MARCUSE, *supra* note 39, at 54–60 (describing the "alienation" created when "many people experience their housing as just another precarious place in a precarious world").

84. See Mudarri & Fisk, *supra* note 66, at 228 (noting one study estimates that "there is an economic consequence from dampness and mold due to asthma alone that is in the range of billions of dollars per year").

85. See U.S. ENVTL. PROT. AGENCY, ENVTL. PROT. AGENCY, OFFICE OF AIR AND RADIATION ENV'TS DIV., *A BRIEF GUIDE TO MOLD, MOISTURE, AND YOUR HOME* 7 (2010), <https://www.epa.gov/mold/brief-guide-mold-moisture-and-your-home> (describing difficulty of repairing damaged possessions and advising disposal instead); Franzese et al., *supra* note 19, at 26 (describing tenants' disposal of furniture and clothing); Cotton, *supra* note 19, at 80 (describing tenants' replacement of furniture).

86. See, e.g., DESMOND, *supra* note 11, at 72–74 ("After two months without a working bathtub or sink and with a barely working toilet, Doreen decided to call a plumber herself. . . . The plumber charged \$150. . . ."); Franzese et al., *supra* note 19, at 36 (describing tenants paying for repairs); Cotton, *supra* note 19, at 80 (describing tenant paying for repairs).

87. See *supra* note 75; see also *infra* Part III.A.2 (explaining calculation of economic damages).

Substandard housing can cause affected individuals and family members to rely on public subsidies, including emergency rooms, disability insurance, and public assistance, which can strain public resources.<sup>88</sup> Child welfare agencies remove children from their parents or delay family reunification as a consequence of inadequate housing.<sup>89</sup> Because substandard housing is experienced primarily by poor people and disproportionately by families of color,<sup>90</sup> the harms of substandard housing also exacerbate health, wealth, and income inequality.

## 2. Why People Live There

A reasonable question is why people live in such conditions. Particularly given the dangers to tenants' health and that of their children, one might expect them to pack up and move. Yet there are multiple, reinforcing reasons why they get stuck. People with the resources to leave generally do not rent such properties in the first place. White, middle-and upper-class individuals are more likely than poor people and people of color to own their homes and thereby avoid the risks of renting.<sup>91</sup> When they do rent, people with social advantages have more options of where to do so.

A constellation of social and economic factors limits the housing choices of poor people. Individuals who need to leave a previous residence in a rush—because of domestic violence, eviction, or other crisis<sup>92</sup>—may not immediately notice substandard conditions.<sup>93</sup> They also may be unable to find alternatives. This can be due to segregation and discrimination, damaged credit, a criminal record, a prior eviction, undocumented status and the absence of a social security number, or simply the unavailability of affordable housing.<sup>94</sup> All of these factors hit people of color, particularly women with children, hardest.<sup>95</sup>

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88. See Sabbeth, *supra* note 41, at 68–69 (collecting sources).

89. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 21, 35 (2002) (emphasizing that inadequate housing is a particularly significant factor in the separation of Black families, while child welfare agencies more often give white families housing assistance).

90. See *infra* notes 91, 93, 95, 97, 100, 109, 110, 112–119 and accompanying text.

91. See Rachel C. Bratt et al., *Why a Right to Housing is Needed and Makes Sense: an Editors' Introduction*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 1, 4 (Rachel G. Bratt et al., eds., 2006) [hereinafter A RIGHT TO HOUSING] (highlighting “enormous racial disparities that exist in home-ownership rates”); see also RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 59–67, 70–73 (2017) (describing federal policies that financially supported home ownership for whites only); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1205–09 (2001) (describing how property ownership patterns exacerbate wealth inequality); Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 669 (2002) (“[M]inorities are disadvantaged with respect to [homeownership, which] is for most middle-class households in the United States the greatest source of household wealth.”).

92. See Desmond et al., *supra* note 42, at 245–46 (documenting reasons for “forced moves”); *id.* at 249–51 (using regression model to show that a forced move “significantly increases the likelihood that a renter will experience long-term housing [conditions] problems such as broken appliances, exposed wires, or no heat”).

93. See Benfer & Gold, *supra* note 17, at S20 (noting “prospective tenants . . . may not discover a hazard until it causes injury”).

94. See *infra* notes 109–114 and accompanying text.

95. See Sabbeth, *supra* note 41, at 90–95 (synthesizing literature).

Once in the unit, tenants might believe that the owner will make repairs. Landlords frequently make promises they fail to honor.<sup>96</sup> They might make repairs for relatively privileged tenants but ignore repeated complaints from poor tenants.<sup>97</sup>

Leaving without the landlord's permission might require breaking a lease. The landlord could threaten to damage the tenant's credit if they stop paying rent. Paying rent for both the old apartment and a new one is unrealistic for most tenants, especially poor tenants who live in substandard housing precisely because they cannot afford alternatives. A tenant with leverage might be able to negotiate an early lease termination. The tenant can argue that the landlord's failure to maintain the premises constitutes constructive eviction, which releases the tenant from the obligation to pay rent.<sup>98</sup> Yet tenants without counsel might not know about their rights under constructive eviction doctrine,<sup>99</sup> or they might find it challenging to negotiate with their landlords. Empirical evidence demonstrates that women and people of color face special obstacles in negotiation.<sup>100</sup> Further, landlords may refuse to negotiate if they can instead exploit tenants' vulnerable position.<sup>101</sup>

A major reason tenants do not leave bad conditions is the absence of somewhere to go. The same factors that cause people to move in will later prevent

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96. See DESMOND, *supra* note 11, at 76.

97. See Marilyn L. Uzdavines, *Barking Dogs: Code Enforcement is All Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 WASHBURN L.J. 161, 164 (2014); Natapoff, *supra* note 23, at 1729 (citing H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 ABA J. AFFORDABLE HOUSING & CMTY. DEV. L. 29, 35 (1996)).

98. See Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 798–99 (2013) (describing development of constructive eviction doctrine).

99. This author has counseled tenants whose primary goal prior to the consultation was simply permission to leave. They did not know they had a right to do so.

100. See DESMOND, *supra* note 11, at 364 n.11 (“[B]ecause of the powerful ways gender guides interaction, . . . a woman who aggressively confronted a landlord commonly was branded rude or out of line.”); Desmond, *supra* note 42, at 112–13 (explaining that men outnumber women almost 3 to 1 among landlords, and “having been socialized to the rhythms and postures of masculinity,” male tenants were more prepared than female tenants to negotiate with their male landlords); Sabbeth, *supra* note 41, at 93 n.300 (“Particularly given the prevalence of sexual harassment in housing, it is understandable that female tenants might want to steer clear of any conduct that could be misinterpreted or used as an opening for such harassment.”); see also Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes it Does Hurt to Ask*, 103 ORG. BEHAV. & HUM. DECISION PROCESSES 84, 99–100 (2007) (demonstrating that women face greater resistance than men when they ask for higher compensation and, if women ask, male evaluators are less inclined to work with them in the future); Morela Hernandez & Derek R. Avery, *Getting the Short End of the Stick: Racial Bias in Salary Negotiations*, MIT SLOAN MGMT. REV. (June 15, 2016), <https://sloanreview.mit.edu/article/getting-the-short-end-of-the-stick-racial-bias-in-salary-negotiations> (documenting that Black job seekers were rated as “pushier” than whites and therefore obtained worse results).

101. See DESMOND, *supra* note 11, at 306 (“[W]e have neglected the critical ways that exploitation contributes to the persistence of poverty. We have overlooked a fact that landlords never have: there is a lot of money to be made off the poor.”).

them from moving out.<sup>102</sup> The most basic obstacle to relocating is the shortage of affordable housing.<sup>103</sup> Across the country, incomes do not cover rising rents.<sup>104</sup>

Inadequate income presents a problem when applying for a new rental. The new landlord may require proof of income three times the rent.<sup>105</sup> Although some might perceive this to be a pretense for race and class discrimination, three-to-one is not an unreasonable ratio for income to housing costs.<sup>106</sup> Indeed, economists have long held that a *maximum* of one-third of a family budget should be devoted to housing, including utilities.<sup>107</sup> The problem is that many households today need more than half of their income to cover their rent.<sup>108</sup>

Income requirements are not the only criteria that disqualify rental applicants. Landlords may exclude applicants based on a prior criminal conviction<sup>109</sup> or eviction.<sup>110</sup> The filing of an eviction lawsuit, regardless of its merits, can land a tenant on a private “blacklist,” which landlords use to weed out applicants.<sup>111</sup>

102. See Desmond et al., *supra* note 42, at 257 (“If we wish to understand why some low-income families live in decidedly worse housing units than others . . . a significant part of the answer may lie in the reasons they relocated in the first place.”).

103. See Sarah Holder, *Minimum Wage Still Can't Pay for a Two-Bedroom Apartment Anywhere*, CITYLAB (June 19, 2019), <https://www.citylab.com/equity/2019/06/affordable-housing-minimum-wage-rent-apartment-house-rental/592024/>; Will Parker, *Apartment Demand Hits Five-Year High*, WALL ST. J. (June 30, 2019), [https://www.wsj.com/amp/articles/apartment-demand-hits-five-year-high-11561917600?fbclid=IwAR1rF-6hPQoXt\\_T5x95\\_VLLtSph1IFIEHtSmlCaXsD1g5pW2ylJflPk85s](https://www.wsj.com/amp/articles/apartment-demand-hits-five-year-high-11561917600?fbclid=IwAR1rF-6hPQoXt_T5x95_VLLtSph1IFIEHtSmlCaXsD1g5pW2ylJflPk85s).

104. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *MILLIONS OF AMERICANS BURDENED BY HOUSING COSTS IN 2015* (2015), <https://www.jchs.harvard.edu/son2017-housing-cost-burdens-table>; NAT'L LOW INCOME HOUS. COAL., *OUT OF REACH 2019* 16–6 (2019), [https://reports.nlihc.org/sites/default/files/oor/OOR\\_2019.pdf](https://reports.nlihc.org/sites/default/files/oor/OOR_2019.pdf); David Montgomery, *The Neighborhoods Where Housing Costs Devour Budgets*, CITYLAB (Apr. 4, 2019), <https://www.citylab.com/equity/2019/04/affordable-housing-map-monthly-rent-home-mortgage-budget/586330>.

105. See Nick Fitzpatrick, *The Income You Need to Rent an Apartment*, FORBES (Apr. 22, 2016), <https://www.forbes.com/sites/axiometrics/2016/04/22/the-income-you-need-to-rent-an-apartmen/#6081f653140d> (“The general rule of thumb in the apartment industry is that a potential renter’s gross income should be three times the cost of the lease.”).

106. See Kathleen Elkins, *Here's How Much of Your Income You Should Be Spending on Housing*, MAKE IT (June 6, 2018), <https://www.cnbc.com/2018/06/06/how-much-of-your-income-you-should-be-spending-on-housing.html>.

107. See MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, *WHO CAN AFFORD TO LIVE IN A HOME?: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 1–2*, <https://www.census.gov/housing/census/publications/who-can-afford.pdf>.

108. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 104; NAT'L LOW INCOME HOUS. COAL., *supra* note 104; Montgomery, *supra* note 104. This creates financial strain for the tenant and risk for the owner. While some landlords seek to avoid the financial risk, others accept tenants unable to pay the rent and then exploit that vulnerability, for example engaging in sexual harassment or refusing to conduct repairs. See DESMOND, *supra* note 11, at 75–76 (landlords who regularly rent to tenants with insufficient incomes operate under a business model of extracting profit from people perpetually behind in their rent, while using the threat of eviction for nonpayment as leverage for tenant concessions); Garboden & Rosen, *supra* note 11, at 640 (“The daily *threat* of eviction subjugates poor tenants, stripping them of their consumer rights.”) (emphasis in original).

109. See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491–92 (2010).

110. See Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. MARSHALL L. REV. 407, 414–15 (2007); Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1356–57 (2007).

111. See ESME CARAMELLO & NORA MAHLBERG, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, *COMBATING TENANT BLACKLISTING BASED ON HOUSING COURT RECORDS: A SURVEY OF APPROACHES 1–7* (2017), <https://perma.cc/PZX2-9HJE>; Spector, *supra* note 110, at 416 (“Consumer reports used for the purpose

Landlords also check credit as an indication of whether applicants will pay future rent.<sup>112</sup> Applications that require social security numbers exclude undocumented immigrants.<sup>113</sup> Landlords also continue to engage in old-fashioned discrimination, refusing to rent to tenants on the basis of race, gender, or familial status.<sup>114</sup>

For a tenant who can overcome these hurdles, financial barriers remain. The screening process typically requires an application fee, which is non-refundable regardless of the landlord's decision.<sup>115</sup> If a tenant is approved, in addition to costs of the actual move,<sup>116</sup> obtaining the keys may require advance payment of the first month's rent, the last month's rents,<sup>117</sup> and a security deposit that may be equal to another month's rent or double that.<sup>118</sup> This total far exceeds the monthly income of a poor tenant.<sup>119</sup> Moreover, the tenant cannot use the security deposit from the current, substandard residence. Most states permit landlords to keep security deposits for thirty days or more after a tenant has vacated a unit,<sup>120</sup> and some landlords never return them.<sup>121</sup>

of determining eligibility for rental housing are widely used by landlords in connection with the selection of tenants and may contain information relating to the timeliness of the tenant's rental history as well as the tenant's prior involvement in eviction proceedings.”)

112. See Claire Tsosie, *What Landlords Really Look for in a Credit Check*, NERDWALLET (June 18, 2019), <https://www.nerdwallet.com/blog/finance/landlords-credit-check> (“Because many landlords check applicants’ credit, your credit history could make a big difference in your next apartment search. The rise in online credit checks and increased competition in the rental market, meanwhile, have combined to put more pressure on potential tenants to make their applications shine.”).

113. See PRIVACY RIGHTS CLEARINGHOUSE, THE RENTER’S GUIDE TO TENANT PRIVACY RIGHTS 2 (2017), <https://www.privacyrights.org/consumer-guides/renters-guide-tenant-privacy-rights>.

114. See, e.g., Gene Demby, *For People of Color, A Housing Market Partially Hidden from View*, NAT’L PUB. RADIO, CODE SWITCH (June 17, 2013), <https://www.npr.org/sections/codeswitch/2013/06/17/192730233/for-people-of-color-a-housing-market-partially-hidden-from-view> (study demonstrated people of color were shown fewer rental units, and asked to pay higher rents, compared to whites).

115. See, e.g., Robert Friedman, *How to Survive Legally as a Landlord*, 83 AM. JUR. TRIALS § 4 (2019) (advising landlords to “charge a non-refundable application fee to cover the costs of credit reports and/or tenant eviction check services”).

116. See, e.g., BRETT THEODOS, SARA MCTARNAGHAN & CLAUDIA COULTON, URBAN INST., FAMILY RESIDENTIAL INSTABILITY: WHAT CAN STATES AND LOCALITIES DO? 8 (2018), [https://www.urban.org/sites/default/files/publication/98286/family\\_residential\\_instability\\_what\\_can\\_states\\_and\\_localities\\_do\\_1.pdf](https://www.urban.org/sites/default/files/publication/98286/family_residential_instability_what_can_states_and_localities_do_1.pdf) (“Relocation costs can consume considerable financial reserves, including costs related to searching for housing, deposits, security fees, and moving. Families on tight budgets can go into debt or be unable to meet basic needs because of the financial burden of moving.”).

117. See *id.*

118. See DiDi Delgado, *Just as I Suspected, Paying Rent is Racist*, SHELTERFORCE (July 26, 2017), <https://shelterforce.org/2017/07/26/just-as-i-suspected-paying-rent-is-racist> (“Sometimes first, last, and security are the only things stopping people from finding a safe place to live.”).

119. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION’S HOUSING 2019, at 4 (2019), [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_State\\_of\\_the\\_Nations\\_Housing\\_2019.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf) (“The share of US households paying more than 30 percent of their incomes for housing [is] the standard definition of cost burdens. . . . 47.4 percent of renter households remained cost burdened. . . . Households with incomes under \$15,000 continue to have the highest burden rates, with 83 percent paying more than 30 percent of income for housing, including 72 percent paying more than 50 percent.”).

120. See *How Long Does the Landlord Have to Return a Security Deposit?*, LEGALNATURE, <https://help.legalnature.com/41902-faqs/223937-how-long-does-the-landlord-have-to-return-a-security-deposit> (last visited Nov. 20, 2019) (summarizing state law regarding maximum time for withholding deposits).

121. See Jennifer White Karp, *New NYC Rent Laws Require Security Deposits to be Returned in 14 Days and Landlords are Fuming*, BRICK UNDERGROUND, (Aug. 23, 2019),

While these impediments to moving are significant, focusing on them elides an important consideration: what if a tenant has reasons to stay? Maintaining a stable residence nets social and economic benefits for children and adults.<sup>122</sup> Moving can require relocating to a neighborhood farther from social support networks, childcare, schools, employment, and other resources.<sup>123</sup>

Even if the tenant were willing to move, why would tenant relocation be the appropriate solution to the problem of substandard housing? As recent eviction research demonstrates, uprooting families and undercutting social ties impedes economic mobility and creates broader damage to communities.<sup>124</sup> Moreover, the law does not place the burden of alleviating substandard housing on the tenant. As the next subpart will show, the law requires the owner to bear responsibility.

### *B. The Right to Safe Housing*

Substandard housing conditions have been prohibited for years.<sup>125</sup> The sources of law protecting tenants' right to safe housing are multiple and overlapping. They authorize both private rights of action for tenants and government enforcement.<sup>126</sup> This subpart will identify the relevant doctrine. It will then discuss how the right to safe housing relates to the absence of a broader right to housing. Finally, it will address potential concerns about the consequences of enforcement.

#### 1. Rights and Remedies

Current doctrine recognizes more than four sets of claims regarding substandard housing and three sets of actors who could enforce the laws. Depending on the facts, a tenant might allege claims from any of the following categories: the implied warranty of habitability; common law torts; consumer protection statutes; or antidiscrimination laws. In addition to tenants' private rights of action, there is statutory authority for public agencies at all levels of government to pursue at least some of these cases. This subpart will very briefly explain the

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<https://www.brickunderground.com/rent/new-rent-laws-require-security-deposit-return-14-days-landlords-NYC> (“Landlords took their sweet time. And there was massive abuse. I can’t tell you how many calls and inquiries I have received over the years on this issue where landlords didn’t return security deposits and had no legal basis to refuse to do so.”) (quoting Sam Himmelstein, an attorney who represents tenants and tenant associations).

122. See Desmond et al., *supra* note 42, at 228, 254 (collecting literature).

123. See Emily Badger, *Why Don’t People Who Can’t Afford Housing Just Move Where It’s Cheaper?*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/upshot/why-dont-people-who-cant-afford-housing-just-move-where-its-cheaper.html>.

124. See Desmond & Bell, *supra* note 15, at 25–26 (collecting literature); Desmond, *supra* note 42, at 89 (“Increased residential mobility is associated with a host of negative outcomes, including higher rates of adolescent violence, poor school performance, health risks, psychological costs, and the loss of neighborhood ties.”) (internal citations omitted). Notably, when a tenant vacates, the underlying problem of substandard conditions remains unresolved and passes along to the next set of occupants.

125. See MADDEN & MARCUSE, *supra* note 39, at 121–26.

126. This Article focuses on claims available in private, unsubsidized housing, but it is worth noting that federal laws and regulations supplement these claims with additional requirements in subsidized housing and public housing. See, e.g., 24 C.F.R. § 982.401 (2015) (describing housing quality standards and inspection of federally subsidized housing); see also Franzese et al., *supra* note 19, at 24, 27–28 (illustrating that government actors’ withholding of subsidies from private landlords who violate housing standards was a strong incentive for landlords to address the problems).

role of local housing codes and enforcement agencies, then describe tenants' private rights of action, and, finally, suggest that state and federal government offices can play a role.

Local housing codes regulate the design, construction, and maintenance of buildings, and local agencies are charged with enforcing the codes.<sup>127</sup> The specifics of the codes and enforcement processes vary by jurisdiction,<sup>128</sup> but most enforcement is conducted through the following administrative process.<sup>129</sup> A tenant makes a complaint to the agency; a housing code enforcement officer inspects; a notice of violation is issued to the owner; the owner is given a defined time period within which to correct the conditions; and if the owner fails to do so, the agency initiates an administrative proceeding, which may result in fines, an order to correct, and, potentially, a loss of a license or a lien on the property.<sup>130</sup> In particularly severe cases, a locality may seize possession of the property or demolish it.<sup>131</sup> In addition to these administrative processes, the housing code agency may pursue a civil enforcement action.<sup>132</sup> If pursued zealously, civil enforcement can result in an injunction to repair the property, civil penalties, and, if an owner fails to comply with the injunctive order, civil contempt.<sup>133</sup>

Tenants may enforce housing standards on their own. The most basic source of modern law for tenants' private right of action is the implied warranty of habitability.<sup>134</sup> Just as sales of goods include implied warranties, so too do leases of property.<sup>135</sup> A residential lease includes an implied warranty that the housing is fit for human habitation.<sup>136</sup> Although the implied warranty of habitability developed through common law,<sup>137</sup> it is now codified in the laws of every state except one.<sup>138</sup> State statutes delineate landlords' specific obligations of

127. See Rosser, *supra* note 16, at 34–36; CHANGLAB SOLUTIONS, UP TO CODE: CODE ENFORCEMENT STRATEGIES FOR HEALTHY HOUSING 5 (2015), [http://www.changelabsolutions.org/sites/default/files/Up-tp-Code\\_Enforcement\\_Guide\\_FINAL-20150527.pdf](http://www.changelabsolutions.org/sites/default/files/Up-tp-Code_Enforcement_Guide_FINAL-20150527.pdf).

128. See Rosser, *supra* note 16, at 36.

129. See CHANGLAB SOLUTIONS, *supra* note 127, at 19–20.

130. *Id.*

131. See Richard E. Carlton, Richard Landfield & James B. Loken, Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 831–34 (1965) (discussing municipal power to demolish buildings and require that tenants vacate).

132. See CHANGLAB SOLUTIONS, *supra* note 127, at 19.

133. *Id.* Some cities criminalize the willful failure to maintain property, *id.* at 20, but this Article focuses on civil enforcement.

134. See Lonegrass, *supra* note 13, 419–25 (describing common law development of warranty of habitability). The predecessor of the warranty of habitability was the “covenant of quiet enjoyment,” which required a landlord not to disturb the tenant through improper eviction, partial eviction, or constructive eviction resulting from intolerable property conditions. See Campbell, *supra* note 98, at 797–99 (describing how expansion of the covenant of quiet enjoyment ultimately led to recognition of the implied warranty of habitability). The implied warranty of habitability provides tenants with more protections than the covenant of quiet enjoyment because, under the warranty of habitability, the tenant does not need to be forced out of the home to assert a claim. *Cf. id.* at 799–800. The covenant of quiet enjoyment continues to operate but has lost importance following recognition of the implied warranty of habitability.

135. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074–77 (D.C. Cir. 1970).

136. *Id.* at 1077.

137. See *id.* at 1077–82.

138. See Benjamin Hardy, *No Vote on Landlord-Tenant Bill After Realtor Association Declares Opposition*, ARK. TIMES (Mar. 7, 2019), <https://arktimes.com/arkansas-blog/2019/03/07/no-vote-on-landlord-tenant-bill-after-realtor-association-declares-opposition> (explaining that every state except Arkansas has codified the implied warranty of habitability).

maintenance and repair, with most requiring landlords to “make all repairs and do what is necessary to maintain the property in fit and habitable condition;” supply running water, hot water, and heat; “maintain systems in good and safe working order”; and control the presence of insects, vermin, and dangerous substances including lead, asbestos, and mold.<sup>139</sup>

Although the breach of the implied warranty of habitability first received recognition and is most frequently contemplated as a defense in a nonpayment action,<sup>140</sup> a tenant may also bring the claim in an affirmative suit initiated by the tenant against the landlord.<sup>141</sup> The breach of the warranty may be interpreted to bar the landlord’s right to collect rent based on the view that the landlord’s obligation to maintain the premises and the tenant’s obligation to pay rent are mutually dependent.<sup>142</sup> The value of the defective premises may be deemed less than that of the premises as warranted, and thus the rent owed will be less than the amount listed in the contract.<sup>143</sup> Remedies for the tenant who establishes a breach of the warranty may include a rent abatement,<sup>144</sup> the option to conduct repairs and deduct the cost from the rent,<sup>145</sup> or specific performance in the form of correcting the conditions.<sup>146</sup>

Substandard conditions that result in harm to a tenant or occupant<sup>147</sup> may also give rise to claims under the common law of torts.<sup>148</sup> Claims may include negligence, breach of the duty to warn, and negligent or even intentional infliction of emotional distress.<sup>149</sup> Establishing the elements of a tort claim can be more complex than proving a violation of the warranty of habitability, but tort law opens up the possibility of significant categories of damages to compensate for a family’s harm.<sup>150</sup>

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139. See Benfer & Gold, *supra* note 17, at S26 (describing states’ adoption of the Uniform Residential Landlord Tenant Act and its revisions).

140. See *Javins* 428 F.2d at 1071–82 (D.C. Cir. 1970) (setting precedent in recognizing the implied warranty of habitability); Franzese et al., *supra* note 19, at 5; Summers, *supra* note 19, at 5–6.

141. A tenant may also raise the breach as a counterclaim in an eviction action. See Sabbeth, *supra* note 41, at 112–14 (discussing counterclaims in summary ejectments).

142. *Javins*, 428 F.2d at 1082–83.

143. See *infra* Part III.A.2.i (describing calculation of rent abatement).

144. See Summers, *supra* note 19, at 5–6 (describing empirical study of rent abatements); Franzese et al., *supra* note 19, at 8–9 (listing available remedies).

145. See Campbell, *supra* note 98, at 808–09 (arguing that the “repair-and-deduct” remedy recognized under modern doctrine exceeds traditional contract law damages).

146. *Id.* at 823 (comparing common law and statutory rights).

147. While the tenant has rights and obligations as a party to the lease agreement, other occupants, such as the children of the tenant, may possess a different set of rights and obligations. For example, the children cannot claim a breach of the warranty of habitability, but they do receive protections from tort law. The above discussion focuses primarily on the claims of tenants.

148. See Lonegrass, *supra* note 13, at 414–15 (explaining why such cases may be interpreted under tort law); see also CHAMALLAS & WRIGGINS, *supra* note 76, at 138–39 (describing tort litigation regarding lead paint in homes).

149. See Lonegrass, *supra* note 13, at 425–26 (listing relevant tort claims); see also DAN B. DOBBS ET AL., *THE LAW OF TORTS* §§ 124 (2d ed. 2019) (defining elements of negligence); 276 (defining duty to warn), 384 (“Emotional distress is a primary element of recovery in many torts, and many causes of action can be recast as claims for intentional or negligent infliction of emotional distress.”).

150. See *infra* Part III.A.2 (describing tort damages).

Consumer protection laws offer additional causes of action. Conduct violating the warranty of habitability might violate state<sup>151</sup> statutes prohibiting unfair debt collection or unfair and deceptive trade practices.<sup>152</sup> In North Carolina, for example, demanding rent for residential property with knowledge that the property is uninhabitable has been recognized as a violation of the state's prohibition on "unfair or deceptive acts or practices in or affecting commerce."<sup>153</sup> A significant feature that distinguishes consumer protection legislation from the law of torts, contracts, and habitability legislation is that consumer protection statutes provide additional remedies. A tenant who prevails on a consumer claim may be entitled to liquidated damages that triple the award,<sup>154</sup> plus attorneys' fees.<sup>155</sup>

If a landlord discriminates on the basis of race or another protected characteristic when assigning a tenant to a substandard property or failing to maintain a property, such conduct will also violate antidiscrimination laws. The federal Fair Housing Act (FHA) "makes it unlawful to discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, [ ] national origin . . . or handicap."<sup>156</sup> It also forbids representing to a potential renter, on the basis of a protected characteristic of the renter, that a unit is not available when the unit is in fact available.<sup>157</sup> Federal regulations specify that the FHA prohibits discrimination in "[f]ailing [to perform] or delaying maintenance or repairs,"<sup>158</sup> or in "[a]ssigning any person to a particular section of a community, neighborhood or development, or to a particular floor of a building . . . ."<sup>159</sup> In addition to violating the FHA, discrimination of this kind against non-white tenants could also potentially give rise to Section 1981 claims under the Civil Rights Act of 1886, which guarantees all persons in the United States the "same right to make and enforce contracts . . . as is enjoyed by white citizens."<sup>160</sup>

Intentionally steering tenants of color to substandard apartments and failing to provide them with maintenance services is not uncommon,<sup>161</sup> but

151. Federal consumer protection statutes may also be implicated, *see* *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 483–86 (1974) (citing cases), but the doctrine is woefully underdeveloped. *See infra* Part IV.A (describing "underenforcement snowballing" and "underdevelopment" of law).

152. *See* Eric Sirota, *The Rental Crisis Will Not be Televised: A Call for Greater Parity Between Tenants and Traditional Consumers* 4–5 (unpublished manuscript) (on file with author) (describing consumer claims).

153. N.C. GEN. STAT. § 75-1.1(a) (2018); *see* *Allen v. Simmons*, 394 S.E.2d 478, 483–84 (N.C. Ct. App. 1990); *Creekside Apartments v. Poteat*, 446 S.E.2d 826, 833-34 (N.C. Ct. App. 1994), *discretionary review denied*, 451 S.E.2d 632 (1994).

154. *See, e.g.*, N.C. GEN. STAT. § 75-16 (2018).

155. *See, e.g.*, § 75-16.1. Fee-shifting statutes require defendants in special categories of cases to pay prevailing plaintiffs' attorneys' fees. *See infra* Part III.A.3 (discussing fee-shifting statutes).

156. 42 U.S.C. § 3604(b), (f) (2012) State and local laws supplement the federal FHA and expand the list of protected classes. *See, e.g.*, *Miller v. 270 Empire Realty LLC*, No. 09-CV-2957 (RJD) (RER), 2012 WL 1933798, at \*6 (E.D.N.Y. Apr. 6, 2012) (ruling that tenant's sexual orientation discrimination claim survived summary judgment under state and local law).

157. § 3604(d).

158. 20 C.F.R. § 100.65(b)(2) (2016).

159. 24 C.F.R. § 100.70(c)(4) (2013).

160. 42 U.S.C. § 1981(a) (2012).

161. *See, e.g.*, 273 Lee Ave. Tenants Ass'n v. Steinmetz, 330 F. Supp. 3d 778, 782–86, 793, 795–96 (E.D.N.Y. 2018) (finding "evidence . . . that Defendants' challenged actions [of denying Latinxs heat and

antidiscrimination laws can also be used to challenge less obvious misconduct. The U.S. Supreme Court has made clear that housing policies with a discriminatory impact can violate the FHA without proof of discriminatory intent.<sup>162</sup> For example, if a landlord adopts a repair or assignment policy that has a disparate impact on tenants of a particular race, this may constitute race discrimination.

Additionally, the FHA requires landlords to make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [disabled tenants] equal opportunity to use and enjoy a dwelling.”<sup>163</sup> For example, if a member of a tenant’s family suffers from asthma, a landlord might be required to remediate mold more quickly than otherwise or might be required to immediately transfer the family to a mold-free unit.<sup>164</sup>

Antidiscrimination laws offer a powerful source of rights for many tenants in substandard homes. Like consumer protection statutes, antidiscrimination laws include provisions for shifting the burden of attorneys’ fees to the landlord if the tenant prevails.<sup>165</sup> These statutes are not available in every case, but they could potentially apply with some frequency.

While tenants possess private rights of action under antidiscrimination and consumer protection laws, they are not the only actors with the authority to pursue these claims. At the same time that local agencies carry responsibility for enforcing local housing codes, state and federal agencies enjoy the power to enforce consumer protection and civil rights statutes. Some offices of states’ attorneys general include divisions dedicated specifically to civil rights or consumer protection. On the federal level, the Civil Rights Division at the U.S. Department of Justice, the Federal Trade Commission, and Consumer Financial Protection

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repairs while providing such services to Hasidic Jews] were motivated by discrimination”); *United States v. Cochran*, 39 F. Supp. 3d 719, 733 (E.D.N.C. 2014) (finding evidence of “a systematic practice or policy to deprive black Americans’ rights guaranteed under the Fair Housing Act on the basis of their race,” including refusal to conduct maintenance and use of racial slurs in response to repair requests); *see also Jimenez v. Tsai*, No. 5:16-cv-04434-EJD, 2017 WL 2423186, at \*5–7 (N.D. Cal. June 5, 2017) (denying motion to dismiss race and national origin discrimination claims, where plaintiffs alleged landlord maintained units occupied by white and Asian tenants but units of Mexican-born tenants were “rife with dangerous, unsanitary, and uninhabitable conditions”); *Khodeir v. Sayyed*, 15 Civ. 8763 (DAB), 2016 WL 5817003, at \*6–7 (S.D.N.Y. Sept. 28, 2016) (denying landlord’s motion to dismiss, where tenants alleged landlord failed to provide services due to familial status and “anti-Arab bias”). More research is needed on discrimination in assignment and maintenance of units. During this author’s practice of representing tenants in substandard housing, race and national origin discrimination has been a recurrent theme. The author’s clinic students have handled multiple cases on behalf of Black and Latinx families assigned first-floor or basement units with substandard conditions that were not present on higher floors, which were reserved for whites.

162. *See Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521–52 (2015).

163. 42 U.S.C. § 3604(f)(3)(B); *see also* Rehabilitation Act of 1973, 29 U.S.C. § 794 (describing protections in federally subsidized housing); Americans with Disabilities Act, as amended, 42 U.S.C. § 1201, *et seq.*

164. Disabilities of family members and other residents, not only those of named tenants, must be accommodated. *See* § 3604 (f)(2) (prohibiting discrimination because of a disability of the “renter, [] a person residing in or intending to reside in that dwelling after it is so . . . rented, . . . or any person associated with that . . . renter”).

165. *See* 42 U.S.C. §§ 3613(c)(2), 12205 (2012).

Bureau operate to safeguard the public in precisely these areas. As Part IV will argue, state and federal agencies could do more of this work.

## 2. A Right to Housing?

The doctrine governing housing safety includes private rights of action for tenants, as explained above. This is important to emphasize because poor people's interests are often viewed as needs, which can be addressed voluntarily in the spirit of charity, rather than as rights that can be demanded.<sup>166</sup> Moreover, housing conditions law is one of the few areas of legal doctrine in the United States that protects the interests of poor people in particular.<sup>167</sup> Poor people possess limited procedural rights, and their substantive, positive rights are even more scarce.<sup>168</sup> Although a universal right to housing remains aspirational,<sup>169</sup> the guarantee of safe housing is well-settled. This subpart briefly explains how these two legal principles interrelate.

Environmental and health justice scholars have pushed for an expanded understanding of housing rights, drawing on federal civil rights statutes.<sup>170</sup> Advocates have also highlighted that housing is an established human right under international law.<sup>171</sup> This author is deeply sympathetic to those arguments, but one need not accept them to accept the right to safe housing.

To be clear, the specific subject of this Article—the right to safe housing—is not debated. Commentators might take a normative position that housing standards should not be enforced,<sup>172</sup> but no one questions whether, as a descriptive matter, these standards exist in the law on the books. Regardless of the position one takes on the broader concept of housing as a right, the status of the right to safe housing in current doctrine is not questioned.

One might argue that a negative prohibition on substandard housing is different from an affirmative right to housing that meets set standards. If there is no guarantee of shelter, how can there be a guarantee that shelter meets any standards? The answer is that, as in many areas of the law, different statuses confer

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166. See Weissman, *supra* note 45, at 785–817.

167. See HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME *passim* (forthcoming 2019) (summarizing legal rights that protect people with low incomes, highlighting few that benefit poor people in particular, and noting that rights specific to poor people tend to be procedural). The closest analogy, with respect to laws that protect poor people in particular, may be labor laws that mandate a minimum wage and prohibit child labor.

168. See JULIET M. BRODIE, ET AL., POVERTY LAW, POLICY, AND PRACTICE 116 (2014) (“In general, poor people’s claims to procedural rights have fared better than their claims to substantive rights.”); see also Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2201 (2013) (“[P]rocedural rights may be especially prone to legitimate the status quo, because ‘fair’ process masks unjust substantive outcomes and makes those outcomes seem more legitimate.”).

169. See Chester Hartman, *The Case for a Right to Housing*, in A RIGHT TO HOUSING, *supra* note 91, at 177 (“Although establishing a right to housing in the United States does not appear to be immediately feasible, that political reality in no way detracts from the argument that our society ought to embrace it.”); MADDEN & MARCUSE, *supra* note 39, at 195–200 (envisioning a “radical right to housing” that “necessarily implies fundamental challenges to the existing system” but “should not, strictly speaking, be seen as utopian”).

170. See Harris & Pamukcu, *supra* note 18, at 42–44, 48–49 (collecting literature).

171. See, e.g., Risa Kaufman et al., *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 777–83 (2014).

172. See *infra* Part II.B.3 (discussing and rejecting arguments against enforcement).

different bundles of rights. Tenants of residential property are entitled to habitable homes.<sup>173</sup> As mentioned above, when property owners fail to provide habitable conditions, the law recognizes causes of action for tenants.

Despite the above collection of legal protections, poor people's right to safe housing remains underenforced. The causes and consequences of this underenforcement will be discussed in the remainder of this Article. Before delving further, however, the section below will anticipate and respond to a potential concern that enforcement might be counterproductive.

### 3. Enforcement as Socially Desirable

This Article takes as established that enforcement of the laws governing housing safety is socially desirable.<sup>174</sup> In the 1970s, a lively academic debate emerged as to whether enforcement of housing safety standards would cause poor tenants to be priced out of housing.<sup>175</sup> Without a substandard market, the argument went, poor people might have no housing at all.<sup>176</sup> Of course today rent is impossibly high and massive numbers of people are homeless, so the rampant underenforcement of housing standards appears not to mitigate the homelessness crisis.<sup>177</sup> Yet, theoretically, the problem could be still worse if standards were enforced. So far, however, empirical evidence does not support this hypothesis.<sup>178</sup>

More fundamentally, even if it were true that enforcement puts upward pressure on market rates for rent, the market is a creation of regulation, and that regulation is subject to revision. The U.S. housing market has been regulated in varying ways since the nation's birth.<sup>179</sup> The inextricability of housing markets and regulation is not only an historical fact but also a basic truth of housing in a social context. David Madden and Peter Marcuse explain:

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173. See David B. Bryson, *The Role of Courts and a Right to Housing*, in *A RIGHT TO HOUSING* 193, *supra* note 91, at 197 (“[The warranty of habitability] does not go further and oblige the government to warrant that everyone will have habitable housing. . . . [The] right to habitable housing . . . does nothing . . . for people who are so poor that they cannot get a landlord to rent to them.”).

174. This Article focuses on rental housing occupied by tenants. Although beyond the scope of this piece, there are good arguments that owners who occupy their residences and cannot afford to repair them should not be required to do so. See Uzdavines, *supra* note 97, at 173–76 (describing enforcement against poor owner-occupants); Rosser, *supra* note 16, at 53–4 (describing code enforcement regarding construction of rural, owner-occupied units). Additionally, while destruction of “blighted” neighborhoods that results in the uprooting of poor communities is deeply problematic, the source of that problem is not an excess of enforcement so much as government intrusion untethered from the goals of the community. See *infra* Part III.B.2. For theoretical models that aim to evaluate when underenforcement is problematic and when it is productive, see Justin LaMort, *The Rich Get Richer and the Public Gets Punished: How Unenforced Regulations Perpetuate Inequality*, 4 *LOYOLA U. CHI. J. REG. COMPLIANCE* 101, 104 (forthcoming 2019) and Natapoff, *supra* note 23, at 1752.

175. See Desmond & Bell, *supra* note 15, at 21–22 (summarizing literature).

176. See *id.*

177. See, e.g., Todd S. Purdum, *Nobody Knows What to Do About L.A.'s Homelessness Crisis*, *THE ATLANTIC* (June 26, 2019), <https://www.theatlantic.com/politics/archive/2019/06/ls-growing-homelessness-crisis-isnt-2020-issue/592624> (describing national “homelessness crisis” and rising housing costs).

178. See Desmond & Bell, *supra* note 15, at 76 (summarizing literature under the heading “An Argument Without Evidence: Does Housing Code Enforcement Help or Harm the Poor?”).

179. See MADDEN & MARCUSE, *supra* note 39, at 121 (noting housing regulation in the United States dates back to colonial Williamsburg, Philadelphia, and Savannah).

[W]hile markets are imagined as self-organizing entities . . . the state has always been central to the process of making housing a commodity that can circulate through market exchange. The state cannot “get out” of housing markets because the state is one of the institutions that creates them. Government sets the rules of the game. It enforces the sanctity of contracts, establishes and defends regimes of property rights, and plays a central role in connecting the financial system to the bricks and mortar in which people dwell. In other words, housing markets are political all the way down. . . . The housing market is, among other things, a domain of struggle between different, unequal groups. Removing the regulations that rein in property owners shifts power towards capital and away from residents. . . . This is why it is the real estate that lobby campaigns to deregulate the housing system, a demand that tenants almost never make.<sup>180</sup>

If policymakers are concerned that enforcement of housing standards could result in rising rents, they can use their legislative powers to prevent the rise. Legislators may choose from a variety of options: pass rent control laws that set maximum rent increases,<sup>181</sup> issue subsidies that cover increases (resulting from maintenance costs or more generally),<sup>182</sup> or raise the minimum wage so tenants can cover increases themselves.<sup>183</sup> Governments also have the option of influencing the price of housing by increasing the supply. An infusion of high-quality public housing would undercut a rent increase in the private market.<sup>184</sup> Increasing the number of high-quality public housing units would also partially address the underlying social problem, by making available more safe and affordable housing.<sup>185</sup>

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180. *Id.* at 46–47. Although commentators often point to “deregulation” trends, Madden and Marcuse remind us that “deregulation has not meant . . . getting rid of regulations so much as rewriting them to make real estate a more liquid commodity.” *Id.* at 131; *see also id.* at 34 (describing revisions to real estate investment trusts, encouraging the “financialization” of housing).

181. *See, e.g.*, Conor Dougherty & Luis Ferré-Sadurní, *California Approves Statewide Rent Control to Ease Housing Crisis*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/business/economy/california-rent-control.html>; Feargus O’Sullivan, *Berlin Will Freeze Rents for Five Years*, CITYLAB (June 19, 2019), <https://www.citylab.com/equity/2019/06/berlin-rent-freeze-senate-vote-affordable-housing/592051/>; Sharon Otterman & Matthew Haag, *Rent Regulations in New York: How They’ll Affect Tenants and Landlords*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/rent-regulation-laws-new-york.html> (explaining rent control and rent stabilization in New York State).

182. J. Peter Byrne and Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 534–35 (2007) (“If society insists on minimum standards, it cannot escape the necessity of providing subsidies to meet the costs of such housing.”).

183. *See* Holder, *supra* note 103 (“Last year, the average worker making the federal wage minimum of \$7.25 per hour had to work 122 hours a week, every single week, to afford an average two-bedroom apartment. Now, they have to work nearly 127—an almost-impossible feat that would require working about three full-time jobs.”).

184. *See* MADDEN & MARCUSE, *supra* note 39, at 204–5.

185. It must be acknowledged that public housing can also be severely substandard, *see, e.g.*, BART M. SCHWARTZ, MONITOR’S FIRST QUARTERLY REPORTER FOR THE NEW YORK CITY HOUSING AUTHORITY 3–8 (2019), <https://newyork.cbslocal.com/wp-content/uploads/sites/14578484/2019/07/NYCHA-federal-monitors-first-quarterly-report.pdf> (describing federal monitoring of New York City Housing Authority conditions including mold, rats, lead paint, and lack of heat or hot water), but history shows that local governments have succeeded in providing high-quality public housing under the right political circumstances. *See* ALEX. F.

The argument that enforcement of tenants' right to safe housing will result in pricing tenants out of housing misses the forest for the trees. It rests on the assumption that it is better to have dangerous housing than no housing. Yet the "no housing" outcome is not predetermined. The enforcement of housing standards does not necessarily cause the affordable housing stock to shrink. Moreover, to the extent that policymakers want housing to remain available for poor people, they have the power to ensure that it does.

### III. THE ENFORCEMENT GAP

The right to safe housing is an established right for poor tenants.<sup>186</sup> Yet neither the private legal market nor the public sector enforces it. The reason is that the affected tenants are poor.

#### A. Market-Based Enforcement

As with other goods and services, market-based mechanisms supply parties with lawyers. While not as well-known as their non-profit counterparts, market-based lawyers, too, engage in public interest litigation.<sup>187</sup> Indeed, many of the attorneys who enforce civil rights statutes and consumer protections work at private, for-profit firms.<sup>188</sup> They rely on a combination of payment approaches,<sup>189</sup> including traditional client billing,<sup>190</sup> contingency fees,<sup>191</sup> and fee-shifting.<sup>192</sup>

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SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 163 (3d ed. 2015) ("[Although] public housing evokes many, mostly negative images in the popular imagination . . . these images do not portray the reality of most public housing developments."). The comparative advantages of publicly owned and managed housing versus public subsidies for private housing are beyond the scope of this Article, but it is important to recognize that—if high-quality affordable housing is a goal—any subsidies or tax benefits for private landlords must be accompanied by stringent housing standards and means of enforcing them. See Franzese et al., *supra* note 19, at 24, 27 (arguing that government actors should withhold subsidies from landlords to incentivize repairs).

186. See *supra* Part II.B.1.

187. See, e.g., ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 169–200 (2013); Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 183 (Robert Granfield & Lynn Mather eds., 2009); Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201 (Austin Sarat & Stuart Scheingold eds., 1996). Although law firms also provide volunteer-based "pro bono" services, this Article directs attention to market-based work, given the fundamental limits of pro bono. See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 116–23 (2004).

188. See Scott Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 3 (2012) (describing "the private public interest law firm, distinguished by a commitment to fuse profit and principle") (italics omitted); Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2094–96 (2004) (describing mass tort lawyers who represent injured plaintiffs); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 105–07, 111–12 (2011) (describing the market for private, for-profit lawyers who represent millions of clients in civil rights and consumer class actions); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1401–05 (1998) (comparing public and private civil rights enforcement).

189. See Cummings & Southworth, *supra* note 187, at 183, 196.

190. See *infra* Part III.A.1.

191. See *infra* Part III.A.2.

192. See *infra* Part III.A.3.

While not without flaws, the private market has brought significant resources and success to the enforcement of public rights.<sup>193</sup>

Although the private market addresses some areas of public rights, it rarely supports representation of poor tenants seeking to vindicate their right to safe housing. Poor tenants cannot pay lawyers to represent them at current market rates. Neither can they rely on alternative market mechanisms to attract lawyers, because the law underestimates the value of their cases and the work involved in representing them.

### 1. The Poor Can't Pay

The traditional rule in the United States is that each party in civil litigation pays its own costs, including those of retaining counsel.<sup>194</sup> Even some civil rights plaintiffs pay their counsel hourly rates plus upfront retainer fees.<sup>195</sup> Poor tenants cannot afford to retain counsel at market rates.<sup>196</sup> While cost is not the only factor that discourages them from seeking counsel, it can be independently prohibitive.<sup>197</sup> Compounding the problem, while tenants in substandard housing generally cannot purchase representation to enforce the laws that prohibit it, individuals who could afford to hire lawyers typically avoid such conditions.<sup>198</sup> As a result, the pay-to-play structure systematically neglects the enforcement of housing safety laws.

### 2. Class, Race, and Gender Biases Devalue Contingency Fees

The contingency fee is a common market mechanism for enforcement when victims are unable to pay lawyers upfront.<sup>199</sup> The lawyer collects the contingency fee only if successful, and it typically comes out of the client's winnings as one-

193. See Kathryn A. Sabbeth, *What's Money Got to Do With It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 482–87 (2014).

194. See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2130–37 (2000) (highlighting “unaided access” as a premise of the U.S. civil justice system). This is one of the major differences between civil and criminal justice, because criminal defendants facing incarceration are provided counsel at the expense of the state. See, e.g., Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 895 (2015).

195. See, e.g., Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Racial Disparities in Legal Representation for Employment Discrimination Plaintiffs*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 107, 118–19 (2016).

196. See Michael Zuckerman, *Is There Such Thing as an Affordable Lawyer?*, THE ATLANTIC (May 30, 2014), <https://www.theatlantic.com/business/archive/2014/05/is-there-such-a-thing-as-an-affordable-lawyer/371746> (describing tenants who faced substandard housing conditions but could not afford a lawyer); David C. Vladeck, In re Arons: *The Plight of the “Unrich” in Obtaining Legal Services*, in LEGAL ETHICS STORIES 255, 261, 284–86 (Deborah L. Rhode & David Luban eds., 2006) (highlighting middle-class families’ difficulty securing counsel). Sliding scales offered by “low-bono” lawyers have not generally been used for housing conditions cases, presumably because of the significant time investment they require. Cf. Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE RELIGION, GENDER & CLASS 1, 9–11 (2014) (describing low-bono alternative for routine, simple matters).

197. See Rebecca Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 352 (2008); Myrick, Nelson & Nielsen, *supra* note 195, at 115 (“Searching for a lawyer is a complicated and time-consuming process” that requires “social and material resources.”).

198. See *supra* Part II.A.2.

199. See HERBERT KRITZER, RISKS, REPUTATIONS, AND REWARDS 9 (2004) (defining contingency fees).

third of the monetary award.<sup>200</sup> Contingency arrangements supply lawyers in cases that have a reasonable probability of success and damages high enough to make the pursuit worthwhile when factoring in the time and expenses of the litigation.<sup>201</sup> The obstacle for housing safety enforcement is that it is not a good financial investment.

Obtaining and enforcing a judicial order to conduct repairs requires time and tenacity. Landlords regularly obfuscate and delay, often with judicial support.<sup>202</sup> Getting the court to hold a hearing may require numerous appearances, and once successful in obtaining an order, the lawyer may need to engage in significant motion practice before the owner complies.<sup>203</sup>

The contingency fee provides little compensation for this work. Lawyers consider the likely time investment when setting the fee, but the fee structure is generally independent of hours actually expended. Contingency fees turn on monetary damages. This dependence on monetary damages creates a fundamental problem for contingency fees as a means for enforcement of poor tenants' rights.<sup>204</sup>

Although people living in substandard conditions experience significant harm, the legal system fails to translate that harm into monetary relief.<sup>205</sup> As the following sections will explain, courts calculate damages using methods that fail to measure accurately the injuries that poor people suffer. Specifically, the law of torts and contracts incorporates biases of class, race, and gender that depress poor tenants' awards. In this sense, the law both undervalues and devalues poor people's claims.

#### a. Rent Abatements Are Proportional to Class and Undervalue Home as a Place to Live

The most common monetary remedy for a violation of the warranty of habitability is a rent abatement.<sup>206</sup> This is a retroactive or prospective rent reduction for any period when the premises are substandard.<sup>207</sup> Abatements are

200. *See id.* at 9–10, 44.

201. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270–71 (1998).

202. *See* Summers, *supra* note 19, at 50 (documenting repeated court appearances by which time conditions had not been remedied); Cotton, *supra* note 19, at 68–71 (explaining that substandard conditions “failed to inspire a sense of urgency” for judges).

203. *Cf.* Summers, *supra* note 19, at 50 (showing that landlords failed to conduct repairs, in violation of court-ordered settlements, in almost seventy-five percent of the cases for which data was available).

204. Technically, a contingency fee agreement is any in which the fee depends on the result, but the common conception is one in which the fee comes out of the client's monetary award. *See* KRITZER, *supra* note 199.

205. Personal injury cases with severe injuries and clear documentary evidence of specific causation can result in larger damage awards. In substandard housing conditions cases, these are the rare exception and do not provide a solution to the common underenforcement of tenants' rights.

206. *See, e.g.,* Summers *supra* note 19, at 19–22 (summarizing literature); 5 THOMPSON ON REAL PROPERTY § 41.06(a)(6)(iii) (David A. Thomas ed., 2d ed. 2015) (“If it is determined that the landlord has breached the implied warranty of habitability, the result will be a judicially approved reduction, or abatement, of the tenant's rental obligation. In most situations, this will probably be the most important remedial option available to a tenant.”).

207. *See, e.g.,* ANDREW SCHERER & HON. FERN FISCHER, RESIDENTIAL LANDLORD-TENANT LAW IN N.Y. § 12:104 (2018) (“Lack of heat and hot water is probably the archetypical violation of the warranty

typically calculated based on the difference between the fair market value of the premises as warranted and the fair market value of the premises in their substandard condition.<sup>208</sup>

The rent abatement method for calculating damages reduces the likelihood of a poor tenant possessing a claim with a high dollar value, because it produces awards that are roughly proportional to class status. People generally live in the most desirable space they can afford, and poor people generally live in homes with relatively low rents compared to people who can afford more. Because the rent abatement calculation is derivative of the tenant's monthly rent, it incorporates class as a factor in the award.

The rent abatement method, as currently calculated, is particularly ill-suited to address severely substandard conditions. The absence of a functioning bathroom or safe sleeping quarters dramatically decreases the utility of a residence, and dangers posed by mold, lead paint, or fire hazards might bring that utility down to a negative figure, as no one would willingly expose their children and themselves to such risks.<sup>209</sup> Yet courts are extremely reluctant to find a fair market value of zero, let alone a negative number. They conclude that tenants benefitted from the living arrangement or would not have chosen to remain. Even in the most serious situations, courts discount the rent by less than half.<sup>210</sup> Their judgments fail to acknowledge that staying does not indicate a lack of suffering, only the absence of alternatives.<sup>211</sup>

In this way, analyzing housing as a contracted-for commodity fails to capture the reality of housing as a place to live.<sup>212</sup> A safe and secure home may actually be more important for a poor tenant than a wealthier one, given the difference in their ability to find a replacement, but the current approach of assessing contract damages seems to assume the reverse.

Remedies for a breach of the warranty of habitability can include consequential damages, such as compensation for damaged possessions. Judges ruling on housing conditions cases, however, often decide that significant damages

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of habitability, and can, if properly proven, result in abatements of 50% of the rent or more for periods that they are not provided.”).

208. See Lonegrass, *supra* note 13, at 431.

209. See *id.* (“[A] tenant rents a dwelling for shelter, not profit, and [the] tenant’s losses, in discomfort and worry over dangers, are intangible.”) (quoting MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* § 10.101 (4th ed. 1997)).

210. See Franzese et al., *supra* note 19, at 24 (describing 50% abatement as best case scenario, available only with good legal representation); Cotton, *supra* note 19, at 72 (“[M]onetary relief . . . was usually small, with the landlord generally receiving 75% of the lease rental amount or more.”); *id.* at 73 (“Even where evidence actually indicated that the premises were unfit for human habitation, judges tended to think that the landlord still ought to get most of the rental amount set forth in the lease.”); *id.* at 74–75 (describing hearing at which judge threatened landlord with ruling that landlord was not entitled to any rent, yet judge decided to award landlord 70% of the lease rent).

211. See *supra* Part II.A.2 (describing why people stay).

212. See MADDEN & MARCUSE, *supra* note 39, at 17–18 (“Commodification is the name for the general process by which the economic value of a thing comes to dominate its other uses. . . . Our economic system is predicated on the idea that there is no conflict between the economic-value form of housing and its lived form. But across the world, we see people who exploit dwelling space for profit coming into conflict with those who seek to use housing as their home.”).

beyond rent abatement are appropriate only for a case in tort.<sup>213</sup> Yet poor tenants' claims are devalued under tort law as well.

#### b. Tort Damages Skew Low for Poor Tenants

Under the common law of torts, both economic and non-economic damage calculations are proportional to class status. Economic damages skew low for poor people for at least three reasons. First, poor tenants' possessions hold minimal market value. A common consequence of substandard housing conditions is the destruction of furniture, linens, clothing, toys, and other personal property, but, despite the personal disruption and difficulty of obtaining replacement items, if the items carry little market value, the economic damages will be minimal. Particularly for major items like furniture, poor people often make purchases in installments,<sup>214</sup> which means they might not own the item and therefore will not be entitled to full reimbursement at the time of damage. Additionally, for possessions tenants do own, the market value of those possessions will have diminished between the time of purchase and the time of damage. The tenant will be entitled to recovery based on the market value of the used item, at the time of damage, regardless of what it would cost to obtain a replacement.<sup>215</sup> Overall, when courts recognize that recovery for destroyed possessions is appropriate, the amount of recovery tends to be small.

Second, major categories of economic damages are tied directly to social position. This is particularly clear with respect to lost wages and estimates of lost future income. The former comes into play when tenants miss work due to physical injuries or waiting for repair personnel. The lost wages of a low-income tenant will necessarily be lower than those of a person with a higher income. In other words, for the same amount of time, the market value of the loss when a low-income individual misses work is lower than that of a higher earner's absence.<sup>216</sup>

Estimates of lost future income capacity also incorporate biases of class, race, and gender. As discussed in Part II, substandard conditions can result in physical, psychological, and cognitive harms with long-term implications for reduced capabilities. In tort law, calculations for loss of future earning capacity depend on predictions of future annual income and the number of remaining years a person would have worked. Annual income predictions reflect prior earnings, educational background, and, for children with little history of their own, the earnings and

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213. See Lonegrass, *supra* note 13, at 431–33 (critiquing courts' rigid categorization of substandard housing claims as based in contracts or torts).

214. See, e.g., Amber Brooks, "Bad Credit" Furniture Financing: 14 Top Options, BADCREDIT.ORG (Oct. 26, 2018), <https://www.badcredit.org/bad-credit-furniture-financing>.

215. See Brie Dyas, *An Open Letter to Everyone Selling Furniture on Craigslist*, HUFFINGTON POST (Dec. 7, 2017), [https://www.huffpost.com/entry/open-letter-to-craigslist\\_b\\_2994760](https://www.huffpost.com/entry/open-letter-to-craigslist_b_2994760) ("You know how they say that a new car loses half its value when you drive it off the lot? It's worse for furniture.").

216. Tenants who do not work in the formal economy face additional hurdles to establishing lost income and loss of future earning potential. See Gilman & Green, *supra* note 65, at 269. Some are unemployed or not fully employed due to a disability, childcare obligations, or the absence of jobs in the local economy. Others are excluded from formal employment opportunities because of immigration status or a criminal conviction. If tenants perform work in an informal economy, they may miss work as a result of their housing conditions, but they will be unable to demonstrate it, either because of a lack of documentation or because such documentation could expose them to liability.

education of their parents.<sup>217</sup> Poor tenants' class position therefore depresses their economic damage awards.

For families headed by women of color, which families in substandard conditions disproportionately are, the award is further reduced by race-specific and gender-specific income predictions. For years, defense attorneys have presented evidence limiting earnings predictions based on the victims' race or gender.<sup>218</sup> These calculations incorporate assumptions that, for instance, African Americans' lives are shorter than whites', women work fewer years than men, or disadvantaged groups receive reduced wages due to discrimination.<sup>219</sup> In spite of critiques of such calculations,<sup>220</sup> many courts still permit their use, resulting in depressed awards.<sup>221</sup>

The third and perhaps most fundamental reason that economic damages for poor tenants run low is that poor people do not possess excess funds to expend and later recoup. The law governing economic damages contemplates a victim who can alleviate her own suffering with fungible resources that can later be replenished, but this does not describe most victims of substandard conditions, who are poor. If most law professors were to find themselves facing dangerous conditions in a rental, they would quickly: move to a hotel or other temporary lodging; take meals in restaurants while without cooking facilities during the transition; and obtain medical care or consultations they deemed necessary to evaluate and treat their and their children's mental and physical conditions. They would likely save receipts from purchases of food, transportation, living accommodations, medical services, and other expenditures. Yet a person without the cash or credit to cover these costs upfront might not make these purchases.<sup>222</sup> Poor people already struggling to make ends meet will often do everything they can to avoid financial expenditures, including foregoing moves and medical care.<sup>223</sup>

Poor tenants are unlikely to accumulate significant economic costs because they cannot bear the weight. The absence of economic costs does not mean that the residents did not suffer but that they were unable to purchase relief from their suffering. Poor people lack the extra financial resources that allow the hypothetical

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217. See CHAMALLAS & WRIGGINS, *supra* note 76, at 158–60.

218. *Id.* at 158–170.

219. *Id.*

220. Critics highlight that such calculations incorporate historical patterns of discrimination, discount the possibility of social progress, and potentially violate the Equal Protection and Due Process clauses of the U.S. Constitution. See *id.* at 166.

221. See Paul Bland, *The Lives of Women and People of Color are Devalued in Our Civil Justice System. Let's Change That.*, DAILY KOS (May 25, 2019), [https://www.dailykos.com/stories/2019/5/25/1860169/-The-Lives-of-Women-and-People-of-Color-are-Devalued-in-Our-Civil-Justice-System-Let-s-Change-That?\\_t=2019-05-25T10:57:33.956-07:00](https://www.dailykos.com/stories/2019/5/25/1860169/-The-Lives-of-Women-and-People-of-Color-are-Devalued-in-Our-Civil-Justice-System-Let-s-Change-That?_t=2019-05-25T10:57:33.956-07:00) (describing advocacy in response to recent case in which damages for boy damaged by lead paint were limited by race-specific earnings predictions).

222. In this author's experience representing clients, tenants in substandard housing have purchased allergy medication but avoided larger medical expenses to the extent possible. One tenant lived with severe mold that caused respiratory damage, but, even during a medical emergency, he refused to board an ambulance a friend had called on his behalf because he feared the bill that would follow.

223. See Corrine Lewis et al., *Listening to Low-Income Patients: Obstacles to the Care We Need, When We Need It*, COMMONWEALTH FUND (Dec. 1, 2017), <https://www.commonwealthfund.org/blog/2017/listening-low-income-patients-obstacles-care-we-need-when-we-need-it> (describing financial and other reasons poor people forgo medical care).

tort victim to respond to the situation with an expenditure of funds. As a result, they cannot translate their suffering into economic damages.<sup>224</sup>

### c. Non-Economic Damages Compound Inequality

The most serious harms of living day in and day out in substandard conditions may be non-economic: anxiety, depression, physical pain, and other forms of suffering.<sup>225</sup> Bear in mind that economic or non-economic harms can result from either physical or emotional injuries. For example, while a burn from a fire could lead to economic damages like medical expenses or lost income, it could also *or instead* lead to non-economic damages like pain or suffering. For comparison, the emotional distress a parent might experience due to seeing her child in anguish is an emotional injury, which could lead to economic or non-economic categories of damages, or both.<sup>226</sup> Despite the various ways the law attempts to acknowledge injuries and make victims whole, assessments of non-economic damages fail to capture the harms experienced by tenants living in substandard conditions.

Calculations of non-economic damages underestimate harms by exacerbating biases of race, gender, and class. A growing literature has demonstrated that the pain of women, and specifically Black women, is routinely minimized.<sup>227</sup> Even more troubling than the biases of jurors are those of medical professionals<sup>228</sup> entrusted to provide the expert testimony that shapes how courts interpret injuries and suffering.

The calculation of non-economic damages incorporates further biases by repeating the problems of the economic damage assessments. An important phenomenon that has received little attention is the direct correlation between economic and non-economic damage amounts. Lawyers commonly evaluate non-economic damages using a multiplier of economic damages.<sup>229</sup> They assign to a

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224. In addition to reducing the economic damage award, a tenant's failure to mitigate harm can, in some jurisdictions, preclude claims altogether. Contributory negligence rules in some states will prevent plaintiffs from seeking compensation if they are found to have contributed to the problem. In a case of substandard conditions, the landlord may claim that, if the tenant stayed in dangerous conditions, they were contributorily negligent and not entitled to compensation. This rule disproportionately cuts off the claims of poor tenants, many of whom cannot relocate unless they accept homelessness.

221. See *supra* Part II.A.1.

226. CHAMALLAS & WRIGGINS, *supra* note 76, at 172.

227. See Camille Noe Pagán, *When Doctors Downplay Women's Health Concerns*, N.Y. TIMES (May 3, 2018), <https://www.nytimes.com/2018/05/03/well/live/when-doctors-downplay-womens-health-concerns.html>; Vanessa Fabien, *My Body, My Pain: Listen to Me and All Black Women*, THE ROOT (April 16, 2017), <https://www.theroot.com/my-body-my-pain-listen-to-me-and-all-black-women-1794332651>; Kelly M. Hoffman, et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs about Biological Differences between Blacks and Whites*, 113 PROC. NAT'L ACAD. SCI. 4296, 4296–97 (2016) (collecting literature).

228. See sources cited *supra* note 227.

229. See, e.g., Mary E. Alexander & Robert E. Cartwright, Jr., 4 LITIGATING TORT CASES § 44:29 (2019) (describing the “multiplier” method); David Goguen, *Two Ways to Calculate a Pain and Suffering Settlement*, NOLO, <https://www.alllaw.com/articles/nolo/personal-injury/two-ways-calculate-pain-suffering-settlement.html> (“The most common approach is to add up all the special damages (remember, those are your more easily calculable economic losses) and multiply those by a number between 1.5 on the low end, and 4 or 5 on the high end.”); David Bressman, *Pain and Suffering Calculator: How to Determine the Value of Your Claim's Noneconomic Damages*, BRESSMANLAW (Mar. 3, 2016), <https://www.bressmanlaw.com/blog/pain-and-suffering-calculator-how-to-determine-the-value-of-your-claims-noneconomic-damages> (“One of the most

victim's pain or suffering a numerical value, typically between one and five, and then multiply the economic damages by that figure.<sup>230</sup> It is difficult to imagine a perfect method for translating physical and emotional suffering into monetary damages, but this particular approach builds in a bias against people whose harms are already devalued by the market.<sup>231</sup> It exacerbates the legal system's recognition of the economic value of a person as the primary indicator of their value overall.<sup>232</sup> This method magnifies the flaws in the economic damages calculation, resulting in the further devaluation of poor tenants' claims.

Finally, for one of the same reasons that poor people accumulate minimal economic damages—they possess few excess financial resources and so can spend little on addressing their harms—they face obstacles to proving non-economic damages. Efforts to avoid accumulation of expenses result in an absence of accumulated evidence. As an example, if poor people avoid medical treatment because of the cost, there will be no corresponding economic damages. While this contributes to the difficulty of attracting market-based lawyers to the cases. The way this plays out in connection with non-economic damages is even more concerning: families do experience the non-economic harm—they suffer from serious medical problems—but lack the proof, because they never got treated. Medical records can show injuries,<sup>233</sup> and treating practitioners can serve as witnesses to explain them,<sup>234</sup> but if a tenant is prohibited by cost from seeking treatment, no such evidence will exist.<sup>235</sup>

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popular ways of determining a fair settlement award for noneconomic damages is the multiplier method. This method multiplies your total number of economic damages by a number (multiplier, between 1.5 and five.”). In some states, damage caps limit the amount of permissible non-economic damages to a multiple of the economic damages. *See, e.g.,* Greg Pogarsky & Linda Babcock, *Damages Caps, Motivated Anchoring, and Bargaining Impasse*, 30 J. LEGAL STUD. 143, 144 n. 2 (2001) (“The formula for deriving the cap amount also varies, with some states limiting damages to a specified dollar amount and others employing a ‘multiplier,’ which limits punitive or noneconomic damages to some multiple (usually two to four) of the compensatory damages awarded.”).

230. *See supra* note 229.

231. Although not as common as the “multiplier” method, another calculation approach is the “per diem” or “daily rate” method, which assigns a dollar value to each day of suffering and multiplies that amount by the number of days the person suffered. *See* Alexander & Cartwright, *supra* note 229 (describing the per diem method and noting it is not permitted in all jurisdictions); Goguen, *supra* note 229 (describing the daily rate approach as more difficult because “justifying the daily rate you use” is “slippery”); Bressman, *supra* note 229 (describing the per diem method). Unfortunately, depending how it is used, this method can incorporate the same biases as the multiplier method. Some attorneys use the person's daily wage as the daily rate of suffering. *See, e.g.,* Goguen, *supra* note 229 (“A good way to make sure your daily rate is ‘reasonable’ is to use your actual, daily earnings. The argument here is that having to deal with the pain caused by your injuries every day is at least comparable to the effort of going to work each day.”). This necessarily devalues the pain of people with low wages.

232. *See* MADDEN & MARCUSE, *supra* note 39, at 17 (describing phenomenon of “commodification”); *see also* David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77 L. & CONTEMPORARY PROBLEMS 1–2 (2015) (noting neoliberalism's “recurring claims” in “the ongoing contest between the imperatives of market economies and nonmarket values grounded in the requirements of democratic legitimacy”).

233. *See* 78 AM. JUR. *Trials* § 559 (2019) (“The medical record is essential in assessing and proving damages and in showing pain and suffering. . .”).

234. *See* 32 C.J.S. *Evidence* § 863 (2019) (describing treating physicians as hybrid fact-expert witnesses).

235. These evidentiary problems can undermine liability as well as damages. *See* AM. JUR., *supra* note 233 (“The medical record. . . is often a vital part of the medical evidence necessary to prove causation and the extent of disease or injury. . .”).

That poor people receive relatively low awards, even when they experience severe suffering, is troubling from both a moral and a practical perspective. Devaluing the suffering of poor individuals raises serious questions related to equality of dignity and personhood. On a practical level, such devaluation exacerbates the challenges poor people face in accessing legal representation in the private market.

### 3. Fee-Shifting Falters

An important market mechanism designed to enforce laws on behalf of clients whose cases do not generate significant contingency fees is the fee-shifting statute.<sup>236</sup> In select areas of public interest law, legislatures have included fee-shifting provisions that permit “prevailing plaintiffs” to recover their attorneys’ fees, as a supplement to other relief, from defendants.<sup>237</sup> Statutes with fee-shifting provisions span a variety of subjects, from civil rights and workers’ rights to environmental protection and freedom of information.<sup>238</sup>

The consumer protection and fair housing statutes discussed earlier include such provisions,<sup>239</sup> but fee-shifting is underutilized in the enforcement of housing standards.<sup>240</sup> The absence of litigation in this area is particularly telling with respect to violations of the warranty of habitability. With the assistance of counsel, establishing substandard conditions and notice to the landlord should be relatively easy. While the damages under current doctrine may be low, the likelihood of “prevailing” on liability should be extremely high, and recovery of fees should therefore be virtually certain.

What explains the absence of housing standards enforcement funded by fee-shifting? One possible explanation is that consumer protections and fair housing claims are not widely available. State consumer protection statutes vary, and the applicability of federal consumer law to substandard rental housing is underdeveloped.<sup>241</sup> The fair housing requirements of the federal FHA are uniform, but not all substandard housing involves discrimination on the basis of a protected characteristic.<sup>242</sup> White lawyers might also minimize the availability of FHA claims due to a tendency to find race-neutral explanations for conduct.<sup>243</sup> Once

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236. See Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 309–10 (1990).

237. See Sabbeth, *supra* note 193, at 465–68.

238. See *Marek v. Chesny*, 473 U.S. 1, app. at 43–51 (1985) (Brennan, J., dissenting) (listing fee-shifting statutes).

239. See 42 U.S.C. §§ 3613(c)(2), 12205 (2012); *supra* pp. 116–18.

240. Because the subject has received inadequate attention, there is no empirical evidence on this point. A Westlaw search in July 2019 identified only twenty-six cases brought by tenants raising FHA claims related to substandard conditions, and in only ten of those cases were the tenants represented by counsel. Cf. *Complaint, Nat’l Fair Hous. All. v. F’dl Nat’l Mortg. Ass’n*, 3:16-cv-06969 (N.D. Cal. Dec. 5, 2016) (alleging Fannie Mae violated the FHA in failing to maintain foreclosed properties in Black and Latinx neighborhoods, while maintaining properties in white neighborhoods), <https://nationalfairhousing.org/wp-content/uploads/2017/04/Lawsuit-Against-Fannie-Mae.pdf>.

241. See *supra* notes 151, 152 and accompanying text.

242. 42 U.S.C. § 3604(b) (1988).

243. See Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2091–93 (2005) (“The professional ideal that lawyers and law should be neutral

recognized, discrimination can still be difficult to prove, which can lessen its attractiveness to attorneys relying on a fee-shifting provision that depends on prevailing.<sup>244</sup>

The skittishness about funding work through fee-shifting might also reflect concerns about courts' willingness to award reasonable fees. Evidence reveals judicial skepticism that public interest lawyers, particularly lawyers representing poor people with low-value cases,<sup>245</sup> deserve to be paid.<sup>246</sup> In recent decades, the U.S. Supreme Court has made this clear. First, the Supreme Court has permitted defense attorneys to make "sacrifice offers" that require plaintiffs' counsel to give up attorneys' fees in exchange for getting injunctive or monetary relief for their clients.<sup>247</sup> This has resulted in lawyers resorting to contingency fee options in their retainers to avoid walking away with nothing.<sup>248</sup> Unfortunately, this means neither the client nor the lawyer receives the full amount to which they are entitled, and it fails as an enforcement mechanism when the monetary damages are too low for the contingency arrangement to be sufficient. Second, the Supreme Court has applied a cramped interpretation to the definition of a "prevailing" party: even if a lawsuit is the catalyst that causes a defendant to change its conduct, no fees will be paid to the plaintiff's attorney unless the change resulted from a court order.<sup>249</sup> Third, Supreme Court decisions have interpreted the market value of attorneys' fees under fee-shifting statutes in ways that keep them relatively low,<sup>250</sup> making enforcement under such statutes increasingly infeasible.<sup>251</sup>

### B. Public Enforcement

In light of the many challenges for market-based enforcement of poor tenants' rights, public enforcement offers distinct advantages. First and foremost, public actors function largely independent of the market.<sup>252</sup> As the above analysis demonstrates, market-based enforcement mechanisms do not address poor tenants' right to safe housing. While many areas of public interest litigation—from classic

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provides support for preferring a race-neutral strategy if readily available . . . [and] supports the tendency of whites to avoid confronting racial issues.").

244. See Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. REV. 587, 602–08 (2019) (describing difficulty of establishing housing discrimination).

245. See *supra* Part III.A.2 (explaining why poor tenants' cases are deemed to hold little value).

246. See Sabbeth, *supra* note 193, at 491–92 (highlighting Supreme Court's resistance to the notion that public interest lawyers should earn market rates).

247. See *Evans v. Jeff D.*, 475 U.S. 717, 729–30, 742–43 (1986).

248. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 114–15.

249. See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087, 1099–1104 (2007) (explaining the decision).

250. See, e.g., *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 483 U.S. 711, 734 (1987) (restricting the availability of risk enhancements in the calculation of fees).

251. See *id.* at 735–36 (Blackmun, J., dissenting); see also Albiston & Nielsen, *supra* note 249, at 1121–23, 1129 (providing empirical evidence that the Court's interpretation of fee-shifting statutes has limited lawyers' ability to pursue public interest litigation).

252. The market does affect government enforcement indirectly, to the extent that agency resources depend on a tax base, which, in turn, reflects the local economy. The governments of New York City and San Francisco, which have created a statutory right to eviction defense lawyers, have been able to do so in part because of the wealth in those cities.

civil rights to environmental justice and numerous other subjects—may not be as robustly supported by the market as some might hope, the rights of poor people are systematically deprived of market support.<sup>253</sup> Although the law recognizes poor tenants' right to safe housing, it does not fully recognize their injuries. It fails to translate poor people's suffering into economic terms. The absence of an economic translation of the harm makes the claims of poor people unattractive to market-driven lawyers. In other words, the market for lawyers, as currently constituted, devalues the importance of poor people's legal claims. As a result, mechanisms independent from the market are crucial to addressing violations of law against poor people. Government actors carry this promise.

More specifically, government actors are likely to pursue forms of relief that market actors neglect. Because of their freedom to define success independent of monetary damages, government actors may be more likely to pursue injunctions. While contingency fee lawyers receive little reward for time spent on obtaining and enforcing orders to correct substandard housing, the salaries of government attorneys are disconnected from individual cases.<sup>254</sup> Government lawyers need not maximize monetary awards or face financial pressure to move on to the next case. Instead, their offices may celebrate and promote those who win injunctive relief or change industry practices.<sup>255</sup>

Government actors also benefit from statutory authority that allows them to utilize different theories of recovery and pursue broad relief with the potential for significant deterrent effect.<sup>256</sup> They can often pursue litigation even if individuals lack standing.<sup>257</sup> If a landlord repeatedly fails to address a home in significant disrepair, a court may impose a lien or even order government seizure of the property.<sup>258</sup>

Government actors may be especially capable of handling their subject matter. Public agencies operate as specialized, long-term, "repeat players."<sup>259</sup> That status gives them expertise with respect to both the substance of the docket and strategy in the fora. If cases continue over multiple years, with battles against landlords who drag their feet about compliance, government lawyers may be more prepared than market-based counsel to stay the course and ensure that any loose ends get tied up properly.

In spite of these advantages, government agencies have failed to fill the enforcement gap for poor tenants living in unsafe housing. This is for at least two reasons. The first is a matter of political will that can potentially shift at the right

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253. See *supra* Part III.A (explaining why market-based enforcement systematically neglects poor tenants).

254. See CHEN & CUMMINGS, *supra* note 187, at 154.

255. See Selmi, *supra* note 188, at 1422; but see Margaret H. Lemos & Max Minzner, *For-Profit Enforcement*, 127 HARV. L. REV. 854 (2014) (suggesting motives influence state and federal agencies in litigation involving huge sums).

256. See Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 454–55 (2007).

257. In some jurisdictions, tenants who move out may lack standing to pursue injunctive relief (assuming they still have the incentive).

258. See *supra* notes 129–131 and accompanying text.

259. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 107–14 (1974).

historical moment.<sup>260</sup> The second is fundamental to the operation of government litigation and requires a structural solution.

### 1. Agency Underenforcement

In many municipalities or counties, a local government agency carries the responsibility of enforcing minimum housing codes but has failed to do so.<sup>261</sup> Agency officials are known to be stretched too thin to perform well.<sup>262</sup> The common view is that agencies' enforcement failures result from insufficient funding and agency culture.<sup>263</sup> While this description may be accurate on its terms, deeper critique is needed to unearth the source of the problem. Agency failure is not a bug, but rather a feature, of the political system in which it operates.<sup>264</sup>

The underenforcement of housing standards is a classic case of "underenforcement"<sup>265</sup> on behalf of communities that have not been a political priority.<sup>266</sup> As Alexandra Natapoff has highlighted, poor people do not enjoy law enforcement resources in proportion to their numbers in the population.<sup>267</sup> At the same time that poor people of color are disproportionately targeted by criminal law enforcement, the harms they experience receive inadequate attention.<sup>268</sup> Underenforcement is "a form of social disinvestment"<sup>269</sup> that results from a lack of political power combined with judgments about "how much disorder, decay, and underenforcement poor communities should be required to tolerate."<sup>270</sup>

For a government to fund its housing safety agencies insufficiently is to make a distributive decision and a political choice.<sup>271</sup> This act deprives one sector of the public of support and, intentionally or unintentionally, allows another sector to exact profits through flagrant violations of law.<sup>272</sup> Even without favoritism toward

260. See Waterstone, *supra* note 256, at 451-52 (arguing that funding is flexible and may respond to public demand).

261. See, e.g., Uzdevines, *supra* note 97, at 161 ("The local code enforcement department lacks the resources, manpower, and strategic plan to deal with blight on a massive scale.").

262. See *id.* at 173 (highlighting the practice of addressing superficial conditions while ignoring serious dangers, because the former are easier to resolve).

263. See *id.*; Ackerman, *supra* note 16, at 1093-94; see also Waterstone, *supra* note 256, at 436 ("[E]xisting academic accounts tend to treat public enforcement as chronically ineffective and incapable of improvement.").

264. See Robert A. Kagan, *Regulatory Enforcement*, in HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 383, 391 (David H. Rosenbloom & Richard D. Schwartz eds., 1994) (describing theory of "political environment" determining enforcement approach).

265. See Natapoff, *supra* note 23, *passim*.

266. *Id.*

267. *Id.* at 1723.

268. *Id.* Natapoff argues that policing is special, but her insights apply also to civil enforcement. *Cf. id.* at 1768 (acknowledging that the Supreme Court interprets policing to be a "public service like health care, trash collection, or housing" but arguing the Supreme Court got it wrong and policing is different).

269. *Id.* at 1730.

270. *Id.*

271. See Natapoff, *supra* note 23, at 1729-30. If that decision results in a racially disparate impact (or is intentionally based on race), it could potentially give rise to FHA claims against the municipality. See Anthony Alfieri, *Poor, Black, and Gone: Civil Rights Law's Inner City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629, 669 (2019) (describing FHA challenge to city's enforcement policy).

272. See DESMOND, *supra* note 11, at 250 ("Urban landlords quickly realized that piles of money could be made by creating slums."); *id.* at 308 ("The annual income of perhaps the worst trailer park in the fourth-poorest city in America is 30 times that of his tenants working full-time for minimum wages and 55

the offenders, indifference leads to systematic underenforcement of laws protecting communities perceived as politically weak.<sup>273</sup> Poor tenants have historically lacked political power,<sup>274</sup> and, as a result, housing code enforcement agencies have been starved of funds.

State and federal actors equipped with more resources could pursue certain categories of housing conditions enforcement, but, perhaps for the same reasons that the local agencies are under-resourced, the better-funded government units have devoted relatively little attention to the concerns of poor tenants.<sup>275</sup> Agencies responsible for consumer protection and civil rights could take on substandard conditions cases that violate consumer protection or antidiscrimination statutes.<sup>276</sup> Yet they rarely do. In particular, consumer protection agencies and the consumer fraud bureaus of attorneys general have not generally recognized tenants as among the consumers they are tasked with protecting.<sup>277</sup> Although federal and state enforcement could make a significant impact on the real estate industry, the concerns of poor tenants have not been their priority.<sup>278</sup>

## 2. Tenants are Not Clients

Even with positive improvements, agencies could not provide a full substitute for private counsel. The fundamental problem with government enforcement is that government lawyers do not represent individual tenants. Government agencies represent the government entity or the people at large.

### a. No Client Autonomy

Government lawyers do not take direction from tenants as clients. Tenants do not define the substantive outcomes to be pursued, whether and for what to settle, or any other aspect of the enforcement. The people victimized by the violations of law function only as third-party beneficiaries, not primary agents, of the action. Tenants are not parties and might not even be called as witnesses.<sup>279</sup> Litigation can proceed without them, as inspectors can document the conditions, and, in fact, the seemingly neutral inspectors' testimony is likely to be trusted more than that of tenants.<sup>280</sup> One might argue that the government's ability to proceed with litigation

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times the annual income of his tenants receiving welfare or SSI."); *id.* at 175–76 (describing income gap between landlords and tenants).

273. Natapoff, *supra* note 23, at 1746.

274. See Julie Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 632 (2008).

275. See Sirota, *supra* note 152, at 8–9 (documenting that consumer protection offices neglect tenants, in comparison with homeowners and other consumers, and seeking to explain the disparity). A Westlaw search also reveals remarkably few conditions-related FHA cases by the U.S. Department of Justice. *Cf.* *United States v. Cochran*, 39 F. Supp. 3d 719 (E.D.N.C. 2014).

276. See *supra* p. 118.

277. See Sirota, *supra* note 152, at 6.

278. *But see infra* note 336 (highlighting exceptions).

279. An affected individual may seek to intervene but would presumably need a lawyer to understand how to do so. This begs the question of how to provide such lawyers.

280. See also Steinberg, *supra* note 19, at 1060 (describing high rate of rulings in favor of tenants when inspectors confirmed substandard conditions).

absent tenant participation makes enforcement more efficient. Yet in so doing, it squeezes out the tenants' voices and control.

Even if a government lawyer sought to empower affected tenants, the structure of the representation poses a challenge. Government actors are charged with serving the broader public good and generally lack the authority to pursue claims and obtain relief for individuals. Academic literature has explored this in the criminal context, where victims and complainants are sometimes surprised to discover that prosecutors' goals diverge from their own.<sup>281</sup> When a conflict arises between a prosecutor's understanding of justice for the public and the goals of a victim, the prosecutor's ethical obligations require prioritizing the public interest.<sup>282</sup> A similar dynamic exists in areas of civil enforcement.

If agency lawyers were charged with seeking relief for individual tenants, this could create ethical tensions between the lawyers' obligations to those tenants and to the goals of the broader public as defined by the agency's mission. For example, a landlord might make a settlement offer that includes improvements to a property in exchange for paying lower monetary damages. If the agency's goal is to cure a neighborhood of unsafe housing, the lawyer must push for the broad repairs, even if this leaves the tenants' monetary goals shortchanged. The lawyers might feel compelled to sacrifice individuals' interests on behalf of the goals of the agency.

This problem has already arisen in the context of the FHA, one of the few statutes that charges government actors with simultaneous obligations to the public and to individual victims. The FHA charges U.S. Department of Justice (DOJ) attorneys with seeking monetary relief for victims of housing discrimination, alongside broader injunctive relief and civil penalties. Unfortunately, the triangular relationship between the DOJ attorney, the individual, and the public "client" creates ethical difficulties,<sup>283</sup> which the lawyers generally resolve against the individuals.<sup>284</sup>

## b. Relief Tenants Don't Want

One of the concrete implications of tenants not controlling enforcement activity is that government agencies may pursue avenues that contradict tenants' wishes. An agency might pursue a vacancy order and demolition of a property, forcing tenants from their homes when they would prefer an approach that allows them to stay.<sup>285</sup> Many municipal efforts to counter "blight" have resulted in the displacement of residents of color without regard for the impact of uprooting

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281. See, e.g., Paul Butler, *How Can You Prosecute Those People?*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 15, 20–21 (Abbe Smith & Monroe H. Freedman eds., 2013).

282. See MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

283. See Gaetke & Schwemm, *supra* note 58, at 339–40, 340 n.78.

284. *Id.*

285. See, e.g., Alfieri, *supra* note 271, at 633 (identifying such orders as part of a broad pattern of "displacement," which he defines as "the involuntary removal of tenants and homeowners caused by evictions and foreclosures, building condemnations and demolitions, and government slum clearance and urban renewal or revitalization"); *id.* at 659 (describing condemnation and demolition as "mass eviction"); *id.* at 661–62 (describing tenants' reluctance to leave their neighborhood despite "a continuing cycle of building condemnation and demolition").

communities.<sup>286</sup> Although this Article rejects the notion that enforcement of housing standards necessarily results in homelessness,<sup>287</sup> enforcement endeavors must be thoughtfully conceived and executed. Without a structure to support tenant participation in enforcement,<sup>288</sup> tenant priorities can get overlooked.

Just as tenants might want to take enforcement in a different direction, they might prefer to avoid it. Poor people, especially poor people of color, might recognize the court system as a place that is dangerous and unfair to them.<sup>289</sup> They might prefer to stay away from courts and instead pursue direct action or other means of political resistance.<sup>290</sup> Alternatively, they might choose to engage in litigation but just as one component in a larger strategy to gain media attention or further legislative goals, not to obtain traditional forms of relief.<sup>291</sup> Such priorities should inform litigation strategy. Yet government agencies promote their own objectives.

### c. Relief Tenants Want is Unavailable

Litigation to enforce housing standards can result in a range of remedies, and lawyers from different sectors vary in the forms they prioritize or even have authority to pursue. As discussed above, government lawyers are especially well-positioned to pursue injunctions, while market-based lawyers might neglect to do so. Yet most government agencies are not authorized to obtain relief for individual tenants and do not win them monetary awards.<sup>292</sup>

Tenants generally receive no monetary compensation when government agencies succeed, even if those tenants faithfully paid rent for years. In most jurisdictions, the statutory authority of local government actors deputizes them to file suit seeking injunctions and modest civil penalties paid to the agency, but it does not contemplate monetary awards for the tenants occupying the property that

286. *Id.* at 652–62 (highlighting Miami's displacement of poor Black communities).

287. *See supra* Part II.B.3.

288. *See infra* Part IV.C.2, 3 (identifying mechanisms that would support tenants who want to intervene).

289. *See* Rebecca Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, in *TRANSFORMING LIVES: LAW AND SOCIAL PROCESS* 112, 126–27 (Pascoe Pleasence et al., eds., 2007) (identifying non-monetary reasons why people do not seek legal solutions to housing problems); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 *IOWA L. REV.* 1263, 1288–1312 (2016) (describing additional non-monetary reasons why poor people, especially poor people of color, avoid courts).

290. *See* MADDEN & MARCUSE, *supra* note 39, at 106–09 (describing historical examples of rent strikes and anti-eviction direct action such as organizing squats, breaking locks, blocking marshals, guarding possessions thrown in the street, and moving evicted tenants back into their residences).

291. *See* Jules Lobel, *Courts as Forums for Protest*, 52 *UCLA L. REV.* 477, 548, 555 (2004).

292. *See, e.g.*, N.Y.C. OFFICE OF CIVIL JUSTICE, 2016 ANNUAL REPORT 49, [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/O CJ%202016%20Annual%20Report%20FINAL\\_08\\_29\\_2016.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/O CJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf) (noting that local agency lawyer does not represent the tenant or her specific interests and cannot argue for individual compensation). *Cf.* Press Release, Illinois State Office of the Attn'y Gen., *Madigan Announces \$1 Million Settlement with Safeguard Properties: Homeowners Illegally Locked Out of Homes to Receive Restitution* (June 3, 2015), [http://www.illinoisattorneygeneral.gov/pressroom/2015\\_06/20150603.html](http://www.illinoisattorneygeneral.gov/pressroom/2015_06/20150603.html) (announcing settlement that agreement that included restitution).

is the subject of the litigation.<sup>293</sup> Government actors do not seek rent abatements or other monetary compensation for tenants who have been harmed.

Obtaining monetary relief may be important to tenants. Although the amount may be too low to attract market-based representation, it is likely to be significant to the individuals involved. Recall that the most common method of calculating damages is based on a rent abatement,<sup>294</sup> and that rent occupies a growing share of household budgets.<sup>295</sup>

Rent is currently so great an expense that many are unable to meet it. While public benefits have decreased and wages have stagnated, housing costs have climbed exponentially.<sup>296</sup> As a result of this yawning gap, the number of eviction proceedings has increased dramatically.<sup>297</sup> Sizeable rent abatements can make all the difference in preventing eviction.<sup>298</sup>

Monetary awards may also help to cover other costs. Tenants report difficulty paying other bills because they shift resources to pay their rent.<sup>299</sup> Whether prospective, until a landlord conducts repairs, or retroactive, as compensation for prior months of uninhabitability, rent relief could give these tenants a chance to meet other needs.

If rent rates continue to rise, so too should rent abatements, calculated in proportion to the rent amounts. The absolute value of the monetary awards should rise. These potential increases in awards make enforcing tenants' right to recover them that much more important. Yet neither public agencies nor private lawyers are prepared to represent tenants seeking such recovery.

#### IV. IMPLICATIONS AND SOLUTIONS

Public and private actors have failed to bridge the gap between the rule of law and the reality for tenants in substandard housing. This enforcement gap produces a negative feedback loop. Tenants' underenforced rights atrophy and become more difficult to enforce. That difficulty makes advocates less likely to attempt enforcement. The absence of enforcement creates individual and collective problems with respect to equality and the rule of law. This Part will identify some of the most troubling implications of the enforcement gap; argue that legislatures

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293. Although local government agencies do not have the power to seek individual relief on behalf of tenants, if federal or state actors were to pursue litigation, they might in some cases be able to obtain individual restitution. *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 533–39 (2011) (describing powers of Federal Trade Commission to obtain relief for victims); *see, e.g.*, N.C. GEN. STAT. §§ 75-15.1, 114-2.4A(b)(2)(b) (2018) (authorizing state attorney general to obtain restitution for members of the public).

294. *See supra* Part III.A.2.a.

295. *See* sources cited *supra* note 104.

296. *See* NAT'L LOW INCOME HOUS. COAL., *supra* note 104, at 1–6; *see also* Colleen Shanahan & Anna Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS, 128, 1293–40 (2019) (describing growth in court dockets as attributable to rise in inequality and loss of social welfare programs).

297. *See* DESMOND, *supra* note 11, at 303.

298. *See infra* Part IV.C.2 (discussing connections between eviction defense counsel and appointed counsel who can pursue litigation affirmatively).

299. *See* Matthew Desmond & Rachel T. Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296 (2015) (“As households are forced to devote a larger portion of their income to housing expenses, their budget shares for food, school supplies, medication, transportation, and other necessities shrink.”).

have both the power and the obligation to address them; and, finally, propose a set of strategies to do so.

### *A. Underenforcement Snowballing*

The enforcement gap results in a snowball effect, which systematically excludes poor tenants from access to the legal system and “underdevelops” the law in areas where it could protect them. The accumulated underenforcement of tenants’ housing rights not only exacerbates social welfare problems but also threatens the rule of law.

Because neither the private nor the public sector represents poor tenants enforcing their rights, these members of the polity are effectively excluded from access to the civil justice system.<sup>300</sup> To be clear, poor tenants are involved in litigation, but they have little opportunity to participate affirmatively. Every year, millions of tenants appear in court as defendants in eviction proceedings, but rarely do they bring suit as plaintiffs.<sup>301</sup> Defendants can raise counterclaims, but appearing as a defendant carries inherent disadvantages.<sup>302</sup> Using the law as a sword, rather than a shield, can shift power between parties and alter the status quo of social relations.<sup>303</sup> The enforcement gap prevents poor tenants from using courts to their benefit.

This exclusion from the privileges of the civil justice system carries ramifications for individuals and groups. On the individual level, it means the courts are available to enforce the rights of some members of society but not others. In the aggregate, it results in systematic exclusion of poor people, especially women of color, whose participation in democracy is already disadvantaged. The exclusionary impact of the enforcement gap means marginalized groups receive inadequate attention from the legal system, thereby contributing to their marginalization.

The problem is compounded by the fact that substandard housing befalls a specific population.<sup>304</sup> Substandard housing is visited upon poor people the most, with women and children of color experiencing it disproportionately.<sup>305</sup> They are vulnerable to categories of abuse and exploitation that other people do not encounter. The neglect of cases challenging substandard housing conditions means not only that these individuals and groups are denied the opportunity to have their problems addressed but also that entire subjects of law are ignored.

In a common law, precedent-based system, neglect of a category of cases results in the underdevelopment and distortion of law. Because poor people are

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300. See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 5 (2017) (“Limitations on lawsuits have the practical effect of limiting individual rights, because lawsuits are the central mechanism for enforcing and protecting rights in the United States.”).

301. See EVICTION LAB, <https://evictionlab.org> (last visited Nov. 20, 2019) (documenting numbers of evictions across the United States).

302. See Sabbeth, *supra* note 41, at 109-16 (identifying limits of defense lawyering and analyzing the extent to which counterclaims can overcome these limits); *infra* pp. 144–45 (describing role of eviction defense lawyers raising defenses and counterclaims).

303. See Florence Wagman Roisman, *How Litigation Can Lead to Substantial Relief for Clients and Significant Social Change*, 38 CLEARINGHOUSE REV. 759 (2005).

304. See *supra* Part II.A.2.

305. See *supra* notes 91, 93, 95, 97, 100, 109, 110, 112–119 and accompanying text.

particularly likely to experience substandard housing and particularly unlikely to hire counsel, the problems of substandard housing receive little legal analysis. Private lawyers do not devote time and attention to raising, researching, or advocating for applicability of the laws protecting tenants' right to safe housing. They do not press judges to refine the doctrine with respect to these legal violations and the specific harms that flow from them. They do not appeal to higher courts and therefore miss out on opportunities to strengthen existing doctrine and create precedent.<sup>306</sup>

Although lawyers for government agencies do pursue some housing conditions cases, as a technical matter, they do not enforce tenants' right to safe housing. The statutes and regulations that government agencies enforce are related to but distinct from the statutory and common law claims of tenants.<sup>307</sup> When government actors engage in enforcement, they do not interpret or advance the law governing tenants' private claims.<sup>308</sup>

This leaves vast areas of law underdeveloped. These include, at minimum, liability and damages under the common law of torts and contracts, along with related questions of evidence and civil procedure. Consider the monetary relief to which tenants are entitled for violations of the warranty of habitability. Courts have historically awarded relatively little compensation for such violations.<sup>309</sup> Yet advocacy by skilled counsel might expand judges' understanding of the value of the harms that poor tenants experience. The historical imbalance between tenants and landlords regarding levels of representation likely explains courts' current interpretations of such awards.<sup>310</sup> We can only imagine how the law and court culture might look if both parties had enjoyed decades of equality of representation.

Instead, the system produces snowballing inequality. The depression of poor tenants' monetary awards results in the systemic undervaluation of the types of injuries that recur for this group of people. The undervaluation recreates and perpetuates itself in judge and jury awards, settlements, and attorneys' assessments of the economic value of cases, all of which inform whether individuals can find lawyers to take on the representation. This is magnified by the private bar's disproportionate perception of the claims of people of color, especially Black women, as too difficult.<sup>311</sup> Given that poor women of color, and their children,

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306. See Cotton, *supra* note 19, at 85 (highlighting the absence of appeals of housing conditions decisions).

307. See *supra* Part II.B.1.

308. Evidence also suggests limited interpretation of the statutes the agencies are charged with enforcing. See Campbell, *supra* note 98, at 836 ("The definition of what constitutes a 'habitable' residence has remained remarkably consistent over the years - with very little evolution even though society itself has changed dramatically.").

309. See *supra* Part II.A.2 (describing undervaluation and devaluation of tenants' claims).

310. See Russell Engler, *Shaping a Context-Based Civil Gideon Movement from the Dynamics of Social Change*, 15 TEMP. POL. & C.R. L. REV. 697, 714-15 (2006); Sabbeth, *supra* note 41, at 78-79.

311. See Myrick, Nelson & Nielsen, *supra* note 195, at 118-19 (showing that plaintiffs' lawyers disproportionately reject African Americans because of fee structures that devalue their cases); see also CHAMALLAS & WRIGGINS, *supra* note 76, at 6, 178 (noting that people of color disproportionately carry markers like criminal convictions that defense counsel can use against them); Chris Chambers Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 BERKELEY LA RAZA L.J. 18, 40-42 (2018) (describing implicit biases that shape attorneys' assessments of communication styles, credibility, and strategy).

comprise large numbers of the victims of injuries due to housing conditions, claims related to housing conditions are repeatedly devalued. In a legal system that requires private individuals to cover the costs of enforcement on their behalf, the problems of poor tenants remain unaddressed, and the laws protecting them wither on the vine.

Poor people are thereby disadvantaged at least fivefold. First, they are the group most likely to get stuck in substandard housing conditions and suffer the consequent physical, emotional, cognitive, and economic harms. Second, if they seek compensation for their injuries, factfinders who recognize their claims at all will compensate them less than wealthier tenants, even if they suffer similar or worse conditions. Third, the expectation of low awards makes poor tenants' cases unattractive to market-based legal representatives. Because the U.S. civil justice system relies primarily on private parties to cover the costs of civil enforcement,<sup>312</sup> the low economic value assigned to their cases results in deprivation of access to that system. Fourth, from a deterrence perspective, the inability of poor tenants to access the legal system means that landlords have the fewest incentives to maintain safe conditions in poor people's homes. Fifth, in the absence of attorneys to pursue these matters, tenants' legal rights atrophy, thereby exacerbating many of the other problems.

### *B. Government Obligations and Opportunities*

Government agencies are not the only actors who can pursue enforcement, and arguably not the best to do so,<sup>313</sup> but in their legislative capacity, governments can and should mitigate the snowballing underenforcement of housing standards. The most obvious reason is that widespread substandard housing creates a social welfare problem.<sup>314</sup> Such conditions affect not only individual residents but also their communities.<sup>315</sup> Indeed, the threat to public health and public coffers motivated passage of the first minimal housing codes.<sup>316</sup> Governments possess not only a moral responsibility but a practical incentive to protect social welfare.<sup>317</sup>

Further, government entities have constructed, and continue to fortify, the enforcement gap and therefore ought to take steps to remedy it. The private market

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312. See *supra* Part III.A.1 (describing traditional American rule of parties covering costs of litigation including representation).

313. Cf. Waterstone, *supra* note 256, at 451–53 (noting concerns about “agency capture” and explaining that the “diffusion of enforcement power” between public and private actors “avoids some capture problems, to the extent they exist”).

314. See *supra* Part II.A.1 (describing physical, emotional, cognitive, and economic harms to individuals, as well as secondary and aggregate social effects).

315. *Id.*; Natapoff, *supra* note 23, at 1717–18, 1729–30 (describing “social and economic deterioration” and damage to democratic legitimacy in “underenforcement zones”).

316. See MADDEN & MARCUSE, *supra* note 39, at 122 (“But contrary to the myth of state benevolence, the real reasons [for adoption of housing codes] were elites’ twin fears of disease and uprising among the city’s growing working class.”); *id.* at 123–24 (showing reformers emphasized that poor people would disrupt the public peace and tax the public coffers in the absence of improvements to housing quality).

317. See Waterstone, *supra* note 256, at 454 (“[W]hen the private market fails to provide a particular public good, the government has an obligation to do so for the betterment of its people.”).

for lawyers,<sup>318</sup> and the doctrinal rules that make substandard conditions cases unattractive to market-based lawyers,<sup>319</sup> are products of law.

So too is the housing market.<sup>320</sup> David Madden and Peter Marcuse explain this as follows:

The government is involved in making housing possible in multiple ways. The state plans and builds the streets on which homes are located. It certifies the materials and techniques out of which houses are contracted. It regulates, or directly supplies, the infrastructure for electricity, water, sewage, and transportation upon which housing depends. It provides the means to enforce contracts and define the legal relationships that make possible the buying, selling, producing, and leasing of housing. It enforces the legal sanctity of the home from intrusion and violation. It constructs and protects the property rights that made landlordism and tenancy possible. It influences the extent to which capital is used for housing or diverted from it. . . . Government does not intervene in an autonomous private housing market. The state can more accurately be said to privilege some groups or classes over others. . . . The question will always be *how* the state should act toward housing, not whether it should do so.<sup>321</sup>

Finally, governments have moral and practical reasons to promote the rule of law.<sup>322</sup> Even if one were to accept the extreme position that poor people in the United States have no social welfare rights, they nonetheless possess a basic right of equality in relation to the rule of law in a democratic society.<sup>323</sup> The executive branch of government, unlike private actors, is responsible for executing the laws.<sup>324</sup> Governments have a monopoly on and responsibility for “lawfulness as a socially valuable good.”<sup>325</sup> Lawfulness is undermined by snowballing underenforcement.<sup>326</sup>

318. See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?* in *LAWYERS ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 18, 18–24 (Susan D. Carle, ed., 2005) (highlighting how lawyers structure the legal market).

319. See *supra* Part III.A.

320. See, e.g., ROTHSTEIN, *supra* note 91, at 64–65 (describing how the federal government subsidized property ownership for whites only).

321. See MADDEN & MARCUSE, *supra* note 39, at 141–42; see also DESMOND, *supra* note 11, at 307 (“Exploitation within the housing market relies on government support.”).

322. See Natapoff, *supra* note 23, at 1721 (highlighting “the state’s role in maintaining individual security, social stability, and the rule of law”); Cotton, *supra* note 19, at 61 (highlighting that when “the rule of law and equal justice under law” are not honored, “the damage is not simply to those who are misled and misused by the system, but also to the reputation and viability of the system itself”).

323. See U.S. CONST. amend. XIV (Equal Protection Clause); Weissman, *supra* note 45, at 743–52 (describing governmental obligation to promote the rule of law, particularly for the protection of poor people).

324. See Waterstone, *supra* note 256, at 453.

325. Natapoff, *supra* note 23, at 1721.

326. *Id.* at 1718 (“Failing to maintain an atmosphere of legality, [government] turns its back on victim classes twice: first, by denying them material protective resources, and second, by depriving them of a robust, responsive legal system.”).

### *C. Filling the Gap*

Governments should take responsibility for enforcement through direct and indirect action. They should bolster the enforcement of executive agencies while also strengthening support for market-based enforcement. Combining public and private approaches to enforcement allows each sector to make up for the shortfalls of the other.<sup>327</sup> It also provides an extra check on public and private mismanagement of housing.<sup>328</sup> The utility of specific programs will vary by geography, public resources, and political pressures. This section identifies three approaches that policymakers can consider. Given the strengths and weaknesses of each, some combination of all three will be most effective.

#### 1. Robust Public Actors

Government enforcement is arguably the best method for addressing widespread patterns of misconduct.<sup>329</sup> Public agencies are particularly well-suited to obtain and enforce injunctive orders or consent decrees requiring owners to correct substandard conditions.<sup>330</sup> When equipped with political and economic resources, government agencies can make a significant mark, resulting in the reform of entire industries.<sup>331</sup>

For public agencies to enforce housing standards, there will need to be changes in agency culture. For state and federal agencies, that may require revising priorities. This Article aspires to encourage state and federal agencies to take a harder look at substandard housing as an area that deserves their attention.

Cultural change in local agencies will likely require increased funds. An infusion of resources could allow agencies to hire more staff and give them more support. Higher salaries and growing personnel could lead to more comradery and lower caseloads. Such investments could produce more zealous advocacy and greater successes, improving morale and attracting talented new people to join the team. To the extent that lawyers currently view housing enforcement as a relatively unsophisticated area of practice, that perception is likely symptomatic of the underenforcement snowball: resources have historically been invested elsewhere and the law has atrophied. Agency investments are policy choices that are not only influenced by, but also influencers of, reputations. They can and do change in response to political forces.<sup>332</sup>

Current policymakers' interest in housing affordability, underscored by recent successes of tenants' rights advocates,<sup>333</sup> can result in the necessary political capital. Some of the cities with the worst housing inequality—like New York City

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327. *See supra* Part III (explaining shortfalls of public and private sector enforcement of poor tenants' rights).

328. *See* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 *YALE J.L. & FEMINISM* 319 (2014) (highlighting how interactions with government institutions pose heightened risks for poor women of color).

329. *See* Waterstone, *supra* note 256, at 455.

330. *See supra* pp. 131-32.

331. *See* Selmi, *supra* note 188, at 1441, 1450-51.

332. *See, e.g., id.*, at 1422-23 (discussing changes in enforcement activity between Bush and Clinton administrations).

333. *See supra* pp. 104-05.

and San Francisco—have indicated an ability and willingness to invest in tenants’ rights, and others have begun to follow suit.<sup>334</sup> At the same time, the attorneys general offices in some of these jurisdictions have begun tackling more political litigation,<sup>335</sup> and a few have begun pursuing landlords.<sup>336</sup>

Capitalizing on this political moment is important, because government enforcement offers significant advantages over private enforcement. As discussed earlier, public actors are generally free from market pressures, possess the authority to pursue cases and relief unavailable to private parties, and function as specialized, long-term players.<sup>337</sup> Enforcement by government actors also carries a special expressive function.<sup>338</sup>

Beyond what any private actor can offer, a government lawyer conveys a message as a public actor who represents “the will of the people.”<sup>339</sup> Enforcement conveys to both victims and bad actors that the violations, and the victims, are taken seriously.<sup>340</sup> For a government actor to appear before a court and press for enforcement is to indicate that the perspectives of the victims are heard and validated by the polity.<sup>341</sup> The reverse is also true. A failure of government actors to address violations of law may be interpreted as validating the lawbreaking and acceptance of harms that would not be accepted if visited upon other members of society.<sup>342</sup>

The symbolic effect of government involvement takes on heightened meaning in the enforcement of poor people’s rights. Habitually ignored in favor of more

334. *See supra* note 34 and sources cited therein (describing expansion of tenants’ rights in New York State and California); *supra* note 41 and sources cited therein (highlighting new statutory rights to eviction defense lawyers, first established in New York City and San Francisco but since developing in Newark, Cleveland, Philadelphia, the District of Columbia, and other jurisdictions).

335. *See* Ben Christopher, *Fastest Litigant in the West*, CALMATTERS (Apr. 18, 2019), <https://calmatters.org/justice/2019/04/california-sues-trump-more-becerra-lawsuit-tracker-update> (highlighting increase in state attorneys general suits against federal government).

336. *See, e.g.*, Press Release, N.Y. State Office of the Att’y Gen., Attorney General James and Governor Cuomo Announce Lawsuit Against Queens Landlord for Violating Rent Stabilization Laws and Tenant Harassment (Mar. 1, 2019), <https://ag.ny.gov/press-release/attorney-general-james-and-governor-cuomo-announce-lawsuit-against-queens-landlord>; Sophie Kaplan, *District Sued Landlord for Exposing Tenants to Lead Paint*, WASH. TIMES (July 31, 2019), <https://www.washingtontimes.com/news/2019/jul/31/dc-attorney-general-karl-racine-sues-dc-landlord-f> (describing suit by Attorney General Karl A. Racine).

337. *See supra* pp. 131-32. As a practical matter, the involvement of a government agency can also encourage other government actors to provide support. For example, local governments with funds for repairs or tenant relocation may be more likely to contribute those resources when an agency has already identified the relevant property as a priority.

338. *See* Waterstone, *supra* note 256, at 454 (arguing that “the expressive function of the law cannot be completely outsourced to private actors”).

339. *Id.* at 453.

340. *Cf.* Natapoff, *supra* note 23, at 1717 (“Underenforcement is a weak state response to lawbreaking as well as to victimization.”)

341. The message that victims’ concerns are taken seriously can resonate with the public, notwithstanding that government objectives might diverge from tenants’ interests. *See supra* Part III.B.2 (explaining that government actors do not represent tenants and do not take direction from them); *see also* Butler, *supra* note 281, at 20 (noting “prosecutors don’t necessarily treat victims with dignity and kindness”).

342. *See* Natapoff, *supra* note 23, at 1749 (“Underenforcement has expressive effects.”).

powerful actors, poor people do not typically enjoy enforcement resources.<sup>343</sup> In popular narratives, poor neighborhoods are infamous for their lawlessness.<sup>344</sup> For government actors to take seriously law-breaking against, not only by, poor people would express recognition of them as valued members of society. This expressive value, as much as any concrete advantage, makes public enforcement essential.

In spite of the many reasons to support robust public enforcement, it cannot address the inherent limits of government actors who, due to the nature of their position, do not generally represent the individual tenants.<sup>345</sup> For this reason, government enforcement must be supplemented by meaningful opportunities for tenants to participate and express their interests. Private lawyers are needed for tenants to initiate their own litigation or intervene in suits brought by government actors. The next two subsections describe two potential avenues for private representation.<sup>346</sup>

## 2. Public-Private Hybrid: Appointed Counsel

One option, building on the recent growth of appointment of counsel for defendants facing eviction,<sup>347</sup> is funding for counsel for tenants on the affirmative, or plaintiff, side. States or municipalities could make available a pool of lawyers to represent tenants who wish to bring cases or intervene in suits brought by government actors. The pool could be employed by a non-profit, public interest office, which could contract with the government entity.<sup>348</sup> The authority for the funds could involve a statutorily created right to appointment or, as a start, legislative commitment of funds.

It should be recognized that non-profit organizations already do represent tenants in affirmative litigation challenging substandard housing conditions. Yet many offices prioritize eviction defense and other, arguably more urgent, categories of cases. Methodically and tenaciously pursuing affirmative relief when members of the public present emergencies can be difficult. Public funds and

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343. *Id.* (“[I]nstances of systemic underenforcement are forms of official subordination and deprivation precisely because the state tolerates illegal harms against vulnerable groups that, for more favored constituents, would be intolerable.”).

344. See Stephen Lurie, *There's No Such Thing as a Dangerous Neighborhood*, CITYLAB (Feb. 25, 2019), <https://www.citylab.com/perspective/2019/02/broken-windows-theory-policing-urban-violence-crime-data/583030> (describing popular perceptions of poor neighborhoods occupied primarily by people of color as dangerous).

345. See *supra* III.B.2.

346. Direct action and other social movement activities are other aspects of tenants' participation. This Article is focused on participation in the enforcement litigation but recognizes that participation can take many forms. In the criminal context, scholars have suggested establishment of community representatives or revision of court rules to allow direct action by community members, although recognizing that such mechanisms could interfere with rule of law values. See Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 292–93 (2019).

347. See NAT'L COALITION FOR A CIV. RIGHT TO COUNSEL, *supra* note 41.

348. See Laura Abel, *Lessons from Gideon*, 15 TEMP. POL. & C.R. L. REV. 527, 535 (2006) (describing criminal defense appointment systems).

special office units dedicated solely to such affirmative work could potentially make a difference.<sup>349</sup>

Appointed counsel would offer a public-private hybrid for enforcement. The funds would have a public source, which would insulate them from market pressures, but the representation would be provided by private counsel, who would act at the direction of tenants as clients. Working within an entity devoted to the particular subject matter of poor people's housing rights would help to ensure that the lawyers benefit from specialization and expertise like lawyers in a government agency.<sup>350</sup> Structuring the appointment through a contract with a non-profit organization devoted exclusively to such appointments can also ensure that the lawyers retain true independence from market pressures.<sup>351</sup> Unlike public agencies, appointed counsel would give tenants access to participate in, shape the goals of, and collect awards from enforcement. Private lawyers representing tenants' claims would also counter the underdevelopment of tenants' rights.

The expressive impact of the appointment of counsel model deserves emphasis. While government enforcement carries inherent messages about the importance of the subject matter and the victims,<sup>352</sup> appointment of counsel may offer other avenues for expression. The value of expression stems from both the message conveyed to listeners and the opportunity afforded the speaker. While government lawyers contribute to the former, it is not clear that they advance the latter. What appointed counsel does is provide a means for the individual to participate in the court system.<sup>353</sup> The opportunity to bring one's grievances to court, to articulate them in a public forum, and, quite literally, to speak truth to power, is significant in its own right.<sup>354</sup> When a government covers the cost of this expression, while delegating execution to a private actor, it enhances and diversifies our democratic dialogue.

Appointment of counsel for tenants to pursue substandard conditions claims would buttress the affordable housing efforts of legislatures already funding eviction defense. In eviction proceedings, represented tenants often raise the warranty of habitability as a defense or a counterclaim, but they are limited by the shape of the lawsuit against which they defend. If the basis of the eviction action is not the failure to pay rent, the warranty of habitability may not be a defense. For example, if the landlord bases the eviction on allegations of nuisance activity that breach the lease, the law generally will not recognize the condition of the premises as relevant to the landlord's right to regain possession.<sup>355</sup> To be sure, defendants

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349. See Paul R. Tremblay, "Acting a Very Moral God": *Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2517–21 (1999) (describing "division of labor" as a solution to the pull of the "rescue mission").

350. See Abel, *supra* note 348, at 535.

351. *Id.* at 545.

352. See *supra* pp. 142–43.

353. See Martha F. Davis, *Participation, Equality and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 *YALE L.J.* 2260, 2263–64 (2013) ("While participation in a community has many facets, one of the most important is certainly participation in civic institutions such as the judicial system."); *id.* at 2268 (highlighting "the Court's intuitive understanding that inequality in access to the courts might distort the checks and balances underlying our democratic system").

354. See Robert Tsai, *Conceptualizing Constitutional Litigation as Anti-Government Expression: A Speech-Centered Theory of Court Access*, 51 *AM. U. L. REV.* 835, 865–68 (2002).

355. In theory, a tenant could assert an equitable defense of estoppel or "unclean hands" due to the landlord's failure to maintain the premises.

may raise counterclaims whose scope is broader than that of permissible defenses, and a tenant facing a nuisance action can raise substandard conditions through counterclaims. Yet some housing courts lack jurisdiction to hear counterclaims, and, further, waiting for a landlord to bring an eviction action before launching a tenant's claims can create other disadvantages for the tenant.<sup>356</sup>

Raising poor people's rights in a defensive posture limits the capacity of the advocacy.<sup>357</sup> At least five disadvantages result from raising claims as a defendant instead of as a plaintiff. First, tenants named as defendants in eviction proceedings get locked out of future housing opportunities, because the filing of the eviction action damages the tenant's record even if the tenant ultimately prevails.<sup>358</sup> Second, occupying the defensive position cedes to the landlord control over strategic decisions regarding whether and when to turn the dispute into a lawsuit.<sup>359</sup> If a tenant waits for the landlord to make the first move, urgent, dangerous conditions will languish unless and until the landlord chooses to initiate action. Moreover, waiting until the landlord is armed with a basis for eviction puts the tenant in a particularly vulnerable position from which to start the dispute resolution process. Third, plaintiffs choose the fora in which they file, and landlords file evictions in courts infamous for their lawlessness and landlord biases.<sup>360</sup> If tenants were to initiate the cases, they could select state or federal courts that might be more hospitable to a thorough hearing of their claims. Fourth, compared with defendants, plaintiffs can more easily join their claims.<sup>361</sup> Fifth, affirmative suits create more opportunities to coordinate with local activists and social movements. While some grassroots organizations have sought to rally around tenants facing eviction, plaintiff-tenants are typically in a better position to collaborate because of their control over the pace of the litigation.<sup>362</sup>

Given the advantages of pursuing rights affirmatively, appointment of counsel to enforce housing standards deserves consideration. Lawyers have historically been appointed to criminal defendants, and more recently to civil defendants, but not to plaintiffs or potential plaintiffs.<sup>363</sup> Yet appointment of lawyers to consult with and potentially initiate litigation on behalf of tenants could improve the enforcement of rights and safeguard the rule of law.

### 3. Market-Based Improvement

Legislative reform could also improve the private market of lawyers available to represent tenants enforcing the right to habitable housing. Legislation could enhance contingency fees for lawyers pursuing such cases. It could also strengthen fee-shifting statutes. Admittedly, the private market will never fully address enforcement of poor tenants' rights. The tension between market values and poor

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356. See Sabbeth, *supra* note 41, at 110–11, 112–113 nn.446–447.

357. *Id.* at 110–11.

358. See CARAMELLO & MAHLBERG, *supra* note 111 (describing “blacklists” of tenants named as defendants in eviction suits).

359. See Sabbeth, *supra* note 41, at 110.

360. *Id.*

361. *Id.* at 112.

362. *Id.*

363. *Id.* at 108–09.

people's lack of value in such a system<sup>364</sup> will always create pockets of people who are ignored.<sup>365</sup> Further, both contingency fees and fee-shifting statutes depend on successful outcomes,<sup>366</sup> and much of the law is stacked against poor people's success.<sup>367</sup> Nonetheless, in combination with the public and public-private actors discussed above, private lawyers operating for-profit firms can play a contributing role. As I have argued elsewhere, for-profit representation can contribute economic power and independence to enforcement efforts.<sup>368</sup> Reforms to support for-profit activity deserve consideration, and this section will provide a very brief sketch of how they might work.

Legislation allowing tenants to aggregate claims could make contingency fees sufficient to attract counsel, because lawyers could bundle many "small value" claims together. An aggregate award for multiple plaintiffs might be enough to produce an attractive contingency fee even if each individual case would not. There is a robust literature exploring the civil procedure and ethics rules related to class action representation.<sup>369</sup> For purposes of this Article, the key lesson from that literature is that in recent decades the Supreme Court has set an increasingly high bar for aggregating cases.<sup>370</sup> Scholars argue that the bar has been set so high as to result in an overall decline in aggregate litigation and caused class action lawyers to consider reshaping their practices.<sup>371</sup> Many of the legal violations poor people experience cannot be aggregated under current law.<sup>372</sup> Policy analysts interested in market-based solutions could advocate for legislative reform to correct this area of doctrine.

The other market-based option is to increase the availability of fee-shifting provisions. Consumer protection and antidiscrimination statutes that apply to some cases of substandard housing already include fee-shifting provisions, but the Supreme Court has made it difficult for private lawyers to rely on fee-shifting mechanisms for earnings.<sup>373</sup> This area is ripe for legislative correction. Additionally, in jurisdictions with consumer protection statutes that might not apply to substandard rental housing, amendments could clarify or expand their applicability. If the consumer protection statutes lack robust fee-shifting provisions, those could be amended as well. Although fee-shifting amendments might not pass in the current U.S. Congress, states and localities enjoy broad authority to pass such laws in their own jurisdictions.

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364. See *supra* Part III.A.1, 2.

365. See CHEN & CUMMINGS, *supra* note 187, at 174–75, 196–97 (describing agendas of large and small firms).

366. Contingency fees depend on winning monetary relief. See *supra* Part III.A.2. Fee-shifting requires that the plaintiff prevail. See *supra* Part III.A.3.

367. See *supra* notes 233–235 and accompanying text (showing that poor tenants face obstacles to establishing liability and damages); see also Butler, *supra* note 168, at 2183 ("Deprivations associated with poverty are usually not 'defenses' to criminal liability. . . ."); *id.* at 2187–89 (summarizing the critique of rights launched by the critical legal studies movement and responses from critical race scholars).

368. See SABBETH, *supra* note 193, at 482–87.

369. See Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 373–74 (2005) (collecting literature).

370. See Resnik, *supra* note 188, at 79.

371. See, e.g., *id.*

372. Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016).

373. See *supra* Part III.A.3.

Compared with aggregation, fee-shifting has the advantage of imposing the cost of enforcement on the bad actors, rather than taking the fee out of the recovery of the victims. This has heightened significance for the enforcement of poor people's rights, as it allows lawyers to represent individuals regardless of the size of their monetary award. As discussed earlier, torts and contracts doctrines devalue the awards of poor people.<sup>374</sup> For this reason, fee-shifting is a particularly important tool for the enforcement of poor tenants' rights.

## V. CONCLUSION

This Article makes several contributions in the areas of enforcement theory, access to justice, poverty law, and housing. First, it highlights an enforcement gap between established doctrine and the lived reality of millions of people. Second, it demonstrates that the reason for the gap is the social position of those affected, revealing significant limitations of current approaches to enforcement of poor people's rights. Finally, the Article offers a new approach to enforcement of housing standards. The proposal includes a combination of public and private elements that build on the strengths of each sector. It identifies specific ways to support enforcement of existing market actors and public agencies. It also includes a new idea: appointed counsel for affirmative representation of poor tenants.

Up to this point, appointment of counsel has been available to poor people only when in a defensive position, but the Civil Right to Counsel Movement<sup>375</sup> has made enormous strides, and expansion deserves consideration. By contrasting the statutory right to counsel in affirmative litigation with other models of government investment, this Article offers a comparative framework that extends the existing literature and enhances ongoing policy discussions. While appointing counsel for tenants in substandard housing might sound expensive, it might be less so than other approaches to promoting affordable housing.<sup>376</sup>

In the United States today, a universal right to housing may not be feasible, and it is not recognized as the law. Yet poor tenants do have a collection of well-established rights that can be realized. The civil justice system is stacked against poor people in many ways, but it also offers a multitude of protections hiding in plain sight.

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374. See *supra* Part III.A.2.

375. See NAT'L COALITION FOR A CIV. RIGHT TO COUNSEL, <http://civilrighttocounsel.org> (last visited Nov. 20, 2019).

376. Compare Sabbeth, *supra* note 41, at 60–61, nn. 27–30 (collecting literature on costs of eviction defense lawyers), with Ryan Ori, *Chicago's Poorest Neighborhoods May be Transformed by Billions Invested in 135 'Opportunity Zones'*, CHI. TRIB. (Apr. 4, 2019), <https://www.chicagotribune.com/columns/ryan-ori/ct-biz-opportunity-zones-chicago-ryan-ori-20190401-story.html>.