Hidden Burdens: Household Water Bills, "Hard-to Reach" Renters, and Systemic Racism

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I. INTRODUCTION

"Control the water and you control everything," snarled the mayor of a fictional town in the movie *Rango.*[1] An animated film about a talking chameleon may seem an unlikely source for timeless wisdom, but history bears out this proposition. In extreme cases, water has been used as a weapon of war, with strategic deprivation of this fundamental human right wielded to bring an enemy to its knees.[2] More typically, access to water is manipulated to simply keep unwanted and devalued populations marginalized and in their place. In Europe, Roma are often denied access to water and sanitation as local and national governments try to keep them unsettled and on the move.[3] Members of the disfavored Dalit caste in India struggle to meet their basic water needs because they are expected to wait at the back of the line at local boreholes.[4]

It is not just far away locales where water access is wielded in this way. In the United States, Black and Brown people often bear the brunt of such policies and practices.[5] For example, for decades, a predominantly African American neighborhood in Zanesville, Ohio, was denied a connection to the city's water system—an abuse of power that jeopardized public health and demeaned the community until a 2002

[1] RANGO (Nickelodeon Movies 2011).

[2] Charlotte Grech-Madin, *Water and Warfare: The Evolution and Operation of the Water Taboo*, 45 *INT'L SEC. 84, 85 (2021).*

[3] Martha F. Davis & Natasha Ryan, *Inconvenient Human Rights: Water and Sanitation in Sweden's Informal Roma Settlements*, HEALTH & HUM. RTS. J. 61, 61 (2017).

[4] Rakesh Tiwary & Sanjiv J. Phansalkar, *Dalits' Access to Water: Patterns of Deprivation and Discrimination*, 3 INT'L J. RURAL MGMT. 43, 44 (2007); Swarup Dutta et al., *Dalit Women and Water: Availability, Access and Discrimination in Rural India*, 4 J. SOC. INCLUSION STUD. 62 (2018).

[5] While other minority groups face similar challenges in the United States, this Article focuses on the disparate impacts of water assistance and affordability policies on Black households.

civil rights complaint and a federal lawsuit forced a change.[6] In Detroit, Michigan, beginning in 2014, tens of thousands of low income people, primarily Black, found their water shut off for nonpayment; many of those affected speculated that the city's goal was not merely to collect outstanding funds, but to compel low income residents to leave their homes and make way for new, more lucrative (and whiter) development.[7]

Sometimes the control of water—and the racial impacts of that control—are more subtle, reflected in administrative inaction, buried in complex bureaucratic structures, or even framed as positive environmental initiatives. The diffusion of responsibilities for water administration between different levels of government can further obscure discriminatory impacts that would be more visible in a unified system.[8] Neutral-sounding terminology may also hide the racial realities.[9]

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[6] *See* Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 456 (S.D. Ohio 2007); Reed N. Colfax, *Kennedy v. City of Zanesville Making the Case for Water*, HUM. RTS. (Oct. 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/fall2009/kennedy_v_city_of_zanesville_making_a_case_for_water/.

[7] Marian Swain et al., *Water Shutoffs in Older American Cities: Causes, Extent, and Remedies*, J. PLAN. EDUC. & RES. 1 (Feb. 21, 2020), https://journals-sagepub-com.ezproxy.neu.edu/doi/pdf/10.1177/0739456X20904431; *see also* Sharmila Murthy, *A New Constitutive Commitment to Water*, 36 B.C. J.L. & SOC. JUST. 151, 171–78 (2016). Lawsuits challenging these shutoffs include *In re* City of Detroit, Lyda v. City of Detroit, 504 B.R. 97 (E.D. Mich. 2013) and Taylor v. Detroit, 20-cv-11860 (E.D. Mich. filed July 9, 2020).

[8] This Article focuses on public systems, though some of the same policies may be adopted by investor-owned systems. Public water systems serve 90 percent of the United States population. U.S. ENV'T PROT. AGENCY, *Information About Public Water Systems*, https://www.epa.gov/dwreginfo/information-about-public-water-systems (last visited Mar. 20, 2022). Distinct aspects of public water utilities are regulated on the federal, state, and local levels, with policies on rates and customer assistance set locally. *See, e.g.*, Donald Forrer et al., *Municipal Utilities: An Overview of Rate Models, Sustainability and the Effects on Affordability*, 5 J. SUSTAINABILITY MGMT. 11, 13 (2017) (using Florida as an example).

[9] For example, consistent with water sector literature, I use the label "hard-to-reach" to refer to renters in multi-family buildings and others who do not receive a water bill directly from the provider. *See* Joseph Cook, *Customer Assistance Programs and Affordability Issues in Water Supply and Sanitation*, OXFORD RSCH. ENCYC. GLOB. PUB. HEALTH 1, 2 (June 30, 2020), https://oxfordre.com/publichealth/view/10.1093/acrefore/9780190632366.001.0001/acrefore-9780190632366-e-247?print=pdf; JANET CLEMENTS ET AL., WATER RSCH. FOUND., CUSTOMER ASSISTANCE PROGRAMS FOR MULTI-FAMILY RESIDENTIAL AND OTHER HARD-TO-REACH CUSTOMERS (2017) (defining hard-to-reach consumers as "households in multi-family buildings, single-family renters, and others who do not receive bills directly from their water or wastewater service providers"). This race-

This Article argues that the complexities of household water billing combined with the indifference of utilities and government authorities to the needs of "hard-to-reach" water consumers—primarily renters in multi-family dwellings—have left many low income, disproportionately minority tenants, excluded from programs designed to help with rising water and wastewater expenses.[10] It is a hidden burden that costs these renters hundreds of dollars a year.[11]

As explained in greater detail below, hard-to-reach renters are disproportionately poor.[12] For reasons that can be traced back to slavery, and include decades of racially-restrictive covenants and other modes of housing discrimination, the lowest income renters are disproportionately people of color.[13] This fact is obscured by the neutral language used in the industry to describe this group of water consumers as "hard-to-reach." According to the National Low Income Housing Coalition, "only 6% of white, non-Latino households are extremely low-

neutral language masks the disparate racial impact of failing to assist this group of water consumers.

[10] The phrase "water bill" commonly refers to combined water and wastewater sewer (or sewer) charges. CLEMENTS, *supra* note 9, at xxi. As noted by the American Water Works Association, wastewater charges are increasing, and "[t]he combined impact of paying for both water and wastewater service may be what puts some residential customers past the point at which they can pay the bills for these essential services." AM. WATER WORKS ASS'N, PRINCIPLES OF WATER RATES, FEES, AND CHARGES - MANUAL OF WATER SUPPLY PRACTICES 208 (7th ed. 2017) [hereinafter AWWA MANUAL 2017].

[11] In 2019, the average monthly water bill nationwide was $96.35. *U.S. Water & Wastewater Bills Increase 3.6% Over Previous Year*, WATERWORLD (Aug. 6, 2019), https://www.waterworld.com/water-utility-management/article/14037578/us-water-wastewater-bills-increase-36-over-previous-year. For a utility offering a 30 percent discount to eligible homeowners, that would amount to a $350 annual savings on an average bill. *See*, *e.g.*, *Residential Billing and Assistance: Elderly & Disability Assistance*, BOS. WATER & SEWER COMM'N, https://www.bwsc.org/residential-customers/billing-info-and-assistance#:~:text=Homeowners%20who%20are%2065%20years,are%20eligible%20for%20the%20discount (last visited Mar. 20, 2022) (offering 30 percent discount on water and sewer charges to qualified seniors and disabled persons).

[12] *See* Cook, *supra* note 9 (noting that renters are more likely to be poor yet may not have access to water subsidies).

[13] WENDY EDELBERG ET AL., HAMILTON PROJECT, A COMPARISON OF RENTERS AND HOMEOWNERS IN RECENT DECADES 1 (2021), https://www.hamiltonproject.org/assets/files/A_Comparison_of_Renters_and_Homeowners.pdf; *Racial Disparities Among Extremely Low-Income Renters*, NAT'L LOW INCOME HOUS. COAL. (Apr. 15, 2019), https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters. Though this Article focuses on Black households, Latino, Asian, American Indian and Alaska Native households are also disproportionately represented among low-income renters. NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 13 (Mar. 2021) [hereinafter THE GAP], https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf.

income renters."[14] In contrast, 20 percent of Black households fall into this category.[15]

In most jurisdictions, the majority of renters do not have a direct relationship with the local water utility.[16] Rather, the property owners are responsible for paying the water and sewer bill.[17] The owners, in turn, either incorporate the charges into their tenants' monthly rent or bill tenants separately based on either estimated usage or submeter readings that register the water consumption for individual units.[18] Whichever of these methods is used, it is the landlord, not the tenant, who interfaces with the local water utility.

The website of the Lynn Water and Sewer Commission ("LWSC") in Massachusetts spells out this arrangement succinctly:

> Per LWSC policy, the Commission will provide one meter per building. This one meter will be read for billing and can be accessed by the Commission. It is the responsibility of the building owner to install sub-meters for individual units, if they so choose. If sub-meters are installed, the Commission will continue to send one bill for the entire building based on the readings from the provided meter. It is the discretion of the property owner to then divide the water bills based on the usage of the sub-meter.[19]

The renters in these multi-family buildings, who have no direct relationship with the utility yet are water consumers, are deemed by utilities to be "hard-to-reach" for purposes of customer assistance.[20]

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[14] THE GAP, *supra* note 13.

[15] *Id.*

[16] Cook, *supra* note 9.

[17] *See, e.g.*, Matt Weiser, *Submeters: A New Incentive for California Tenants to Save Water*, NEW HUMANITARIAN (Oct. 13, 2016), https://deeply.thenewhumanitarian.org/water/community/2016/10/13/submeters-a-new-incentive-for-california-tenants-to-save-water (describing landlord's role given submetering initiatives in California). The California law defines "water service" as including charges for "water, sewer, stormwater, and flood control." S.B. No. 7 (Cal. 2016), s. 1954.202(h), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB7.

[18] Cook, *supra* note 9, at 1.

[19] *Sub-Metering*, LYNN WATER & SEWER COMM'N, http://www.lynnwatersewer.org/customers.shtml#gpm2_6 (last visited Mar. 20, 2022); *see also* MASS. WATER WORKS ASS'N, *Fact Sheet: An Act Authorizing Water Sub-Metering in Residential Tenancies (House 5001)* (Jan. 2005), http://www.lynnwatersewer.org/documents/data_sheets/MWWA_SubMetering.pdf (explaining statewide submetering laws).

[20] *See* discussion *supra* note 9 and accompanying text.

In contrast to Lynn, renters in some jurisdictions are permitted to open water accounts in their own names.[21] These renters are, of course, not so hard-to-reach since they have a direct relationship with the utility. Nonetheless, such tenant accounts are only feasible in the minority of rental units that are directly metered.[22] Even then, landlords may not agree to this arrangement. For example, as noted by the consulting firm Connect California, "[m]ost California landlords handle the water utility and account for it when setting the base rent price for a unit or building, to avoid legal issues if a tenant moves out with past-due bills."[23] A Portland, Oregon, management company adds that landlords may want to maintain control because they can pocket extra income by "charging slightly more in rent than [they] actually pay in utility costs."[24] Since landlord-held accounts are the norm in the multi-family residences more likely to house low income tenants,[25] this Article adopts the assumption that low income renters in multi-family residences are not water account holders, even though there may be some exceptions to that generalization.

As water costs have risen, more jurisdictions have recognized the financial squeeze that rising rates put on water customers, and a growing number have begun to offer Customer Assistance Plans or

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[21] *See*, *e.g.*, *General Billing Questions*, *Finance*, CHICAGO.GOV https://www.chicago.gov/city/en/depts/fin/supp_info/utility-billing/common-questions-on-utility-services.html#q23 (last visited Mar. 20, 2022) (describing how a tenant creates and pays their water bill); *Customer Service*, CAPE CORAL, FLA., https://www.capecoral.net/department/financial_services/customer_service.php (last visited Mar. 20, 2022) (tenants must provide a signed lease in order to open an account).

[22] *See*, *e.g.*, OLIVIA WEIN & CHARLIE HARAK, SOAKING TENANTS: BILLING TENANTS DIRECTLY FOR WATER AND SEWER SERVICE 1 (2003), https://www.nclc.org/images/pdf/energy_utility_telecom/water/report.pdf.

[23] *Water Utility Policy for Tenants and Landlords in California*, CONNECT CA., https://www.connectcalifornia.com/utilities/water-responsibility-tenant-landlord (last visited Mar. 20, 2022).

[24] David Cota, *Benefits of Including Utilities in the Rest of Your Portland Property*, PROP. MGMT. BLOG (Sept. 18, 2020), https://www.propmhomes.com/blog/benefits-of-including-utilities-in-the-rent-of-your-portland-property. Such additional charges beyond a reasonable administrative fee are generally prohibited when apartments are submetered. *See*, *e.g.*, *Utility Submetering*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 15, 2016), https://www.ncsl.org/research/energy/utility-submetering.aspx (describing state submetering laws).

[25] Despite an influx of higher income renters in recent years, low-income households still account for 38 percent of renters, as opposed to 23 percent for high income households. AMERICA'S RENTAL HOUSING 2020 1 (Joint Ctr. for Hous. Studs. Harv. Univ. 2020).

Affordability Plans intended to ease consumers' financial burden.[26] The most common component of Customer Assistance Plans are bill discounts, which generally target low income households, seniors, veterans, or disabled individuals.[27] The discounts may be an absolute figure (e.g., $20.00 off of a bill) or a percentage reduction (e.g., 25 percent off), depending on the jurisdiction.[28] They may apply to both the water and the wastewater portions of a bill, or just the water charge, or some other subset of the bill.[29] Affordability Plans, such as the program adopted in Philadelphia, go one step farther and provide tiered rates to water customers based on their income.[30] Whatever the

[26] AWWA MANUAL 2017, *supra* note 10, at 207 (noting increased interest in Customer Assistance Plans).

[27] U.S. ENV'T PROT. AGENCY, DRINKING WATER AND WASTEWATER UTILITY CUSTOMER ASSISTANCE PROGRAMS 6 (2016) [hereinafter EPA 2016 REPORT]. As of the EPA survey, a majority of utilities do not offer discounts. *See, e,g.*, *Water & Sewer Public Notices*, CITY OF LAWRENCE, MASS., https://www.cityoflawrence.com/595/Water-Billing (last visited Mar. 20, 2022) (no discounts listed); Transcript, Briefing of the Massachusetts State Advisory Committee of the U.S. Commission on Civil Rights (May 19, 2020), p. 27, https://securisync.intermedia.net/us2/s/login?public_share=IpZLlodj4Gr2wmwKuqw1jp0011ef58 (statement of Milagros Puello, Acting Water and Sewer Commissioner for the City of Lawrence, acknowledging that no discounts had been adopted in Lawrence). The absence of discounts or other Customer Assistance Plans may reflect a philosophical stance regarding the role of water utilities. AWWA MANUAL 2017, *supra* note 10, at 208 (observing that "in some cases, utilities' governing boards or management take the position that it is not the role of a water utility to address society's low income or affordability issues"). *But see* David Zetland, *The Role of Prices in Managing Water Scarcity*, 12 WATER SEC. 9 (Apr. 2021) (arguing that "[f]unctional policies to address . . . social concerns are a pre-requisite if citizens are to accept price-mechanisms for allocating remaining water to economic uses").

[28] *See generally* EPA 2016 REPORT, *supra* note 27, at 1 (collecting examples of Customer Assistance Plans).

[29] *See, e.g.*, *Discount Application*, BOS. WATER & SEWER COMM'N, https://www.bwsc.org/sites/default/files/2019-01/senior_discount_application.pdf (last visited Mar. 20, 2022) (allowing a senior discount for water only); *Senior Citizen Water Bill Discount*, CITY OF PHILA., https://www.phila.gov/services/payments-assistance-taxes/senior-citizen-discounts/senior-citizen-water-bill-discount/ (last visited Mar. 20, 2022) (offering seniors a discount on water and sewer charges); *Utility Discount Programs*, CITY OF COLUMBUS, https://www.columbus.gov/utilities/customers/Utility-Discount-Programs/ (offering waiver of service charges to seniors). In many places, the sanitation charge is the larger of the two portions of the bill. *See* Sam Adjangba, *Why Is Your Sewer Bill More Than Your Water Bill?*, LINKEDIN (May 16, 2015), https://www.linkedin.com/pulse/why-your-water-bill-more-than-sewer-sam-adjangba/.

[30] *See* Rejane Frederick, *Water as a Human Right: How Philadelphia Is Preventing Shut-Offs and Ensuring Affordability*, CTR. FOR AM. PROGRESS (Nov. 8, 2017), https://www.americanprogress.org/issues/poverty/news/2017/11/08/441834/water-human-right-philadelphia-preventing-shut-offs-ensuring-affordability/ (explaining components of Philadelphia's Tiered Assistance Program). On the distinction between

approach, Customer Assistance Plans and Affordability Programs generally offer assistance only to account holders, leaving out most renters and especially disregarding hard-to-reach renters in multi-family homes.[31] Therefore, even if tenants themselves are low-income, seniors, veterans, or disabled persons, they will not qualify for assistance if their landlord is not eligible.

Perhaps this poor fit between a tenant's financial need and the utility's financial assistance program was easy to ignore, despite its disparate racial impacts, when water rates were low, but in the past two decades, water prices have risen significantly relative to other household costs.[32] The amounts at issue may be small as compared to the overall rent, but they are not trivial for low-income tenants, and they add up month after month.[33]

In most jurisdictions, hard-to-reach renters have few alternatives for financial support to help pay the steadily rising cost of their water. It is a situation that leads to further impoverishment of tenants who were already struggling, jeopardizing their housing, affecting their credit scores, and contributing to a downward spiral of poverty.[34] In fact, in a 2016 survey, more renters (70 percent) said that they were worried about rising utility bills than about rising rents (63 percent).[35]

This Article unpacks the dilemma of hard-to-reach renters and water unaffordability a step at a time, drawing on specific examples from jurisdictions across the country. Following this introductory Part,

Assistance Plans and Affordability Plans, see Marian Swain, *As Shutoff Season Approaches, Push for Affordability, Not Assistance*, AM. WATER SHUTOFFS, MIT (Apr. 27, 2018), https://americanwatershutoffs.mit.edu/blog/shutoff-season-approaches-pushing-affordability-not-assistance ("Assistance refers to programs . . . which offer bill credits, payment plans, or debt freezes. Affordability, however, refers to programs that set the water bill for low-income customers based on the household's actual ability to pay, for example by limiting the water bill to 2 percent of a household's income.").

[31] As mentioned above, there are some exceptions where tenants may be account holders. *See* discussion *supra* notes 21–22 and accompanying text.

[32] *See* discussion *infra* Section II.A and accompanying notes.

[33] *See Water Prices by State 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/water-prices-by-state (last visited July 23, 2021).

[34] *See, e.g.*, Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 230 (2015). For more information on renters' credit scores, see Jung Hyun Choi et al., *We Must Act Quickly to Protect Millions of Vulnerable Renters*, URB. INST.: URB. WIRE (Mar. 25, 2020), https://www.urban.org/urban-wire/we-must-act-quickly-protect-millions-vulnerable-renters.

[35] *Renters More Concerned About Utility Bills than Rents, Give High Marks to Environmentally-Friendly Properties*, FREDDIE MAC (Nov. 15, 2016), https://freddiemac.gcs-web.com/news-releases/news-release-details/renters-more-concerned-about-utility-bills-rents-give-high-marks/?_ga=2.52122025.1899729305.1627066139-1487112980.1627066139.

Part II reviews rising water unaffordability and utilities' efforts to address the impacts of rising water prices through Customer Assistance Plans and Affordability Plans. These policy initiatives often assist homeowners rather than respond to financial needs of the full range of water consumers—a contrast to the billing options offered by other utilities, where renters are much more likely to hold their own accounts and thereby access financial assistance directly from the utility.[36] With assistance and affordability programs generally available only to homeowners and others in individually metered units, most renters—and particularly those in multi-family dwellings—receive no relief from the rising water prices that they are paying indirectly.

Part III examines the racial impacts of this prevalent approach to customer assistance. Because of racial disparities in housing, including the nationwide homeownership gap, Customer Assistance and Affordability Plans that fail to assist hard-to-reach renters while subsidizing owners and other account holders disproportionately harm Black households.[37] The concept of racial valuation explains policymakers' complacency in the face of these policies.[38] Viewed through a racial valuation lens, a policy that fails to assist hard-to-reach renters with rising water prices seems natural, since it affects a large proportion of (undervalued) Black households but a relatively small proportion of the (valuable) white population.[39] Consciously or not, policymakers' and utilities' apparent acceptance of racially disparate impacts contribute to the persistence of discriminatory water utility policies.

A close analysis suggests that there may be circumstances where these disparities can be challenged under the federal Fair Housing Act, which bars race discrimination in housing.[40] Yet even in cases with clear race-based impacts, such claims are difficult to make out. Instead of

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[36] *See* discussion *infra* notes 129–132 and accompanying text. One recent study of the twenty largest U.S. water utilities found that four had no assistance plans, eight restricted their plans to homeowners, and only two offered programs to assist renters who are not account holders. SRIDHAR VEDACHALAM & RANDALL DOBKIN, ENV'T POL'Y INNOVATION CTR., H_2AFFORDABILITY: HOW WATER BILL ASSISTANCE PROGRAMS MISS THE MARK 13–15, 20–21 (2021), https://www.policyinnovation.org/publications/h2affordability.

[37] This Article focuses on Black renters, but similar impacts also disproportionately burden Latino, Asian, and American Indian and Alaska Native renters. *See discussion supra* note 13.

[38] The concept of racial valuation in the context of COVID-19 is explored at length in Matiangai Sirleaf, *Racial Valuation of Diseases*, 67 UCLA L. REV. 1820 (2021).

[40] *See*, *e.g.*, *id.* at 1830 (describing different policy models for which racial valuation serves as a causal factor, including the Flint water crisis).

[40] Fair Housing Act, 42 U.S.C. § 3604.

condemning programs that reinforce disparities along racial lines, the current law sends a message that these impacts are generally benign, incidental, and unworthy of judicial or administrative attention.[41]

As Part IV explains, there are alternative approaches that can better reach renters and address the racial inequity found in most Customer Assistance Plans and Affordability Programs. These approaches are exemplified by programs adopted in Portland, Oregon; Seattle, Washington; New York, New York; and Austin, Texas. In these cities, renters are not placed at a disadvantage when confronted with rising water rates. Instead, they can access specific benefits designed to offset their increasing costs. Seattle's program, adopted in the 1980s, has been tested over a period of decades.[42]

The Conclusion sums up the evidence, hidden in a complex system of water billing, that many jurisdictions around the country perpetuate policies that use water assistance and affordability programs to favor (disparately white) homeowners and other account holders and to make (disparately Black) hard-to-reach consumers further marginalized and financially vulnerable. It is an example of structural racism—obscured by neutral language and regulatory diffusion—that contributes to the racial housing and wealth gaps in the United States.

II. WATER UNAFFORDABILITY: IMPACTS AND POLICY RESPONSES

A. *Water and Sanitation Costs Are Rising Significantly*

The study of water policies and water rates is complicated, not least because there is no centralized, national regulatory system for water rates. While many aspects of water quality are regulated at the federal level by the Environmental Protection Agency (EPA), water rates and related policies are set at the local, regional, or state levels of government.[43] Since there are over 148,000 water authorities in the United States, comprehensive data is difficult to obtain.[44] For that

41 *See* Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523 (2015) (holding that plaintiffs cannot bring disparate impact claims under the FHA that rely on statistical disparities unless they identify a policy or policies of the defendant that cause the disparities).

42 *See* discussion of Seattle program, *infra* notes 271–276 and accompanying text.

43 *See, e.g.*, Andrea Kopaskie, *Public vs Private: A National Overview of Water Systems*, UNC ENV'T FIN. CTR.: THE ENV'T FIN. BLOG (Oct. 19, 2016), https://efc.web.unc.edu/2016/10/19/public-vs-private-a-national-overview-of-water-systems/ (describing local and state regulation of water rates).

44 *Information About Public Water Systems*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/dwreginfo/information-about-public-water-systems (last visited July 23, 2021).

reason, this Article looks at general trends and provides specific examples, but does not attempt the impossible task of analyzing the policies of every water utility.

It is clear, however, that consumer water prices have been steadily increasing for some time. According to one study, water rates in the United States rose on average more than 10 percent each year between 2008 and 2016.[45] In 2020, the *Guardian* commissioned a study of twelve U.S. cities, conducted by utilities analyst Roger Colton.[46] Colton concluded that in these cities "the combined price of water and sewage increased by an average of 80% between 2010 and 2018, with more than two-fifths of residents in some cities living in neighborhoods with unaffordable bills."[47] Other surveys have observed similar price increases, with particularly stark effects on the lowest income consumers.[48] In Colton's study, the highest increase observed was "a staggering 154% in Austin, Texas, where the average annual bill rose from $566 in 2010 to $1,435 in 2018."[49] In 2019, the average monthly cost of combined water and sewer in the fifty largest cities in the United States was more than $116.60 per month, for a total bill exceeding $1399 annually.[50]

The explanations for these increases vary. A likely factor is the withdrawal of substantial federal support from local water systems—a trend that began in the 1980s during the Reagan presidency.[51] One

[45] Joseph Kane, *Investing in Water: Comparing Utility Finances and Economic Concerns Across U.S. Cities*, BROOKINGS INST. (Dec. 14, 2016), https://www.brookings.edu/research/investing-in-water-comparing-utility-finances-and-economic-concerns-across-u-s-cities/.

[46] Nina Lakhani, *Revealed: Millions of Americans Can't Afford Water as Bills Rise 80% in a Decade,* GUARDIAN (June 23, 2020), https://www.theguardian.com/us-news/2020/jun/23/millions-of-americans-cant-afford-water-bills-rise.

[47] *Id.* There is a rich literature on how affordability should be defined, but the precise definition of affordability and the methodology for ascertaining what is affordable is beyond the scope of this article. *See*, *e.g.*, Cook, *supra* note 9, at 3–4 (describing approaches to defining water affordability).

[48] *See*, *e.g.*, Scott J. Rubin, *Water Costs and Affordability in the United States: 1990 to 2015,* 110 J. AM. WATER WORKS ASS'N 48, 52 (2018).

[49] Lakhani, *supra* note 46.

[50] *Up 43% over Last Decade, Water Rates Rising Faster than Other Household Utility Bills*, BLUEFIELD RSCH. (Aug. 23, 2021), https://www.bluefieldresearch.com/ns/up-43-over-last-decade-water-rates-rising-faster-than-other-household-utility-bills/.

[51] Shadi Eskaf, *Four Trends in Government Spending on Water and Wastewater Utilities Since 1956*, UNC ENV'T FIN. BLOG (Sept. 9, 2015), https://efc.web.unc.edu/2015/09/09/four-trends-government-spending-water/; CONG. RSCH. SERV., WATER INFRASTRUCTURE FINANCING: HISTORY OF EPA APPROPRIATIONS 1, 10–11 (2019), https://fas.org/sgp/crs/misc/96-647.pdf.

recent study found that in 2017, after years of reductions in federal funding, state and local governments shouldered 91 percent of all capital spending on water and wastewater utilities.[52]

An additional explanation for increased water costs is aging infrastructure, an issue across the country.[53] A recent report from the American Society of Civil Engineers ("ASCE") gave the United States a "C-" for the quality of the nation's water infrastructure—up from a "D" in 2017, but still indicating the urgent need for action.[54] Necessary repairs to pipes and other systems result in costs that are passed on to local consumers.[55] If repairs are postponed, leaky pipes may also result in additional charges to consumers; for instance, the ASCE estimates that there is a water main break in the United States every two minutes, resulting in a loss of 6 billion gallons of treated, potable water each year.[56] That water must be paid for even though it does not reach the intended end users. All of these local expenses increase the burden on local utilities, and costs are often recovered—at least partially—through rate hikes.[57]

The rise in extreme weather events in recent years, a trend attributed to climate change, also plays a role.[58] Excessive flooding can jeopardize existing systems that were not designed to handle torrential rainstorms or rising sea levels, requiring costly repairs that must be

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[52] AM. SOC'Y OF CIV. ENG'RS, 2021 INFRASTRUCTURE REPORT CARD: DRINKING WATER (2021), https://infrastructurereportcard.org/cat-item/drinking-water/; *see* Shadi Eskaf, *Four Trends in Government Spending on Water and Wastewater Utilities Since 1956*, UNC ENV'T FIN. CTR: THE ENV'T FIN. BLOG (Sept. 9, 2015), https://efc.web.unc.edu/2015/09/09/four-trends-government-spending-water/ (explaining that in 2014, state and local governments spent twenty-four times as much as the federal government on water and wastewater utilities). As of November 2021, it appears that the federal government is poised to provide some relief through a significant investment in nationwide infrastructure, including water infrastructure. Emily Cochrane, *Senate Passes $1 Trillion Infrastructure Bill, Handing Biden a Bipartisan Win*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/08/10/us/politics/infrastructure-bill-passes.html.

[53] Sarah Frueh, *A Looming Crisis for Local U.S. Water Systems?*, THE NAT'L ACADS. OF SCIS., ENG'G, & MED. (Feb. 19, 2021), https://www.nationalacademies.org/news/2021/02/a-looming-crisis-for-local-u-s-water-systems.

[54] AM. SOC'Y OF CIV. ENG'RS, *supra* note 52.

[55] Frueh, *supra* note 53.

[56] AM. SOC'Y OF CIV. ENG'RS, *supra* note 52.

[57] Swain et al., *supra* note 7, at 1.

[58] *Id.*; *see* STACEY BERAHZER ET AL., UNC ENV'T CTR., NAVIGATING LEGAL PATHWAYS TO RATE-FUNDED CUSTOMER ASSISTANCE PROGRAMS: A GUIDE FOR WATER AND WASTEWATER UTILITIES 9 (2017).

paid for locally.[59] The expenses of addressing these issues will likely increase with every passing year.

Paradoxically, water bills are increasing despite a nationwide effort to conserve water.[60] Water utilities have taken on the conservation agenda with great vigor, urging full loads of laundry, turning off the tap while brushing teeth, and taking shorter showers, among other strategies.[61] In fact, many water districts assist consumers by providing free or discounted water-saving showerheads and other water-saving installations.[62] Conservation campaigns promise to lower consumer cost burdens while also promoting environmentally sound practices.[63] For example, Energy Star, an EPA-run program to promote energy efficiency, explains that practicing conservation "diverts less water from our rivers, bays, and estuaries, which helps keep the environment healthy. It can also reduce water and wastewater treatment costs and the amount of energy used to treat, pump, and heat water."[64]

Yet while conservation measures have moderated rising monthly household water costs, they have not stemmed rising prices entirely.[65] Households cannot completely eliminate their water usage, and water for cooking, drinking, and hygiene is difficult to minimize.[66] Apartment

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[59] AM. SOC'Y OF CIV. ENG'RS, *supra* note 52.

[60] *See*, *e.g.*, WYLAND FOUND., *Wyland National Mayor's Challenge for Water Conservation*, https://www.mywaterpledge.com/#:~:text=My%20Water%20Pledge%20is%20a,%2Dto%2Duse%20pledges%20online (last visited Apr. 22, 2022).

[61] *See*, *e.g.*, *Conservation*, ARIZ. DEP'T OF WATER RES., https://new.azwater.gov/conservation (last visited Apr. 22, 2022) (offering conservation assistance, outreach and education to consumers); *Conservation Tips*, CITY OF MADISON, WIS., https://www.cityofmadison.com/water/sustainability/conservation-tips (listing conservation options) (last visited Apr. 4, 2022); Matt Stevens, *There's Little Incentive for L.A. Renters to Take Shorter Showers*, L.A. TIMES (July 26, 2015), https://www.latimes.com/local/california/la-me-apartments-water-20150726-story.html (discussing L.A. apartment renters lacking the incentive to conserve water because they do not directly pay the bill).

[62] *See, e.g.*, *Conservation Tips & Kits*, BOS. WATER & SEWER COMM'N, https://www.bwsc.org/environment-education/green-programs/conservation-tips-kits (last visited Apr. 22, 2022).

[63] *See, e.g.*, COLO. STATE UNIV. EXTENSION, HOMEOWNER'S GUIDE TO: HOUSEHOLD WATER CONSERVATION (2018), https://extension.colostate.edu/docs/pubs/consumer/xcm219.pdf; S.H.A. Koop et al., *Enhancing Domestic Water Conservation Behaviour: A Review of Empirical Studies on Influencing Tactics*, 247 J. ENV'T MGMT. 867 (2019).

[64] *Saving Water Helps Protect Our Nation's Water Supplies*, ENERGY STAR, https://www.energystar.gov/products/saving_water_helps_protect_our_nations_water_supplies (last visited Apr. 22, 2022).

[65] Rubin, *supra* note 48, fig.3.

[66] AM. WATER WORKS ASS'N, PRINCIPLES OF WATER RATES, FEES, AND CHARGES - MANUAL OF WATER SUPPLY PRACTICES 129 (5th ed. 2000) [hereinafter AWWA MANUAL 2000] ("[W]ater

dwellers are already less likely than homeowners to have extensive lawns, pools, places to wash their cars on the premises, or sidewalks to hose down, meaning that they have fewer ways to cut back on discretionary water usage.[67] According to Stephanie Pinceti of the California Center for Sustainable Communities at UCLA, "[p]eople are not reducing because they don't have a lot to reduce."[68]

Further, regardless of individual usage, many of the overhead costs for operating water systems—costs of maintaining pipes, testing water quality, and so on—remain fixed.[69] If water consumption drops, utilities may need to charge more per cubic meter of water to cover their fixed expenses.[70] Because of this, average household water costs are rising even as water conservation measures are widely implemented.[71]

Analysts predict that water prices are likely to continue increasing in the foreseeable future.[72] As the costs increase, water becomes more and more unaffordable while nevertheless remaining a fundamental human need and an internationally recognized human right.[73] As became clear during the COVID-19 crisis, the benefits of water access and affordability are not just individual, but community-wide.[74] Access

and wastewater bills are perhaps the most difficult expenses for low-income families" because "there are no real substitutes for potable water.").

67 *See*, *e.g.*, Stevens, *supra* note 61.

68 *Id.*

69 Swain et al., *supra* note 7, at 1.

70 Douglas S. Kenney, *Understanding Utility Disincentives to Water Conservation as a Means of Adapting to Climate Change Pressures*, 106 J. AWWA 36, 37 (2014) ("[C]onservation can drop revenue (income) faster than costs, leading to budgetary shortfalls that necessitate rate increases.").

71 Swain et al., *supra* note 7, at 1.

72 NAT'L ASS'N OF CLEAN WATER AGENCIES, 2020 COST OF CLEAN WATER INDEX 2–3 (2020), https://www.nacwa.org/docs/default-source/news-publications/index-1-2021-final.pdf?sfvrsn=8a56fa61_6.

73 S*ee* G.A. Res. 64/292 The Human Right to Water and Sanitation (July 28, 2010); Human Rights Council Res. 15/9 U.N. Doc. A/HCR/RES/15/9 (Sept. 30, 2010); AWWA MANUAL 2017, *supra* note 11, at 207. California state law also recognizes water as a human right. *See* AB 685, 2011-2012 Leg., Reg. Sess., 2012 Cal. Stat. 4779; *California Law on Human Right to Water Sets Example for Others – UN Expert*, UN NEWS (Sept. 28, 2012), http://www.un.org/apps/news/story.asp?NewsID=43118&Cr=water+and+sanitation&Cr1#.URmxDqVJPJI.

74 *See* Justin Stoler et al., *Beyond Handwashing: Water Insecurity Undermines COVID-19 Response in Developing Areas*, 10 J. GLOB. HEALTH, June 2020, http://www.jogh.org/documents/issue202001/jogh-10-010355.pdf (noting difficulties faced by the Navajo Nation); *see also* Catherine Coleman Flowers, *Old, Possums and Pools of Sewage: No One Should Have to Live Like This*, N.Y. TIMES (Nov. 14, 2020), https://www.nytimes.com/2020/11/14/opinion/sunday/coronavirus-poverty-us.html (describing the rapid spread of COVID-19 in a community with inadequate wastewater systems).

to affordable water contributes to maintaining the public health and housing security, and helps ensure that individuals can retain jobs and participate in educational opportunities. Ultimately, access to water is a matter of human dignity that is undermined when water becomes unaffordable.[75]

B. *Utilities' Efforts to Address Unaffordability*

Recognizing that rising water costs can create hardships for consumers, an estimated 30 percent of local water utilities sponsor Customer Assistance or Affordability Plans to provide assistance to those who have difficulty paying their bills.[76]

1. Customer Assistance Plans

Customer Assistance Plans commonly include six types of programs: (i) lifeline rates; (ii) charitable subsidies; (iii) flexible payment plans; (iv) temporary emergency assistance; (v) conservation assistance; and (vi) discounts.[77] Each of these policy responses is described below.

i. Lifeline Programs

Lifeline programs provide targeted, sub-market rates for the first block of water consumption, with graduated pricing for subsequent blocks.[78] Block pricing is often used by utilities as part of their general billing practices, in part as a strategy to encourage conservation.[79]

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[75] *See* Michelle Bachelet, U.N. High Comm'r for Hum. Rts., Leave No One Behind (Mar. 19, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24360&LangID=E.

[76] LAUREN PATTERSON, WATER AFFORDABILITY & EQUITY: RE-IMAGINING WATER SERVICES: A REPORT FROM THE 2020 ASPEN-NICHOLAS WATER FORUM, ASPEN INST. 20 (2020) [hereinafter WATER AFFORDABILITY & EQUITY], https://www.aspeninstitute.org/wp-content/uploads/2020/12/Water-Forum-Consolidated-Report-2020.pdf.

[77] EPA 2016 REPORT, *supra* note 27, at 7; *see also* HENRY CNTY. WATER AUTH., *Charitable Assistance Program*, https://www.hcwa.com/customer-care/charitableassistance program.cms (last visited Apr. 22, 2022).

[78] Sophie Trémolet & Diane Binder, *What Are the Strengths and Limitations of Lifeline Rates?*, BODY KNOWLEDGE ON INFRASTRUCTURE REGUL. (June 2009), https://regulationbodyofknowledge.org/faq/social-pricing-and-rural-issues/what-are-the-strength-and-limitations-of-lifeline-rates/; Cook, *supra* note 9, at 5 (describing lifeline programs).

[79] Daniel Irvin, *Fun Facts about Water System Rate Structures*, UNIV. N.C.: THE ENV'T FIN. BLOG (Oct. 12, 2016), https://efc.web.unc.edu/2016/10/12/water-system-rate-structures/. Block rates may be either increasing or declining. *See* U.S. ENV'T PROT. AGENCY, *Community Water System Survey, Vol. 1: Overview* 48 (2006). Block rates of different types are designed to encourage certain behaviors, and municipalities structure their rate system based on "the political and environmental issues that they

Lifeline rates operate on the same principles but provide deeper discounts upon proof of need.[80]

To qualify for a lifeline program, an applicant must meet specified criteria, generally based on age, disability, and income.[81] The water account must be in the applicant's name.[82] From the customer's perspective, a drawback of the lifeline approach is that unit costs rise significantly if the customer is unable to stay within the initial block.[83] Subsidies provided for the first block also mean that prices rise for other consumers.[84] Historically, lifeline block rates have been less common than other Customer Assistance Plans. In its 2016 survey of affordability programs, the EPA found that only 5 out of the 365 Customer Assistance Plans it identified adopted this approach to assistance.[85]

ii. Charitable Programs

Charitable subsidy programs have been established by some water utilities as a way to avoid the constraints of state regulations that bar cross-subsidization and mandate equity across customer classes.[86] Because the funding for such programs comes from donations originating outside of the rate structure, rates are not being used to subsidize some consumers over others, thereby avoiding issues of

must address." Donald A. Forrer et al., *Waste and Wastewater Utility Affordability – the Cape Coral Florida Experience*, 7 J. BUS. CASE STUD. 37, 47 (2011) (describing rate-setting process in a Florida city).

80 MOONSHOT MISSIONS NACWA, ADDRESSING THE AFFORDABILITY OF WATER AND WASTEWATER SERVICES IN THE U.S.: CASE STUDIES OF UTILITY AFFORDABILITY PROGRAMS AND RATE STRUCTURES 4 (2021).

81 *See*, *e.g.*, *Lifeline Rate Information*, CONTRA COSTA WATER DIST., https://www.ccwater.com/237/Lifeline-Rate-Information (last visited Apr. 22, 2022).

82 *Lifeline Water Rate Application*, CONTRA COSTA WATER DIST. (Apr. 1, 2021), https://www.ccwater.com/DocumentCenter/View/145/Lifeline-Water-Rate-Application-Form-PDF?bidId=.

83 EPA 2016 REPORT, *supra* note 27, at 7.

84 *Id.* at 11.

85 *Id.*, at app. A; *see also* Cook, *supra* note 9, at 9. Some analysts do not consider lifeline pricing to be a true Customer Assistance Plan, given that lifeline prices are often available to all low-use consumers. AWWA MANUAL 2000, *supra* note 66, at 129.

86 G. Tracy Mehan III & Ian D. Gansler, *Addressing Affordability as a Necessary Element of Full-Cost Pricing*, J. AWWA 41, 42–43 (Oct. 2017) (noting that such programs are "gaining traction" in the water sector); *see also* Murthy, *supra* note 7, at 222–23.

equity.[87] For some jurisdictions, charitable programs are the only assistance offered to water customers.[88]

Methods of structuring these charitable programs vary, but typically local water customers are given the option of "rounding up" their monthly bill.[89] In some jurisdictions, city employees are also urged to make contributions.[90] The contributions are then pooled in a fund that is administered by a charity situated outside of local government. Applications from account holders needing financial assistance with their bills are reviewed, and grants are made to eligible applicants.[91] For example, the Washington, D.C. program, Serving People by Lending a Supporting Hand ("SPLASH"), is administered by the Greater Washington Urban League.[92]

While charity-based programs can be helpful, they are generally relatively modest and, because they rely on contributions, are finite and unable to provide assistance to all customers in need.[93] Further, some water authorities balk at setting up a charitable program that competes for contributions with local non-profits.[94]

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[87] On "equity" constraints, see *infra* text and accompanying notes 163–169; *see also* Alex Clegg, *CAPped: Five Examples of Customer Assistance Programs*, UNIV. N.C.: ENV'T FIN. BLOG (Oct. 28, 2015), https://efc.web.unc.edu/2015/10/28/customer-assistance-programs/.

[88] *See*, *e.g.*, *Operation Watershare: Neighbors Helping Neighbors*, CITY OF DALLAS., https://www.dallascitynews.net/operation-watershare-neighbors-helping-neighbors (last visited Apr. 23, 2022); *Billing and Account Information*, CITY OF DALLAS, https://dallascityhall.com/departments/waterutilities/Pages/billing_account_information.aspx (last visited Apr. 23, 2022) (identifying no discounts or subsidies for water customers).

[89] Cook, *supra* note 9, at 7.

[90] *See*, *e.g.*, *Help2Others Assistance Program*, MISSION SPRINGS WATER DIST., https://www.mswd.org/bill_assistance.aspx (last visited Apr. 23, 2022) (stating that Mission Springs Water District employees make thousands of dollars in contributions to the water utility's emergency assistance fund).

[91] Clegg, *supra* note 87.

[92] *Customer Assistance Programs,* D.C. WATER, https://www.dcwater.com/customer-assistance#Emergency%20Relief (last visited Apr. 4, 2022).

[93] BERAHZER ET AL., *supra* note 58, at 9.

[94] U.S. ENV'T PROT. AGENCY, *Drinking Water and Wastewater Customer Assistance Programs*, YOUTUBE, at 47:40–48:00 (June 7, 2016) [hereafter EPA Webinar], https://youtu.be/doW9rTq3pI0?t=2860 (statement of Brad Blake, Portland, Oregon, explaining why the city had not created a charitable arm and instead relied on rates to provide assistance).

iii. Flexible Payment Plans

Flexible payment plans are another mechanism for addressing water unaffordability.[95] Again, payment plans are only available to those with water accounts in their name, a group that typically excludes renters. While many water authorities indicate on their websites or in written material that payment plans are available, few water authorities spell out with any specificity what the parameters of such plans might be. One 2017 example shared by Portland, Oregon, however, indicated that a flexible payment plan could include a $50 credit and waiver of delinquency fees provided that the debtor continued to make agreed-upon payments; if timely payments were made over a period of time, a more substantial $300 credit would accrue under the plan.[96]

iv. Temporary Assistance

Many water authorities offer temporary assistance to customers facing emergencies.[97] These payments are made on a one-time basis, in a lump sum.[98] Since these payments occur outside of the rate structure, they are not subject to the "reasonable rate" or "equity" requirements commonly imposed by state law.[99] Often, water authorities impose an annual cap on these funds.[100] Renters can only access these sorts of temporary emergency payments in those atypical instances where the water account is in their name.[101]

v. Conservation Assistance

Conservation assistance, i.e., offering subsidies for energy efficient appliances and installations, is also a popular intervention that is generally limited to enrolled customers.[102] Usually only the few renters who are billed directly by the utility can access such programs. Further, even if renters have a direct account, they cannot authorize the plumbing modifications that may be required to make the installations. But incentive programs may encourage landlords to install conservation

95 Cook, *supra* note 9, at 9.

96 EPA Webinar, *supra* note 94, at 43:30–45:40.

97 Cook, *supra* note 9, at 8.

98 EPA 2016 REPORT, *supra* note 27, at 7; *see also* Clegg, *supra* note 87.

99 *See infra* notes 163–169 and accompanying text.

100 *See infra* notes 163–169 and accompanying text.

101 *See*, *e.g.*, *Care and Conserve*, CITY OF ATLANTA DEP'T WATERSHED MGMT., https://www.atlantawatershed.org/care-and-conserve/ (last visited Mar. 20, 2022).

102 EPA 2016 REPORT, *supra* note 27, at 7.

measures throughout their property—a practice that may inure to the renters' benefit, particularly if the landlord invoices water separately.[103]

vi. Discounts

Discounts are the most common way of addressing water unaffordability for consumers, with 42 percent of Customer Assistance Plans offering discounts as of 2016.[104] Discounts are typically limited to individuals with a water account in their name. These are most often owner-occupants of buildings of a specified size, ranging from single-family homes to larger apartment buildings. These benefits are generally not accessible to hard-to-reach renters.[105]

While each jurisdiction is different, the most frequent discounts are based on income, commonly combined with age, veteran status, disability, or emergency needs.[106] For some jurisdictions, the water authority grants discounts to any senior homeowner who has qualified for housing assistance or participates in another program, such as the Low Income Home Energy Assistance Program ("LIHEAP"), the Supplemental Nutritional Assistance Program ("SNAP"), or Supplemental Security Income ("SSI").[107]

Water discount programs have many variations. In Boston, Massachusetts, discounts are not tied to income but rather are available to owner-occupants who are senior, disabled, or blind.[108] In contrast, in San Antonio, Texas, water discounts for homeowners are based solely on income eligibility.[109] The discounts in Little Rock, Arkansas, combine water conservation with savings, automatically applying a 15 percent discount to households that keep water use under 750 gallons per month.[110] According to Central Arkansas Water, which administers the program, the discount "is intended to benefit domestic customers on

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103 *See Rebates and Incentives for Multi-Family Properties (5+ Units)*, MASS SAVE, https://www.masssave.com/saving/energy-assessments/multi-family-facilities-5-units-plus (last visited Mar. 8, 2022).

104 Cook, *supra* note 9, at 9.

105 EPA 2016 REPORT, *supra* note 27, at 27 (describing the "owner-occupier dilemma" and noting that this requirement excludes low-income households from assistance).

106 *Id.* at 6.

107 *Id.* app. B at 76–77.

108 *Discount Application*, BOS. WATER & SEWER COMM'N, https://www.bwsc.org/sites/default/files/2019-01/senior_discount_application.pdf (last visited Mar. 8, 2022).

109 *Affordability Discount*, SAN ANTONIO WATER SYS. (Jan. 2021), https://www.saws.org/service/water-sewer-rates/affordability-discount/.

110 *Water Rates*, CENT. ARK. WATER, https://carkw.com/customer-service/water-rates/#:~:text=The%20Conservation%20Rate%20Discount%20provides,billing%20month%20(1%20CCF%20%3D%20750 (last visited Mar. 8, 2022).

limited incomes and serve as an incentive for wise water use by all customers."[111]

The amounts of the discounts also vary significantly from jurisdiction to jurisdiction. Some include water and wastewater charges, while others only cover water.[112] Some are percentage-based discounts while others are absolute numbers.[113] Some discounts apply to the fixed portion of the bill and others apply only to usage.[114] By way of example, in Alvin, Texas, a city near Houston, single family residential customers age 65 and over may apply for "[a] 20% discount to the minimum base rate . . . [on] the first increment of water usage up to and including 2,000 gallons."[115] In Alvin, discounts are applied only to the base water charge and cannot be applied to wastewater charges.[116] In contrast, the utility in Tucson, Arizona, provides low-income account holders a discount of up to 75 percent of water and sewer charges.[117] Eligibility is based on income and household size, and the discount remains in place for thirty-six months before they must be renewed.[118] In Pittsburgh, Pennsylvania, water customers with incomes at or below 150 percent of the poverty line are eligible for a 75 percent discount on water and wastewater charges for one year, amounting to a monthly discount of $26.66.[119] San Antonio, Texas, provides combined water and wastewater discounts—families with incomes at or below 125 percent of the federal poverty line receive a $9.80 monthly discount, and families with incomes at or below 50 percent of the poverty line receive a monthly discount of $28.35.[120]

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111 *Id.*

112 *Water Service*, VILLAGE OF PLAINFIELD, https://www.plainfield-il.org/services/water-service (last visited Mar. 8, 2022) (offering 10 percent discount on total water, sewer, and capital charges for senior in Village of Plainfield, Illinois); *Updates to the Senior Discount Program*, TOWN OF ABINGTON, MASS. (Apr. 30, 2020, 1:33 PM), https://www.abingtonma.gov/abington-rockland-joint-water-works/news/updates-to-the-senior-discount-program (qualified seniors eligible for $10.00 discount on water only).

113 *See* EPA 2016 REPORT, *supra* note 27, at 8–9.

114 AWWA MANUAL 2000, *supra* note 66, at 130.

115 *Senior Water Bill Discount*, CITY OF ALVIN, TEX., https://www.alvin-tx.gov/page/ub.senior%20discount (last visited Mar. 8, 2022).

116 *Id.*

117 *Low Income Assistance Program*, CITY OF TUCSON, ARIZ., https://www.tucsonaz.gov/water/low-income-assistance-program (last visited Mar. 8, 2022).

118 *Id.*

119 PITT. WATER & SEWER AUTH., *Customer Assistance Program*, PGH$_2$O https://www.pgh2o.com/sites/default/files/2020-02/CAP%20flyer%20-%20WITH%20FAQ%202020_0.pdf (last visited Mar. 8, 2022) (providing information on Pittsburgh's CAP).

120 *Affordability Discount*, *supra* note 109.

2. Affordability Plans

In addition to the more common Customer Assistance Plans, two jurisdictions—Philadelphia and Baltimore—have adopted Affordability Plans that tie water rates to household income.[121]

The Philadelphia program, called the Tiered Assistance Plan ("TAP"), enrolls households with water accounts and monthly incomes of 150 percent of the federal poverty level ($41,625 a year for a family of four) and below, as well as customers with special hardships like death of a primary wage earner or job loss.[122] Water bills for customers making up to 50 percent of the federal poverty level are set at 2 percent of their monthly income, with a $12 minimum bill.[123] Those with somewhat higher incomes are subject to somewhat higher rates—for example, water bills of those making between 51 percent and 100 percent of the federal poverty levels are set at 2.5 percent of their monthly income.[124] The program also provides water debt forgiveness for TAP customers who enroll and then make twenty-four monthly payments.[125] The Baltimore program, which is still in an implementation phase, is based on similar principles.[126]

As progressive as these affordability plans are, they share the shortcoming of Customer Assistance Plans: both the Philadelphia and the Baltimore initiatives are addressed only to water account holders, who are primarily homeowners.[127] While these programs do not address the water affordability issues facing hard-to-reach water consumers, the Community Legal Services of Philadelphia, which helped

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121 *See* Elizabeth A. Mack et al., *An Experiment in Making Water Affordable: Philadelphia's Tiered Assistance Program (TAP)*, 56 J. AM. WATER RES. ASS'N 431 (2020) (describing Philadelphia's affordability program); *Water Assistance*, BALT. MAYOR'S OFF. OF CHILD. & FAM. SUCCESS, https://www.bmorechildren.com/residents/#water (last visited Apr. 23, 2022) (describing Baltimore's affordability program).

122 *See* Mack et al., *supra* note 121, at 434 (describing Philadelphia's affordability program).

123 *Id.*

124 Emily Nonko, *How Philadelphia Has Tried to Address Water Debt*, NEXT CITY (Sept. 1, 2020), https://nextcity.org/daily/entry/how-philadelphia-has-tried-to-address-water-debt.

125 *Id.*

126 *Another Water Rate Hike: Advocates Call for Relief*, FOOD & WATER WATCH (July 1, 2021), https://www.foodandwaterwatch.org/2021/07/01/another-water-rate-hike-advocates-call-for-relief/ (describing delays in implementation of Baltimore affordability plan).

127 *See*, *e.g.*, Nick Vadala, *Pennsylvania Landlord and Tenant Rights: Water, Utility Bills and Shutoffs*, PHILA. INQUIRER (Oct. 7, 2020), https://www.inquirer.com/philly-tips/tenant-rights-pennsylvania-ultilities-20201007.html (noting that landlords often retain responsibility for paying water bills).

craft the TAP program, promises that extending TAP to tenants is the "next piece of advocacy."[128] For now, though, in both Philadelphia and Baltimore, this low-income, disparately minority group, must wait for assistance that is already available to other water consumers.

C. *Limitations of Customer Assistance and Affordability Plans*

1. Homeowners Benefit, but Not Hard-to-Reach Renters

Water is unique among basic utilities in that renters typically do not see the utility bill, which instead goes to the landlord.[129] In contrast, renters often maintain other utilities, including electric, gas, and telecommunications accounts in their own names.[130] Professor Joseph Cook of the Water Research Center at Washington State University reports that "[o]f renter-occupied units, 10% have electricity included in the rent," and 16 percent have gas included in their rental payments.[131] In contrast, 71 percent of renters have water included in their rent.[132]

Why is water treated differently than other utilities? The history is somewhat obscure but a century ago, it was the norm for all utilities to be covered by a landlord through a rental agreement.[133] But as rents increased over time, many landlords sought ways to create the appearance that rental rates remained affordable.[134] One method of keeping the rental price low was to take utility payments out of the basic monthly rent and shift them to the tenant, creating the illusion that the costs of renting remained steady.[135]

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128 Nonko, *supra* note 124.

129 Chaplin & Ward, *supra* note 16; Cook, *supra* note 9, at 1; *see also* Matt Frankel, *Does Rent Include Utilities?*, MILLIONACRES (Feb. 4, 2021), https://www.millionacres.com/real-estate-investing/rental-properties/does-rent-include-utilities/ (noting that "many" landlords include water in rent because it is easier than installing individual meters); Vadala, *supra* note 127 (observing that landlords may retain control over water bills to avoid property liens imposed if tenants are delinquent).

130 Chaplin & Ward, *supra* note 16.

131 Cook, *supra* note 9, at 10.

132 *Id.*

133 *Submetering History: What Is the History of Submetering*, THINK UTIL. SERVS., https://thinkutilityservices.com/what-is-the-history-of-submetering/ (last visited Mar. 8, 2022).

134 *Id.*

135 Ellen Romano, *Making Water Submetering Easier to Swallow*, 63 J. PROP. MGMT. 38, 40–41 (1998).

Separate metering for electricity and gas began in the 1920s and gained popularity during the energy crisis of the 1970s.[136] In fact, with the Public Utilities Regulatory Policies Act of 1979 ("PURPA"), the federal government mandated that all new apartments built in the United States must be individually metered for electricity.[137]

Water, however, was a different matter.

First, because water was the least expensive of the basic utilities, the market pressure to detach it from rental payments was considerably less.[138] Landlords did not have as much to gain in terms of their premises' marketability and installing direct meters was (and still is) expensive. Separate metering is particularly unattractive for older buildings and smaller properties that have low tenant turnover and slim profit margins. According to experts testifying before the California legislature in 2015, installing water meters in existing apartments "costs thousands of dollars per unit," far beyond the investment capacity of small-scale owner-occupants.[139] As a result, though separate metering for water gained popularity in the 1990s, in part as a conservation strategy,[140] it remains much less common than it is for other utilities.[141] Some state laws now require separate water metering for new construction.[142] However, the majority of existing properties built before this wave of regulation do not have separate water meters for each apartment.[143]

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136 *Submetering History*, *supra* note 133.

137 Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of 15, 16, 30 & 42 U.S.C. (1982)); Cook, *supra* note 9, at 10.

138 AWWA MANUAL 2000, *supra* note 66, at 130 (noting that because costs of other utilities "have traditionally been much higher than water service," these utilities have "already faced issues of affordability").

139 Stevens, *supra* note 61.

140 *Submetering History*, *supra* note 133; Leta Heman, *Landlords Go with the Flow to Save Costs by Having Tenants Pay for Water,* WASH. POST, Mar. 3, 2001 (describing history and trends in water billing, including conservationists' interest in promoting separate metering).

141 *See*, *e.g.*, *Utility Submetering*, *supra* note 24 (describing state submetering laws). Note that submetering does not necessarily mean that the tenant has a separate water account. *See supra* notes 17–23 and accompanying text.

142 *See id.* (describing laws of California, Georgia, and Texas requiring submetering in new construction).

143 *See*, *e.g.*, Stevens, *supra* note 61; *see also* Julia Sulek, *California Landlords Pass Along Water Bills to Coax Apartment Dwellers to Conserve*, MERCURY NEWS (June 6, 2015), https://www.mercurynews.com/2015/06/06/california-landlords-pass-along-water-bills-to-coax-apartment-dwellers-to-conserve/ (reporting that in 2015, 80 percent of apartment dwellers in California did not have separate water meters).

Second, as interest in separate metering of water rose in the 1990s, advocates for low-income people, such as the National Consumer Law Center, took a strong stand against the de-coupling of water from rent.[144] These low-income advocates argued that adding another, separate bill to tenants' load would simply set the tenants up to miss payments.[145] If water remained part of the tenant's overall rental payment, these issues would be less likely to arise. This vocal opposition from advocates likely had some effect in keeping water accounts in the hands of owners.

The impact of this situation on hard-to-reach renters is no secret. In 2015, immediately prior to adoption of the California law mandating installation of individual water meters in new construction, representatives of the Apartment Association of Los Angeles estimated that more than 90 percent of apartment buildings in that city used a "master meter" to provide a single reading for the whole building, with the bill delivered to the building owner.[146] Nationwide, in 2015, separate billing of residents of multi-family dwellings was below 30 percent for buildings of three to four units, though studies reflect increases in unit-based billing for properties with five or more units.[147] According to the California State Water Control Board, writing in 2020, "[i]n the water sector, master-metering has effectively prevented water affordability benefits from reaching eligible households."[148]

144 OLIVIA WEIN & CHARLIE HARAK, SOAKING TENANTS: BILLING TENANTS DIRECTLY FOR WATER AND SEWER SERVICE (2003), https://www.nclc.org/images/pdf/energy_utility_telecom/water/report.pdf. More recently, recognizing the rise of assistance and affordability plans, the National Consumer Law Center has worked to ensure "that the benefits of affordability programs reach low-income customers when it is the landlord who is the utility's customer." NAT'L CONSUMER L. CTR., REVIEW AND RECOMMENDATIONS FOR IMPLEMENTING WATER AND WASTEWATER AFFORDABILITY PROGRAMS IN THE UNITED STATES 46 (2014).

145 WEIN & HARAK, *supra* note 144; *see also* Kenneth Lelen, *Liquid Assets: More Landlords Add Water Meters*, WASH. POST, Nov. 8, 1997 (noting that tenants with moderate incomes may prefer having water bills incorporated into rent). But some tenants have expressed a preference for individualized accounts, feeling that they pay more when an undifferentiated water charge is included in the rent. *See e.g.*, Jason Song, *Asking if Water Meters Matter*, BALT. SUN (Aug. 26, 2002), https://www.baltimoresun.com/news/bs-xpm-2002-08-26-0208260244-story.html.

146 Stevens, *supra* note 61.

147 Rubin, *supra* note 48, at 50 fig.2. Apartments in small and mid-sized buildings, where individual meters are least often installed, "typically have lower rents and are therefore more affordable to modest-income households." AMERICA'S RENTAL HOUSING, *supra* note 25, at 13.

148 CAL. STATE WATER RES. CONTROL BD., RECOMMENDATIONS FOR IMPLEMENTATION OF A STATEWIDE LOW INCOME WATER RATE ASSISTANCE PROGRAM 31–32 (2020), https://

Without separate metering, water companies are unable to accurately bill tenants directly. Instead, an overall bill for the property is presented to the landlord, who is responsible for paying the water authority. The landlord may recoup the funds by either incorporating the bill into the monthly rent or dividing it among the tenants for separate payment, depending on the rules in the jurisdiction. Sewer costs may also be divided among tenants.[149] Allocations are often made according to square footage of the apartments or number of persons in the apartment.[150]

When a landlord incorporates water prices into rental payments, the arrangement can have the effect of obscuring the impact of rising water rates on renters. For example, in 2017, a spokesperson for the San Antonio water authority stated that she saw "little value in reducing the water bill" for landlords of multi-family dwellings, because "[the landlords] mostly try to roll that into what your rent is."[151] In the spokesperson's mind, because the water cost was a relatively small, undifferentiated portion of the overall rent, it was a trivial concern. Of course, the reality for low-income renters is just the opposite: every dollar is needed in order to keep abreast of payments and incorporating rising water rates into the monthly rental may be enough to put these low-income households over the edge.[152]

More robust metering of water might, as it gains traction over time, promote practices for water billing that are more comparable to those

www.waterboards.ca.gov/water_issues/programs/conservation_portal/assistance/docs/ab401_report.pdf.

149 The sanitation charge is often the largest portion of the bill. Adjangba, *supra* note 29.

150 This method of dividing costs is known as the Ratio Utility Billing System. *See*, *e.g.*, *Multi-Family Apartment Complex: Ratio Utility Billing System*, MONTGOMERY CNTY., MD., https://montgomerycountymd.gov/DHCA/Resources/Files/housing/licensing/Form_RUBS_Jan19.pdf (describing prescribed RUBS formula for Montgomery County, Maryland); *see also* Trevor Henson, *Why a Ratio Utility Billing System (RUBS) Is a Property Owner's Formula for Success*, LINKEDIN PULSE (Nov. 6, 2019), https://www.linkedin.com/pulse/why-ratio-utility-billing-system-rubs-property-owners-henson-pmp/. This approach has been controversial in some jurisdictions. *See*, *e.g.*, *Court Declares that Landlords Can't Circumvent Rent Limits by Charging Extra for Water*, SANTA MONICA DAILY PRESS, Aug. 30, 2018, (finding that landlords cannot use RUBS to exceed rent limits).

151 EPA Webinar, *supra* note 94 (start video at 55:45–57:08) (statement of Sandi J. Wolfe, Communications and External Settings, San Antonio Water System).

152 PATRICIA JONES & AMBER MOULTON, UNITARIAN UNIVERSALIST SERV. COMM., THE INVISIBLE CRISIS: WATER UNAFFORDABILITY IN THE UNITED STATES 6–10 (2016) http://uswateralliance.org/sites/uswateralliance.org/files/Invisible%20Crisis%20-%20Water%20Affordability%20in%20the%20US.pdf (discussing household economics amid rising water prices).

of electricity and gas billing, making it easier for water utilities to design assistance programs in ways that benefit hard-to-reach consumers. With increasing attention to climate change and conservation, both separate metering and submetering (where the landlord retains responsibility for the bill) are often touted as effective ways to ensure that tenants conserve water, since they will be seeing their own water usage reflected in their bill.[153] Currently, however, the cost of installing meters remains a deterrent, particularly for smaller landlords.[154]

In any event, water authorities have not generally championed direct billing of tenants.[155] Addressing bills to landlords is administratively easier than opening, closing, and reopening the accounts of tenants as they move in and out.[156] Even when direct billing of tenants is permitted, the landlord generally remains ultimately responsible for the bill.[157] Further, as of 2021, local laws regarding water billing may require that the bill be delivered to and paid by the landlord, regardless of the metering situation.[158] Submeters are simply

153 Stevens, *supra* note 61; Romano, *supra* note 135, at 40–41; *see also* Alexandra B. Klass & Elizabeth Wilson, *Remaking Energy: The Critical Role of Energy Consumption Data*, 104 CAL. L. REV. 1095, 1101 (2016) (noting ways that additional data can affect consumption).

154 Eric Weld, *Water Submetering: Costs, Benefits and Legal Compliance*, MASSLANDLORDS.NET, https://masslandlords.net/laws/water-submetering/ (last visited Mar. 20, 2022) (estimating that submetering for a triple decker could cost as much as $12,000).

155 AWWA MANUAL 2017, *supra* note 10, at 215 (noting, with particular reference to renters, that "[t]he logistical and administrative challenges that need to be addressed when establishing a new affordability program may be extensive").

156 In fact, Seattle stopped opening tenant accounts in 2011 in part for this reason. *Seattle Water Utility No Longer Opening Tenant Accounts*, TENANT SCREENING BLOG (July 12, 2011), http://www.tenantscreeningblog.com/rents-and-deposits/seattle-water-utility-no-longer-opening-tenant-accounts/; *see also Renting in Seattle*, SEATTLE.GOV, https://www.seattle.gov/rentinginseattle/renters/moving-in/utilities (last visited Mar. 20, 2022) (explaining that "[s]ince 2011, new tenants cannot open accounts in their own names"). Because Seattle offers water assistance to renters through their electricity accounts, discussed in detail *infra* notes 267–272 and accompanying text, low-income renters remain eligible for assistance despite the absence of individual water accounts.

157 *See Tenant Direct Billing Agreement – Water and Sewer,* CITY OF COLUMBUS (2018), https://www.columbus.gov/utilities/customers/bill-payment/tenant-billing-agreement—-water-and-sewer/.

158 Rubin, *supra* note 48, at 50; *see, e.g.*, Stevens, *supra* note 61 (discussing Los Angeles); *see also* Oskar Rey, *Landlord/Tenant Issues for Water and Sewer Utilities*, MRSC INSIGHT BLOG (April 22, 2019), https://mrsc.org/Home/Stay-Informed/MRSC-Insight/April-2019/Landlord-Tenant-Issues-Water-Sewer-Utilities.aspx (describing Washington State law).

used by the landlord to ensure accurate allocation of the water costs among tenants and to encourage tenants to conserve.

Customer Assistance or Affordability Plans are beneficial for those who qualify. In most cases, however, Customer Assistance or Affordability Plans address the needs of account holders (usually homeowners) rather than renters, and are particularly likely to exclude hard-to-reach renters in multi-family housing units—the very cohort that is most likely to need assistance.[159] On that basis, these plans fall short of "target[ing] explicit subsidies to those who really need them"—a basic principle of water pricing.[160] For example, writing in 2020, the California State Water Resources Control Board estimated that "among households with incomes under 200% federal poverty level (FPL) in California, about 60% (or 2.6 million households) do not directly receive a water bill and thus cannot access current benefits from water affordability assistance programs."[161] One expert estimates that nationwide 21 percent of all U.S. housing units are occupied by "hard-to-reach," low income, disproportionately minority renters, who are left out of most water assistance programs.[162]

2. Legal Restrictions on Customer Assistance and Affordability Plans

In some jurisdictions, Customer Assistance or Affordability Plans are unavailable to any water consumer, regardless of their account status. Elsewhere in the world, "[c]ross-subsidies in water tariff structures are common," as rate structures are often used to facilitate income redistribution and achieve social goals.[163] In some U.S. jurisdictions, however, the concepts of "equity" and non-discrimination are construed to require that all residential water customers be charged the same rates, despite their inability to pay or other extenuating circumstances.[164] California is a case in point, where Proposition 218, approved by voters in 1996, bars public utilities from charging

159 WATER AFFORDABILITY & EQUITY, *supra* note 76, at 6.

160 Sanford V. Berg & Lynn Holt, *Pricing: The Most Dangerous and Most Important Decision*, WATER 21: MAG. INT'L WATER ASS'N, Feb. 2002, at 4.

161 CAL. STATE, *supra* note 148, at 31.

162 Cook, *supra* note 9, at 1.

163 Berg & Holt, *supra* note 160, at 3; *see* AWWA MANUAL 2000, *supra* note 66, at 130.

164 Berahzer et al., *Navigating Legal Pathways*, *supra* note 58, at 16–17, 25, 57, 74; AWWA MANUAL 2017, *supra* note 10, at 215 (noting that some state laws prohibit providing financial assistance to low income customers).

differential rates to customers.[165] These provisions, originally intended to legislate fairness within consumer classes, have instead encouraged inflexible regimes that ignore basic needs.[166]

Statutory or regulatory bans on cross-subsidization between consumer groups, bars on using rate revenue to provide assistance, and ambiguous legal requirements that rates be "reasonable" have been cited by utilities to justify their refusal to offer any discounts, debt forgiveness, or tiered, affordable rates such as those adopted in Philadelphia and Baltimore.[167] In fact, there is little case law construing these statutory terms in the context of assistance or affordability plans.[168] Faced with a legal gray area, utilities are simply choosing the path that is most risk averse from their perspective, even though it ignores the needs of consumers.

A recent expert report from the 2020 Aspen-Nichols Water Forum called out this approach, decrying the lack of political will to address the issue and pointedly urging states to "update policies and legislations that are barriers to local governments setting rates or financing CAPs [Customer Assistance Plans]."[169] Meanwhile, in some jurisdictions, these policies continue to frustrate access to discounts and other water assistance for account holders and hard-to-reach consumers alike.

3. A Regime that is Stacked Against Low Income Renters

Without access to Customer Assistance or Affordability Plans, hard-to-reach renters have few alternatives to help cover water costs. Other benefits programs designed to benefit low-income renters generally do not extend to water. Benefits from SNAP can only be used for water if the tenant receives a separate bill.[170] LIHEAP, the federally-

165 WATER AFFORDABILITY & EQUITY, *supra* note 76, at 18; PUB. POL'Y INST. OF CAL., *Paying for Water in California* 2–3 (Oct. 2016).

166 WATER AFFORDABILITY & EQUITY, *supra* note 76, at 20.

167 Tracy Mehan III & Ian D. Gansler, *Addressing Affordability as a Necessary Element of Full-Cost Pricing*, J. AWWA 46, 47 (Oct. 2017) (noting that such programs are "gaining traction" in the water sector); Berahzer et al., *Navigating Legal Pathways*, *supra* note 58, at 7; Gregory Pierce et al., *Solutions to the Problem of Drinking Water Service Affordability: A Review of the Evidence*, WIREs WATER 9, Mar. 7, 2021, https://doi.org/10.1002/wat2.1522 (describing state-level legal constraints).

168 Berahzer et al., *Navigating Legal Pathways*, *supra* note 58, at 16.

169 WATER AFFORDABILITY & EQUITY, *supra* note 76, at 18; *see also* Pierce et al., *supra* note 167, at 7–8 (noting lack of programmatic support for addressing water unaffordability, in contrast to other residential utilities).

170 *Facts About SNAP*, U.S. DEP'T OF AGRIC., FOOD & NUTRITION SERV., https://www.fns.usda.gov/snap/facts (last visited Apr. 23, 2022) (applicant must show water bill in order to qualify for income deduction).

funded program that provides electricity or gas assistance to low income consumers, cannot be applied to relieve the burden of water costs.[171] Tellingly, water utilities have found that using LIHEAP databases to assist with identifying water customers in need is ineffective, since most LIHEAP customers are renters who are ineligible for water utilities' Customer Assistance Plans.[172]

The federally-funded Low Income Household Water Assistance Program ("LIHWAP")—a temporary assistance program created in response to COVID-19—could potentially be used in the short term by local authorities to support renters who need assistance.[173] Unfortunately, the legislation creating the program does not invite innovative approaches. Instead, it directs the U.S. Department of Health and Human Services ("HHS") to "use existing processes, procedures, policies, and systems in place to provide assistance to low-income households, including by using existing programs and program announcements, application and approval processes."[174] With few exceptions, "existing processes" will not reach renters. Nevertheless, with the creation of LIHWAP, local water administrators have the opportunity to articulate a vision of how to reach non-owners, whose water costs may be substantial. Despite the discouraging legislative language, some local authorities are already implementing such plans with an expanded focus on renters.[175] Yet because LIHWAP is a temporary assistance program tied to COVID-19 relief, when the federal

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171 *Help with Bills: Get Help with Your Home Energy Bill*, USA.GOV, https://www.usa.gov/help-with-bills (last visited Apr. 23, 2022) (stating that "LIHEAP funds may not be used to pay water and sewer bills").

172 U.S. WATER ALL., *Modern, Effective, and Compassionate Billing: How Louisville Made an Overdue Upgrade to Assistance Programs and Improved the Utility Customer Relationship* 4 (2020), http://uswateralliance.org/sites/uswateralliance.org/files/publications/FINAL%20Louisville%20case%20study_1.pdf.

173 *See* Low Income Household Water Assistance Program (LIHWAP), U.S. DEP'T OF HEALTH AND HUM. SERVS.: OFF. OF CMTY. SERVS (Oct. 7, 2021), https://www.acf.hhs.gov/ocs/programs/lihwap.

174 Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, s. 533.

175 *Welcome to the DC Water Cares Multifamily Assistance Program*, DC WATER, https://www.dcwater.com/welcome-dc-water-cares-multifamily%C2%A0assistance%C2%A0program%C2%A0 (last visited Apr. 24, 2022) (describing new program for hard to reach renters in multifamily housing); *see also* Resolution of the Board of Directors of the District of Columbia Water and Sewer Authority, #21-42, D.C. WATER & SEWER AUTH. (May 6, 2021), https://www.dcwater.com/sites/default/files/event_attachment/Board%20Approved%20Resolutions%20Nos%2021-35%20through%2021-43%20-%2005.06.2021.pdf (providing that the program will terminate on September 30, 2021, unless extended by the Board).

funds are depleted, there is no assurance of continued appropriations to support new, more renter-friendly water assistance programs.

In sum, in most communities in the United States, water discounts and other assistance programs target account holders—generally homeowners—who meet specific criteria. Most renters, particularly those in multi-family residences, are de facto excluded from these programs.[176] As explained in Part III below, racial disparities in homeownership mean that these assistance programs favor white households while reaching a much smaller fraction of Black households in most communities. Further, the benefits are not well-targeted at those who need them. For example, a landlord may not qualify for a discount even though their low-income tenants are senior or disabled and are paying for water through their monthly rent. The tenants' water burden is increasing, but the tenants' situations simply do not count for purposes of determining eligibility for water assistance.

III. WATER ASSISTANCE PROGRAMS HAVE RACIALLY DISCRIMINATORY IMPACTS BECAUSE THEY EXCLUDE LOW INCOME RENTERS

A. *Who Rents and Why?*

People choose to rent rather than buy their homes for many reasons. Renters may be transient—perhaps they are students who expect to move on after graduation, or new arrivals not yet ready to commit to a particular location or neighborhood.[177] Renters may also be community members who lack wealth, likely carrying debt that is substantial enough to deter mortgage lenders.[178] Perhaps they cannot afford the down payment required to purchase a home or do not have

[176] *See* MICHAEL GRINSHPUN, MEASURING AND ADDRESSING WATER AND WASTEWATER AFFORDABILITY IN THE UNITED STATES 9–10 (2020), http://www.bu.edu/ise/files/2020/06/measuring-and-addressing-water-and-waste-water-affordability-in-the-united-states-june2020-final.pdf.

[177] JOINT CTR. FOR HOUS. STUD., *Renter Demographics* (2011), https://www.jchs.harvard.edu/sites/default/files/ahr2011-3-demographics.pdf; *see also* Eunice Tamoh Anu, *Analyzing the Renting Decision Made by Tenants Instead of Owning Their Own Homes*, 8 INT'L J. RSCH. BUS. STUD. & MGMT. 1, 5 (2017), http://ijrbsm.org/papers/v4-i8/1.pdf. Even in housing markets with a university, students may make up only a small percentage of renters. For example, the U.S. Department of Housing and Urban Development estimated that students made up only 5 percent of residents in Allegheny County, which includes Pittsburgh, in 2016. *Comprehensive Housing Market Analysis: Pittsburgh, Pennsylvania*, U.S. DEP'T OF HOUS. & URB. DEV. 6–7 (July 1, 2018), https://www.huduser.gov/portal/publications/pdf/PittsburghPA-comp-17.pdf.

[178] Desmond et al., *supra* note 34, at 231; Kerrie Kennedy, *What's Behind the Racial Homeownership Gap?*, CHI. AGENT MAG. (Feb. 25, 2020), https://chicagoagentmagazine.com/2020/02/25/whats-behind-the-racial-homeownership-gap/.

the steady employment required to make regular payments on a mortgage.[179] Or perhaps the renters do have steady jobs and access to funds, but—particularly if they are Black—they have been discouraged from buying because of realtors' racial biases or race-based difficulties obtaining credit.[180]

According to Christopher Herbert of the Joint Center for Housing Studies at Harvard University, "the racial gap in homeownership is primarily tied to hundreds of years of slavery and discrimination that have left Black Americans with lower incomes, less wealth, fewer college degrees, and a higher likelihood of being raised in a single-parent household than their white counterparts."[181] Redlining practices are part of this centuries-long continuum. Redlining was the U.S. government-sponsored practice initiated in the 1930s of using red ink on local maps to indicate predominantly Black neighborhoods, signaling a purported danger zone for bank lending, and thus making it harder for Black households to buy homes and build wealth.[182] The practice was officially outlawed in 1968 with the passage of the federal Fair Housing Act, but redlining-type practices by lenders and realtors continue to have real impacts on Black individuals' access to the full range of housing.[183] Black homebuyers are rejected for mortgage loans at 2.5

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179 Anu, *supra* note 177, at 5–6.

180 Kennedy, *supra* note 178; Zeninjor Enwemeka et al., *Black and Hispanic People More Likely to Be Denied Mortgage Loans in Boston*, WBUR (Mar. 30, 2022), https://www.wbur.org/news/2022/03/30/home-loans-mortgages-boston-denials (noting ways in which mortgage discrimination discourages black home-buyers). *See generally* COTY MONTAG, NAACP LEGAL DEF. & EDUC. FUND, INC., WATER/COLOR: A STUDY OF RACE & THE WATER AFFORDABILITY CRISIS IN AMERICA'S CITIES 3–18 (2019) (describing intertwined history of housing discrimination and household water access).

181 Jim Morrison, *Shut Out: What Buyers of Color Need to Close the Homeownership Gap*, BOSTON.COM (Dec. 8, 2020), realestate.boston.com/buying/2020/12/08/closing-racial-homeownership-gap/.

182 Andre Perry & David Harshbarger, *America's Formerly Redlined Neighborhoods Have Changed, and So Must Solutions to Rectify Them*, BROOKINGS INST. (Oct. 14, 2019), https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/; *see also* RACIAL RESTRICTION AND HOUSING DISCRIMINATION IN THE CHICAGOLAND AREA: REDLINING, DIGITAL CHICAGO, https://digitalchicagohistory.org/exhibits/show/restricted-chicago/intro-restricted-chicago (last visited Apr. 23, 2022); Montag, *supra* note 180, at 14 (describing origins and impacts of redlining).

183 Nellie Peyton, *Redlining in America: How a History of Housing Discrimination Endures*, THOMSON REUTERS FOUND. (July 13, 2020), https://news.trust.org/item/20200713110849-az14m/. *See*, *e.g.*, United States v. Eagle Bank & Trust, 15-cv-1492 (E.D. Mo. 2015) (challenging bank's redlining practices); United States v. KleinBank, 17-cv-136 (D. Minn. 2017) (challenging unlawful redlining in Minneapolis-St. Paul area); United States v. First Merchants Bank, 19-cv-2365 (S.D. Ind. 2019) (challenging bank's unlawful redlining in Indianapolis).

times the rejection rate for white applicants and prospective purchasers from minority groups are regularly steered toward certain neighborhoods.[184]

The impacts of these disparities cumulate over time. Census data shows that, in general, renters' incomes are well below those of homeowners.[185] Renters are also disproportionately Black and Hispanic households, even though white renters may add up to more in absolute numbers.[186] Nationally, the first quarter 2021 homeownership rate for non-Hispanic White Alone householders was at 73.8 percent, while the rate for Black Alone householders was only 45.1 percent, a 28.7 percent gap.[187] In many communities, such as Buffalo, New York, Albany, New York, and Minneapolis, Minnesota, the gap is greater than 40 percentage points.[188] In the period from 2000 to 2018, 93 percent of the new Black households in Minneapolis-St. Paul were renters.[189]

The legacy of redlining does not end with skewed access to homeownership, however. Studies also show that homes owned by Black people are appraised less generously than comparable homes owned by white individuals.[190] For instance, Black-owned homes in Boston are valued at about 17 percent less than white-owned homes.[191] This disparity in home values is an important component of the racial wealth gap, adding up to billions in lost dollars for Black homeowners—

184 NAT'L ASS'N OF REALTORS, SNAPSHOT OF RACE AND HOMEBUYING IN AMERICA, at pp. 14, 12, 20, 23 (2021), https://www.nar.realtor/research-and-statistics/research-reports/a-snapshot-of-race-and-home-buying-in-america.

185 AMERICA'S RENTAL HOUSING 2020, *supra* note 25, at 11.

186 *Id.* at 9 fig.7.

187 U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FIRST QUARTER 2021, Release Number: CB21-56 (Apr. 27, 2021).

188 Alanna McCargo & Sarah Strochak, *Mapping the Black Homeownership Gap*, URB. INST. (Feb. 26, 2018), https://www.urban.org/urban-wire/mapping-black-home ownership-gap.

189 Yonah Freemark et al., *Research Report: Who Owns the Twin Cities? An Analysis of Racialized Ownership Trends in Hennepin and Ramsey Counties*, URB. INST. (June 16, 2021), https://www.urban.org/events/who-owns-twin-cities-analysis-racialized-ownership-trends-hennepin-and-ramsey-counties.

190 Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 25, 2020), https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html; Andre Perry et al., *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, BROOKINGS INST. (Nov. 27, 2018), https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/.

191 Michelle Lerner, *Report: In Boston, Black Homeownership Rate Is Nearly Half of White*, BOSTON.COM (May 12, 2021), http://realestate.boston.com/buying/2021/05/12/report-in-boston-black-homeownership-rate-is-nearly-half-of-white/ (reporting results of Zillow study of homeownership).

losses that are passed down over generations.[192] At the same time, there is evidence that Black tenants pay more for their rentals than white tenants, further frustrating their efforts to save money for other purposes, including a home purchase.[193]

Faced with these race-specific difficulties of buying a home, Black households are more likely to be hard-to-reach renters than are white households. And hard-to-reach water consumers, unless they live in the few communities that extend assistance to renters, are unlikely to be able to access the benefits of Customer Assistance or Affordability Plans to address their rising water and wastewater expenses. Those benefits are generally reserved for homeowners.

B. *The Subtle Impacts of Racial Valuation*

As Matiangai Sirleaf points out in her recent discussion of racial valuation in the context of COVID-19, policymakers tacitly take race into account in developing policy approaches by undervaluing or even completely discounting negative impacts on Black individuals.[194] Sirleaf describes racial valuation as "encompassing the perceived sum of the moral importance or inherent value of a person or group based on race."[195] Racial valuation is a particularly pertinent concept when fundamental human rights like health or water are at stake, since undermining those rights tends to dehumanize the targeted individuals, thus further justifying unequal or inhumane treatment.[196]

The failure of most water authorities and water experts to consider, or even investigate, the racial impacts of their Customer Assistance or Affordability Plans appears to be an instance of racial valuation.[197] Perhaps this is not surprising. Water assistance initiatives

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[192] Kamin, *supra* note 190.

[193] Dick Early et al., *Analysis: African Americans Pay More for Rent, Especially in White Neighborhoods*, CHI. REP. (Oct. 31, 2018), https://www.chicagoreporter.com/analysis-african-americans-pay-more-for-rent-especially-in-white-neighborhoods/.

[194] Sirleaf, *supra* note 38, at 1825–26 (describing the concept of racial valuation).

[195] *Id.* at 1826.

[196] *See* Kalina Christoff, *Dehumanization in Organizational Settings: Some Scientific and Ethical Considerations,* 8 FRONTIERS HUM. NEUROSCIENCE 1, 1–2 (2014) (arguing that "neglect" is one aspect of dehumanization, and that such everyday dehumanization is neither benign nor inconsequential).

[197] *See*, *e.g.*, WATER AFFORDABILITY & EQUITY, *supra* note 76, at 17 (noting "how little" States know about their utilities and "how little" utilities know about their customers). A few policymakers are beginning to use a racial lens to examine their practices. For example, the California Water Boards have begun to develop specific initiatives on racial equity and water. *See*, *e.g.*, *Open Data, Water Quality and Equity: A Conversation with Greg Gearhart of the California Water Board,* LOCAL & REG'L GOV'T ALL. ON RACE & EQUITY

are administered in the context of a national housing system that embeds both historic and current discrimination on the basis of race.[198] Broader cultural norms of racial valuation—seen in everything from advertising to health care to policing—tell utilities that policies disparately and negatively impacting Black consumers are of relatively little concern.[199]

There is ample evidence that racial valuation affects Black individuals and households in a range of settings connected to housing. The devaluation of assets, including homes, in Black-identified spaces, has been well-documented.[200] Black residents' need for clean household water has likewise been systematically devalued, as demonstrated in Flint, Michigan, where thousands of residents were exposed to drinking water with dangerous levels of lead.[201] Flint's population is majority (54 percent) Black or African American, with just 38.4 percent of residents identifying as white.[202] The decisions leading to the water crisis in Flint, including failure to respond quickly to customer complaints, were not overtly racist. Yet reviewing the record, the Michigan Civil Rights

(May 4, 2020), https://www.racialequityalliance.org/2020/05/04/open-data-water-quality-and-equity-a-conversation-with-greg-gearhart-of-the-california-water-board/; *Racial Equity Initiative Site*, CAL. WATER BDS., https://www.waterboards.ca.gov/racial_equity/. Similarly, in 2019, Austin Water partnered with the University of Texas to examine "how to advance racial equity through its departmental policies and programs." BRYTANI CAVIL ET AL., MAKING EQUITY FLOW: PROPOSALS FOR ADVANCING RACIAL EQUITY IN WATER DEPARTMENT PRACTICES (2019), https://soa.utexas.edu/sites/default/files/2020.5_MakingEquityFlow_0.pdf.

198 See discussion *supra* notes 177–193 and accompanying text.

199 *See*, *e.g.*, Sirleaf, *supra* note 38 at 1848; Delrisha White, *Capitalism and California's Urgent Need to Reform the Prison Volunteer Program*, 35 HARV. BLACKLETTER L.J. 73, 76 (2019) (arguing that state practice of training inmates, predominantly Black men, to fight fires for little compensation reflects devaluation of Black lives); Note, *Black Lives Discounted: Altering the Standard for Voir Dire and the Rules of Evidence to Better Account for Implicit Racial Biases Against Black Victims in Self-Defense Cases*, 134 HARV. L. REV. 1521, 1526 (2020) (noting that juries tend to devalue Black lives); Judy Foster Davis, *Selling Whiteness: A Critical Review of the Literature on Marketing and Racism*, 34 J. MKTG. MGMT. 134 (2018); Trevor Robinson, *A Brief Rundown of Racism with Advertising and Why It's Still Happening Today*, ADWEEK, Feb. 21, 2019.

200 *See*, *e.g.*, Perry et al., *supra* note 190.

201 *See generally* ANNA CLARK, THE POISONED CITY: FLINT'S WATER AND THE AMERICAN URBAN TRAGEDY (2018).

202 *QuickFacts: Flint City, Michigan*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/flintcitymichigan (last visited Apr. 23, 2022).

Commission identified systemic racism as a critical factor in the sequence of events.[203] Wrote the Commission:

> We want to believe, and indeed it is likely true, that nobody ever specifically even considered the race, income, or national origin of the people in Flint as factors in their decision-making. All of their decisions were, as we commonly say, "colorblind." Yet it is difficult to find anybody outside government who does not believe that at least some decisions would have been made differently if the community affected looked more like Birmingham [Michigan, 89 percent white] and less like Flint.[204]

Given the ubiquity of racial valuation, the racial impacts of water policies disfavoring low-income, disparately Black renters may likewise seem so "natural" and unremarkable that utilities fail to see that there is even an issue to be addressed.

Water conservation initiatives are a case in point. The energy and enthusiasm that water utilities pour into conservation measures contrast sharply with most utilities' general indifference to assisting low-income renters in affording adequate water and sanitation. Conservation goals are important, and there is every reason to install water-saving devices and repair expensive leaks that are wasting precious water resources.[205] But using conservation initiatives as a key strategy to lower water costs for low-income consumers—as is done, for instance, in Little Rock, Arkansas—is just another version of using water to control the behavior (i.e., encouraging shorter showers, etc.) of those who cannot afford rising water prices.[206] As prices rise, more affluent and more white consumers retain the option of not conserving water because they do not need discounts; they can afford to water their lawns, wash their cars, take long showers, and so on. Low-income consumers, in contrast, can qualify for help only by cutting their consumption; the actual water needs of these disproportionately Black

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203 MICHIGAN CIVIL RIGHTS COMMISSION, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT, at iii (Feb. 17, 2017), https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf.

204 *Id.* at 12.

205 Pierce et al., *supra* note 167, at 7–8.

206 On the prevalence of policies that police the behavior of poor people, see generally JANE L. COLLINS & VICTORIA MAYER, BOTH HANDS TIED: WELFARE REFORM AND THE RACE TO THE BOTTOM OF THE LOW-WAGE LABOR MARKET, at xiii (2010).

households are implicitly devalued.[207] Instead of using water conservation as a primary strategy for addressing unaffordability, expanding financial assistance to low-income renters would enhance their autonomy vis-à-vis water and give some weight to their judgments about their own water needs.

Likewise, ostensibly neutral state and local rules that mandate "equitable" rates and purport to bar discrimination between consumers—rules that are sometimes used as a sword to frustrate programs to assist residents with their water bills—pretend that all consumers begin from a baseline of equality and that fairness therefore requires identical treatment.[208] Seen through a racial-valuation lens, however, the "neutral" principle of non-discrimination between consumers simply becomes another mechanism to further value the "haves" and to extend control over those who can least afford access to basic water and sanitation services.

Water utilities and other policymakers may feel free to ignore race in crafting water policies because they do not have information on the racial impacts of these policies. In fact, utilities are notorious for their failure to collect data that might assist them in recognizing and responding to a range of racial disparities in treatment and access.[209] The Michigan Civil Rights Commission found the same phenomenon at work in Flint, concluding that

> [r]esearch into how the human brain works suggests that race played a role in the Flint Water Crisis precisely because it was never considered. That it is so deeply entrenched in the very

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[207] Pierce et al., *supra* note 167, at 2 (noting that "low-income households for whom water is unaffordable may consume less water than is needed to satisfy basic household drinking and sanitary needs," which raises health concerns).

[208] *See* Nick Leonard et al., *Legal Pathways to Income-Based Drinking Water Rates in Michigan*, GREAT LAKES ENV'T L. CTR. & NAT'L WILDLIFE FED'N 1 (2020), https://www.nwf.org/-/media/Documents/PDFs/NWF-Reports/2020/Legal-Pathways-to-Income-Based-Drinking-Water-Rates-in-Michigan.ashx (describing position of state and local officials that income-based rates would violate Michigan Constitution, but disagreeing with that position); *see also* Berg & Holt, *supra* note 160, at 21 (describing principle of equity, that consumers "pay amounts proportionate to the costs they impose on utilities").

[209] *See* Brett Walton, *Counting Homes Cut Off from Water Is a Data Collection Nightmare*, CIRCLE OF BLUE (Nov. 20, 2018), https://www.circleofblue.org/2018/world/counting-homes-cut-off-from-water-is-a-data-collection-nightmare/; *see also* Coty Montag, *Lien in: Challenging Municipalities' Discriminatory Water Practices Under the Fair Housing Act*, 55 HARV. C.R.-C.L. L. REV. 199, 204 n.23 (2020) (noting utilities' failure to collect data regarding water unaffordability); WATER AFFORDABILITY & EQUITY, *supra* note 76, at 17 (noting that the pandemic marked the first time that many states began collecting data about water access).

> fiber of society that we have normalized what occurs in communities that are 'primarily of color' and poor.[210]

These communities' experiences are so devalued that they are essentially invisible.

In short, this is all of a piece. Utilities' failure to even collect the data about the impacts of water policies helps ensure that administrators will remain in the dark about, and unaccountable for, the ways that race intersects with their customers' access to affordable water.

C. *Is this a Civil Rights Violation?*

The disparate racial impact of excluding hard-to-reach renters from water discounts and other Customer Assistance or Affordability Plans does raise legal concerns, particularly under the federal Fair Housing Act (FHA), which bars race discrimination in housing and lending.[211] Disparate impact claims are virtually impossible to make out under the U.S. Constitution after the Supreme Court's ruling in *Washington v. Davis*.[212] But in 2015, in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project* (hereinafter, *Inclusive Communities*), the U.S. Supreme Court confirmed that the FHA does allow for suits based on disparate impact.[213]

However, the standards for proving disparate impact under the FHA are also difficult to meet. In *Inclusive Communities*, the plaintiffs claimed that the skewed allocation of low-income housing tax credits to

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210 MICHIGAN CIVIL RIGHTS COMMISSION, *supra* note 203, at 14.

211 *See* Fair Housing Act, *supra* note 40. *See generally* Roger D. Colton, *Discrimination as a Sword for the Poor: Use of an "Effects Test" in Public Utility Litigation*, 37 WASH. U. J. URB. & CONTEMP. L. 97 (1990).

212 *See generally* Washington v. Davis, 426 U.S. 229 (1976). Likewise, private enforcement of disparate impact claims is not available under Title VI, 42 U.S.C. § 2000d, following the Supreme Court's ruling in Alexander v. Sandoval, 532 U.S. 275, 293 (2001). Title VI bars discrimination by recipients of federal funds. The dim prospects for an administrative complaint to enforce Title VI are spelled out in Montag, *supra* note 209, at 253–54, though the Biden administration has expressed support for expanding the availability of disparate impact claims at the agency level in some contexts. *See HUD Proposes Restoring Discriminatory Effects Rule*, U.S. DEP'T HOUS. & URB. DEV. (June 25, 2021), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_107. Montag also notes that state law disparate impact claims may be available to challenge discriminatory water policies in individual jurisdictions. *See* Montag, *supra* note 209, at 254.

213 *Tex. Dep't of Hous. & Cmty. Affs.' v. The Inclusive Cmtys.' Project, Inc.,* 576 U.S. 519 (2015). The Supreme Court decision confirmed the conclusions of eleven circuit courts of appeal that had previously recognized FHA disparate impact claims. Montag, *supra* note 209, at 222.

predominantly Black neighborhoods impermissibly perpetuated housing segregation in and around Dallas, Texas, making it more difficult to develop affordable housing in non-minority neighborhoods and disparately impacting minority renters in violation of the FHA.[214] It was a complicated claim, but the Supreme Court's consideration was limited to the legal question of whether disparate impact liability is cognizable under the FHA. Concluding that it is, Justice Kennedy's majority opinion specifically noted that disparate impact analysis "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[215]

Utilities' failure to provide assistance to low-income, hard-to-reach renters, a group that is disproportionately Black, would seem to fall into the category outlined by Justice Kennedy. But the Court also spelled out several limitations on disparate impact claims under the FHA. First, the Court indicated that defendants (in this instance, the utility or local government) must be given "leeway to state and explain the valid interest their policies serve."[216] Second, the Court articulated a "robust causality requirement" that would "protect[] defendants from being held liable for racial disparities they did not create."[217] The Court further stipulated that the required "causal connection" must be demonstrated at the pleading stage in order to make out a prima facie case of disparate impact.[218] While remanding the case to the District Court for further proceedings, the Court expressed skepticism as to whether the *Inclusive Communities* plaintiffs would ultimately be able to establish such causation. "From the standpoint of determining advantage or disadvantage to racial minorities," the Court opined, "it seems difficult to say as a general matter that a decision to build low-income housing in a blighted inner-city neighborhood instead of a suburb is discriminatory, or vice versa."[219]

Though there has been little litigation challenging discriminatory household water policies under the FHA, several courts have accepted the claim that access to household water is encompassed within its scope as a component of housing. For example, in 2018, an affordable housing complex in Oviedo, Florida, challenged the City of Oviedo's

214 *See Inclusive Cmtys.*', 576 U.S. at 526.

215 *Id.* at 540.

216 *Id.* at 541.

217 *Id.* at 542.

218 *Id.* at 542–43.

219 *Id.* at 542.

decision to raise water and sewer rates under the FHA.[220] Though the plaintiffs ultimately lost their claim under the causation prong, the court did not question the applicability of the FHA to the situation.[221]

Likewise, the plaintiffs in the Zanesville, Ohio, case—where a Black-identified neighborhood was denied connection to the city's water system—included a claim under 42 U.S.C. § 3604(b), the provision of the FHA that bars racial discrimination in the "provision of services" in connection with the "sale or rental of a dwelling."[222] While some courts have limited this provision to incidents surrounding an initial sale or rental transaction, most have recognized that the reference to "services" must encompass discrimination that occurs once an owner or tenant has taken up residence.[223] In light of this statutory language, and with little controlling case law to the contrary, there is a strong presumption that water service falls within the FHA.[224]

Mapping the *Inclusive Communities* proof requirements on to the question of water discounts raises more difficult questions. The Supreme Court set out three threshold standards that disparate impact claims under the FHA must meet in order to establish a prima facie case. A plaintiff must: (1) show a statistical disparity in the effects of the policy that adversely impacts a minority group or harms the community by perpetuating segregation; (2) allege with specificity that a defendant's policy or policies cause that disparity; and (3) meet "a robust causality requirement" linking the challenged facially neutral policy to the adverse statistical disparity at issue.[225] To explore the

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220 *See generally* Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo, 759 Fed. App'x 828 (11th Cir. 2018).

221 *See id.* at 835; *see also* Quinn Marker, *Zoning for All! Disparate Impact Liability Amidst the Affordable Housing Crisis*, 88 U. CIN. L. REV. 1105, 1121 (2020) (criticizing the 11th Circuit Court of Appeals' causation analysis in the Oviedo case).

222 *See* Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 493 (S.D. Ohio 2007).

223 *See* Montag, *supra* note 209, at 259–261 (collecting FHA cases concerning water services); *see also* Benjamin A. Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(b) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services – A Historical View*, 41 U. TOL. L. REV. 411, 411–412 (2010).
222 Montag, *supra* note 209, at 261; *see* Complaint, Pickett v. City of Cleveland, No. 19-cv-02911 (N.D. Ohio Dec. 18, 2019) (asserting that the city's policy of putting liens on properties with delinquent water accounts has racially discriminatory impacts).

225 *See* Daniel Sheehan, *Disparate Impact Liability Under the Fair Housing Act After* Inclusive Communities, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 391, 396–98 (2017) (discussing requirements of *Inclusive Communities* decision). Some have argued that "segregative effects" claims are distinct from disparate impact claims under FHA. *See* Robert Schwemm, *Segregative-Effect Claims Under the Fair Housing Act*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 709, 710 (2017). However, the more persuasive view is that "segregative effects" is an alternative way of framing a disparate impact claim under the FHA. *See*

challenges of meeting these elements in the context of a specific Customer Assistance Plan, I turn to the water discounts offered by the City of Boston.

Boston's relatively generous Customer Assistance Plan offers 30 percent discounts on monthly water and sewer charges to "[h]omeowners who are 65 years of age and older, or fully disabled who live in a 1-4 family residential dwelling."[226] In Boston, homeownership is a requirement; no discounts are offered to account holders who do not own their home.[227] Accordingly, Boston makes no provision to assist older or disabled renters who are paying for water and sewer through their landlords or otherwise. In Boston, the homeownership rate for Blacks is 35.3 percent, as compared to a homeownership rate of 68.8 percent of whites.[228]

In Boston, then, the policy of limiting water rate assistance to homeowners clearly falls hardest on Black residents, who are almost twice as likely as white individuals to be tenants. Renters, disproportionately Black households, are ineligible for benefits amounting to hundreds of dollars a year. This establishes the statistical disparity required to meet the first prong of the FHA test.[229]

The next question is whether this disparity between the Black and white experience of water affordability is attributable to Boston's decision to limit water assistance to homeowners. Recent case law applying the *Inclusive Communities* test provides guidance. In evaluating this prong, courts have looked for a specific policy rather than a vague set of circumstances that leads to disparate results. For example, in *Mhany Management v. County of Nassau*, the Second Circuit explicitly recognized the connection between minorities and multi-family dwellings—the same correlation that is at issue in water utilities'

Nat'l Fair Hous. All. v. Bank of Am., 401 F. Supp. 3d 619, 641 (2019); *see also* Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use and Disparate Impact*, 48 COL. HUM. RTS. L. REV. 98, 118 n.101 (2017).

226 *Residential Billing Info & Assistance*, BOSTON WATER & SEWER COMM'N, https://www.bwsc.org/residential-customers/billing-info-and-assistance#elderly-and-disability-discounts (last visited Apr. 23, 2022).

227 BOSTON WATER & SEWER COMMISSION, *Residential Billing Info & Assistance: Discounts and Payment Plans*, https://www.bwsc.org/residential-customers/billing-info-and-assistance (last visited Apr. 4, 2022) (Discounts are available only to "Owner-occupied, residential properties.").

228 Lerner, *supra* note 191.

229 Several alternative approaches to demonstrating impact are discussed in Montag, *supra* note 209, at 226–227. According to Montag, one method is to show that the percentage of persons harmed includes a greater percentage of Black people compared to white people. *Id.* at 226.

Customer Assistance Plans.[230] In *Mhany*, the appellate court upheld the plaintiff's prima facie claim that a zoning rule limiting multi-family dwellings is a policy that "perpetuates segregation generally because it decreases the availability of housing to minorities in a municipality where minorities" were only a small percentage of those living in single-family homes.[231] Here, Boston's water discount program, explicitly limited to homeowners and thus excluding all renters in multi-family dwellings, is a specific policy that limits minority access to affordable water, meeting the second prong of the test.

The third, "robust causality" prong is more challenging to meet here. In articulating this standard, the Supreme Court was concerned with ensuring that disparate impact liability does not "inject racial considerations into every housing decision" that may have some statistically disparate impact.[232] Boston's Customer Assistance program did not cause the homeownership gap between Blacks and whites. But, there is another way to look at the causality issue. That is, while this is a facially neutral policy based on homeownership, it results in a de facto disparity between what older, or fully disabled, Black and white residents of Boston generally pay for residential water.[233] More granular demographic data is necessary to fully explicate the disparity, but it appears that as many as two-thirds of Black residents of Boston will be paying for water through their landlords without any opportunity to access discounts or other aspects of Boston's Customer Assistance Plans. In contrast, up to two-thirds of white residents will be able to claim discounts of 30 percent on their water bills and also access other aspects of Boston's water assistance programs if they are seniors or disabled.

Assuming that the prima facie case is met, that does not end the analysis. The FHA adopts a burden shifting structure that allows the defendant to establish that the policy in question was "necessary to achieve a valid interest."[234] In the case of Boston, the city might argue that, as a practical matter, a direct relationship with the water utility is a necessary component of a water discount or other Customer Assistance Program; the utility simply has no relationship with renters through which to offer assistance.

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230 *See* Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 619–20 (2d Cir. 2016).

231 *See id.* at 620.

232 Tex. Dep't of Hous. & Cmty. Affs.' v. The Inclusive Communities Project, Inc., 576 U.S. 519, 543 (2015).

233 *See*, *e.g.*, Reyes v. Waples Mobile Home Park, 903 F.3d 415, 428–29 (2018) (discussing disparities sufficient to meet the robust causality standard).

234 *Inclusive Cmtys.'*, 576 U.S. at 541.

This "valid interest" defense might be sufficient to meet the defendant's burden, but there is a final step in the burden shifting framework. The plaintiff can rebut the defendant's assertion of "valid interest" by showing "that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs."[235] As set out in greater detail below, Seattle, Washington, Portland, Oregon, and several other cities around the country have found ways to address the needs of hard-to-reach renters as water rates increase.[236] These initiatives moderate any racially disparate impact by levelling the treatment of homeowners and renters, while still satisfying the valid interest that the utility has in accurate billing and promoting conservation.

Government policies that have disparate racial impacts can also violate international human rights law, particularly as water is itself a recognized human right.[237] The United States has ratified the Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which establishes the government's obligations to affirmatively and pro-actively address disparate racial impacts in access to economic, social, and cultural rights such as water.[238] But, while international bodies and human rights experts can put pressure on domestic policymakers—as they did in both Detroit and Flint, Michigan—human rights accountability largely depends on "monitoring and oversight by government officials and those who are affected . . . [and] demands transparency, access to information, and active popular participation."[239] Domestic activists should take advantage of the

235 *Id.* at 520.

236 See discussion *infra* notes 253–273 and accompanying text.

237 See discussion *supra* notes 73–75 and accompanying text.

238 *See* INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, art. 2, Sept. 28, 1965, S. Treaty Doc. 95-18, 660 U.N.T.S. 195 (hereinafter CERD); *see also* Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. FOR SOC. JUST. 263, 263 (2011). This analysis has been brought to bear in the United States. *See* Murthy, *supra* note 7, at 170 (describing international attention to Detroit water shutoffs); *see also Flint Michigan Crisis 'Not Just About Water,' UN Rights Experts Say Ahead of President Obama's Visit*, UN NEWS (May 3, 2016), https://news.un.org/en/story/2016/05/528272-flint-michigan-crisis-not-just-about-water-un-rights-experts-say-ahead.

239 Alicia Ely Yamin, *Beyond Compassion: The Central Role of Accountability in Applying a Human Rights Framework to Health*, 10 HEALTH HUM. RTS. J. (Sept. 6, 2013), https://www.hhrjournal.org/2013/09/beyond-compassion-the-central-role-of-accountability-in-applying-a-human-rights-framework-to-health/. International actors can influence that domestic process, and some policymakers attribute California's

human rights framing, but the complexity of water billing and the lack of transparency about the racial impacts of water unaffordability make this issue a challenging vehicle for stimulating international activism.

In sum, while disparate impact claims are difficult to establish, the FHA could serve as a basis for challenging policies that treat homeowners and hard-to-reach renters differently for purposes of water assistance, with racially disparate results. Specific, local data on racial disparities in housing and the impacts of Customer Assistance or Affordability Plans would be a critical factor in establishing the "robust causality" that the case law requires. Customer Assistance and Affordability Plans with disparate impacts on Black households also violate international legal norms and a human rights framing of the issues can convey the gravity of these racial disparities.

It should not, however, take a lawsuit or international intervention to encourage local utilities or other policymakers to remedy this issue.

IV. ALTERNATIVES TO REACH RENTERS AND IMPROVE THE RACIAL EQUITY OF THE WATER BILLING SYSTEM

I am not arguing here that landlords or other account holders should not be eligible for water assistance or affordability programs. The landlords of some owner-occupied buildings will themselves be low-income racial minorities who have suffered from the consequences of housing discrimination and need assistance with rising water bills.[240] Rather, the problem with the current system adopted in many jurisdictions is that it recognizes only account holders' needs while ignoring the needs of hard-to-reach renters, who likely have less wealth than building owners but are nevertheless paying indirectly for rising water rates.[241]

The racial impacts of this system have largely gone unacknowledged, but the general problem of reaching renters to provide financial assistance for their water bills is well known among water utilities and expert analysts. For example, in its 2017 rate manual, the American Water Works Association reviewed a range of assistance

recognition of the human right to water to the "naming and shaming" activities of the UN in the state. *See Open Data*, *supra* note 197.

240 On landlords' financial precarity, see Corianne Scally & Dulce Gonzales, *Renters Are More Likely than Homeowners to Struggle with Paying for Basic Needs*, URB. WIRE: HOUS. & HOUS. FIN. (Oct. 31, 2018), https://www.urban.org/urban-wire/renters-are-more-likely-homeowners-struggle-paying-basic-needs (observing that "[t]hough they generally fare better than renters, low-income homeowners also struggle to cover living expenses").

241 *See* Vedachalam & Dobkin, *supra* note 36, at 20 (noting that "homeowners typically have much higher levels of income than renters").

programs and specifically identified renters' situation as a conundrum.[242] In a Webinar the same year, sponsored by the EPA, a spokesperson for the San Antonio, Texas, water system, cited the fact that "you have to have a water bill" as the "biggest qualifier" for her program's outreach.[243] She added, "[w]e've done some great outreach . . . with our food banks. The problem with that population is that unfortunately they don't have a water bill. . . . So that's always been a challenge for us for outreach."[244] In the same webinar, Brad Blake, representing Portland, Oregon, added "we're in the same boat. A large percentage of our low-income customers are in multi-family" housing and, therefore, lack a direct relationship with the water utility.[245] Three years later, the issue still persisted. In December 2020, the Aspen-Nicholas Water Forum noted that some Customer Assistance Plans experienced "limited success" because of their inability to reach hard-to-reach, unmetered water customers in multi-family homes.[246] In 2021, the Environmental Policy Innovation Center argued, also without noting the racial impacts of the status quo, that utilities should eliminate homeownership requirements and prioritize expanded support for renters.[247]

Several water authorities have offered constructive proposals for addressing the issue. For instance, writing in 2020, the California State Water Control Board suggested the creation of a renter's water tax credit, delivered through the state's tax system.[248] Drawbacks of this proposal include the fact that very low-income consumers, those struggling the most, may not pay taxes at all. Further, the benefits of tax credits are realized just once a year, whereas cash-flow problems arising from rising water costs are a year-round issue for renters.[249] To date, California has not implemented the program.

Likewise, in late 2019, as Buffalo, New York, was working with a team from Code for America to address water affordability in the city, recent college graduate Mike Brown cogently explained in a blog the

242 *See* AWWA MANUAL 2017, *supra* note 10, at 215.

243 EPA Webinar, *supra* note 94, at 15:00–15:09 (Sandi Wolf).

244 *Id.* at 15:16–15:33.

245 *Id.* at 35:47–36:19 (Brad Blake, Portland Water Bureau).

246 *See* WATER AFFORDABILITY & EQUITY, *supra* note 76, at 6.

247 Vedachalam & Dobkin, supra note 36, at 37.

248 CAL. STATE WATER RES. CONTROL BD., *supra* note 161, at 32.

249 *Id.* at 33.

issues raised by hard-to-reach renters.[250] Doing some back of the envelope math, Brown concluded that the renters' conundrum could affect "between 28% and 54% of all our end-users," depending on how many Buffalo landlords incorporate water prices into tenants' rents.[251] The Code for America project in Buffalo floated the possibility of subsidizing landlords and mandating that they pass on the subsidies to their tenants—an obligation that some think landlords would be unlikely to honor.[252] In any event, Buffalo's Code for America project ended without any new policy approach to assist renters who do not pay water bills directly.[253] Instead, Buffalo allows some renters to obtain a modest discount if they are low-income and if they are responsible for paying their own water bill, as reflected in a lease agreement.[254] As noted above, the great majority of renters do not have such an arrangement because their residences are not separately metered or their landlords prefer to handle the billing.[255] Throughout the on-line discussion identifying this issue in Buffalo, the racial disparities that it implicates were not mentioned.

Though California and Buffalo policymakers have not fully addressed the renter issue, other water authorities have developed viable ways to assist these hard-to-reach consumers. In some instances, such as in Washington, D.C., these are recent innovations triggered by the COVID-19 pandemic that may not last beyond that emergency.[256] In other instances—specifically in Seattle, Washington—alternative approaches to assisting renters with the impacts of rising water prices have been in place for decades.[257] What is striking, however, is that so few jurisdictions around the country have adopted such measures despite the existence of viable models. The attached chart describes the assistance programs of the twenty-five largest cities in the United

250 *See* Mike Brown, *Affordable Water for Renters: An Unsolvable Puzzle?*, MEDIUM (Oct. 23, 2019), https://medium.com/@mpbrown15/affordable-water-for-renters-an-unsolvable-puzzle-84e6cedac822.

251 *Id.*

252 *See* Cook, *supra* note 9, at 14.

253 Mike Brown moved on to join the consulting firm "rprt" as a software engineer. *See Our Team: Mike Brown*, RPRT, https://www.rprt.dev/our-team (last visited Mar. 2, 2022).

254 2-1-1: BUFFALO WATER AFFORDABILITY PROGRAM, http://www.211wny.org/provider/10388/ (last visited Mar. 2, 2022). Income qualifications are set based on federal low-income guidelines.

255 See discussion *supra* notes 17–19 and accompanying text.

256 *See* DC WATER, *supra* note 175.

257 MARGOT SAUNDERS ET AL., WATER AFFORDABILITY PROGRAMS 19 (1998) (observing that Seattle's program had been in place "[f]or nearly [twenty] years").

States.[258] Only six of these cities have a program designed to serve hard-to-reach water consumers (i.e., low income renters in multi-family buildings).[259] Of these programs, one (Washington, D.C.) is temporary and four have been adopted since 2016, about two decades after Seattle first developed its model.[260] The disparate racial implications of the remaining nineteen large cities' failure to provide hard-to-reach renters with assistance has gone almost completely unremarked by water authorities.[261]

Washington, D.C.'s program, adopted in the wake of COVID-19, is a variation of the approach considered in Buffalo: the Multifamily Assistance Program.[262] Identified as a temporary program using federal funds allocated for COVID-19 relief, the program provides significant assistance with water bills to income-qualifying residents of buildings with more than four units, including both owners and tenants. Participation depends upon building owners, who must apply for the program. Once the owner is registered, tenants become eligible for the relief. The benefit is administered as a credit to the owner, who is then obligated under the program to post 90 percent of the credit to the tenants' rental account to reduce their rent by the amount of the tenants' water bill. This DC Water program is augmented by the District's "STAY DC" fund, an emergency relief fund that assists residents with rent and utility debts in the wake of COVID.[263]

Whether these Washington, D.C. programs, which are identified as short-term responses to the pandemic emergency, will be renewed in the long term remains to be seen. But, the availability of federal emergency funds has provided an opportunity for jurisdictions such as Washington, D.C., to try out new approaches. The DC Water website asserts that "DC Water has long recognized the need to provide water

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258 See *infra* Appendix hereto. The Author compiled this chart using census data to identify the twenty-five largest cities in the United States and conducting web searches to identify each city's water affordability policies.

259 *Id.*

260 *Id.*

261 Race issues may be gaining attention, however. Notably, following George Floyd's murder, the experts participating in the 2020 Aspen-Nicholas Water Forum drew a straight line connecting historic race discrimination in the water and housing sector and current policies that perpetuate that discrimination. *See generally* WATER AFFORDABILITY & EQUITY, *supra* note 76, at Preface.

262 *See generally* DC WATER, *supra* note 175. This source also supports the additional information about the program provided in this paragraph.

263 *Financial Assistance*, OFF. OF THE PEOPLE'S COUNS.: WATER SERVS.' DIV., https://opc-dc.gov/dc-water-consumer-help/get-payment-help-with-your-bill (last visited Mar. 2, 2022).

bill assistance to families with fixed and limited incomes."[264] The influx of federal funds has allowed for at least a temporary expansion of benefits to include renters in multi-family dwellings, provided that the building owner agrees to participate in this voluntary program.

Longer term and more stable solutions to the renters' dilemma are found in New York City, New York, Portland, Oregon, Seattle, Washington and, as of 2020, Austin, Texas.

New York City's Multi-Family Water Assistance Program ("MWAP"), adopted in 2017, offers a credit of $250 per unit to multi-family properties of four or more units that meet specific affordability criteria and have a regulatory contract with the City.[265] While this is not a credit that benefits tenants directly, reports from housing advocates indicate that landlord recipients of these credits have used the funds for general improvements to buildings that result in long-term cost reductions and benefits to tenants, such as the installation of LED lighting and improved weatherization.[266]

Portland, Oregon commissioned several studies on the issue of how to reach renters in multi-family buildings and came up with a solution in 2018.[267] There, the water authority has partnered with the local housing assistance agency, Home Forward, to give $500 cash to qualified low-income residents facing eviction, reflecting the estimated portion of their rent attributable to their water bills.[268]

Austin's program, passed by the City Council in late 2020, applies an annual water credit of up to $200 to low-income renters' energy utility bills.[269] Interestingly, Austin is the rare program initiated as an intentional effort to address racial inequity. The city's new renter

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264 DC WATER, *supra* note 175.

265 *See* Minutes of the Meeting of the New York City Water Board, N.Y.C. WATER BD. (June 16, 2017), https://www1.nyc.gov/assets/nycwaterboard/downloads/pdf/minutes_and_resolutions/wb-minutes-20170616.pdf (adopting the HWAP program).

266 *Views from the Northwest Bronx*, UNIV. NEIGHBORHOOD HOUS. PROGRAM (July 6, 2018), https://unhp.org/blog/10m-water-credit-yields-benefits-for-bronx-affordable-housing.

267 *See* Molly Harbarger, *Water Bureau Proposes Fix for Decades-Old Bill Assistance Program*, OREGONIAN: OR. LIVE (Feb. 13, 2018), https://www.oregonlive.com/politics/2018/02/water_bureau_proposes_fix_for.html.

268 *See id.*; *see also Assistance for Renters in Multi-Family Properties*, THE CITY OF PORTLAND, OR.: PORTLAND WATER BUREAU, https://www.portlandoregon.gov/water/article/689542 (last visited Mar. 2, 2022).

269 *Austin Water Expands Affordability Initiatives to Include Multi-Family Customer Assistance*, AUSTIN WATER, https://www.austintexas.gov/news/austin-water-expands-affordability-initiatives-include-multi-family-customer-assistance (last visited Mar. 2, 2022).

assistance program was adopted after a University of Texas practicum project partnered with Austin Water; the Texas students recommended extending Austin's Customer Assistance Program to renters in multi-family buildings for the express purpose of increasing the program's racial equity.[270]

In Seattle, a water credit for low-income renters is likewise delivered through consumers' electricity bills, in this case from Seattle City Light, which shares the same billing system with the water authority, Seattle Public Utilities.[271] The program has been in effect for around four decades.[272]

Stacey Berahzer, formerly with the University of North Carolina, identified four factors that enabled Seattle to create and then operate their water credit program long before other cities followed suit.[273] First, unlike some jurisdictions, Washington state statutes allow discounts for low-income customers and also permit cross-subsidization, so that rates lost through discounts can be recovered through increased rates to other customers. Second, Seattle's water utility shares a billing system with Seattle City Lights, the city's electric utility, which facilitates providing a water credit on low-income customers' electricity bills. Third, Berahzer notes that the high cost of living in Seattle led city officials to recognize, decades ago, the need for support and to place a priority on developing assistance programs.[274]

Finally, unlike the Buffalo proposal, and the Washington, D.C. and New York City programs, the Seattle (and Portland and Austin) approaches have the virtue of bypassing landlords and working directly with tenants. These programs assume that landlords are passing water costs on to tenants through rental charges, and water assistance is provided directly to tenants in the form of credits.[275] In fact, in many cases, tenants need not even apply for these credits. Instead of putting the burden on tenants to come forward and initiate an application, jurisdictions use enrollment in other benefits programs in which renters

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270 Cavil et al., *supra* note 197, at 6.

271 *See* BERAHZER ET AL., *supra* note 58, at 149.

272 *See* Saunders, *supra* note 257, at 19.

273 *See* Stacey Berahzer, *Four Factors the Allow One Utility to Provide Financial Assistance to People Who Don't Even Have a Water Account*, UNC SCH. OF GOV'T: ENV'T FIN. BLOG (Sept. 15, 2016), https://www.sog.unc.edu/blogs/environmental-finance/four-factors-allow-one-utility-provide-financial-assistance-people-who-don%E2%80%99t-even-have-water-account. Information in this paragraph and the next is supported by this source.

274 *See id.*

275 *See* BERAHZER ET AL., *supra* note 58, at 149.

participate, such as LIHEAP or SNAP, to identify those who are eligible for water bill assistance.[276]

V. CONCLUSION

Policies that favor homeowners by providing water discounts only to account holders while ignoring the impacts of rising water prices on hard-to-reach renters clearly have a disparate racial impact. This racial impact compounds the deep, systemic history of racism in housing policy manifested in official decisions and private biases of mortgage lenders, realtors, and other community members.

While water experts and many local water authorities have recognized the need to address rising water prices with responsive assistance and affordability programs, many have focused those programs on homeowners or other account holders. But hard-to-reach renters are equally, if not more, likely to suffer financial burdens from rising water costs, and because of historic discrimination, renters are disproportionately Black households. Given the successful models in Portland, New York, Austin, and Seattle that respond to renters' needs—and in the case of Seattle, have done so for decades—other water jurisdictions' failure to develop programs providing relief to hard-to-reach renters seems inexplicable without reference to the role of racial valuation in these policy decisions.

More extensive metering of rental units may ultimately make it easier to identify renters who need assistance by cross-referencing other utility assistance programs. A direct relationship between renters and the water utility would facilitate direct delivery of assistance. Establishing direct relationships between water authorities and renters recognizes renters as independent consumers and shifts some of the control over household water to tenants. Expanded metering, however, is slow to come, and as prices rise, relief for renters cannot wait for technology to become affordable and pervasive.

Rising water prices highlight the need for attention to this issue, but the seeds of this discriminatory system have germinated for decades in the legacy of housing segregation and racial valuation in local policymaking. For water authorities and local governments, eliminating such discriminatory systems should be seen as a cost of doing business, a civil rights imperative, and a human rights obligation.

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276 *See*, *e.g.*, DC Water, *supra* note 175 (noting that tenants may be eligible if enrolled in SNAP, LIHEAP, or other benefits programs).

Appendix, dated 04/24/2022

City	Programs for "Hard to Reach" consumers, i.e., unmetered renters?	Temporary (COVID) or Permanent?	Criteria/Restrictions	Enrollment	Benefit
New York City	Yes: (1) Home Water Assistance Program (HWAP), https://www1.nyc.gov/site/dep/pay-my-bills/home-water-assistance-program.page; (2) Multifamily Water Assistance Program (MWAP), https://www1.nyc.gov/site/hpd/services-and-information/multifamily-water-assistance-program.page	Permanent	HWAP: 1-4 units MWAP: over 4 but less than 2000 units and designated affordable housing	HWAP: automatic, based on other benefits eligibility MWAP: initiated by landlord, capped enrollment	HWAP: credit on tenant utility bill, approx. $140 in '22 MWAP: per-unit water and sewer credit of $250 to landlord
Los Angeles	No				
Chicago	No				
Houston, TX	No				
Phoenix, AZ	No				
Philadelphia	No				
San Antonio	No				
Dallas	No				
San Jose	No				
Austin, TX	Yes (in 12/20), https://www.austintexas.gov/news/austin-water-multifamily-customer-assistance-program-discount-receives-council-approval	Permanent	In initial implementation phase, customer must be enrolled in electricity benefit program	Automatic	Credit on tenant utility bill or direct payment to tenant, capped at $200/year

City	Program for "Hard to Reach" consumers, i.e., unmetered renters?	Temporary (COVID) or Permanent?	Criteria/Restrictions	Enrollment	Benefit
Fort Worth, TX	No				
Jacksonville, FL	No				
Columbus, OH	Yes: https://www.columbus.gov/utilities/customers/Utility-Discount-Programs/	Permanent	At least 80% of tenants must be income eligible; tenants must be responsible for paying water, per lease	Initiated by landlord	20% discount on landlord's water/sewer bill
Charlotte, NC	No				
Indianapolis	No				
San Francisco	Yes: https://sfwater.org/modules/showdocument.aspx?documentid=13617	Permanent		Landlord or tenant initiated	Free or subsidized fixtures and equipment, monitoring and evaluations
Seattle	Yes: https://www.seattle.gov/utilities/your-services/discounts-and-incentives/covid-19-assistance	Permanent	Income below 70% of state median, seniors or disabled persons	Tenant initiated	Credit on tenant utility bill
Denver	No				

Washington, D.C.	Yes: https://www.dcwater.com/welcome-dc-water-cares-multifamily%C2%A0assistance%C2%A0program%C2%A0	Temporary	4 or more units; benefits-eligible or income-eligible tenants or designated affordable housing	Landlord initiate application for affordable housing; automatic for benefits-eligible; tenants initiate for income-based eligibility	Rental credit received by landlord, to be applied to tenant's rent
Boston	No				
El Paso, TX	No				
Nashville	No				
Detroit	No				
Las Vegas	No				