

PART 2

LEGAL LEVERS FOR HEALTH EQUITY IN HOUSING: A SYSTEMS APPROACH



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The Legal Levers for Health Equity through Housing Report Series

This is the second in a series of reports exploring the role of law in housing equity and innovative uses of law to improve health equity through housing. The reports are based on extensive literature scans and semi-structured interviews with people who are taking action in housing policy and practice. The full series includes: Report I: A Vision of Health Equity in Housing; Report III: Health Equity in Housing: Evidence and Evidence Gaps; Report IV: Creative People and Places Building Health Equity in Housing; Report V: Governing Health Equity in Housing; Report VI: Health Equity through Housing: A Blueprint for Systematic Legal Action.

LEGAL LEVERS FOR HEALTH EQUITY IN HOUSING: A SYSTEMS APPROACH

"Creating healthy communities will require a broad range of players—urban planning, education, housing, transportation, public health, health care, nutrition and others—to work together routinely and understand each other's goals and skills."

— Robert Wood Johnson Foundation Commission to Build a Healthier America (Robert Wood Johnson Foundation Commission to Build a Healthier America, 2014)

Introduction

The first report in this series described the strong relationship between housing, neighborhood and health. The report offered a vision of “health equity in housing” that captures the imperative to assure that all Americans can live in a safe home in a socio-economically diverse place that nurtures well-being, opportunity and community. Building enough affordable housing where it is needed is already several kinds of problems, taking different forms in different places and times: too little space to build, high construction costs, exclusionary zoning rules, stagnant wages and even globalization of real estate markets may all play a part. Going beyond home-building to fostering and maintaining diverse, equitable neighborhoods runs counter to decades of deliberate segregationist policy, enduring stigmas of race and class, enmity towards immigration, and the growing economic inequality in the United States.

Given its many complexities, attaining health equity in housing can be counted as a “wicked problem.” This concept, introduced by urban planners in the 1970s, refers to a problem that combines so many elements that there is considerable dispute even as to the problem's existence or boundaries. Each version of the problem can be seen as a symptom of another problem, with no clear set of solutions corresponding with any of the many alternative formulations of the problem (Rittel & Webber, 1973). Although wicked problems can be solved, they

will not typically be solved by individual programs chipping away at discrete facets. Instead, the best strategies for addressing wicked problems are adaptive, collaborative, cross-sectoral and informed by a systems perspective (Roberts, 2000). This is what the Commission for a Healthier America was talking about when it said that solving the housing problem “will require a broad range of players—urban planning, education, housing, transportation, public health, health care, nutrition and others—to work together routinely and understand each other’s goals and skills.”

The Commission left lawyers off its list of key players, yet law is one of the most important forces that has created our housing landscape, and a primary tool for improving it. In this report, we will describe a broad range of potential “legal levers” for health equity in housing. These levers are laws and enforcement strategies that address aspects of our national housing problem, and so, at least in theory, could be part of the solution. We speak of “potential” solutions, and levers that work “in theory,” because law as a tool for healthier housing comes with two important caveats. First, we often have little or no evidence that laws do what they are supposed to do, and what evidence we do have suggests that law often operates as part of the problem rather than the solution. Report 3 in this series will dive into what we know empirically about law and housing. Second, law is no exception to the Commission’s admonition that players “work together routinely and understand each other’s goals and skills.” It is imperative to deploy law within a strategic systems approach that recognizes the complex links between different legal practice areas — like antidiscrimination, zoning, tax, regional governance — and the links between law and other mechanisms of policy, like education, transportation, and social support. Just doubling down on one legal lever such as fair housing enforcement will not bring much improvement when there are too few quality apartments in the neighborhoods people want to move to.

“I think the building of housing is a challenge always because there are so many actors, so many factors that are involved, and anytime any remedy moves in that direction there are likely to be real challenges. ... to deal with the central problem would require a whole new orientation, not to mention budget reorientation, on the part of this country...”

– Alexander Polikoff, *Business and Professional People for the Public Interest*

“All these things are intertwined. It’s jobs, it’s grocery stores, it’s schools, it’s all these different things. ... When it comes to actually having enough affordable housing for low-income people, we need a ton of money to build more, but also, we need to address the education and job situation and family support systems so that people can have the money that they need to live in the house regardless of the housing market conditions.”

– Lauren Walker Lee, Tacoma Community House (formerly with the Fair Housing Center of Washington)

This report begins with an overview of just some of the factors that make housing a complex system. It summarizes key methods and tools for systems thinking, and then discusses the many ways law can influence systems. It concludes with a model of the key legal elements — levers — in that system. The model is a conceptual interface to help people from many backgrounds include law in a systematic approach to promote greater health equity in housing.

The Complexity of Housing

The housing system — the set of people, organizations and environmental conditions that interact to produce our current arrangements — is complex. Start with hundreds of millions of people, all of whom choose based on their own preferences from available options of where and how to live. Their choices themselves can be complicated, influenced by economic resources, social ties, and their knowledge of school and transportation options, crime rates and job opportunities — all of which can be shaped by differing histories, values, and sources of information. Various interventions in our housing system, like rent vouchers and the home mortgage interest deduction, are meant to support people’s ability to get the housing they want, but they only deal with part of the picture of housing options and choices.

Information about and access to housing options is substantially channeled through intermediaries — brokers, landlords, lenders, housing agencies — that have their own biases, limitations, and plans. Important biases include attitudes towards racial and class mixing and beliefs about customer racial preferences. Law intervenes to prohibit consideration of race and other protected traits in housing sale and rental, or practices that have a disparate impact, and law is enforced by a variety of mechanisms and actors. The impact of these rules on the behavior of people seeking or providing housing is itself complex, and we cannot assume that people have accurate information about discriminatory behavior and conditions in any

“When African American folks come they’ll give these subtle indicators that maybe they’d be more comfortable if they lived in the eastern part of the village. Pretty much everybody else, white folks, Asians, and Latinos will say, they love Oak Park and love its diversity. Then they’ll say they want to live west of Ridgeland. There’s different reasons why each group says that. The African American population is saying it’s mostly concerns like fear of harassment or isolation, or the kinds of things that...feeling like they might be pinpointed because they expect to be one of very few in the western part of Oak Park, which is not the case. So, we have to assure folks about the integration of Oak Park and that the whole community is open to all people.”

– Rob Breymaier, Heartland Alliance (formerly with Oak Park Regional Housing Center)

particular neighborhood (Kyle & Maria, 2016). Law protects a right to choose one's neighborhood, but law also sets rules about where housing can go, how it must be constructed, and what kind of buildings and units are allowed, which end up shaping the distribution of affordable housing in ways that may also "steer" people to economically and racially segregated neighborhoods.

The existing housing stock from which people choose also reflects historical decisions and preferences that often go back a century or more, as well as a wide range of current influences like conditions in the market, availability of construction and mortgage financing, construction costs, land use laws and building codes. That people with needs and preferences are moving into neighborhoods introduces further complexities. Since schools, transportation, shopping, parks and other amenities all influence housing desirability and value, all the system determinants of each of those is also part of the context that supports and constrains the system for moving towards health equity in housing. The same complexities arise in consideration of new housing, which is far more complicated than supply meeting demand. Much of America's affordable housing is funded with tax credits, the rules for which influence where the units will be built. Some cities intervene to try to get more affordable housing into their residential mix, while others maintain land-use rules that act to limit or exclude affordable housing for which there would otherwise be a market.

The amenities in neighborhoods, from parks through bus stops to supermarkets, are products of decisions by political and economic actors. There is no reason in physics, chemistry, or biology that poor neighborhoods can't have the same quality schools and other amenities that rich neighborhoods do, but today's neighborhoods reflect a history of resource allocation and a system of local finance for schools and other services (Frankenberg & Orfield, 2012). Those allocations have reflected the size of the tax

"I think we, to our detriment, really silo housing as its own issue, as opposed to seeing [it] as a part of all of the other issues that low-income folks are experiencing. So, low wages, accessibility to education. All of those things need to be a part of the same conversation. So, my magic wand would also be to . . . break down these walls that we have between these kinds of different areas, and all see them as symptomatic of a larger system and understand how each of these systems can support each other to get us to a better place up."

– Rasheedah Phillips, Shriver Center on Poverty Law (formerly with Community Legal Services of Philadelphia)

"There is an incredible myriad of regulations that are used to restrict housing, such as minimum lot sizes, restrictions on septic systems, and wetlands rules. All of these layer on top of each other. It's not one regulation that makes it difficult, but a great cluster of them."

– Edward Glaeser, Harvard University

base, decision-maker attitudes about neighborhoods and people in them, and politics. Poorer and more segregated neighborhoods have tended also to be adjacent to unhealthy things, like garbage dumps and industrial zones, where land is cheap and residents' voices are more easily ignored (Maantay, 2002). Economic investment in neighborhoods, and the way the dollars of the denizens are treated, also come out of complicated processes. Virtually all cities are resource-constrained, but some face more demands on their budgets or have greater economic flexibility than others.

The various political and policy decisions that lie behind things like fair housing law and restrictive zoning are additional sources of complexity. Systems are manageable, and problems within systems are fixable, but one has to take a systems view to get an approximation of good information about how management efforts and problem solving are working. The current governance arrangements for housing are not optimal for promoting or effectuating a systems perspective. Authority is divided for largely historical reasons between local, state and federal governments, and across topical silos of education, transportation, housing, law enforcement and economic development. No one government department, no single jurisdiction, has the authority to define the rules or work all the legal levers that define the housing system.

Law in a Strategic Systems Perspective

A “systems approach” is simply one that takes complexity seriously by adopting some basic ways of thinking and working. (See Figure 1.) Different ways of thinking are essential because information is the life-blood of social systems. The more information an agent has about its environment, and the better it can comprehend and use that information, the more likely that agent is to adapt successfully to dynamic

Usual Approach	Systems thinking approach
Static thinking	Dynamic thinking
Focusing on particular events	Framing a problem in terms of a pattern of behavior over time
Systems-as-effect thinking	System-as-cause thinking
Viewing behavior generated by a system as driven by external forces	Placing responsibility for a behavior on internal actors who manage the policies and "plumbing" of the system
Tree-by-tree thinking	Forest thinking
Believing that really knowing something means focusing on the details	Believing that to know something requires understanding the context of relationships
Factors thinking	Operational thinking
Listing factors that influence or correlate with some result	Concentrating on causality and understanding how a behavior is generated
Straight-line thinking	Loop thinking
Viewing causality as running in one direction, ignoring (either deliberately or not) the interdependence and interaction between and among the causes	Viewing causality as an on-going process, not a one-time event, with effect feeding back to influence the causes and the causes affecting each other

Figure 1 Skills of Systems Thinking (from (de Savigny & Adam, 2009).

change, all else being equal. The need to work across professional, social and economic boundaries follows, because diversity of viewpoints helps agents of change get a better — though still imperfect — understanding of how the system works and might be nudged towards better outcomes.

There is one aspect of systems that might be considered simple. Every system, as health policy expert Don Berwick has famously said, is perfectly designed to produce exactly the results it produces. Our world of expensive, sometimes unsafe housing in segregated, often unhealthy neighborhoods, is not an accident or by-product: it is what our current housing system reliably produces, year after year. Obviously we have to “change the system,” but that’s where the complexity comes in. There is no master plan, no single factor that we can adjust. Systems are made up of countless individuals and subsystems, all acting through elaborate networks for their own reasons in response to the random bits of typically incomplete information they are getting from each other and the environment.¹

Since the system cannot itself be fully comprehended, deliberate systems change is a process of experimentation, learning and adaptation to results. Strategic systems change demands that the experiments are informed by evidence and a diversity of perspectives, and that rapid learning and adaption are built-in from the start.

Law is one of the forces driving the system now, and so a likely means of instigating change. Specific acts, like registering a rental property, can be required, and others, like discrimination, can be forbidden by legal rules. Laws also structure behavior in systems by creating processes and parameters. Zoning laws set presumptive limits on affordable housing. A law like Massachusetts’s 40B creates a process for developers

“[Successful housing proponents] commit themselves to a kind of iterative experimentalism that says... ‘We’re going to try the following 10 things in this development. We’re going to have a look at what works. We’re going to tweak it for the next one. We’re going to be open to the possibility that what we’re doing is not the best way to achieve the goal, but we’re going to try lots of different things.’ Having watched [Boulder Housing Partners] for the better part of 10 years, they were constantly tinkering, constantly saying, ‘Well, we tried this. It didn’t quite work out the way we wanted it to. We’ll try something else.’ So, a pretty clear idea, although an evolving view. Not a close-minded view but a pretty clear idea of the goals and the breadth of the goals and then a kind of glee with which they approach the experimentalism.”

– Nestor Davidson, Fordham University School of Law

1. This discussion draws on the work of several thinkers on systems (de Savigny & Adam, 2009; Luhmann, 1995; Meadows, 1999), networks (Castells, 2000), and governance (Braithwaite, 2004; Braithwaite & Drahos, 2000; Burris, Drahos, & Shearing, 2005).

to more expeditiously challenge zoning limits. Eviction law sets a process for ejecting tenants from their homes. The process can be changed to make it more or less user-friendly for tenants. The filing fee for an eviction action is an adjustable parameter; as the fee goes up, the utility of eviction for landlords goes down. These kinds of changes can be thought of as “nudges,” using rules to structure environments, information or behavior toward a desired end (Sunstein & Thaler, 2008), and over time they can create robust feedback loops that encourage pro-social behavior and discourage the behavior we don’t want. Like other treatments, however, even simple rules can have unexpected side-effects. For example, many cities adopted the idea of making landlords take more care in overseeing their properties by making them responsible for disorderly conduct and other nuisances; lawmakers evidently did not foresee that these laws would discourage tenants with legitimate needs from calling 911 (Arnold, 2016). The effects of legal rules and processes — alone and in combination — is a vital form of information for systems change.

The visible, instrumental manifestations of law as rules and processes are only part of the story. Law also shapes power in a system by how it allocates formal legal authority to make decisions, devise rules and enforce them. Zoning, for example, is a primary legal tool for shaping the availability and location of affordable housing. In our system, this is entrusted by law primarily to local governments. In contrast, the Low Income Housing Tax Credit and public funding for new housing is a heavily federal matter. Education and transportation decisions that are important for housing are typically made somewhere between the most local and the federal, typically by authorities who have no mandate or authority to consider their impact on housing. Where the power to make these decisions lies decisively shapes whether and how policies are made and implemented.

Along with creating formal legal authority, the law creates and sustains other forms of social power and

“The general attitude and approach to landlord-tenant issues and housing as a contractual obligation, or something that is governed by contracts and not governed by people who are writing contracts, completely ignores the power imbalance.”

– Rasheedah Phillips, Shriver Center on Poverty Law (formerly with Community Legal Services of Philadelphia)

“Some countries ... just have a complete shift in the understanding of the meaning and importance of housing in the life not only of the individuals, but of the community..., where you acknowledge that housing is a central fact of the health of a community, and their well-being and their welfare. So that people are not struggling just to pay rent every month and can be assured that they can live in their homes for [an] extended period of time and invest their energies in their community. ... I realize a lot of this is heresy in the current climate, but nonetheless it’s not impossible. It works in different parts of the world.”

– Marc Janowitz, East Bay Community Law Center

status, helping make some agents and networks more powerful than others. The Constitution protects property rights, giving owners important legal status in relation to tenants and housing regulators. Landlord-tenant law defines the relative rights and duties of the parties. Even seemingly “neutral” rules, like making eviction proceedings a matter of public record, can influence the relative power of landlords and tenants: because a record of eviction makes it more difficult for tenants to rent in the future, the rule gives landlords additional power to pressure a tenant into self-evicting. In this way, formal law casts a shadow that pervasively influences what happens outside the legal system.

Experts in systems change emphasize the importance of ideas, particularly shared understandings of how the world works and what the system is supposed to do. Because diversity and networks are so central to systems, change agents need a shared understanding of long-term goals so that they can work independently yet coherently towards those goals. Agents have to work independently because they are too many and too diverse to be actively managed by any central leader. A broad shared goal

“Thinking big, housing should be a right. That is one of the biggest macro level changes that could help families find and keep decent housing.”

– Liza Cristol-Deman, Brancart & Brancart

can guide information flows, network structures, and self-organizing behavior without intensive day-to-day coordination or centralized oversight. This is how “movements” work, and building health equity in housing will require one.

Law comes into play at this level of ideas, too. Legal stories shape beliefs about the world we live in: the triumphant civil rights story of *Brown v. Board of Education* and the Fair Housing Act helps obscure the fact that racial segregation has never actually been put behind us. Law defines what sort of behavior, values or goals are socially approved. The Fair Housing Act doesn’t just prohibit discriminatory behavior; it also embodies and asserts a social norm against racism and discrimination. Its passage a week after the murder of Martin Luther King signaled the nation’s disgust with racist violence. Similarly, the decision by the Trump administration to delay enforcement of the Obama-era Affirmatively Furthering Fair Housing Rule is more than a change in process: it may be interpreted as signaling a more relaxed and tolerant regulatory approach to reducing segregation. Most importantly, law is a medium for articulating social goals. In systems thinking, shared goals for the future character or products of the system are particularly powerful because they operate as a sort of social beacon toward which agents can independently navigate without active coordination. Civil rights law may have failed – so far – to produce universal, sustained, school integration, but *Brown* still stands for the idea that separate is inherently unequal. The aspiration towards a Culture of Health, or health equity in housing, if taken up and more firmly built into our law through legislation and litigation, can support an adaptive and coherent movement for change among people and organizations that have only loose or no ties.

Strategic systems change is a conscious, adaptive process of action, observation, and learning. Making change is less about specific interventions and their intended immediate effects, and more about observing how interactions and outcomes change

in the system as new features are introduced and tweaked. Any intervention in the system is best treated as a hypothesis rather than a solution. This means that evaluation — and less formally, careful observation and frequent reflection — is an essential element of effective systems work, and must be integral to strategies for change. Taking an experimental, adaptive approach, in which tactics and strategies for change are assiduously monitored and adapted in response to feedback, allows people working for change to learn as quickly as possible what seems to be working. Linking change agents in strong networks, and ensuring that they have ready access to the information and expertise in the network, helps effective ideas spread. As we will discuss further in the last report in this series, leaders — and funders — must consider how to support these practices and nurture these networks over time.

Legal Levers for Health Equity in Housing

Our model of legal levers aims to pull together in one picture the key factors many have identified — and typically work on — separately. It is also, we stress, a “logic model” in the most basic sense, in that the domains are derived from our selected goal, health equity in housing. The model is also rooted in logic in the sense that there is very little research evidence addressing whether most of the individual levers actually do the specific things they purport to do, let alone whether they operate in synergy with other levers to promote health equity. We have used interviews with experienced housing experts to tune the list, and to learn how these levers might best be used. The figure below depicts the model:

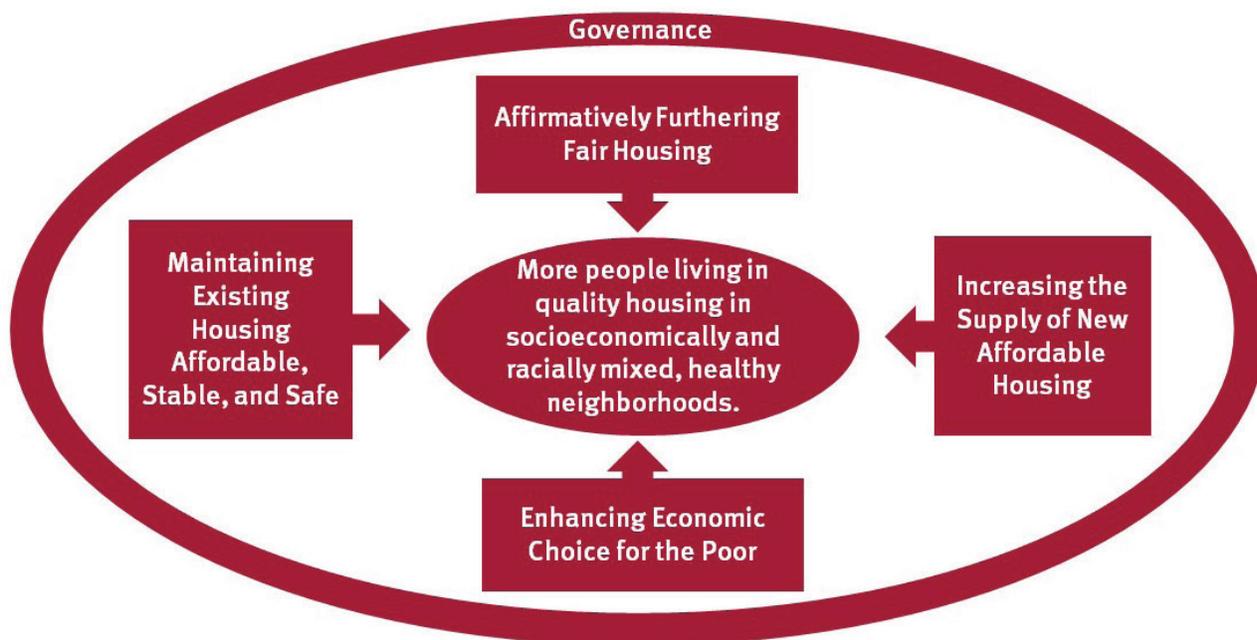


Figure 2: A legal levers model for Health Equity in Housing

Increasing the Supply of New, Affordable Housing

The domain of **increasing the supply of new, affordable housing** covers legal tools that influence financing, location, cost and character of new housing. Hence, it encompasses a wide range of tax, eminent domain, funding and standards provisions. Land use regulation — zoning, for short — also appears here, since that has a crucial impact on the location of affordable housing. Building codes, which have been blamed for raising construction costs, and the range of levers used to gain possession of vacant or abandoned property for redevelopment, are also included. The levers that we have so far identified as key in this domain are:

- **Low Income Housing Tax Credit Program (LIHTC):** Established by the Tax Reform Act of 1986, LIHTC is administered by the U.S. Department of Treasury and is intended to incentivize financial institutions to invest in affordable housing developments. Through the program, developers (including, in many cases, non-profit housing organizations) can compete for tax credits, which they can “sell” to the banks in return for project financing. LIHTC authorizes state housing finance agencies to issue tax credits to developers through a competitive process, which involves a call for proposals from developers. The key legal lever within the LIHTC is the Qualified Allocation Plan (QAP) that each state agency must have to establish eligibility priorities and criteria for awarding tax credits. QAP criteria act as rules that potentially have a direct impact on what sort of units are built where.
- **Land use regulations (zoning):** These are the powerful rules set by localities regulating what can and cannot be built on specific land parcels. If the parcel is used for residential purposes, regulations may address occupancy limits, types of housing (single family housing, multifamily housing), lot sizes, and architectural features.
- **Anti-Vacancy Laws:** Some distressed units have deteriorated to a point that it might be cheaper for

“There’s just not enough affordable housing. And even if extremely low-income renters all had vouchers, there’s just not enough housing to use those vouchers in some markets. The supply is constrained and one of the constraints is local land use policy. Zoning out multi-family housing, for example, and parking requirements. Parking takes up a lot of land, making it more expensive and land is already a costly component of housing development. So there’s a lot of local policy that constrains the supply of housing in general and the supply of multi-family housing, in particular, which is the type of housing more likely to be affordable.”

– Andrew Aurand, National Low Income Housing Coalition

the owner to abandon them than to fix them up. Anti-vacancy laws are meant to prevent decay by allowing neighbors to sue the abandoning property owner and seek damages for the lost value, deterring abandonment and helping maintain existing housing. Many jurisdictions also have vacant property registration ordinances, which require owners of vacant properties to pay a fee and register their property.

- **Land banks:** Land banks facilitate temporary management and disposal of problem properties through mechanisms specific to local and state law. Problem properties are those that have been abandoned or are tax-delinquent. Land banks assure that land is properly titled and unencumbered by liability, and organize transfer to new owners consistent with community development plans. In this way, they create a store of available property for development (a buffer) that, ideally, absorbs some of the uncertainty and delay attendant in other steps in the housing development process.
- **Land trusts:** A land trust is a device for maintaining the long-term affordability of new affordable housing by changing the rules of ownership. The basic idea behind a land trust is the separation of home ownership and land ownership. Community land trusts acquire land and lease parcels to low-income home seekers through a long-term renewable lease. When the homeowner wants to move and sell the house, she is obligated to sell either back to the land trust or to another low-income family under conditions that ensure affordability. In that way, the parcel remains affordable to the next owner. Some municipalities support existing trusts through funding. Municipalities also can support community land trusts through reduced tax burdens on resale-restricted homes built on a trust's land, or through waiving administrative/impact fees.
- **Building codes:** The bundle of regulations specifying standards for new building construction is commonly known as a building code. These codes, usually set by localities and states but based on models created by independent standards organizations,

cover issues including building structure, fire safety, environmental hazards, water and electricity systems, materials that can and cannot be used, energy efficiency standards, and accessibility requirements. These rules have a powerful, direct impact on the costs and character of new housing.

Maintaining Existing Housing as Affordable, Stable, and Safe

The second action domain in our model that tackles the health and affordability problem head on is **maintaining existing housing as affordable, stable, and safe**, which covers a variety of legal levers that govern housing quality and the willingness and capacity of tenants and owners to stay in their dwellings.

- **Housing code enforcement:** Housing codes are concerned with the function, condition, and maintenance of housing. Housing code enforcement, usually conducted on the municipal level, constitutes a negative feedback loop designed to ensure that units are kept up to code.
- **Landlord-tenant law:** A lease is a contract, and the body of law regulating the residential lease is usually referred to as “landlord-tenant” law. All states have enacted some form of landlord-tenant statute to codify the rights of landlords and tenants in lease agreements (Center for Public Health Law Research, 2018b), and all but Arkansas now recognize an implied warranty of habitability — a promise that the premises will be suitable and safe for residential use — in residential leases (Lonegrass, 2010). Landlord-tenant laws govern lease agreements, maximum security deposit amounts, property maintenance requirements, and steps landlords and tenants may take if lease agreements are broken or breached, among other elements. In theory, these are powerful rules to balance the interests of landlords, renters, and communities.
- **Disability discrimination laws:** Tenants in housing receiving federal financial assistance have used

the Americans with Disabilities Act (ADA) (42 U.S.C. §§12102, 12131-12134; 28 C.F.R. Part 35), the Fair Housing Act (42 U.S.C. §§ 3601-3619), and Section 504 of the Rehabilitation Act (29 U.S.C. § 794; 24 C.F.R. Part 8) to secure relief from lead hazards or mold problems. These laws provide protections for people with a disability, meaning an impairment that substantially limits a major life activity. Since lead poisoning affects so many systems in the body, residents suffering from lead poisoning may be covered by these laws. For example, *Baez v. NYC Housing Authority* was a class action lawsuit under the ADA filed on behalf of New York City Housing Authority (NYCHA) tenants because the unabated mold in their homes exacerbated their asthma. The suit resulted in a settlement requiring NYCHA to remediate the mold, and improve its process for handling reasonable accommodation requests under the ADA.

- **Lead Law:** These laws regulate lead-based paint hazards in a variety of ways, such as requiring contractors to be trained and certified to abate and inspect for lead-based paint; requiring disclosure of lead-based paint hazards; and regulating inspections for lead hazards. In addition to federal laws, at least 43 states and the District of Columbia have a lead poisoning prevention statute (National Conference of State Legislatures, 2017). Further, several municipalities have passed local lead laws in an attempt to fill the gaps left by federal and state legislation (Korfmacher & Hanley, 2013).
- **Nuisance (or “crime free”) property ordinances:** These are municipal ordinances that vary, but generally label some conduct (e.g., calling the police or other emergency services) a nuisance, and require in a negative feedback loop that the landlord or homeowner abate the nuisance or suffer penalties such as fines, loss of rental permits, condemnation of property, or even incarceration.
- **Just-cause (or “good-cause”) eviction laws:** These rules mandate that landlords may evict tenants only for a good reason, such as damage to the property, non-payment of rent, or other lease violations.

While just-cause eviction is a standard protection in federally subsidized housing, only four states and the District of Columbia have a just-cause eviction law for tenants generally (Jolin, 2000; Williams, 2010). Some of these laws, such as in Massachusetts, contain a specific list of reasons for which a tenant may be evicted. Connecticut has a just-cause requirement that protects elderly tenants and tenants with disabilities, and at least 20 states have a just-cause protection for mobile home tenants (Carroll, 2008). Several cities, including Chicago, Los Angeles, Oakland, CA, Seattle, and San Francisco have just-cause eviction laws (PolicyLink, 2002).

- **Free legal representation in housing court:** Tenants may qualify for legal aid, but research suggests most low-income tenants are not represented in eviction proceedings (Desmond, 2016). New York City has enacted an ordinance to ensure that as of July 31, 2022, all low-income tenants must receive legal representation (City of New York, 2017). Newark, NJ, and San Francisco have similar laws. Given evidence that having a lawyer in housing court significantly improves tenant outcomes (Steinberg, 2011), this is a rule change thought to have potential influencing not just case outcomes but landlord behavior more generally.
- **Eviction record laws:** Multiple states have laws that regulate access to housing court records. Some of these laws automatically restrict public access to certain eviction records, some explicitly allow courts to seal eviction records, and some regulate use of eviction records by tenant screening bureaus (Caramello & Mahlberg, 2017).
- **Rent control:** Rent control laws prevent or delay large increases in rent, either by creating a strict rent ceiling, or in softer, more sophisticated, ways. Rent control can, under at least some circumstances, help maintain the affordability of housing units without depriving landlords of the incentive to maintain the property, and can smooth the effect of fluctuating real-estate values during market bubbles. Rent control has been widely used since the 1940s, but

“When we think like that ... that all we need to do is build units and find ways to build more units ... that’s really not where all the focus needs to be, it also needs to be on preserving what we have, and keeping people in place to some extent, because there’s no way we’re ever going to be able to build to meet the need. So, looking at other things ... not just building new housing ... we need that as well, but how do we keep people in place and how do we fix up the aging housing stock that we do have, I think needs to be just as prominent a part of the conversation.”

– Rasheedah Phillips, Shriver Center on Poverty Law (formerly with Community Legal Services of Philadelphia)

today, only four states and Washington, DC, allow local rent control laws, one state (Oregon) has a statewide rent control law, and the majority of states preempt localities from enacting rent control measures (National Multifamily Housing Council, 2019).

- **Mortgage foreclosure and property tax foreclosure protections:** Some states have laws that may protect homeowners who are at risk of losing their home to foreclosure. This lever includes laws that authorize or require emergency assistance for homeowners facing mortgage foreclosure, and laws that allow property tax exemption or deferral for households with low incomes (National Consumer Law Center, 2009).

Affirmatively Furthering Fair Housing

The domain of **affirmatively furthering fair housing** covers the legal levers used to actively promote racial and socioeconomic diversity in housing. The anti-discrimination and integration project signaled by the passage of the Fair Housing Act, while so far not entirely successful, surely must be part of the effort in the future.

- **Fair housing protections:** The federal Fair Housing Act prohibits housing discrimination based on race, color, religion, national origin, sex, disability, and familial status. Fair housing laws regulate not only the rental and sale of housing, but also insurance and lending transactions, such as prohibiting predatory mortgage lending based on race (“reverse redlining”). All states except Mississippi have enacted a fair housing law of their own, either reiterating federal protections or expanding upon them (Center for Public Health Law Research, 2018a).
- **Affirmatively Furthering Fair Housing Rule:** The Fair Housing Act not only prohibits discrimination in housing-related transactions, but also imposes a duty on the U.S. Department of Housing and Urban Development (HUD) and its program participants to affirmatively further fair housing (AFFH) — to take meaningful steps to promote integration. This

“Within metro areas, it’s about racial segregation, to the point where I call it a meta-problem, essentially. So ... it’s the problem that causes or has a significant effect on all the other problems that we’re trying to address, but we fail to recognize that we can’t come up with a solution to those problems unless we deal with segregation.”

– Rob Breymaier, Heartland Alliance (formerly with Oak Park Regional Housing Center)

“The thing with housing is it’s all about increasing opportunity for folks ... giving folks more decisions ... more opportunity, and more choices about where they want to live.”

– Len Albright, Facebook (formerly with Northeastern University)

“[M]ore people need to be able to afford to pay rent.”

– Mark A. Willis, NYU Furman Center

duty applies to state and local governments that receive funds from HUD. Eight states also have an AFFH requirement in their state fair housing law (Center for Public Health Law Research, 2018a). The AFFH regulations (“Affirmatively Furthering Fair Housing,” 2018) provide a mechanism to induce systematic local and regional planning, monitor implementation, and use the threat of withholding funds to ensure that the mandate is carried out. By requiring municipalities receiving HUD funding to conduct an assessment of their fair housing needs, the rule potentially changes the information available to agents in the system in important ways. Enforcement of the rule is presently suspended by HUD.

- **Inclusionary zoning:** Inclusionary zoning is a legal lever that municipalities and counties can use to promote affordable housing construction. Inclusionary zoning schemes operate to incentivize or force developers to include affordable units in their projects, or to contribute funds towards the construction of affordable units elsewhere in the community. As of 2017, almost 900 jurisdictions have inclusionary zoning schemes (Thaden & Wang, 2017).
- **Fair Share and other state-level inclusionary development mandates:** In some states, legal rules have been enacted or created by courts to counter zoning and planning barriers to affordable housing. The most explicit requirement came out of litigation in Mt. Laurel, NJ, and led to a still-unique legal lever, a requirement that all municipalities in New Jersey assure their “fair share” of affordable housing. Other states have taken action to make the development of affordable housing in all neighborhoods easier by simplifying permit processes (“Comprehensive Permit Act,” 2018), speeding appeals of adverse zoning decisions (“Affordable Housing Land Use Appeals,” 2018), or requiring municipalities to plan for and assist development of housing for low- and moderate-income people (“Housing Elements,” 2018).

Enhancing Economic Choice for the Poor

The domain of **enhancing economic choice for the poor** addresses the factors that influence the ability of lower-income people to get, hold, and spend resources sufficient to have healthy options in the housing market. It reflects the fact that people struggling for housing are not passive objects of policy and market forces, but people who can and do strive with determination and creativity to find suitable places to live. In systems terms, the levers below can change the parameters of housing choice for poor people.

- **Federal Rental Assistance programs:** These are levers related to the three primary rental assistance programs in the United States aimed at making housing affordable for families with low incomes: Public Housing, Section 8 Housing Choice Voucher program, and Section 8 Project-Based Rental Assistance. Each program is overseen by HUD, which administers funds through local public housing authorities (PHAs) that are required to develop both Five-Year and Annual Plans that must be approved by HUD. Established in 1974, the Housing Choice Voucher (HCV) program is the largest of the three. Voucher holders select units that meet the program's housing quality standards, and if the PHA approves the unit, it will enter a contract with the owner to pay the remainder of the rent on behalf of the tenant. Other voucher or housing support funding may be provided through special programs for veterans or the homeless. The Section 8 Project-Based Rental Assistance (PBRA) program is similar to the HCV program, except that instead of using vouchers to rent anywhere in the private rental market, low-income households rent units in specific privately owned housing developments where the owners have entered into multi-year rental assistance agreements with HUD or local PHAs. If a tenant with PBRA moves from the property, the rental assistance remains with the development rather than being retained by the tenant. The public housing program was established by the U.S. Housing Act of 1937 (42 U.S.C. § 1437). Public housing units (of which there are approximately 1 million throughout the U.S.) are mostly owned and managed by PHAs (Center for Budget and Policy Priorities, 2017b). Eligibility for these rental assistance programs is restricted to households in which income is less than 80 percent of the local area median income (AMI). Households contribute about 30 percent of their monthly income to the rent, and the assistance program covers the balance. Together, these programs provide assistance for about 90 percent of households receiving federal rental assistance (Center for Budget and Policy Priorities, 2017a). Federal regulations set certain eligibility criteria for these programs, and PHAs have discretion to set their own admission and eviction standards.
- **Other Federal Renter Support Mechanisms:** The federal government offers other programs aimed explicitly at increasing the impact of rental-assistance programs on employment and economic well-being. The Family Self Sufficiency program (FSS) was established in 1990 to enable families receiving HUD rental assistance to increase their earned income and reduce their dependency on public assistance and rent subsidies. It works through case management and establishment of an escrow savings account that grows as earnings rise and which participants own once they achieve their goals ("Section 8 and Public Housing Family Self-Sufficiency Program," 2018). The Moving to Work demonstration program gives PHAs flexibility to design their own approaches to incentivize families to seek work in order to become more self-sufficient, and to increase families' housing choices (Abravanel et al., 2004).
- **The Mortgage Interest Deduction:** First included in the income tax code in 1913, the mortgage interest deduction (MID) is currently one of the largest tax deductions in the tax code and the nation's largest housing subsidy. In its current form, the MID allows homeowners to deduct the interest on a mortgage of up to \$750,000.
- **Earned Income Tax Credit:** The Earned Income Tax Credit (EITC) is another lever intended to directly

impact the income of the working poor. The EITC was designed to support low-and moderate-income working families with children. Like the minimum wage, the EITC is a federal program, but states can establish their own EITCs, supplementing the federal credit. Twenty-nine (29) states and the District of Columbia do exactly that (National Conference of State Legislatures, 2018b). In 2016, the program assisted almost 26 million households (Center on Budget and Policy Priorities, 2018). Unlike other benefits, EITC is dispersed once a year in a lump sum. Like a higher minimum wage, the EITC could influence the housing problem by increasing disposable income.²

- **Minimum wage:** The federal minimum wage is a legacy of the 1938 Fair Labor Standards Act, and currently stands at \$7.25 per hour of work. As of January 1, 2019, all but five states (Alabama, Louisiana, Mississippi, South Carolina, and Tennessee) have enacted minimum wage laws of their own. In most states the state’s minimum wage is higher than the federal minimum wage. To the extent that the problem of affordability is a function of income rather than housing costs, in theory, raising wages could reduce the proportion of Americans who are excessively burdened by housing costs.³
- **Consumer protections against predatory lending:** Credit is a vital resource for sound household economic stability and growth. There is a slew of law that is intended to protect borrowers from predatory practices that undermine household budgets. The Fair Housing Act and the Equal Credit Opportunity Act (ECOA) prohibit lending discrimination based on race, color, national origin, religion, sex, and other protected classes. Predatory lending can be a discriminatory practice if members of protected

"I ... think regulation is important and helps, but it can distract our attention away from what I think is the root cause of the problem, which is people not having enough money, not being able to save and being forced to borrow at the end of the month."

– Annie Harper, Yale School of Medicine

classes are required to pay higher costs or interest rates than others. The law gives authority to the U.S. Department of Justice (DOJ) to take action against financial institutions that engage in discriminatory lending practices. In the context of housing, fair lending is often thought of as relating to mortgages, but we take a more holistic view. Many poor households struggle to pay rents or mortgage payments, or are left with little cash after they do. Due to lack of access to credit many of those households turn to “payday” loans, high fee and high interest short-term loans, that are paid back at once on the borrower’s payday. Payday loans are not legal in all states. Storefront payday lending is explicitly regulated in 37 states (National Conference of State Legislatures, 2018a), and may fall under some credit regulations in other states. Installment contracts, also called contracts for deed, are transactions in which a buyer makes payments to the seller over a period of time (often decades), and

2. Some have proposed establishing a Federal Assistance In Rent (FAIR) Credit. The FAIR credit, in essence, would use the tax code to create a universal housing voucher program, but it would be more flexible and help a broader range of people. One way this could work is by providing each rent-burdened family that earns less than 80 percent of the area median income the remainder between 30% of the annual household income and the gross rent or the small-area fair market rent, whichever is lower (Galante, Reid, & Decker, 2016).

3. Universal basic income is another approach that has been discussed for assuring a living income. It is an annual fixed stipend that helps households cover basic living expenses, and thereby increases housing stability. Often framed as an anti-poverty measure, this stipend is conceptually different from the many forms of aid currently used. It does not prioritize certain populations over others, and in this way, it broadens the safety net and does not contribute to social stigma.

the seller agrees to convey legal title to the home once all payments have been made. If the buyer fails to make a payment, the seller can cancel the contract, keep the payments that have been made, and evict the buyer, who has accumulated no equity. Land installment contracts place all the obligations of homeownership (such as making substantial repairs) on buyers without conveying the rights or protections associated with owning a home (Mancini & Saunders, 2017).

- **Legal Financial Obligations:** Legal financial obligations include fines, fees, and bail payments resulting from criminal justice charges, including minor offenses. The 2015 Department of Justice Report on the criminal justice system in Ferguson, MO, found not just deliberate racial discrimination but also that “[t]he City budgets for sizeable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved” (United States Department of Justice & Civil Rights Division, 2015). There is growing awareness that Ferguson is not unique in transforming its public order and safety officers into ad hoc tax collectors (Bastien, 2017). Some states and municipalities have laws or legal rules that aim to reduce the impact of legal financial obligations, such as allowing payment plans, providing ability-to-pay hearings for defendants who request them, and allowing people to participate in community service if they cannot afford to pay fees, fines, or court costs.

Governance

Finally, surrounding all the other domains is the element of **governance**. This domain addresses the fact that all the laws and practices we have discussed operate within larger, overlapping systems. Governance can be defined as the management of the course of events in a social system (Burriss et al., 2005). In its public management sense, governance refers to the set of powers and institutions (like regional planning authority) through which

government can try to strategically coordinate the many individual legal and policy levers for housing development, preservation, and equity. In a broader sense, governance encompasses how policymakers, citizens, businesses and other individuals and organizations manage the law (and each other) to attain their ends.

The governance challenge of an equitable, healthy housing policy in the United States lies in the fact that housing needs and housing markets are regional (and much of the money and policy is federal), but key policies are local if not hyperlocal, woven into the social capital and values of communities (Bezdek, 2016). Most metropolitan areas in this country are made up of many localities and even counties, with authority over zoning, transportation, redevelopment and schools. The task of pulling these little sovereigns together in coherent planning and execution of a more equitable housing vision — even if we can imagine regional governance processes operating as a site for useful political deliberation over what the vision for housing should be — is complicated further by the low expectations of government, opposition to taxation as such, and loss of faith in regulatory intervention, that are widespread both in the public and among policy makers.

Nonetheless, communities and policy makers persist, using both formal and informal governance tools. Indeed, housing experts like David Erickson start with the proposition that America’s affordable housing “program” is in fact a network of networks of government agencies, for-profit developers, lenders, community development organizations and citizen-resident stakeholders that combine and recombine around specific projects in particular places. In this model, coordination is not top-down or government-outward, but a matter of on-going adaptation among network nodes to changing conditions and incentives (Erickson, 2009).

- **Regional planning law:** Regional governance focuses on institutional approaches to implement

regional plans, and has been defined as “deliberate efforts at collective action in environments of multiple governmental jurisdictions” (Ohm, 2017). Intergovernmental approaches can take various forms, such as informal cooperation, inter-local service contracts, joint power agreements, or regional planning commissions. Regional planning commissions generally are empowered to gather and distribute information, to prepare a regional plan, and to provide technical services to local planning boards. However, these commissions usually lack authority to require municipalities to implement the regional plan.

- **Local government law:** the authority and powers of local governments, including taxation and regulation, are established by state law. State law determines the boundaries of school districts, cities and towns, and the authority of counties in relation to the municipalities within the county.
- **Governance elements of other legal levers:** Many of the legal levers that were identified above relate to the governance of housing markets. For example, the LIHTC QAP is a lever for shaping the character and location of a substantial proportion of new affordable housing, as are Fair Share and other mechanisms for overcoming zoning barriers. The federal Affirmatively Furthering Fair Housing Rule can likewise be understood as a compulsory planning mechanism backed by federal financial incentives. Litigation under federal and state fair housing law has empowered community housing organizations to instigate, participate in and monitor large, long-term housing programs.

Our Next Report

The housing system is infused with a great deal of law, much of which seems, on the face of things, to be well-designed to achieve specific ends and to support a nation of people socially and economically able to secure healthy, affordable housing. In fact, though, we have serious problems of affordability and segregation. In our third Report, we explore what we know and don't know about the operation and impact of legal levers on housing and health equity. ▽

"One of the reasons that the Montgomery County program ... is successful is because it's a county-wide program. If Maryland organized its housing authorities city by city; you know, if Chevy Chase had one housing authority and Rockville had another housing authority this wouldn't be possible.... [w]e need metropolitan governance for these issues."

– Richard Rothstein, Economic Policy Institute

"Local governments are and have been for more than a century the primary regulator of zoning, bulk, height, setback. All of the use and area restriction that create the context in which housing can be developed. ... So, if you think about the data about what drives housing costs, particularly differential housing costs around the country, there's very good evidence that the strictness of the local land use regulatory regime is, if not the most important variable, one of the most important variables."

– Nestor Davidson, Fordham University School of Law

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