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## Health, Housing, and the Law

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## I. Introduction

A decent dwelling is necessary for health and well-being—but not actually sufficient. The community in which the dwelling stands matters, too: access to transportation, good schools, shops, parks, socioeconomic mixture, social capital and collective efficacy, and economic opportunity are all features necessary for both a high-level and equitable distribution of well-being. These goods are basic human needs that any society should ensure to its members for both moral and practical reasons. This article assumes that increasing the proportion of Americans who live in healthy homes in socially and racially heterogeneous communities with the features we describe would be good for individual and collective well-being alike.

Both healthy homes and diverse communities are consistent with the stated values and preferences of most Americans,<sup>1</sup> and the law has done much to promote them. For 50 years, the Fair Housing Act has stood as a ban on discrimination and a mandate to affirmatively foster integration. Since the 1970s, most states have read into residential leases an implied warranty of habitability to promise that every rental unit has the basic requirements for safe living, and these have been supported by housing codes and specific rules on lead and other domestic hazards. Since the 1980s, the Low-Income Housing Tax Credit program (LIHTC) funded millions of new units of long-term affordable housing. Federal housing subsidy programs have put billions of dollars every year into low income rental assistance. Dedicated lawyers, community organizations, and bureaucrats work with these tools every day, and every day they win battles. It is not their fault we have lost the war.<sup>2</sup>

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1 See J. Rosie Tighe, *Public Opinion and Affordable Housing: A Review of the Literature*, 25 J. PLAN. LITERATURE 3, 7 (2010).

2 The failure of the U.S. to deliver on the promise of equitable housing has not come cheap. In fiscal year 2017 HUD spent more than \$28 billion on public and Indian housing (including the Housing Choice Voucher Program), almost \$7 billion on community development programs including the Homeless Assistance Grants and Housing Opportunities for Persons with AIDS, and \$11 billion in housing programs including project-based vouchers. See U.S. DEPT OF HOUS. & URBAN DEV., FISCAL YEAR 2017 CONGRESSIONAL JUSTIFICATIONS (2017), [https://www.hud.gov/sites/documents/FY\\_2017\\_CJS\\_COMBINED.PDF](https://www.hud.gov/sites/documents/FY_2017_CJS_COMBINED.PDF). In addition, the U.S. treasury spends \$8 billion annually on the Low Income Housing Tax Credit program and \$77 billion on the mortgage interest deduction. JOINT COMM. ON TAXATION, JCX-34-18, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2017-2021 (May 25, 2018), <https://www.jct.gov/publications.html?func=startdown&id=5095>.

The promise of fair housing law has more often been honored in the breach than the observance, and the United States remains segregated by race and class. Poor tenants remain largely powerless in conflicts with their landlords, facing tragic choices between housing and exposure to toxins, such as lead and mold. For the poorest, eviction is a common, devastating experience. The country has a shortage of affordable units. Vouchers remain a perpetual pilot, available to only a small proportion of those who need them. Sadly, law was much more successful in promoting segregation in the first 70 years of the 20th century than it has been in remedying the problems in the last 50 years.

There are many explanations for the collective failure to achieve a higher standard of healthy, integrated housing. One is that law has never stopped promoting and preserving segregation. Affirmative tools of zoning (which can impede the diffusion of affordable housing in suburbs, towns, and urban neighborhoods), or the incentives written into LIHTC (which can nudge developers to build new units in or on the edges of poor neighborhoods), as well as broader policy actions and inactions around gentrification and urban development have all played a role. Supplying enough affordable housing to all citizens is a huge challenge. Going beyond simply building healthy affordable units and reaching toward fostering and maintaining diverse, equitable neighborhoods runs counter to decades of deliberate segregationist policy, enduring stigmas of race and class, widespread enmity toward immigration, NIMBYism, and the rising inequality in the U.S. It counts as a “wicked problem”—a complex problem with so many elements that there is even a dispute about its definition, and that has no clear set of solutions.<sup>3</sup> The best strategies for addressing “wicked problems” are adaptive, collaborative, and informed by a systems perspective.<sup>4</sup>

In this article, we take three preliminary steps that strike us as necessary for using law more effectively in the adaptive, system-oriented process of promoting healthier, more equitable communities. In Part II, we propose (and defend) a broad goal of health equity in housing. In Part III, we offer a heuristic model of the system of legal levers that are arguably instrumental to that goal. We hope that such a model can be a useful tool for breaking the

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3 Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 *POL'Y SCI.* 155, 161 (1973).

4 Nancy Roberts, *Wicked Problems and Network Approaches to Resolution*, 1 *INT'L PUB. MGMT. REV.* 1, 2–15 (2000).

wicked problem into a set of tamer ones. Finally, in Part IV of this article, we grapple with what we actually know about these legal levers. Despite the importance of housing, the effects and operation of many of the primary legal levers have not been studied. While research cannot produce definitive answers to wicked problems, it can serve to help define problem elements, narrow the range of solutions, and improve implementation. We conclude in Part V with some early thoughts about next steps for a renewal of systematic efforts toward housing equity.

## II. A Goal of Health Equity in Housing

*“The connection between health and the dwellings of the population is one of the most important that exists”* – Florence Nightingale<sup>5</sup>

We have asserted that increasing the proportion of Americans living in racially and socioeconomically mixed communities—a condition we will call “health equity in housing”—will make us a happier, healthier nation. This part reviews scientific evidence that supports our claim. We do not assert that heterogeneous communities are the only kind of healthy communities; we know, on the contrary, that cohesive, ethnically concentrated neighborhoods can be very healthy indeed.<sup>6</sup> Nor do we believe that some sort of statistically complete integration is either possible or necessary to yield substantial social benefits. Rather, as the evidence we present below will suggest, we believe that pursuing more diversity in residential conditions in America is a powerful way to deal with a variety of ills.

A broad vision plays a crucial role in an adaptive systems change, by providing an attractive endpoint around which an account of the system and its dynamics can cohere. For lawyers and others working for a healthier America, it provides both accountability and a point of reference linking tactics with strategies: it is a way to ensure that we do not only win battles but also the war itself. A broad vision is important politically for many of the same reasons: it helps reclaim the credibility of the idea of working for major social change, and that idea has to be fairly clear and broadly attractive.

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5 Florence Nightingale, *cited in* S. Lowry, *Housing*, 303 BRITISH MED. J. 838 (1991).

6 Brenda Egolf et al., *The Roseto Effect: A 50-Year Comparison of Mortality Rates*, 82 AM. J. PUB. HEALTH 1089 (1992).

In the remainder of Part II, we make the case for why this goal is desirable, from a health and health equity standpoint.<sup>7</sup>

Housing is crucial to health. A house provides shelter, protection against the elements, and a locus for maintaining personal identity and family life. Financially, it is often a family's biggest investment (or monthly expense). Moreover, as sociologist Douglas Massey and his colleagues describe,

In selecting a place to live, a family does much more than simply choose a dwelling to inhabit; it also selects a neighborhood to occupy. In doing so, it chooses the crime rate to which it will be exposed; the police and fire protection it will receive; the taxes it will pay; the insurance costs it will incur; the quality of education its children will receive; the peer groups they will experience; the goods, services, and jobs to which the family will have access; and the relative likelihood a household will be able to build wealth through home appreciation; not to mention the status and prestige, or lack thereof, family members will derive from

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7 In 2013, the Robert Wood Johnson Foundation announced an endeavor to promote a “Culture of Health . . . that enables all members of our diverse society to lead healthy lives, now and for generations to come.” LAURIE T. MARTIN ET AL., HOW CULTURAL ALIGNMENT AND THE USE OF INCENTIVES CAN PROMOTE A CULTURE OF HEALTH (2017) (quoting Alonzo L. Plough, *Building a Culture of Health*, 47 AM. J. OF PREVENTIVE MED. S388 (2014)). As we understand it, the idea of a “culture of health” is a way to recast the epidemiological concept of the social determinants of health—a set of conditions and causal processes in the world—as a matter of beliefs, knowledge and actions in communities. Speaking in terms of a culture of health highlights our interdependence and suggests that we as a society can choose to attach greater value to promoting health in “[t]he contexts in which people live, learn, work, and play.” See Paula A. Braveman et al., *Broadening the Focus: The Need to Address the Social Determinants of Health*, 40 AM. J. PREVENTIVE MED. S4 (2011); see also WHY ARE SOME PEOPLE HEALTHY AND OTHERS NOT? (Robert G. Evans et al. eds., Aldine de Gruyter 1994); Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants of Health*, WORLD HEALTH ORGANIZATION [WHO] (2008). See generally Bruce G. Link & Jo Phelan, *Social Conditions as Fundamental Causes of Disease*, Extra Issue, J. HEALTH & SOC. BEHAV. 80, 81 (1995) (providing evidence, frameworks and action recommendations for addressing social determinants of health). Our work on housing, supported by the Foundation, aspires to identify ways in which Americans can improve health through action on housing.

living in the neighborhood.<sup>8</sup>

The epidemiology connecting housing and health can be divided into four elements: (1) the relationship between housing hazards and health; (2) the relationship between housing *affordability* and health; (3) the relationship between housing *stability* and health; and (4) neighborhood effects on health. These elements are captured in Figure 1.



Figure 1: A simple model of the synergistic effect of all housing aspects on health

#### A. *Safe Housing Without any Hazards*

Home is the epitome of a safe place—or at least it ought to be. Diseases associated with hazards such as lead and mold persist at high numbers and rates. According to the most recent American Housing Survey, 1,505,000 households in the U.S. were living in units that were severely inadequate and 5,184,000 were in moderately inadequate units.<sup>9</sup> These statistics reflect that up to six

<sup>8</sup> DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 1* (2013).

<sup>9</sup> U.S. CENSUS BUREAU, *AMERICAN HOUSING SURVEY* (2015).

percent of housing units are inadequate to some degree.<sup>10</sup>

The most notorious housing hazard is lead. “The most common source of childhood lead poisoning is lead-based paint (LBP) in older homes and buildings, and the primary exposure pathway is ingestion of lead-contaminated dust.”<sup>11</sup> According to the Centers for Disease Control and Prevention (CDC), there is no safe amount of lead in a child’s blood.<sup>12</sup> Although lead had been a high-profile policy concern for decades and its toll has declined,<sup>13</sup> in 2016, the CDC still reported elevated blood-lead levels in approximately 500,000 children.<sup>14</sup> Even low blood-lead levels are associated with intellectual impairment,<sup>15</sup> academic performance deficits,<sup>16</sup> attention deficits,<sup>17</sup> and anti-social behavior.<sup>18</sup>

Lead is not the only housing hazard. Cockroaches, rats, and other vermin have been shown to contribute to the development of asthma, particularly in children.<sup>19</sup> Indoor dampness and water leaks can produce mold that leads to asthma and other respiratory

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10 *Id.*

11 STEPHANIE P. BROWN, FEDERAL LEAD-BASED PAINT ENFORCEMENT BENCH BOOK 11 (2009).

12 Ctrs. for Disease Control and Prevention, *Childhood Blood Lead Levels in Children Aged <5 Years – United States, 2009–2014*, 66 SURVEILLANCE SUMMARIES 1, 6 (2017).

13 The difficult battle to protect Americans from lead is thoroughly explained in GERALD E. MARKOWITZ ET AL., LEAD WARS: THE POLITICS OF SCIENCE AND THE FATE OF AMERICA’S CHILDREN 6 (2013).

14 NAT’L CTR. FOR ENVTL. HEALTH/AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, MEETING OF THE LEAD POISONING PREVENTION SUBCOMMITTEE OF THE NCEH/ATSDR BOARD OF SCIENTIFIC COUNSELORS: RECORD OF THE PROCEEDINGS 9 (Sept. 9, 2016).

15 David C. Bellinger & Herbert L. Needleman, *Intellectual Impairment in Blood Lead Levels*, 349 NEW ENG. J. MED. 500 (2003).

16 David C. Bellinger et al., *Low-Level Lead Exposure, Intelligence and Academic Achievement*, 90 PEDIATRICS 855, 860 (1992).

17 Joel T. Nigg et al., *Confirmation and Extension of Association of Blood Lead with Attention-Deficit/Hyperactivity Disorder (ADHD) and ADHD Symptom Domains at Population-Typical Exposure Levels*, 51 J. CHILD PSYCHOL. & PSYCHIATRY 58, 58 (2010).

18 Kim N. Dietrich et al., *Early Exposure to Lead and Juvenile Delinquency*, 23 NEUROTOXICOLOGY TERATOLOGY 511, 514 (2001).

19 Virginia A. Rauh et al., *Deteriorated Housing Contributes to High Cockroach Allergen Levels in Inner-City Households*, 110 ENVTL. HEALTH PERSP. 323, 323 (2002); Augusto A. Litonjua et al., *Exposure to Cockroach Allergen in the Home is Associated with Incident Doctor-Diagnosed Asthma and Recurrent Wheezing*, 107 J. ALLERGY & CLINICAL IMMUNOLOGY 41, 41 (2001).

problems.<sup>20</sup> Radon, a radioactive gas prevalent in some homes, is the second leading cause of lung cancer in the U.S.<sup>21</sup> Improper sanitation, extreme temperatures, pesticide residues, and risk of injury due to poor conditions (particularly for children and the elderly) are all hazards that one can be exposed to in the home.<sup>22</sup>

### **B. Housing Affordability and Instability**

The six percent of households that live in structurally inadequate housing are paying a steep health price for shelter—but they are not getting off easy on the rent.<sup>23</sup> The rising cost of housing is a problem for Americans, ranging from the poorest all the way to the middle class; millions of Americans face a monthly struggle to pay their rent or mortgage. Almost one in three households—mostly renters—in the U.S. is cost-burdened, defined as paying more than 30% of annual income for housing.<sup>24</sup> About half of those are *severely* cost-burdened, paying more than *half* of annual income for shelter.<sup>25</sup> The U.S. Department of Housing and Urban Development (HUD) estimated that in 2015, 8.3 million low-income households were cost-burdened, received no government assistance, and/or lived in severely inadequate conditions—a significant increase from 5.9 million households in 2005.<sup>26</sup> While the housing market of a global city like San Francisco cannot be compared to a poor city like Milwaukee, cost-burdened households are scattered all across America.<sup>27</sup>

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20 W. J. Fisk et al., *Meta-Analyses of the Associations of Respiratory Health Effects with Dampness and Mold in Homes*, 17 J. INDOOR AIR 284, 284 (2007).

21 R. William Field, *A Review of Residential Radon Case-Control Epidemiologic Studies Performed in the United States*, 16 REV. ENVTL. HEALTH 151, 151 (2001).

22 Edmond D. Shenassa et al., *Social Disparities in Housing and Related Pediatric Injury: A Multilevel Study*, 94 AM. J. PUB. HEALTH 633, 633–39 (2004); Stephen R. Lord et al., *Home Environment Risk Factors for Falls in Older People and the Efficacy of Home Modifications*, 35 AGE & AGEING ii55, ii55–59 (2006); Muhammad Sarwar, *Indoor Risks of Pesticide Uses are Significantly Linked to Hazards of the Family Members*, 3 COGENT MED., Dec. 22, 2016, at 1. For a review of housing standards see Thomas D. Matte & David E. Jacobs, *Housing and Health—Current Issues and Implications for Research and Programs*, 77 J. URB. HEALTH 7, 7 (2000).

23 MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 5 (2016).

24 See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 5 (2017).

25 *Id.*

26 NICOLE ELSASSER WATSON ET AL., *WORST CASE HOUSING NEEDS 2017 REPORT TO CONGRESS* 1–2 (2018).

27 According to the National Low-Income Housing Coalition, “in no state can a

Struggling to pay for housing has significant consequences for health. An individual who is cost-burdened must constantly make tradeoffs that are harmful for health. A report published by the Center for Housing Policy Leadership finds that “[c]ompared with working families in more affordable housing, families that pay more than half of household expenditures for housing reduce expenditures for other essentials such as food, clothing, and healthcare.”<sup>28</sup> For cost-burdened households, “the rent eats first.”<sup>29</sup> In addition, housing cost-burden is a source of stress,<sup>30</sup> which has a powerful, lifelong impact on health.<sup>31</sup> Furthermore, social epidemiology studies find

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person working full time at the federal minimum wage afford a two-bedroom at the Fair Market Rent [as determined by HUD].” Some states/municipalities enacted “living wages” that are higher than the federal minimum wage, however these too are far from the hourly wage needed to pay fair market rents. In San Francisco, the most expensive metropolitan area in 2018, the effective minimum wage is the state’s wage of \$11 an hour while the needed hourly-wage for a two bedroom is \$38.13. In 2018, a person earning minimum wage in San Francisco would need to work 218 hours a week to pay only 30% of annual income. This is not only a coastal problem. The lowest hourly minimum wage that would allow someone working full time to not be cost burdened is \$13.84, which would prevent a minimum wage earner from being cost burdened in Arkansas only. Additionally, in only 22 counties in the entire nation a full-time worker earning the federal or state minimum wage can pay less than 30% of annual income on rent. NAT’L LOW INCOME HOUS. COAL., OUT OF REACH 2017 (2017). Further analysis from the Coalition reveals that the wages are not the only problem: “The U.S. has a shortage of 7.4 million rental homes affordable and available to extremely low-income renters, whose income is at or below the poverty guideline or 30% of their area median income.” NAT’L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOUSING 6 (2017).

- 28 BARBARA J. LIPMAN, SOMETHING’S GOTTA GIVE: WORKING FAMILIES AND THE COST OF HOUSING 7 (2005).
- 29 DESMOND, *supra* note 23, at 303; See also Elizabeth J. Mueller & J. Rosie Tighe, *Making the Case for Affordable Housing: Connecting Housing with Health and Education Outcomes*, 21 J. PLAN. LITERATURE 371, 378 (2007).
- 30 Joseph Harkness & Sandra J. Newman, *Housing affordability and children’s well-being: Evidence from the national survey of America’s families*, 16 HOUSING POL’Y DEBATE 223, 225 (2005); M. Sandel & R.J. Wright, *When Home is Where the Stress Is: Expanding the Dimensions of Housing That Influence Asthma Morbidity*, 33 ARCHIVES OF DISEASE IN CHILDHOOD 942–48 (2006).
- 31 See Robert N. Buschmann, et al., *Stress and Health Behaviors as Potential Mediators of the Relationship Between Neighborhood Quality and Allostatic Load*, 28 ANNALS OF EPIDEMIOLOGY 346 (2018); Karen A. Matthews & Linda C. Gallo, *Psychological Perspectives on Pathways Linking Socioeconomic Status and Physical Health*, 62 ANN. REV. PSYCHOLOGY 501 (2010); Pilyoung Kim et al., *How Socioeconomic Disadvantages Get Under the Skin and into the Brain to Influence Health Development Across the Lifespan*, in HANDBOOK OF LIFE COURSE HEALTH

that stress is unequally distributed, affecting populations of low-income and people of color at higher rates. The “stress gap” is thought to be an important cause of the health gap between advantaged and disadvantaged groups.<sup>32</sup>

One source of stress for people struggling to pay the rent or the mortgage is the brooding threat of losing their dwelling to eviction or foreclosure.<sup>33</sup> Matthew Desmond’s *Evicted: Poverty and Profit in the American City* rendered visible to Americans the magnitude of eviction as a part of life for the poor—and the serious harm widespread eviction causes. Eviction leads to an increase in the likelihood of material hardship, depression in mothers, and worsened health outcomes for mothers and children.<sup>34</sup> Additionally, eviction increases the likelihood that a low-income worker will be laid off.<sup>35</sup> A systematic literature review confirms Desmond’s findings that forced moves lead to poor physical and mental health.<sup>36</sup> The negative health outcomes have a disparate impact on families with children, and hence women.<sup>37</sup>

Eviction seems to be hard on both children and adults. Research from Milwaukee shows that the majority of tenants facing eviction lived with children. More than half of those evicted children were school-aged,<sup>38</sup> and each eviction leads to a higher risk of future forced moves.<sup>39</sup> Research suggests that moves are associated with poorer academic performance,<sup>40</sup> meaning that there is a high

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DEVELOPMENT 463 (Neal Halfon et al., eds., 2018); Vincent Felitti et al., *Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245–58 (1998).

32 See generally Jacob Bor et al., *Population Health in an Era of Rising Income Inequality: USA, 1980-2015*, 389 THE LANCET 1475, 1485–86 (2017); Peggy A. Thoits, *Stress and Health: Major Findings and Policy Implications*, 51 J. HEALTH & SOC. BEHAV. S41, S49 (2010).

33 Matthew Desmond & Rachel Tolbert Kimbro, *Eviction’s Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 299 (2015).

34 See generally DESMOND, *supra* note 23.

35 Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 SOC. PROBS. 47 (2016).

36 Hugo Vásquez-Vera et al., *The threat of home eviction and its effects on health through the equity lens: A systematic review*, 175 SOC. SCI. & MED. 199, 205 (2017).

37 Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 303, 314, 320 (2013).

38 *Id.* at 314.

39 Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 255 (2015).

40 Shana Pribesh & Douglas B. Downey, *Why Are Residential and School Moves*

likelihood that evicted children will have to switch schools, and are thus more likely to drop out.<sup>41</sup> Often, eviction leads to moves to neighborhoods with higher crime rates,<sup>42</sup> which are associated with lower quality schools and poorer academic performance.<sup>43</sup> Poor health, material hardship, and parenting stress—all associated with eviction<sup>44</sup>—have also been associated with lower performance in school.<sup>45</sup> Finally, eviction is associated with increased risk of homelessness,<sup>46</sup> which produces lower test scores.<sup>47</sup>

The evidence based on foreclosure's health toll is even larger. Mirroring eviction effects, foreclosure disproportionately affects already-vulnerable populations and leads to both higher incidence and exacerbation of poor health.<sup>48</sup> There is ample evidence that foreclosure is correlated with a decline in mental health,<sup>49</sup> including an increase in the likelihood of suicide.<sup>50</sup>

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*Associated with Poor School Performance?*, 36 DEMOGRAPHY 521, 521 (1999).

- 41 See Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, 107 AM. J. EDUC. 1, 3, 19–22. (1998).
- 42 Desmond et al., *supra* note 39, at 230, 254.
- 43 Dana Charles McCoy et al., *Neighborhood Crime and School Climate as Predictors of Elementary School Academic Quality: A Cross-Lagged Panel Analysis*, 52 AM. J. COMMUNITY PSYCHOL. 128, 128–40 (2013).
- 44 DESMOND, *supra* note 23, at 1.
- 45 Edward A. Frongillo et al., *Food Stamp Program Participation is Associated with Better Academic Learning Among School Children*, 136 J. NUTRITION 1077, 1077–80 (2006); Steven R. Shaw et al., *The Relationship Between Student Health and Academic Performance: Implications for School Psychologists*, 36 SCH. PSYCHOL. INT'L 115, 115–34 (2015); Kathryn Soltis et al., *Associations Among Parental Stress, Child Competence, and School-Readiness: Findings from the PACE Study*, 24 J. CHILD & FAM. STUD. 649, 649–55 (2015).
- 46 See generally Maureen Crane & Anthony M. Warnes, *Evictions and Prolonged Homelessness*, 15 HOUSING STUD. 757, 757–73 (2000); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).
- 47 See, e.g., Joshua M. Cowen, *Who Are the Homeless? Student Mobility and Achievement in Michigan 2010–2013*, 46 EDUC. RESEARCHER 33, 33–43 (2017).
- 48 Craig Evan Pollack & Julia Lynch, *Health Status of People Undergoing Foreclosure in the Philadelphia Region*, 99 AM. J. PUB. HEALTH, 1833, 1833, 1838 (2011); Alexander C. Tsai, *Home Foreclosure, Health, and Mental Health: A Systematic Review of Individual, Aggregate, and Contextual Associations*, 10 PLOS ONE 1 (2015); Craig Evan Pollack et al., *Foreclosure and Health Status*; LEONARD DAVIS INST. HEALTH ECON. ISSUE BRIEF, Jan.–Feb. 2010, at 2–3.
- 49 Jason N. Houle, *Mental Health in the Foreclosure Crisis*, 118 SOC. SCI. & MED. 1 (2014); Janelle Downing, *The Health Effects of the Foreclosure Crisis and Unaffordable Housing: A Systematic Review and Explanation of Evidence*, 162 SOC. SCI. AND MED. 88, 95 (2016).
- 50 Katherine A. Fowler et al., *Increase in Suicides Associated with Home Eviction and*

High rent burdens, eviction, and foreclosure are all facets of residential instability which, in addition to forced moves, has been associated with poor health outcomes and with loss of employment and possessions that could lead to material hardship. The trauma of forced moves is also associated with more punitive parenting.<sup>51</sup> In addition, families often find it difficult to find housing after eviction or foreclosure, and are forced into homelessness,<sup>52</sup> inadequate housing,<sup>53</sup> and/or a move to a neighborhood with more crime and poverty.<sup>54</sup>

### C. *Healthy Neighborhoods*

There are many aspects of a neighborhood that contribute to health, but in this article, we focus on four related elements: poverty rate, racial segregation, public amenities, and social mobility.

Concentrating poor people in poor neighborhoods does not have positive effects, so it is concerning that between 2010 and 2014, the number of Americans living in an extreme poverty census tract (poverty rate greater than 20%) doubled, reaching 13.5% of the population.<sup>55</sup> The demographic of those concentrated in poverty is also unequal: only 5.5 percent of white people live in extreme poverty tracts, while 25.1% of black people and 17.6% of Hispanic people do.<sup>56</sup> The Moving to Opportunity (MTO) demonstration, a large randomized controlled trial funded by HUD to test the impact of moving from a poor neighborhood, produced experimental evidence that growing up in a neighborhood with a low poverty rate

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*Foreclosure During the US Housing Crisis: Findings From 16 National Violent Death Reporting System States, 2005–2010*, 105 AM. J. PUB. HEALTH 311, 314–15 (2015); Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, 104 AM. J. PUB. HEALTH 1073, 1073 (2014); see Tsai, *supra* note 48, at 6–12.

51 See Robert H. Bradley & Robert F. Corwyn, *Socioeconomic Status and Child Development*, 53 ANN. REV. PSY. 371, 384 (2002).

52 See generally Crane & Warnes, *supra* note 46; Robin Phinney et al., *Housing Instability Among Current and Former Welfare Recipients*, 97 AM. J. PUB. HEALTH 832 (2007).

53 Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 256 (2015).

54 *Id.* at 234, 254.

55 Elizabeth Kneebone & Natalie Holmes, *U.S. Concentrated Poverty in the Wake of the Great Recession*, BROOKINGS (Mar. 31, 2016), <https://www.brookings.edu/research/u-s-concentrated-poverty-in-the-wake-of-the-great-recession/>.

56 *Id.*

improves well-being on multiple dimensions.<sup>57</sup> Low neighborhood poverty rates led to less distressed parents and male children,<sup>58</sup> healthier adults,<sup>59</sup> reduction in the prevalence of obesity and diabetes,<sup>60</sup> and higher incomes in adulthood for children who grew up in these neighborhoods.<sup>61</sup> Moving toward opportunity is also moving toward better health.

Living in a highly racially segregated neighborhood also has effects on health. Segregation is by no means a relic of the past and the cities with the largest black populations are still highly segregated.<sup>62</sup> An economic analysis of the effects of segregation on schooling, employment, and single parenthood finds that “blacks in more segregated areas have significantly worse outcomes than blacks in less segregated areas.”<sup>63</sup> The authors of the analysis concluded that “a one standard deviation decrease in segregation would eliminate one-third of the black-white differences in most of our outcomes.”<sup>64</sup> Living in a racially segregated neighborhood is associated with almost every illness one could think of, such as heart disease, obesity, tuberculosis, reduced life expectancy, depression, and infant mortality.<sup>65</sup>

Part of the story is that poor, segregated neighborhoods are often less salubrious places to live. Urban planners tend to use areas with high minority populations for land use that exposes communities to environmental hazards.<sup>66</sup> Further, these areas tend to

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57 Tama Leventhal & Jeanne Brooks-Gunn, *Moving to Opportunity: An Experimental Study of Neighborhood Effects on Mental Health*, 93 AM. J. PUB. HEALTH 1576, 1576 (2003).

58 *Id.*

59 Jens Ludwig et al., *Neighborhood Effects on the Long-Term Well-Being of Low-Income Adults*, 337 SCIENCE 1505 (2012).

60 Jens Ludwig et al., *Neighborhoods, Obesity, and Diabetes — A Randomized Social Experiment*, 265 NEW ENG. J. MED. 1509, 1509 (2011).

61 Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 899 (2016).

62 JOHN R. LOGAN & BRIAN J. STULTS, *THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 6–7 (2011).

63 David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?*, 12 Q.J. ECON. 827, 827 (1997).

64 *Id.*

65 Dolores Acevedo-Garcia et al., *Future Directions in Residential Segregation and Health Research: A Multilevel Approach*, 93 AM. J. PUB. HEALTH 215, 215–16 (2003).

66 An example of this can be seen in an analysis of zoning changes over four

lack basic amenities such as healthcare facilities, stores with healthy foods, and transportation centers.<sup>67</sup> There is even research to suggest that urban trees could reduce crime,<sup>68</sup> while vacant properties are associated with crime and reduced collective efficacy<sup>69</sup>—the social glue that helps maintain community health.

If this were all there was to it, public policy might plausibly focus its attention on improving conditions in areas of concentrated poverty and racial segregation—except for the fact that, as the Supreme Court at least temporarily grasped in *Brown v. Board of Education*, separate is inherently unequal.<sup>70</sup> The political and other benefits of having the better-off on your team in campaigns for good schools, parks, and transportation are obvious. Less obvious, but apparently equally real, are the benefits that come (to rich and poor of all races) of rubbing shoulders at work, school, and home.<sup>71</sup> Studies of school integration found that students in integrated schools have higher average test scores, are less likely to drop out, and are more likely to enroll in college.<sup>72</sup> Integrated classrooms encourage critical thinking, problem solving, and creativity for all students.<sup>73</sup>

The benefits of integration at the population level have been documented in Raj Chetty's influential work.<sup>74</sup> His work has been

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decades in NYC that found that major manufacturing zones, which bring with them environmental hazards, were generally characterized with a “higher percentage of minority populations than borough or city averages” and “lower than average incomes and rates of home ownership.” Juliana Maantay, *Zoning, Equity, and Public Health*, 91 AM. J. PUB. HEALTH 1033, 1037 (2001).

67 NAT'L RESEARCH COUNCIL & INST. OF MED., U.S. HEALTH IN INTERNATIONAL PERSPECTIVE: SHORTER LIVES, POORER HEALTH 192–206 (Steven H. Woolf & Laudan Aron eds., 2013).

68 Michelle C. Kondo et al., *The Association Between Urban Trees and Crime: Evidence from the Spread of the Emerald Ash Borer in Cincinnati*, 157 LANDSCAPE URB. PLAN. 193, 198 (2017).

69 Eugenia Garvin et al., *More Than Just an Eyesore: Local Insights and Solutions on Vacant Land and Urban Health*, 90 J. URB. HEALTH 412, 413 (2012).

70 *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

71 See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2008).

72 AMY STUART WELLS ET AL., THE CENTURY FOUND., *HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS* 8, 10–11, 14 (2016), [https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/02/09142501/HowRaciallyDiverse\\_AmyStuartWells-11.pdf](https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf).

73 *Id.*

74 See generally Raj Chetty et al., *The Association Between Income and Life Expectancy in the United States, 2001–2014*, 315 J. AM. MED. ASS'N 1750 (2016); Raj Chetty

particularly useful in its focus on social mobility and long-term access to economic opportunity.<sup>75</sup> Mobility, defined as the ability to financially fair better than one's parents, has, on average, been either flat or declining (depending on the measure used) throughout the majority of the 20th century in the U.S.<sup>76</sup> Additionally, mobility is distributed unevenly across the U.S., with some areas having more upward mobility than others.<sup>77</sup> Research on the characteristics of neighborhoods shows that both racial and economic segregation impede social mobility.<sup>78</sup> Where MTO showed the benefits of leaving a poor neighborhood, further geographically granular analysis finds that black people living in racially segregated neighborhoods<sup>79</sup> and neighborhoods with high levels of racial bias<sup>80</sup> pay a high price in social mobility compared to those living in more affluent and integrated areas with less bias.<sup>81</sup>

### III. Legal Levers for Health Equity in Housing

The problem of housing in America reflects a variety of factors, such as: market issues, a history of affirmative legal support for segregation, stagnating wages, rising inequality, and a decline in government investment and regulatory capacity. Since housing-related problems are a reflection of a system, tackling them as if they were discreet problems has a low chance of having a substantial impact on the overall problem. The first step toward a more cross-

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et al., *Relationships Between Income, Health Behaviors, and Life Expectancy: Reply*, 316 J. AM. MED. ASS'N 880 (2016); Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCI. 398 (2017); Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility II: County-Level Estimates*, 133 Q.J. ECON. 1163 (2018).

75 Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. R. 855, 899 (2016); Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107 (2018).

76 Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCI. 398, 398 (2017).

77 Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1620 (2014).

78 *Id.* 1604.

79 *Id.* 1553–1623.

80 See Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective* (Nat'l Bureau of Econ. Research, Working Paper No. 24441, 2018).

81 Chetty & Hendren, *supra* note 74.

cutting campaign is to describe the system to be influenced, and to specify the legal levers that may be used to do the influencing. Our model is a heuristic tool to help people interested in a systematic approach promote greater health equity in housing. It aims to pull together, in one picture, the key factors many have identified serially. As we will canvas in Part IV 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. The figure below depicts the model we use in this article.

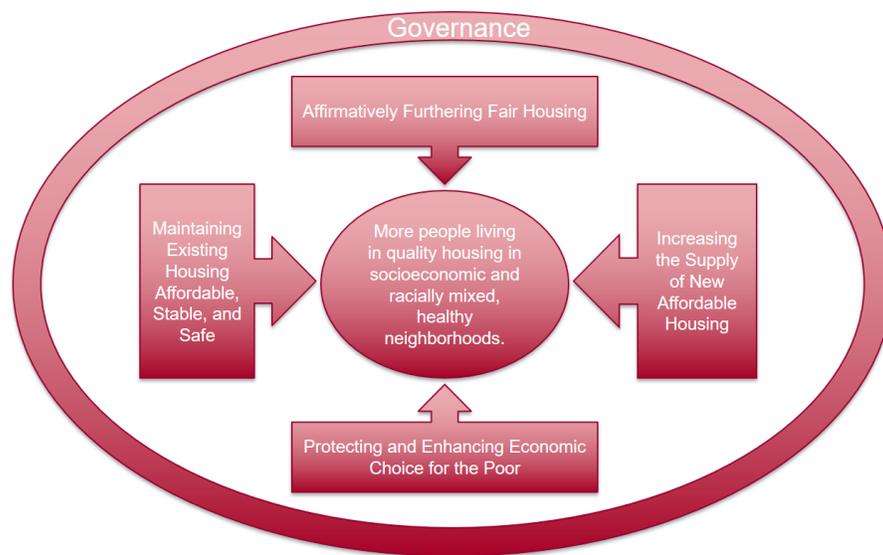


Figure 2: A Legal Levers Model for Health Equity

The domain of increasing the supply of new, affordable housing covers legal tools that influence financing, location, cost, and character of new housing. The levers that we identified as key in this domain are as follows.

*Low-Income Housing Tax Credit program (LIHTC)*: Established by the Tax Reform Act of 1986, the 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 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.<sup>82</sup> The key legal element is the Qualified Allocation

82 U.S. DEPT OF TREASURY, OFFICE OF THE COMPTROLLER OF THE CURRENCY, LOW-INCOME HOUSING TAX CREDITS: AFFORDABLE

Plan (QAP) that each state agency must have to establish eligibility priorities and criteria for awarding tax credits.<sup>83</sup> QAPs are usually drafted annually.

*Land use regulations (zoning)*: These rules are set by localities regulating what can and cannot be built on specific land parcels. A key feature of land use regulation is whether the parcel is zoned for commercial or residential purposes. If the parcel is used for residential purposes, regulations may address occupancy limits, types of housing (single family housing, multifamily housing, etc.), lot sizes, and architectural features.

*Land banks*: Land banks facilitate temporary management and disposal of problem properties through mechanisms specific to local and state law. Problem properties include those that have been abandoned or are tax-delinquent.<sup>84</sup> Land banks assure that land is properly titled and unencumbered by liability, and organize transfer to new owners consistent with community development plans.

*Anti-Vacancy Laws*: Some distressed units have deteriorated to a point that it might be cheaper for the owner to abandon them than to fix them. Since vacant properties can negatively affect the community in the form of decreasing property values of neighboring homes, some states allow neighbors to sue the abandoning property owner and seek damages for the lost value.<sup>85</sup> These suits could theoretically have a deterrent effect on abandonment, and may be seen as a lever to maintain existing housing. In practice, these laws seem to kick in only once a property is a total loss, and to operate along with land banks as a mechanism for redevelopment. Many jurisdictions also have vacant property registration ordinances, which require owners of vacant properties to pay a fee and register their property.<sup>86</sup>

*Land trusts*: The land trust is a device for maintaining the long-term affordability of new housing. 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

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HOUSING INVESTMENT OPPORTUNITIES FOR BANKS (2014).

83 26 U.S.C. § 42(m)(1) (2018).

84 FRANK S. ALEXANDER, *LAND BANKS AND LAND BANKING* (2d ed. 2015).

85 *See, e.g.*, TENN. CODE ANN. §§ 13-6-101, 13-6-104(a) (2018).

86 U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-34, *VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES* 59-61 (2011).

homeowner wants to move and sell the house, he or she is obligated to sell the property back to the land trust or to another low-income family under conditions that insure affordability. This way, the parcel remains affordable for the next owner. Some municipalities support existing trusts through funding, through reduced tax burdens on resale-restricted homes built on a trust's land, or through waiving administrative/impact fees.<sup>87</sup>

*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, could cover a slew of 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. Since the 1990s, the leader of the building code industry has been the International Code Council (ICC). The majority of states use the model codes released by the ICC as their building codes.<sup>88</sup>

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.<sup>89</sup> The levers in this

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87 JOHN EMMEUS DAVIS & RICK JACOBUS, LINCOLN INST. OF LAND POLICY, *THE CITY-CLT PARTNERSHIP: MUNICIPAL SUPPORT FOR COMMUNITY LAND TRUSTS* (2008), <https://www.lincolninst.edu/sites/default/files/pubfiles/the-city-clt-partnership-full.pdf>.

88 David Listokin & David B. Hattis, *Building Codes and Housing*, 8 *CITYSCAPE* 21, 29–31 (2005).

89 This domain encompasses efforts to manage the problems of gentrification (the process of redesigning lower-income neighborhoods to suit middle-class preferences) and “globalization” (the phenomenon of cities becoming magnets for overseas residential investment). Both push up rents and housing prices, imperiling the tenancy of existing residents. Because this Article focuses on the housing struggles of low-income people, we do not address the globalization issue and its legal levers per se. See, e.g., Conor Dougherty, *In Vancouver, a Housing Frenzy That Even Owners Want to End*, N.Y. TIMES (June 2, 2018), <https://www.nytimes.com/2018/06/02/business/economy/vancouver-housing.html> (reporting on legal efforts of Canadian global city to suppress rise in housing presses). By contrast, gentrification and its management present both challenges and opportunities for health equity in housing. Legal levers for gentrification management, like housing code enforcement, stronger regulation of condo conversion, use of transfer taxes to deter speculation, and property tax relief for existing home owners, have been identified. Donald C. Bryant, Jr. & Henry W. McGee, Jr., *Gentrification and the*

domain are as follows.

*Housing code enforcement:* Housing codes concern the function, condition, and maintenance of housing.<sup>90</sup> Housing code enforcement is the activity, usually conducted on the municipal level, to ensure that units are kept up to code.<sup>91</sup> In general, housing code enforcement efforts start with something that ignites an inspection (complaint, strategic choice of municipality, point of sale/rent), then proceeds to an inspection, remediation, and an abatement process.

*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. During the late 1960s, a “revolution” in landlord-tenant law emerged.<sup>92</sup> In 1970, the court in *Javins v. First National Realty Corp.* confirmed the existence of an implied warranty of habitability.<sup>93</sup> A warranty of habitability promises that the premises will be suitable and safe for residential use, and in theory gives tenants a legal basis to demand repairs or to take self-help measures, such as withholding rent.<sup>94</sup> Since the *Javins* decision, courts in many other states have adopted the warranty, and state legislators have enacted statutory warranties. All states but Arkansas now recognize a general implied warranty of habitability in residential leases.<sup>95</sup> Further, all states have enacted some form of landlord-tenant statutes. These laws provide a

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*Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43 (1983); see also Leila Ghaffari et al., *Toward a Socially Acceptable Gentrification: A Review of Strategies and Practices Against Displacement*, GEOGRAPHY COMPASS, Feb. 2018, at 1 (reviewing strategies to protect existing residents). For purposes of this Article, we do not treat gentrification as an independent problem or domain, but as one expression of the problems of segregation, housing shortage, lack of economic agency, and poor governance.

90 H. Laurence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 29, 31 (1996).

91 Code enforcement agencies should accomplish the following three goals in order to be effective: (1) identify code violations; (2) monitor properties that violate the code, and take action when the issue is not remediated; and (3) engage in a remediation process to either restore or demolish the property. Marilyn L. Uzdavines, *Barking Dogs: Code Enforcement is all Bark and No Bite (Unless the Inspectors Have Assault Rifles)*, 54 WASHBURN L.J. 161, 163 (2014).

92 Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520–21 (1984).

93 *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1072–73 (D.C. Cir. 1970).

94 Corey Mostafa, *The Implied Warranty of Habitability, Foreseeability, and Landlord Liability for Third-Party Criminal Acts Against Tenants*, 54 UCLA L. REV. 971, 980–81 (2007).

95 Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective*, 85 TUL. L. REV. 413, 423 (2010).

varying degree of protection, depending on the jurisdiction.

*Nuisance (or “crime free”) property ordinances:* These ordinances are municipal in nature and generally label some type of conduct (e.g., calling the police or other emergency services) a nuisance. They require the landlord or homeowner to abate the nuisance or suffer penalties such as fines, loss of rental permits, condemnation of property, or even incarceration.<sup>96</sup> The typical mechanism to abate is eviction.

*Just-cause (or “good-cause” or “no-fault”) eviction laws:* These laws 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.<sup>97</sup> While just-cause eviction is a standard protection in federally subsidized housing, many tenants in the private rental market do not enjoy the same safeguard.<sup>98</sup> As of 2008, only three states and the District of Columbia have a just-cause eviction law that protects some, if not all, tenants.<sup>99</sup> Several cities, including Oakland, San Francisco, and Los Angeles have just-cause eviction laws.<sup>100</sup>

*Free legal representation in housing court:* When low-income tenants meet their landlords in court, usually the landlord is armed with a lawyer while the tenant is not. Mostly, legal help for tenants is accomplished through a fund that pays for representation. However, in New York City, a law was enacted to require that, as of July 31, 2022, all low-income tenants receive legal representation.<sup>101</sup>

*Rent control:* This lever consists of legal schemes that prevent

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96 AMERICAN CIVIL LIBERTIES UNION WOMEN’S RIGHTS PROJECT, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 3 (2015), [https://www.aclu.org/sites/default/files/field\\_document/equ15-report-nuisanceord-rel3.pdf](https://www.aclu.org/sites/default/files/field_document/equ15-report-nuisanceord-rel3.pdf) [hereinafter ACLU].

97 Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. CHI. L. REV. 521, 522, 529–30 (2000).

98 *Id.* at 522. For tenants receiving federal housing assistance, the illegal drug-related activity of other household members or guests may be considered good cause for evicting the entire household. 24 C.F.R. § 5.858 (2018).

99 Aleatra P. Williams, *Real Estate Market Meltdown, Foreclosures and Tenants’ Rights*, 43 IND. L. REV. 1185, 1204–05 (2010); Florence Wagman Roisman, *The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore*, 86 N.C. L. REV. 817, 834–35 (2008).

100 Roisman, *supra* note 99, at 836–37; Williams, *supra* note 99, at 1205; POLICYLINK, EQUITABLE DEVELOPMENT TOOLKIT: JUST CAUSE EVICTION CONTROLS 2 (2002), <http://www.policylink.org/sites/default/files/just-cause-eviction-controls.pdf>.

101 N.Y.C., ADMIN. CODE §§ 26-1301 to -1302 (2018).

excessive increases in rent, either by creating a strict rent ceiling, or in softer, more sophisticated, ways. Rent control can help maintain the affordability of housing units without depriving landlords of the incentive to maintain the property.<sup>102</sup> Rent control has been widely used since the 1940s, but has gone out of fashion.<sup>103</sup> Today, only four states and the District of Columbia have rent control laws, and the majority of states preempt localities from enacting rent control measures.<sup>104</sup>

The domain of affirmatively furthering fair housing covers the legal levers used to actively promote racial and socio-economic diversity in housing.

*Fair housing protections:* Fair housing law might be traced back to the *Shelley v. Kraemer* case, which held racially restrictive covenants legally unenforceable,<sup>105</sup> but was symbolically launched in April 1968 when Lyndon B. Johnson signed the Fair Housing Act into law. The Act, as amended in 1988 by the Fair Housing Amendments Act, prohibits housing discrimination based on race, color, religion, national origin, sex, disability, and familial status.<sup>106</sup> In 2015, the U.S. Supreme Court affirmed that the Act protects not only against intentional discrimination, but also against facially neutral policies that have a disparate impact on one of the protected classes.<sup>107</sup> 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<sup>108</sup> (“reverse redlining”<sup>109</sup>). As of August 1, 2017, all states except Mississippi have enacted a fair housing law of their own, either reiterating federal protections or expanding upon them.<sup>110</sup>

102 See Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 *ECON J. WATCH* 73, 79–83 (2009) (reviewing history and economic opinion on rent control).

103 Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 *ANN. REV. L. SOC. SCI.* 15, 16–17 (2015).

104 *Rent Control Laws by State*, NAT’L MULTIFAMILY HOUSING COUNCIL (Aug. 29, 2018), <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/>.

105 *Shelley v. Kraemer*, 334 U.S. 1 (1948).

106 42 U.S.C. §§ 3601–3619 (2012).

107 *Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015).

108 42 U.S.C. § 3605 (2012).

109 RICHARD ROTHSTEIN, *THE COLOR OF LAW* 109–13 (2017).

110 The Policy Surveillance Program, *State Fair Housing Protections*, CTR. FOR PUB. HEALTH LAW RESEARCH, TEMPLE UNIV. BEASLEY SCHOOL OF LAW (Aug. 1, 2017), <http://lawatlas.org/datasets/state-fair-housing->

*Affirmatively Furthering Fair Housing rule:* The Fair Housing Act not only prohibits housing discrimination, but also imposes a duty on HUD and its program participants to affirmatively further fair housing (AFFH)—to take meaningful steps to promote integration.<sup>111</sup> This duty applies to state and local governments that receive funds from HUD.<sup>112</sup> The AFFH obligation is the broadest potential legal lever for achieving integration over the long term. The law, now specified through a 2015 regulation (the AFFH rule),<sup>113</sup> provides 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. The 2015 rule required about 1,200 municipalities to conduct an assessment of their fair housing needs to be submitted by October 31, 2020, but the rule has effectively been suspended by HUD as explained in Part IV. Eight states have an AFFH requirement in their state fair housing law.<sup>114</sup>

*Inclusionary zoning:* By limiting the amount of space in a community that can be used for affordable, multi-family housing through devices like minimum lot requirements and density limits, conventional zoning schemes exclude lower-income people.<sup>115</sup> Inclusionary zoning is a legal lever that municipalities can use to require that a specified proportion of new housing units be affordable. It can incentivize or force developers to include affordable units in their projects, or to contribute funds toward the construction of affordable units elsewhere in the community. As of 2017, almost 900 jurisdictions have inclusionary zoning schemes.<sup>116</sup>

*State-level mandates:* In some states, various legal devices have been used to counter zoning and planning barriers to affordable housing. These requirements are based on income and not on race, but given how closely associated race and income are, the

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protections-1498143743.

111 42 U.S.C. § 3608(e)(5) (2012).

112 Timothy M. Smyth et al., *The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 231, 235 (2015); 24 C.F.R. §§ 91.225(a)(1), 91.325(a)(1) (2018); 24 C.F.R. §§ 570.487(b), 570.601(a)(2) (2018).

113 24 C.F.R. §§ 5.150–5.168 (2018).

114 The Policy Surveillance Program, *supra* note 110.

115 DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL 18-19 (2013).

116 Emily Thaden & Ruoniu Wang, *Inclusionary Housing in the United States: Prevalence, Impact, and Practices* 11 (Lincoln Inst. of Land Policy, Working Paper No. WP17ET1, 2017), [https://www.lincolninst.edu/sites/default/files/pubfiles/thaden\\_wp17et1\\_0.pdf](https://www.lincolninst.edu/sites/default/files/pubfiles/thaden_wp17et1_0.pdf).

requirements theoretically could work as a force against racial segregation as well as poverty concentration. The most explicit requirement came out of litigation in Mt. Laurel, New Jersey and led to a still-unique legal lever: a requirement that all municipalities in the state develop/accommodate 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 (Massachusetts),<sup>117</sup> speeding appeals of adverse zoning decisions (Connecticut),<sup>118</sup> or requiring municipalities to plan for and assist the development of affordable housing (California).<sup>119</sup>

The domain of protecting and enhancing economic choice for the poor addresses the factors that influence the ability of poor people to get, hold, and spend resources sufficiently 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 are people who can and do strive with determination and creativity to find suitable places to live.

*Housing Choice Vouchers:* Established in 1974,<sup>120</sup> the Housing Choice Voucher (HCV) program is administered by public housing agencies (PHAs), and allows low-income individuals to rent private housing while generally paying no more than 30% of their income in rent, unless the rent is higher than the local payment standard.<sup>121</sup> 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.<sup>122</sup> Other voucher or housing support funding may be provided through special programs for veterans or the homeless.<sup>123</sup>

*The Mortgage Interest Deduction:* First included in the income

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117 See, e.g., MASS. GEN. LAWS ch. 40B, §§ 20–23 (2018).

118 CONN. GEN. STAT. § 8-30g(f) (2017).

119 CAL. GOV’T CODE § 65583(c) (West 2018).

120 12 U.S.C. § 1706e (1988) (repealed 1991); 42 U.S.C. § 1437f (2018).

121 24 C.F.R. § 982.1 (2018).

122 *Id.*

123 42 U.S.C. § 1437f(o)(19) (2018). This includes Medicaid. There is a movement of physicians who argue that housing is the “prescription” that they want to write for their patients. Since 2015 Medicaid funds can be used to pay for housing for the chronically homeless. Michael Ollove, *States Freed to Use Medicaid Money for Housing*, STATELINE (Nov. 20, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/11/20/states-freed-to-use-medicaid-money-for-housing>; Kathy Moses & Rachel Davis, *Housing Is a Prescription for Better Health*, HEALTH AFFAIRS (July 22, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20150722.049472/full/>.

tax code in 1913, the mortgage interest deduction (MID) is currently one of the largest tax deductions in the tax code and the largest housing subsidy. In its current form, the MID is intended to promote homeownership by allowing homeowners to deduct their mortgage interest on a principle of up to \$750,000 and up to two residences.<sup>124</sup>

*Consumer protections against predatory lending:* There is a slew of law that is intended to protect low and middle-income borrowers from predatory practices. The Fair Housing Act<sup>125</sup> and the Equal Credit Opportunity Act (ECOA)<sup>126</sup> 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 classes are required to pay higher costs or interest rates than others. The law gives the Department of Justice (DOJ) authority to take action against financial institutions that engage in discriminatory lending practices. Since 2011, the Consumer Financial Protection Bureau (CFPB) has assumed the role of point agency for all matters of compliance with federal consumer protection laws, including the enforcement of fair lending laws.<sup>127</sup> In the context of housing, fair lending is often thought of as relating to mortgages, but we take a more holistic view and include payday lending. Storefront payday lending is legal in 36 states.<sup>128</sup> Some states enacted interest rate limits intended to protect consumers.<sup>129</sup>

*Minimum wage:* The federal minimum wage currently stands at \$7.25 per hour of work.<sup>130</sup> As of 2016, all but five southern states enacted minimum wage laws of their own, and in seven states the minimum wage is lower than the federal minimum wage, and as such, is non-binding.<sup>131</sup>

*Earned Income Tax Credit:* The Earned Income Tax Credit

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124 26 U.S.C. § 163(h) (2018). See Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1348–49 (2000).

125 42 U.S.C. § 3605 (2018).

126 15 U.S.C. § 1691 (2018).

127 12 U.S.C. §§ 5511, 5514 (2018).

128 PEW CHARITABLE TRS., HOW STATE RATE LIMITS AFFECT PAYDAY LOAN PRICES 1 (2014), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes/contentlevel\\_pages/fact\\_sheets/stateratelimitsfactsheetpdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes/contentlevel_pages/fact_sheets/stateratelimitsfactsheetpdf.pdf).

129 *Id.*

130 *Minimum Wage Tracker*, ECON. POL'Y INST., <https://www.epi.org/minimum-wage-tracker/> (last visited Jan. 2, 2019).

131 Policy Surveillance Program, *Minimum Wage Laws Map*, LAWATLAS, <http://legacy.lawatlas.org/query?dataset=minimum-wage-laws-1457972234> (last visited Jan. 2, 2019).

(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 minimum wage, the EITC is a federal program, but states can expand on it and provide more generous payments. Twenty-nine states and the District of Columbia do expand on EITC. In 2016, the program assisted almost 26 million households. Unlike other benefits, EITC is most often dispersed once per year, in a lump sum.<sup>132</sup>

Finally, surrounding the other domains is the element of governance. This domain addresses the fact that all of 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.”<sup>133</sup> In its public management sense, governance refers to the set of “meta-levers” (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.

*Regional governance 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.”<sup>134</sup> Intergovernmental approaches can take various forms, such as informal cooperation, inter-local service contracts, joint power agreements, or regional planning commissions.<sup>135</sup> Regional planning commissions are generally “empowered to gather and distribute information, to prepare a regional plan, and to provide . . . technical services to local planning boards.”<sup>136</sup> However, the commission does not generally

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132 *Policy Basics: State Earned Income Tax Credits*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/state-budget-and-tax/policy-basics-state-earned-income-tax-credits> (last updated Aug. 23, 2017); *Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit> (last updated Apr. 19, 2018).

133 Scott Burris et al., *Nodal Governance*, 30 AUSTL. J. LEGAL PHIL. 30 (2005).

134 Brian W. Ohm, *Is There a Law of Regional Planning?*, 4 BELMONT L. REV. 35, 38 (2017) (quoting ETHAN SELTZER & ARMANDO CARBONELL, *REGIONAL PLANNING IN AMERICA* 10 (2011) (citation omitted)).

135 *Id.* at 38.

136 PATRICIA SALKIN, *AMERICAN LAW OF ZONING* § 10:9 (5th ed. 2018).

have authority to require municipalities to implement the regional plan.<sup>137</sup>

*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 laws and other mechanisms for overcoming zoning barriers. The federal AFFH Rule can likewise be understood as a compulsory planning mechanism backed by federal financial incentives. In the governance section below, we describe some examples of those interactions.

#### **IV. The Many Things We Do Not Know About the Impact of Basic Housing Laws**

While there are many laws influencing housing, there are still many unknowns regarding the impact of these laws. This form of ignorance is dangerous. It fosters and supports the belief that problems that have been addressed in law have been solved, or at least are in the process of being solved, when in fact the “solutions” may be flawed in design, implementation, or both.

This part explores research into the workings and effects of the most prominent legal levers in our heuristic model. Most studies are peer-reviewed, but not-for-profit groups’ reports comprise much of the literature in some domains. Aside from MTO, we did not find randomized controlled trials on the impact of law on housing related outcomes. Rather, the literature is largely comprised of what would ordinarily be considered low-quality evidence: observational studies of one or a few instances over short time spans without strong design elements to support causal inferences.<sup>138</sup> There are few studies exploiting changes in policy as a rigorous, natural experiment over time. We therefore do not explicitly rate the strength of evidence, but start with the general caveat that virtually all of our knowledge of the workings of the legal levers we describe should be approached with caution.

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<sup>137</sup> *Id.*

<sup>138</sup> See L Rychetnik et al., *Criteria for Evaluating Evidence on Public Health Interventions*, 56 J. EPIDEMIOLOGY & COMMUNITY HEALTH 119, 120 (2002); see generally PUBLIC HEALTH LAW RESEARCH: THEORY AND METHODS 93 (Alexander Wagenaar & Scott Burris eds., 2013) (reviewing research methods in legal evaluation).

## A. Domain 1: Increasing the Supply of New Affordable Housing

### 1. The Low-Income Housing Tax Credit Program (LIHTC)

Between 1987 and 2015, the federal government subsidized the building of more than three million housing units through LIHTC.<sup>139</sup> The program has an annual budget of nearly \$8 billion per year and between 1995 and 2016 has created an average of 108,810 units per year.<sup>140</sup> Unfortunately, demand for affordable housing continues to outpace supply.<sup>141</sup> It is plausible that more tax credits would lead to more units but the “big” empirical policy question is whether a system of tax credits is the most efficient way to build the affordable housing we need.<sup>142</sup> That question is extremely difficult, if not impossible to answer. The decentralized, public-private approach to affordable housing finance, of which LIHTC is the fulcrum, emerged from a more traditional government production model that was itself not meeting the need, and was vigorously attacked by proponents of a more conservative, free-market approach.<sup>143</sup>

In the matter of health equity in housing, we ask how and to what extent LIHTC contributes to greater economic and racial integration. The majority of LIHTC developments are sited in low-income neighborhoods,<sup>144</sup> which often means predominantly non-white neighborhoods with fewer jobs, more pollution, and

139 *Low-Income Housing Tax Credits*, OFF. POL’Y DEV. & RES., <https://www.huduser.gov/portal/datasets/lihtc.html> (last updated June 6, 2018).

140 *Id.*

141 U.S. DEPT OF HOUS. & URBAN DEV., *WORST CASE HOUSING NEEDS: 2017 REPORT TO CONGRESS ix-xi* (2017), <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

142 That is, assuming that LIHTC survives. By slashing the corporate tax dramatically enough to seriously reduce what corporations owe, the Tax Cuts and Jobs Act dramatically decreased the demand for tax credits, but since LIHTC has bi-partisan support, Congress may yet maintain historical funding levels by other means. Conor Dougherty, *Tax Overhaul Is a Blow to Affordable Housing Efforts*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/business/economy/tax-housing.html>.

143 For a historical view of housing policy and the “revolution” in approach of which LIHTC is a part, see DAVID JAMES ERICKSON, *THE HOUSING POLICY REVOLUTION: NETWORKS AND NEIGHBORHOODS xi-xiv* (Urban Institute Press. 2009).

144 See Jean L. Cummings & Denise DiPasquale, *The Low Income Housing Tax Credit: An Analysis of the First Ten Years*, 10 HOUSING POL’Y DEBATE 251, 268–69 (1999).

lower performing schools.<sup>145</sup> The decision regarding where to site a LIHTC development is based on the QAP. The Internal Revenue Code requires that the QAP give preference to projects located in high poverty census tracts and gives developers in those tracts a tax credit increase of up to 30%. Developers respond to this incentive by building more in high-poverty neighborhoods.<sup>146</sup>

The program also incentivizes building developments that are not mixed income. LIHTC requires that 20% or 40% of units in a development be affordable, depending on the level of affordability.<sup>147</sup> However, states reward developments that have more affordable units by giving more tax credits to those developers.<sup>148</sup>

These rules of the game raise concern that LIHTC contributes to racial segregation and poverty concentration.<sup>149</sup> Overall, studies of LIHTC's impact on segregation show mixed results with modest effects either way. While LIHTC might not contribute actively to increased racial segregation and poverty concentration, it is clear that it is not a major force of racial and socioeconomic integration.<sup>150</sup>

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145 Ingrid Gould Ellen et al., *Gateway to Opportunity? Disparities in Neighborhood Conditions Among Low-Income Housing Tax Credit Residents*, 28 HOUSING POL'Y DEBATE 572, 573 (2018).

146 Nathaniel Baum-Snow & Justin Marion, *The Effects of Low Income Housing Tax Credit Developments on Neighborhoods*, 93 J. PUB. ECON. 654 (2009).

147 See 26 U.S.C. § 42(g) (2018).

148 EDWARD L. GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY 107 (2008).

149 The Inclusive Communities Project, a fair housing litigation group based in Texas, brought a law suit against the U.S. Department of Treasury claiming that LIHTC is "perpetuating racial segregation" and "relegating minority families to unequal conditions of slum, blight, and distress." See Complaint at 6, *Inclusive Cmty. Project, Inc. v. U.S. Dep't of Treasury*, No. 3:14-CV-3013-D, 2016 WL 6397643 (N.D. Tex., Oct. 28, 2016). In 2010, Philip Tegeler, the President Executive Director of the Poverty and Race Research Action Council sent a letter to the department of the Treasury arguing that LIHTC "create[s] and perpetuate[s] racial segregation in assisted housing." Letter from Philip Tegeler et al., President Exec. Dir., Poverty & Race Research Action Council, to Michael S. Barr, Assistant Sec'y for Fin. Insts., Dep't of the Treasury (Oct. 26, 2010), [http://www.prrac.org/pdf/civil\\_rights\\_letter\\_to\\_Michael\\_Barr\\_10-26-10.pdf](http://www.prrac.org/pdf/civil_rights_letter_to_Michael_Barr_10-26-10.pdf).

150 See Ingrid G. Ellen et al., *Poverty Concentration and the Low Income Housing Tax Credit: Effects of Siting and Tenant Composition*, 34 J. HOUS. ECON. 49, 50, 58 (2016); Keren M. Horn & Katherine M. O'Regan, *The Low Income Housing Tax Credit and Racial Segregation*, 21 HOUS. POL'Y DEBATE 443, 467 (2011); Matthew Freedman & Tamara McGavock, *Low-Income Housing Development, Poverty Concentration, and Neighborhood Inequality*, 34 J. POL'Y ANALYSIS & MGMT. 805 (2015); Lance Freeman & William Rohe, *Subsidized Housing*

There are efforts to make LIHTC a stronger force for socioeconomic integration. Some states have been working on including provisions in the QAP that encourage siting of developments outside of high-poverty areas. For example, in 2009, Texas's QAP started awarding points to developments that are in "high opportunity" areas. A pre-post analysis of LIHTC developments in San Antonio found that after the provision was put in place, more LIHTC units were sited in low-poverty neighborhoods.<sup>151</sup> Similarly, since 2013, New Jersey's QAP requires 60% of the tax credits to be allocated in areas with low poverty, such as prosperous suburbs.<sup>152</sup> This change to the QAP has been shown to increase the number of LIHTC developments next to public transit, placing half of the credits in "job-center municipalities," and in "proficient school districts."<sup>153</sup>

Authors of a HUD report published in 2015 analyzed changes in the QAPs of 21 states between 2002 and 2010, and found that various types of opportunity provisions impact the siting outcomes of LIHTC developments.<sup>154</sup> The report shows considerable variation in how states define an opportunity area, the mechanism through which the state incorporates opportunity in the QAP (set asides, point changes, or others), and the impact of the change on locational outcomes.

While some of the rules that govern LIHTC come from the treasury, every state program with its QAP is a different program in a sense. Since early 2002, there is a growing recognition of the importance of the QAP and, as such, we need research to help direct state agencies in their efforts to use LIHTC as a force for racial and social economic integration.

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*and Neighborhood Racial Transition: An Empirical Investigation*, 11 HOUS. POL'Y DEBATE 67–89 (2000); Nathaniel Baum-Snow & Justin Marion, *The Effects of Low Income Housing Tax Credit Developments on Neighborhoods*, 93 J. PUB. ECON. 654 (2009).

151 Rebecca J. Walter, et al., *Comparing Opportunity Metrics and Locational Outcomes in the Low-Income Housing Tax Credit Program*, 38 J. PLAN. EDUC. & RES. 449 (2018).

152 TIM EVANS, NEW JERSEY FUTURE, ASSESSMENT OF THE NEW JERSEY LOW INCOME HOUSING TAX CREDIT PROGRAM 12–13 (2017), <http://www.njfuture.org/wp-content/uploads/2017/05/New-Jersey-Future-Assessment-of-the-NJLIHTC-program.pdf>.

153 *Id.*

154 U.S. DEPT OF HOUS. & URBAN DEV., EFFECT OF QAP INCENTIVES ON THE LOCATION OF LIHTC PROPERTIES (2015), [https://www.novoco.com/sites/default/files/atoms/files/pdr\\_qap\\_incentive\\_location\\_lihtc\\_properties\\_050615.pdf](https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf).

## 2. *Land Use Regulation*

Land use regulation has potential effects on health equity in housing across all of the domains of our model. It can influence the cost of new housing, and can be a means of affirmatively encouraging or preventing integration. It is a primary instrument of planning. The classical economic case against zoning is that it raises costs, which constricts the supply of affordable housing. The most expeditious way to get people the housing they need is not to help tenants pay rent, but to relax regulations that restrict supply, and allow the invisible hand to achieve equilibrium. There is evidence to support this theoretical position, although it varies both in significance and magnitude.<sup>155</sup> In its broadest form, the claim ignores the potential benefits of land use regulation, and its many particular forms.

Land use regulations can be divided into five categories: (1) limits of density and intensity; (2) design and performance standards; (3) moving costs (such as sewerage) from locality to developer; (4) banning development on specific lots; and (5) controls on growth.<sup>156</sup> The majority of studies that attempt to estimate the impact of land use regulation use crude measures to capture the regulation, so we remain in the dark as to the costs and benefits of particular elements of regulation. A review of empirical evidence concluded that “the most promising strategy for improving our understanding of the economic effects of zoning and land use restrictions would be to devote resources to measuring regulatory conditions systematically in a large cross-section of cities and metropolitan areas.”<sup>157</sup>

A few years after this recommendation, researchers from the Wharton School of the University of Pennsylvania conducted a survey of land use regulations in over 2,000 jurisdictions. The survey results, with additional data, were used to create a measure of the stringency of the regulatory environment in each community, called

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155 For a review of the literature see John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulations on the Price of Housing: What Do We Know? What Can We Learn?*, 8 *CITYSCAPE* 69, 69–70 (2005), and Ralph B. McLaughlin, *Land Use Regulation: Where Have We Been, Where Are We Going?*, 29 *CITIES* S50, S54 (2012).

156 Elizabeth Deakin & Douglas R. Porter, *Growth Controls and Growth Management: A Summary and Review of Empirical Research*, in *UNDERSTANDING GROWTH MANAGEMENT: CRITICAL ISSUES AND A RESEARCH AGENDA* 5–6 (David J. Brower & David R. Godschalk eds., 1989).

157 Quigley & Rosenthal, *supra* note 155, at 89, 100.

the Wharton Residential Land Use Regulatory Index (WRLURI).<sup>158</sup> Using the WRLURI, the researchers found that coastal markets are more highly regulated,<sup>159</sup> and were able to model a demand curve for housing<sup>160</sup> and correlate housing elasticity to the amount of developable land.<sup>161</sup> Further, since the index was used in a rigorous and scientific manner, it is now used as a benchmark for indexing regulation.<sup>162</sup>

The WRLURI was a large step in the right direction. There are two next steps that will progress the research on land use regulations. The first is moving from indexes to observable elements of the law. This move will enable evaluation of what parts of land use regulation drive supply effect, if any at all. Second, a longitudinal dataset of regulations must be built to increase the ability of studies to achieve causal inference.

### 3. *Vacant Properties, Land Banks, and Land Trusts*

Vacant properties are a problem in cities throughout the U.S. In 2017, 9.3% of housing units in the U.S. were estimated to be vacant year-round.<sup>163</sup> Vacant lots and properties are associated with neighborhood crime, illicit drug use, and a reduced perception of safety.<sup>164</sup> As of 2011, “439 jurisdictions have enacted vacant property registration ordinances.”<sup>165</sup> Another effort to estimate the prevalence of these ordinances coded more than 500 ordinances to a database.<sup>166</sup> The popularity of these ordinances does not translate to research and evaluation. We found only one study that suggests

158 Joseph E. Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: Wharton Residential Land Use Regulatory Index*, 45 *URB. STUD.* 693–729 (2008).

159 *Id.*

160 Christian A.L. Hilber & Frédéric Robert-Nicoud, *On the Origins of Land Use Regulations: Theory and Evidence from US Metro Areas*, 75 *J. URB. ECON.* 29–43 (2013).

161 Edward Glaeser et al., *Housing Supply and Housing Bubbles*, 64 *J. URB. ECON.* 198–217 (2008).

162 Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 *J. URB. ECON.* 45–56 (2016).

163 U.S. CENSUS BUREAU, *QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2017* (2018), <https://www.census.gov/housing/hvs/files/qtr417/Q417press.pdf>.

164 Eugenia Garvin et al., *More Than Just an Eyesore: Local Insights and Solutions on Vacant Land and Urban Health*, 90 *J. URB. HEALTH* 413, 420–21 (2013).

165 U.S. GOV'T. ACCOUNTABILITY OFF., *supra* note 99, at 61.

166 Yun Sang Lee et al., *New Data on Local Vacant Property Registration Ordinances*, 15 *CITYSCAPE* 289 (2013).

that these registration requirements actually reduce vacancy rates.<sup>167</sup>

Once the property is vacant, the challenge is to acquire and dispose of the land with reasonable dispatch. Land banks are a popular mechanism to do so. Along with securing a marketable title, land banks can (or should) become integral to the community development and planning process, helping to define and promote desirable uses of vacant property.<sup>168</sup>

A limited evaluation of literature finds mostly positive results. An implementation study of five land banks shows how “a land bank can operate as a local government authority to transcend the legal and structural impediments to conversion” of vacant properties to “assets.”<sup>169</sup> The challenge in major land banking cities, where tens of thousands of properties may be vacant, is scaling up disposition. Although the land banks reviewed in the study held large amounts of land, the rate of disposition was much lower.<sup>170</sup> While land banks can have measurable success locally,<sup>171</sup> there is a question of whether they can be scaled to address the magnitude of the vacancy problem. For example, if the Philadelphia Land Bank disposed of 500 vacant parcels per year, and not a single new parcel became vacant, it would take about 83 years for Philadelphia to dispose of all 40,000 vacant properties.<sup>172</sup> Scaling up is possible in theory, and would be expected to increase the magnitude of benefits compared to mechanisms like sheriff’s sales, but it also increases administrative costs considerably.<sup>173</sup> Interviews with more than 40 land bank officials show that the challenge for land banks is funding.<sup>174</sup> While there is general agreement, mainly from non-peer reviewed evaluations, that

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167 Thomas J. Fitzpatrick et al., *The Effect of Local Housing Ordinances* (Fed. Reserve Bank of Cleveland, Working Paper No. 1240, 2014).

168 PAYTON HEINS & TARIK ABDELAZIM, CTR. FOR CMTY. PROGRESS, TAKE IT TO THE BANK: HOW LAND BANKS ARE STRENGTHENING AMERICA’S NEIGHBORHOODS (2014), <http://www.communityprogress.net/take-it-to-the-bank--how-land-banks-are-strengthening-america-s-neighborhoods-pages-466.php>.

169 Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 140 (2005).

170 *See id.* at 156.

171 TYLER BOROWY ET AL., LAND POL’Y INST. MICH. ST. U., ECONOMIC IMPACTS OF THE INGHAM COUNTY LAND BANK: 2006–2012 (2013).

172 PHILA. LAND BANK, 2017 STRATEGIC PLAN & PERFORMANCE REPORT 22 (2017), <http://wp.philadelphialandbank.org/wordpress/wp-content/uploads/2015/01/philadelphia-land-bank-strategic-plan-february-2017.pdf>.

173 *Id.* at 34.

174 HEINS & ABDELAZIM, *supra* note 168, at 18.

land banks are a force for good in communities, it is unclear if they can be scaled up to address systemic vacancy in cities with distressed housing stock.

Another mechanism to increase the utilization of vacant land parcels is a community land trust. Similar to land banks, community land trusts show a lot of promise, but not to scale. Compared to other homeowners, community land bank homeowners had much lower rates of completed foreclosures throughout the foreclosure crisis of 2008–2010.<sup>175</sup> This occurrence was due, in part, to the fact that the land trust helped delinquent homeowners sell their houses and avoid foreclosure.<sup>176</sup> A few case studies on specific land trusts show that they were able to help low-income people achieve homeownership, while retaining affordable housing.<sup>177</sup> A national study of community land trusts in 2006 found that nearly 190 land trusts throughout the U.S. held 6,495 units.<sup>178</sup>

#### 4. Building Codes

Like land-use regulations, building codes are mechanisms to promote safety<sup>179</sup> and support rational planning, but they may also affect the cost of new housing.<sup>180</sup> Empirical interest in the basic costs and benefits of codes seems to have peaked in the 1970s

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175 Emily Thaden, *Stable Home Ownership in a Turbulent Economy: Delinquencies and Foreclosures Remain Low in Community Land Trusts* 11 (Lincoln Inst. of Land Policy, Working Paper No. WP11ET1, 2011), [https://www.lincolnst.edu/sites/default/files/pubfiles/1936\\_1257\\_thaden\\_final.pdf](https://www.lincolnst.edu/sites/default/files/pubfiles/1936_1257_thaden_final.pdf).

176 *Id.* at 16.

177 KENNETH TEMKIN ET AL., THE URBAN INST., *BALANCING AFFORDABILITY AND OPPORTUNITY: AN EVALUATION OF AFFORDABLE HOMEOWNERSHIP PROGRAMS WITH LONG-TERM AFFORDABILITY CONTROLS*, at iii (2010), <https://www.urban.org/sites/default/files/publication/29291/412244-Balancing-Affordability-and-Opportunity-An-Evaluation-of-Affordable-Homeownership-Programs-with-Long-term-Affordability-Controls.PDF>.

178 Yesim Sungu-Eryilmaz & Rosalind Greenstein, *A National Study of Community Land Trusts* 16 (Lincoln Inst. of Land Policy, Working Paper No. WP07YS1, 2007), <http://cltnetwork.org/wp-content/uploads/2014/01/2007-A-National-Study-of-CLTs.pdf>.

179 A clear example of this comes from seismic building codes that are intended to mitigate the impact of an earthquake on buildings. A review by the World Bank Group concludes that “[b]uilding code implementation has a crucial role to play in disaster risk reduction.” World Bank Group, *Building Regulation for Resilience: Managing Risks for Safer Cities*, at 13 (2015), <https://www.gfdrr.org/sites/default/files/publication/BRR%20report.pdf>.

180 David Listokin & David B. Hattis, *Building Codes and Housing*, 8 CITYSCAPE 21, 42 (2005).

and 80s, including the publication of a 1969 report to the Douglas Commission on Urban Problems.<sup>181</sup> This report identified several building codes as wasteful practices.<sup>182</sup> While multiple early studies found that more restrictive building codes (often unclear how defined) led to an increase in cost of construction and as such are restrictive,<sup>183</sup> a study that aimed to determine the magnitude of the increase found that “the effects of local building codes on housing costs is, at most, small.”<sup>184</sup>

Building codes are often discussed in monolithic terms but can be separated into various types. Although specific requirements may be debatable, fire codes, plumbing codes, and general safety codes are directly related to public health.<sup>185</sup> On the other hand, regulations on room dimensions, though they may reflect older notions of public health, are harder to justify epidemiologically and may unnecessarily inflate housing costs; the general trend is for these types of codes to reduce in scope in recent years.<sup>186</sup>

A review of the current literature suggests that there is a need for an update to address today’s code and technology. As in the broader land use law literature, the majority of existing studies utilize a more or less fuzzy measure of restrictiveness, and measure cost without consideration of the potential benefits of these codes. For the policymaker, it is imperative to know if the increased cost of codes has a greater societal benefit, but thorough evaluation to estimate the benefit is not available.<sup>187</sup> One study helped distinguish

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181 Cty. of Santa Clara Planning Dep’t., Summary: The Douglas Commission Report (1969), <https://searchworks.stanford.edu/view/4038271>.

182 Sharon M. Oster & John M. Quigley, *Regulatory Barriers to the Diffusion of Innovation: Some Evidence from Building Codes*, 8 THE BELL J. OF ECON. 361, 361–68 (1977).

183 *Id.*; Eli M. Noam, *The Interaction of Building Codes and Housing Prices*, 10 AM. REAL EST. & URB. ECON. ASS’N J. 394, 394–95 (1983).

184 Richard F. Muth & Elliot Wetzler, *The Effect of Constraints on House Costs*, 3 J. URB. ECON. 57, 64 (1976).

185 See James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 763 (2002).

186 See generally PAUL BOUDREAUX, *THE HOUSING BIAS: RETHINKING LAND USE LAWS FOR A DIVERSE NEW AMERICA* (Palgrave Macmillan 1st ed. 2011) (cataloging the harms of traditional zoning); Listokin & Hattis, *supra* note 180, at 25.

187 A few studies do conduct these types of cost-benefit analysis for building codes. JAMES K. HAMMIT ET AL., HARVARD UNIVERSITY, *RESIDENTIAL BUILDING CODES, AFFORDABILITY, AND HEALTH PROTECTION: A RISK-TRADEOFF APPROACH 2* (1999) (“We estimate that a code change that increases the nationwide cost of constructing and maintaining homes by

code requirements that improve safety (fire codes/structural requirements) from those that are outdated or reflect self-interested pressures of a professional or commercial group.<sup>188</sup>

**B. Domain 2: Maintaining Existing Housing Affordable, Stable, and Safe**

**1. Housing Code Enforcement and Landlord-Tenant Law**

Approximately one-third of Americans rent their homes.<sup>189</sup>

High transaction costs and the dynamics of the rental market can result in unequal bargaining power between landlords and tenants. In addition, renters may be particularly vulnerable, as they are more likely than homeowners to have low incomes or to be minorities.<sup>190</sup> A variety of laws regulate the relationship between landlords and tenants, including the implied warranty of habitability and state landlord-tenant laws.

The implied warranty of habitability has long been seen in academic writing as an extremely weighty development. An abundance of articles discuss, praise, or critique the warranty, but virtually none empirically evaluate its actual use or impact. A recent article used historic rent data to estimate the effect of the implied warranty on rents.<sup>191</sup> The author found that there is reason to believe that the implied warranty of habitability achieves its goal of improving housing conditions, but also leads to an increase in rents.<sup>192</sup> The last study that took place before this 2010 study dates back to 1975.<sup>193</sup> Neither article was peer-reviewed, and neither provides strong support for claims about the effect of the warranty

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\$150 (0.1% of the average cost to build a single-family home) would induce offsetting risks yielding between 2 and 60 premature fatalities or, including morbidity effects, between 20 and 800 lost quality-adjusted life years (both discounted at 3%) each year the code provision remains in effect.”).

188 Listokin & Hattis, *supra* note 180, at 21 (providing a strong framework on how to assess building codes as well as a breakdown of codes that should be used in future research).

189 Megan E. Hatch, *Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUSING POL’Y DEBATE 98, 98 (2017).

190 *Id.*

191 Michael A. Brower, *The “Backlash” of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 851–52 (2011).

192 *Id.* at 887.

193 Werner Z. Hirsch et al., *Regression Analysis of the Effects of Habitability Laws upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 1098 (1975).

on quality or affordability.

The state of the evaluation of other landlord-tenant law is not much better. A 1980 study using mixed methods to evaluate the utilization of landlord-tenant laws in two cities found that legislation has had little effect on landlord and tenant litigation.<sup>194</sup> Since then, we found no evaluation of landlord-tenant litigation or the effect of law on their relations, and experts know little about its effect.<sup>195</sup> A study of the Milwaukee market powerfully demonstrates the failure of landlord-tenant law in giving some leverage to tenants.<sup>196</sup> Aside from Desmond's recent work, there has been little research on what really happens in landlord-tenant disputes. It is unclear to what extent states enforce landlord-tenant laws, and to what extent tenants know about these laws or how to use them to protect their rights. Additionally, it is unknown how parties typically operate in the shadow of these laws where many, if not most, evictions are handled informally.

The "revolution" in landlord-tenant law sparked a vigorous debate about the effects that housing code enforcement, tenant rights, and the implied warranty of habitability have on the poor. Two camps of legal scholars formed at the time, with Bruce Ackerman leading one and Neil Komesar leading the other, in a debate about whether housing code enforcement hurts the poor.<sup>197</sup> However, "[d]espite all the ink spilled in this debate, little empirical research has been conducted to inform either position."<sup>198</sup>

While there is a small body of literature suggesting that code enforcement achieves the goal of improving housing quality<sup>199</sup> and reducing incidence of childhood lead poisoning,<sup>200</sup> the effects on the housing market are still largely unevaluated. Publicly available data from Rochester, New York suggests that concentrated efforts

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194 Samuel Jan Brakel & Donald M. McIntyre, *The Uniform Residential Landlord and Tenant Act (URLTA) in Operation: Two Reports*, 5 AM. B. FOUND. RES. J. 557, 557, 566 (1980).

195 Hatch, *supra* note 189.

196 DESMOND, *supra* note 23. The tenants he followed in Milwaukee were consistently bullied by their landlords, and found little help in court.

197 Hirsch, et al., *supra* note 189, at 1116–17.

198 Desmond & Bell, *supra* note 103, at 22.

199 See, e.g., Carla Campbell et al., *Philadelphia's Lead Court Is Making a Difference*, 38 J. HEALTH POL., POL'Y & L. 709, 709 (2013).

200 See Chinaro Kennedy et al., *Primary Prevention of Lead Poisoning in Children: A Cross-Sectional Study to Evaluate State Specific Lead-Based Paint Risk Reduction Laws in Preventing Lead Poisoning in Children*, 13 ENVTL. HEALTH 1, 8 (2014).

to address lead did not result in a negative impact on housing markets.<sup>201</sup> A case study from Minneapolis supports these results.<sup>202</sup> However, an older study of three cities found that strict housing code enforcement contributed to urban blight.<sup>203</sup>

Given the different results from cities and a small body of empirical research, the debate remains open and policymakers who want to improve the adequacy of the rental housing stock without increasing rents are left in the dark. Research is needed on the impact strict housing code enforcement may have on factors such as rent levels, eviction rates, and number of rental units on the market. In addition, evaluation is needed on the effectiveness and impacts of potentially promising models, such as strategic code enforcement.<sup>204</sup>

## 2. Nuisance Property Ordinances

It is estimated that more than 2,000 municipalities have nuisance and crime-free property ordinances.<sup>205</sup> However, policy surveillance of these ordinances in the 40 most populous U.S. cities shows that there is wide variation regarding the type of conduct the city defines as a nuisance, along with other key elements.<sup>206</sup>

There has been little research on the effects of these laws.

201 Katrina Smith Korfmacher et al., *Rochester's Lead Law: Evaluation of a Local Environmental Health Policy Innovation*, 120 ENVTL. HEALTH PERSP. 309, 309, 313 (2012).

202 Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 197 (1993).

203 H. Laurence Ross, *Housing Code Enforcement as Law in Action*, 17 LAW & POL'Y 133, 158 (1995).

204 The Center for Community Progress, a leader in code enforcement and anti-blight efforts, defines strategic code enforcement as, “[c]ode enforcement that goes beyond complaint response to strategically address systemic targets and focus on bringing properties into compliance with codes.” They further explain that the rationale is that “[c]omplaint-driven code enforcement, while necessary, is inefficient and leads to scattered outcomes rather than systematic compliance and neighborhood stabilization.” ALAN MALLACH, CTR. FOR CMTY. PROGRESS, RAISING THE BAR: A SHORT GUIDE TO LANDLORD INCENTIVES AND RENTAL PROPERTY REGULATION 4 (2015), [http://mayorscaucus.org/wp-content/uploads/2016/01/SSMMA\\_landlord-incentives\\_how-to-guide\\_final-am-12-28-15.pdf](http://mayorscaucus.org/wp-content/uploads/2016/01/SSMMA_landlord-incentives_how-to-guide_final-am-12-28-15.pdf).

205 Kate Walz, *Let's Stop Criminalizing Victims of Domestic Violence*, THE SHRIVER BRIEF (Oct. 27, 2017), <https://theshriverbrief.org/lets-stop-criminalizing-victims-of-domestic-violence-a72a06b50e42>.

206 *City Nuisance Property Ordinances*, THE POL'Y SURVEILLANCE PROGRAM: A LAW ATLAS PROJECT (Aug. 1, 2017), <http://lawatlas.org/datasets/city-nuisance-property-ordinances>.

An analysis of nuisance citations distributed in Milwaukee in 2008 and 2009 finds that almost one in three citations were generated by domestic violence incidents, and that most property owners abated the nuisance by evicting abused women.<sup>207</sup> Properties in predominantly black neighborhoods have the highest likelihood of receiving a nuisance designation. The authors concluded that a nuisance property ordinance “has the effect of forcing abused women to choose between calling the police on their abusers (only to risk eviction) or staying in their apartments (only to risk more abuse)” and could explain “why women from poor black neighborhoods are evicted at significantly higher rates than men.”<sup>208</sup> An analysis of two cities in New York State finds that “domestic violence was the single largest category of enforcement” under both cities’ nuisance ordinances,<sup>209</sup> adding to the concern that the results from Milwaukee are generalizable to other settings.

The experience of domestic violence survivors reinforces the results from the statistics. A qualitative study interviewing 27 low-income African American women who survived domestic violence finds the ordinances hinder access to safe and secure housing, as well as “discourag[e] them from calling 911.”<sup>210</sup> Multiple states have enacted laws protecting the right to call for emergency assistance,<sup>211</sup> but we found no empirical evaluation of these laws and whether they affect enforcement efforts on the ground.

The harm of nuisance property ordinances may not be limited to people in need of emergency intervention. Some argue that these ordinances reduce the supply of rental housing by revoking property rental licenses, or by discouraging homeowners from providing rental housing because they do not want to be exposed to the possibility of nuisance enforcement.<sup>212</sup> While the intuition behind the argument

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207 Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 118 (2013).

208 *Id.*

209 ACLU, *supra* note 96.

210 Gretchen W. Arnold, *From Victim to Offender: How Nuisance Property Laws Affect Battered Women*, 2016 J. INTERPERSONAL VIOLENCE 1, 1.

211 NAT’L HOUS. LAW PROJECT, HOUSING RIGHTS OF DOMESTIC VIOLENCE SURVIVORS: A STATE AND LOCAL LAW COMPENDIUM (2016), <http://nhlp.org/files/CombinedD-HousingStateLawCompendium.pdf>.

212 EMILY WERTH, THE COST OF BEING “CRIME FREE”: LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 5, 9, 24 (2013), <http://www.povertylaw.org/files/advocacy/housing/ShriverCenter.HousingReport.08-2013.cost-of->

is plausible, we found no empirical evaluation to support it.

There is a need for further research on the effects nuisance property ordinances have on victims of domestic violence, people with disabilities, and on the rental market in general.

### 3. Preventing Eviction—“Just-Cause” and Free Legal Representation

In response to what some have called an eviction crisis, cities and states are looking for solutions to help protect renters. One solution is the enactment of “just-cause” eviction laws. Opponents of “just-cause” argue that just-cause evictions, like other tenant protections, hurt low-income renters by raising the cost of low-income housing, and reducing the number of affordable units that can be built.<sup>213</sup> Proponents assert that any costs are justified by the decrease in unjust and costly evictions.<sup>214</sup> Just-cause protections, proponents argue, promote housing stability, particularly in areas where landlords might want to evict tenants to get higher rents.<sup>215</sup>

Just-cause and other changes in landlord-tenant law do not eliminate, and may increase, the need for legal services. For those parties negotiating in the shadow of law, there must be awareness of the protection and, between both landlords and tenants, some sense that courts truly police the justice of the cause.<sup>216</sup> As of now, despite the salience of both the just-cause approach and eviction generally, we remain evidence-free.

In recent years there has been a push for free legal representation of low income tenants in housing courts. At least one jurisdiction, New York City, has established a program in which free legal representation in housing court will be provided for all low-income tenants facing eviction.<sup>217</sup> Some studies—including a randomized controlled trial—suggest that, unsurprisingly, lawyers

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being-crime-free.report.pdf.

213 Jolin, *supra* note 97, at 532. Legal scholars have also analyzed just-cause evictions in the context of the takings clause. See Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 927, 929 (1989); Laura L. Westray, *Are Landlords Being Taken by the Good Cause Eviction Requirement?*, 62 S. CAL. L. REV. 321, 323, 366 (1988) (considering whether just-cause protections constitute a taking).

214 Jolin, *supra* note 97, at 534.

215 POLICYLINK, *supra* note 100, at 1, 6.

216 See generally *id.*; Roisman, *supra* note 99, at 851–52.

217 N.Y.C., ADMIN. CODE §§ 26-1301 to -1302 (2017).

improve outcomes for tenants,<sup>218</sup> but there is no existing evaluation of what happens when a city starts providing these services to all low-income residents. Key questions include: whether representation reduces informal evictions, how much added cost the measure creates for legitimate evictions, and whether a case-by-case system of dispute resolution at the point of eviction is the best use of public resources for helping poor tenants.

#### 4. *Rent control*

The idea of rent control has been heavily debated in economics literature. The classical economist argues that for the prices between the market rent and the lower rent imposed by rent control, there are tenants who are willing and able to pay, and landlords who are willing and able to supply. A large survey conducted in the 1990s found that 76.3% of economists working in the U.S. generally agree with the proposition “a ceiling on rents reduces the quantity and quality of available housing.”<sup>219</sup> None of the other 40 propositions in the questionnaire had a higher consensus rate.<sup>220</sup>

Generally, rent control can be divided into strict price ceilings and the softer rent stabilization models. A comprehensive literature review of economic studies finds that indeed rent control “creates many more problems than it solves.”<sup>221</sup> The author of the review finds negative impacts for strict and soft rent controls. The negative impacts go beyond housing supply. For example, one study finds that “far from eliminating segregation, at least in New Jersey, rent control has appeared to increase it.”<sup>222</sup> Reflecting on rent control, Desmond comments that the literature on this topic has largely

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218 See generally Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y REV. 419 (2001); D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); BOS. BAR ASS’N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION (Mar. 2012), <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

219 Richard M. Alston et al., *Is There a Consensus Among Economists in the 1990’s?*, 82 AM. ECON. REV. 203, 204 (1992).

220 *Id.*

221 Blair Jenkins, *Rent Control: Do Economists Agree?*, 6 ECON. J. WATCH 73, 105 (2009) (quoting Peter Navarro, *Rent Control in Cambridge, Massachusetts*, 78 PUB. INT. 83 (1985)).

222 Edward L. Glaeser, *Does Rent Control Reduce Segregation?*, 10 SWEDISH ECON. POL’Y REV. 179, 198 (2003).

ignored the “increasing professionalization of urban landlords . . . .” Understanding the power dynamics behind rent control could help gauge whether the rare occasions that seem to show benefits from rent control could be replicated.<sup>223</sup>

### C. Domain 3: Affirmatively Furthering Fair Housing

#### 1. Fair Housing Protections and the AFFH Rule

Though officially outlawed, housing discrimination persists in the rental, sales, and lending markets (see the Predatory Lending section below for further discussion of discrimination in lending).<sup>224</sup> The persistence of discrimination is reported both by official HUD studies<sup>225</sup> and by not-for-profit groups helping homeseekers with their complaints—tens of thousands every year.<sup>226</sup> The actual magnitude of discrimination based on race is probably understated in complaint statistics. A 2017 Robert Wood Johnson Foundation-Harvard survey reported that 45% of African Americans, 25% of Asian-Americans, and 31% of Hispanic Americans report having been discriminated against when seeking housing.<sup>227</sup> Furthermore, there is reason to believe that many people of color are so discouraged by the persistence of segregation, and expect discrimination, that they do not seek housing in predominantly white areas at all.

There is reason to believe that the problem is not the fair housing laws but rather, their enforcement. There are several ways enforcement is deficient. First, many or most victims may not come forward because they do not realize they have experienced discrimination, may not trust the remedy or wish to invest time and energy in litigation, or simply because their focus is on trying to fill their housing needs. Second, the system may not process claims

223 Desmond & Bell, *supra* note 103, at 17.

224 Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 629 (2010); NAT'L FAIR HOUS. ALL., THE CASE FOR FAIR HOUSING: 2017 FAIR HOUSING TRENDS REPORT 76–82 (2017), <https://nationalfairhousing.org/wp-content/uploads/2017/04/TRENDS-REPORT-4-19-17-FINAL-2.pdf>.

225 E.g., U.S. DEPT' OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, at xi–xii (2013), [https://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf).

226 NAT'L FAIR HOUS. ALL., *supra* note 224, at 77–78.

227 *Discrimination in America*, ROBERT WOOD JOHNSON FOUND., <https://www.rwjf.org/en/library/research/2017/10/discrimination-in-america-experiences-and-views.html> (last visited Dec. 2, 2018).

efficiently, which could reduce the incentives for victims to complain and providers to abstain from discrimination.<sup>228</sup> Only a small proportion of HUD complaints result in a charge of discrimination (2.5% of completed cases in 2016), about one-third are settled, and nearly half are dismissed or withdrawn.<sup>229</sup> There is also a considerable backlog of incomplete cases.<sup>230</sup>

Third, the enforcement system may not use its investigatory mechanisms optimally. Fair housing law has been enforced in part by funding non-governmental fair housing organizations to assist people who suffer discrimination, investigate claims, and conduct proactive efforts like testing. The National Fair Housing Alliance (NFHA) reports on these activities, and supports organizations across the country to investigate potential discrimination in dozens of cities and states. For its part, the federal government brings a small but impactful number of pattern and practice cases each year. While these efforts successfully identify discriminatory activity, and produce positive legal outcomes, NFHA has also said that “this work receives neither the support nor respect it deserves.”<sup>231</sup>

The persistence of discrimination in housing markets is evidence that half a century after the enactment of the Fair Housing Act, the law did not achieve significant social norm changes, nor a significant deterrence effect to make landlords stop discriminating.

Although the evidence raises concerns about the anti-discrimination project,<sup>232</sup> there is a dearth of literature evaluating the impact of fair housing law on racial residential segregation. There is almost no empirical evaluation of either federal or state fair housing laws’ effect on residential segregation, and the little evidence that does exist suggests that such laws may be insufficient as a tool of integration.<sup>233</sup> There is some evaluation of city-level

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228 Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in THE OXFORD HANDBOOK OF REGULATION 147–49 (Oxford Univ. Press ed. 2010) (ebook).

229 U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, ANNUAL REPORT TO CONGRESS FY 2016, at 21 (2017), <https://www.hud.gov/sites/documents/FY2016FHEOANNUALREPORT.PDF>.

230 *Id.* For a comparison, see Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1 (2001).

231 NAT’L FAIR HOUS. ALL., *supra* note 224, at 75.

232 Nancy A. Denton, *Half Empty or Half Full: Segregation and Segregated Neighborhoods 30 Years After the Fair Housing Act*, 4 CITYSCAPE 107, 113 (1999).

233 Richard A. Smith, *The Effects of Local Fair Housing Ordinances on Housing*

initiatives, with mixed results. In case studies, efforts to increase black homeownership in New York City in the 1990s had some of the desired results,<sup>234</sup> while St. Louis, Missouri showed no impact of city-level desegregation efforts.<sup>235</sup>

The Fair Housing Act not only prohibits discrimination in housing-related transactions, but it also imposes a duty on HUD and its program participants to affirmatively further fair housing.<sup>236</sup> This duty applies to state and local governments that receive HUD funds.<sup>237</sup> In the 1990s, HUD issued regulations and published a Fair Housing Planning Guide to clarify the AFFH mandate and provide guidance on how to comply. However, some recipients have not complied with their AFFH obligation, either to conduct a serious analysis of fair housing barriers, or to take concrete and meaningful steps to overcome identified barriers.<sup>238</sup>

Despite significant litigation on this issue,<sup>239</sup> noncompliance remained a significant problem in many jurisdictions. This noncompliance led the U.S. Government Accountability Office (GAO) to publish a report highlighting HUD's general ineffectiveness in enforcing the AFFH mandate.<sup>240</sup> The GAO report prompted HUD to promulgate new regulations to clarify the AFFH process and standards for grantees. Published in 2015, the new rule requires grantees to submit an Assessment of Fair Housing (AFH) to HUD that identifies integration and segregation patterns, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity for any protected class, and disproportionate housing needs for any protected class.<sup>241</sup> The AFH must include

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*Segregation: Their Impact is Small, but It's an Important Positive Change Toward Integration*, 48 AM. J. ECON. & SOC. 219, 219 (1989).

234 Lance Freeman, *Black Homeownership: The Role of Temporal Changes and Residential Segregation at the End of the 20th Century*, 86 SOC. SCI. Q. 403 (2005).

235 Dennis R. Judd, *The Role of Governmental Policies in Promoting Residential Segregation in the St. Louis Metropolitan Area*, 66 J. NEGRO EDU. 214, 214–15 (1997).

236 42 U.S.C. § 3608(e)(5) (2012).

237 24 C.F.R. § 5.154 (2018).

238 Smyth et al., *supra* note 112, at 238–39.

239 *See, e.g., U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009); *see also Stipulation & Order of Settlement & Dismissal, U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester County*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009) (No. 06 Civ. 2860), [http://prrac.org/pdf/2009-08-10\\_order\\_settlement\\_signed.pdf](http://prrac.org/pdf/2009-08-10_order_settlement_signed.pdf).

240 Smyth et al., *supra* note 112, at 243–44.

241 24 C.F.R. § 5.154(d) (2018).

goals to overcome fair housing issues, and the public must be given an opportunity to participate in the development of the AFH.<sup>242</sup> Program participants are encouraged to collaborate and submit a single AFH for two or more jurisdictions.<sup>243</sup>

In May of 2018, HUD withdrew the Assessment Tool to be used by local governments in conducting their AFH, claiming that the tool is deficient.<sup>244</sup> Because the Assessment Tool must be used to complete the AFH, HUD in effect has suspended the AFH submission requirement. As of the publication of this article, HUD is in the process of developing a proposed rule to amend the existing AFFH regulations.

It is too soon to know what, if any, amendments will be made, or if there will be a substantial change in the quality of assessments under the new rule. Questions remain as to whether states, cities, and PHAs will identify real fair housing issues that need to be addressed, and if they will take concrete and meaningful steps to overcome barriers to integration. It also remains to be seen how strongly HUD will enforce the AFFH mandate going forward. To what extent will HUD review the AFHs? Will HUD withhold funds from jurisdictions that are not working to affirmatively further fair housing? In addition to the federal mandate, eight states have an AFFH requirement in their state fair housing law.<sup>245</sup> However, the impact of the state requirement on segregation levels is unknown.

## 2. *Inclusionary Zoning*

There is ample evidence that “density zoning is now the most important mechanism promoting class and racial segregation” in the U.S.<sup>246</sup> Inclusionary zoning is a legal lever that could be used to reduce the exclusionary impact of density zoning. In considering the evidence of its impact, it is important to recognize that inclusionary zoning is a nuanced legal mechanism that can be tailored to the needs of a specific community given the market pressures, housing resources, and the regulatory environment. The main elements of inclusionary zoning ordinances are the required share of affordable

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242 24 C.F.R. §§ 5.154, 5.158 (2018).

243 24 C.F.R. § 5.156 (2018).

244 83 F.R. § 23922 (2018).

245 The Policy Surveillance Program, *supra* note 110.

246 Jonathan T. Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779, 779–806 (2009); Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1140–41 (2010).

units in the development, target income level, duration of the affordability requirements, and exemptions and buyout options. Some inclusionary zoning ordinances are mandatory, while others are voluntary and use incentives such as additional density.<sup>247</sup> Inclusionary zoning is still zoning: it functions as a form of exception to density or other requirements that operate to limit affordable housing.

From an economic theory perspective, inclusionary zoning operates as a tax to raise the costs of housing construction. Developers must build some units below the market price, which results in affordable housing that is smaller or of lower quality, and market-rate housing that is more expensive than it otherwise would have been. The predicted result would, in theory, be fewer affordable units and higher prices than would have been attained by leaving matters to the invisible hand. The specific effects—marginally higher prices for market rate houses and smaller affordable units—have been observed, but the size of the effect varies depending on location and study design, and often the overall effect on the market is small.<sup>248</sup>

The economic critique of inclusionary zoning is merely a variant of the argument against zoning itself. The more important question is whether inclusionary zoning provides the promised gains in social welfare: as many (or perhaps more) affordable units as the market or other mechanisms would supply, in locations that create racial and social integration. A recent review judiciously, but credibly, cuts the baby in half: inclusionary zoning can increase affordable housing production and integration, though there may be trade-offs between these two goals.<sup>249</sup> The real issue for research and practice is to better identify what particular elements of inclusionary zoning—i.e. which regulatory strategies—are most effective in producing both goals without significant adverse effects. Such

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247 See Vinit Mukhija et al., *Can Inclusionary Zoning Be An Effective And Efficient Housing Policy? Evidence from Los Angeles and Orange Counties*, 32 J. URB. AFF. 229, 234 (2010) (reporting heterogeneity in effects of inclusionary zoning policies).

248 Vinit Mukhija et al., *The Tradeoffs of Inclusionary Zoning: What Do We Know and What Do We Need to Know?*, 30 PLAN. PRAC. & RES. 222, 228–29, 230 (2015); Antonio Bento et al., *Housing Market Effects of Inclusionary Zoning*, 11 CITYSCAPE, no. 2, 2009, at 10, 20–21.

249 Mukhija et al., *supra* note 247, at 226–30. Notably, the review reports that inclusionary zoning “programs produce as much affordable housing as the Low Income Housing Tax Credits (LIHTC) program.” *Id.* at 227.

studies can also inform normative debates about any tradeoffs that inclusionary zoning creates: if there are less overall housing units, but the share of affordable housing increases, do we define that as a net positive or net negative from an equity lens with the goal of promoting a culture of health?<sup>250</sup>

### 3. *Fair Share and Other State-Level Mandates*

While zoning is usually left to localities, some states have created inclusionary housing requirements. The requirements are based on income, not race, but given how closely associated race and income are, the requirements theoretically could work as a force against racial segregation as well as poverty concentration. Litigation in Mt. Laurel, New Jersey led to a still-unique legal lever, a requirement that all municipalities develop/accommodate their “fair share” of affordable housing.<sup>251</sup> The three-decade process of defining, implementing and applying the requirement statewide has involved local governments, courts, and the state legislature. The results of the Mt. Laurel doctrine are “a proof of concept for the further development of affordable family housing, both as a social policy for promoting racial and class integration in metropolitan America and as a practical program for achieving poverty alleviation and economic mobility in society at large.”<sup>252</sup> Outcomes for low-income individuals who acquired affordable housing through the Mt. Laurel litigation were better than those for similar people who remained in an area of concentrated poverty on numerous measures, including welfare use, employment, mental health, and income.<sup>253</sup> That said, the doctrine has by no means substantially desegregated New Jersey, nor has the doctrine been adopted elsewhere.

There is some evaluation of other states’ “fair share-ish” laws. For example, there is a small body of literature that argues that Chapter 40B played a role in increasing density, combating exclusionary zoning,<sup>254</sup> and generating economic activity in

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250 Vinit Mukhija et al., *The Tradeoffs of Inclusionary Zoning: What Do We Know and What Do We Need to Know?*, 30 PLAN. PRAC. & RES. 222, 230, 233 (2015).

251 S. Burlington Cty. NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983).

252 MASSEY ET AL., *supra* note 8, at 190 (providing a detailed review of the evidence about the experience of Mt. Laurel, N.J.).

253 *Id.* at 148.

254 See, e.g., Lynn M. Fisher & Nicholas J. Marantz, *Can State Law Combat Exclusionary Zoning? Evidence from Massachusetts*, 52 URB. STUD. 1071 (2014).

Massachusetts.<sup>255</sup> In California, New Jersey, and Massachusetts, LIHTC produces more affordable housing units per year than the statewide affordable housing programs.<sup>256</sup>

#### **D. Domain 4: Enhancing Economic Choice for the Poor**

The economic analysis of affordable housing tends to put considerable emphasis on supply-side issues, such as zoning. Likewise, measures like LIHTC, inclusionary zoning, and housing code enforcement aim to primarily influence developers and landlords. We think it is also important to take people with low incomes seriously as agents in the housing market, and therefore to consider how subsidy programs and other measures aimed at increasing the resources at their disposal could or do support the market agency of lower-income people.

##### **1. Housing Choice Voucher Program**

Housing vouchers have been shown to reduce homelessness and housing instability.<sup>257</sup> Children in homeless families that receive vouchers are 42% less likely to be placed into foster care.<sup>258</sup> The MTO experiment showed long-term positive effects for voucher families moving into less poor neighborhoods.<sup>259</sup> The HCV program can also benefit property owners. In 2016, owners received \$17.5 billion in voucher payments, which can help to pay property taxes and maintain properties in good condition.<sup>260</sup>

Given the broad evidence of positive impact, the most obvious defect in the program is that it is chronically, and substantially, underfunded. Although the HCV program is the largest rental

255 LINDSAY KOSHGARIAN ET AL., U. MASS. DONAHUE INST., ECONOMIC CONTRIBUTIONS OF HOUSING PERMITTED THROUGH CHAPTER 40B 6–7, 10 (2010), [http://massbenchmarks.org/publications/studies/pdf/Economic\\_Contributions\\_of\\_Housing.pdf](http://massbenchmarks.org/publications/studies/pdf/Economic_Contributions_of_Housing.pdf).

256 Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?* 10 (Sept. 2016) (unpublished working paper), [https://penniur.upenn.edu/uploads/media/FreemanSchuetz\\_PennIUR-Philly\\_Fed\\_working\\_paper\\_091616v2.pdf](https://penniur.upenn.edu/uploads/media/FreemanSchuetz_PennIUR-Philly_Fed_working_paper_091616v2.pdf).

257 Matthew Desmond & Kristen L. Perkins, *Are Landlords Overcharging Housing Voucher Holders?*, 15 CITY & COMMUNITY 137 (2016).

258 CTR. ON BUDGET & POLICY PRIORITIES, UNITED STATES HOUSING CHOICE VOUCHERS FACT SHEET (2017), [https://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets\\_us.pdf](https://www.cbpp.org/sites/default/files/atoms/files/3-10-14hou-factsheets_us.pdf).

259 See Ludwig et al., *supra* note 59; Chetty et al., *supra* note 61; LOGAN & STULTS, *supra* note 62; Cutler & Glaeser, *supra* note 63.

260 CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 258.

assistance program in the U.S., with more than five million people in 2.2 million low-income households using vouchers,<sup>261</sup> the demand for vouchers substantially outweighs the supply: overall, only one in four households eligible to receive a voucher actually gets one.<sup>262</sup> “According to a recent survey, 53% of HCV waiting lists were closed to new applicants, and the median list had a wait time of 1.5 years.”<sup>263</sup>

It is clear that the HCV program is an invaluable tool to help low-income renters afford housing. However, what is not clear in a broader context is whether or not the program leads to poverty deconcentration and racial integration. In other words, while it is clear that the program achieves the goal of helping voucher holders pay rent, it is unclear whether the program allows for mobility. One study that tackles this question head on finds that, “to a large extent, the residents did not live in places that met their location preferences.”<sup>264</sup> Other studies analyze HCV program data to estimate whether voucher holders move to low poverty neighborhoods or if they get stuck in voucher submarkets.<sup>265</sup> The Center on Budget and Policy Priorities reports that of the more than 2.2 million households using vouchers, only 399,000 families (18%) use their vouchers to live in neighborhoods with a poverty rate below 20%.<sup>266</sup> However, one study found that between 2007 and 2013, there was a notable decline in voucher use in high-poverty areas in Florida.<sup>267</sup> Another article suggests that vouchers are working to reduce poverty concentration and racial segregation in Columbus, Ohio.<sup>268</sup> Further, one analysis

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261 *Id.*

262 Desmond & Bell, *supra* note 103, at 18.

263 NAT’L LOW INCOME HOUS. COAL., *OUT OF REACH 2017: THE HIGH COST OF HOUSING 6* (2017), [http://nlihc.org/sites/default/files/oor/OOR\\_2017.pdf](http://nlihc.org/sites/default/files/oor/OOR_2017.pdf).

264 Ruoniu Wang, *Tracking “Choice” in the Housing Choice Voucher Program: The Relationship Between Neighborhood Preference and Locational Outcome*, 54 *URB. AFF. REV.* 302, 302 (2018).

265 Rebecca J. Walter et al., *Moving to Opportunity? An Examination of Housing Choice Vouchers on Urban Poverty Deconcentration in South Florida*, 30 *HOUSING STUD.* 1064 (2015); Stephanie DeLuca et al., *Segregating Shelter: How Housing Policies Shape the Residential Locations of Low-Income Minority Families*, 647 *ANNALS AM. ACAD. POL. & SOC. SCI.* 268 (2013).

266 *CTR. ON BUDGET & POLICY PRIORITIES, supra* note 258.

267 Ruoniu Wang & Rebecca J. Walter, *Tracking Mobility in the Housing Choice Voucher Program: A Household Level Examination in Florida, USA*, 33 *HOUSING STUD.* 455 (2017).

268 Barbra Teater, *Residential Mobility of Section 8 Housing Choice Voucher Program Recipients: Assessing Changes in Poverty and Racial Composition in Neighborhoods*, 12 *J. POVERTY* 351, 353 (2008).

indicates that some black voucher holders are moving out of low-income, hyper-segregated areas into historically white communities, but that other voucher holders move in clustered patterns, which can lead to reconcentration of race and poverty.<sup>269</sup>

Given the mixed evidence, one conclusion that can be drawn is that even if there are mobility gains from the HCV program, these gains are not very large. One reason for this, which was documented through qualitative research, is that the voucher is geographically tied to a housing authority. Often, there is a jurisdictional boundary between the high poverty area in which the voucher holder currently lives and the low poverty area to which the holder wishes to move. While it is possible to move the voucher across jurisdictions, arranging the transfer requires “time-consuming steps” that are a barrier for many working poor.<sup>270</sup> One region shows that another way to govern the voucher program is possible. Following the *Thompson v. HUD*<sup>271</sup> desegregation case, the Baltimore Housing Mobility Program (BHMP) was founded. BHMP not only provides intensive housing counseling to voucher holders, but also makes it easier to use a voucher from Baltimore City in the more affluent neighborhoods of Baltimore County. The program shows promise and, compared to other voucher programs, BHMP voucher holders “moved to more integrated and affluent neighborhoods.”<sup>272</sup>

Another reason that we do not see more mobility gains from the HCV program is discrimination against voucher holders, known as source of income discrimination.<sup>273</sup> Thirteen states plus the District of Columbia have laws prohibiting discrimination based on source of income, which often protects voucher holders.<sup>274</sup> However, in three of those states, housing choice vouchers are excluded as a protected

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269 Kelly L. Patterson & Eun-Hye Enki Yoo, *Trapped in Poor Places? An Assessment of the Residential Spatial Patterns of Housing Choice Voucher Holders in 2004 and 2008*, 38 J. SOC. SERV. RES. 637 (2012).

270 Stephanie DeLuca et al., *Why Don't Vouchers Do a Better Job of Deconcentrating Poverty? Insights from Fieldwork with Poor Families*, POVERTY & RACE, Sept./Oct. 2012, at 1, 10–11.

271 *Thompson v. U.S. Dep't. of Hous. and Urban Dev.*, 348 F. Supp. 2d 398 (2005).

272 Stefanie DeLuca & Peter Rosenblatt, *Walking Away From The Wire: Housing Mobility and Neighborhood Opportunity in Baltimore*, 27 HOUSING POL'Y DEBATE 519, 519, 533 (2017).

273 Jessica Luna & Josh Leopold, *Landlord Discrimination Restricts the Use of Rental Vouchers*, URB. INST. (July 22, 2013), <https://www.urban.org/urban-wire/landlord-discrimination-restricts-use-rental-vouchers>.

274 The Policy Surveillance Program, *supra* note 110.

source of income.<sup>275</sup> The fact that source of income protections are so rare is disheartening, given the potential efficacy of these laws.<sup>276</sup> Studies show not only that source of income protections increase voucher utilization,<sup>277</sup> but that they are associated with more voucher holders moving to areas with less poverty—even though the laws do not reduce voucher holder concentration.<sup>278</sup> Other barriers to mobility include: (1) documented harassment of voucher holders from community members<sup>279</sup>; for example, aggressively reporting voucher holders to the housing authority or the police<sup>280</sup>; (2) lack of financial readiness supports<sup>281</sup>; and (3) poor housing search resources of the HCV program makes finding units hard.<sup>282</sup>

Another unknown factor related to the HCV program is how it affects housing prices for voucher holders, and for urban rental markets generally. One recent analysis from Milwaukee found that voucher holders are charged between \$51 and \$68 more in monthly rent than tenants without vouchers in comparable units and neighborhoods.<sup>283</sup> However, more research is needed to confirm that this result is not unique to Milwaukee. Overcharging should be of concern as it leads to fewer vouchers being in circulation.

The structure of the HCV program, at least for many areas, theoretically enables overcharging. Voucher holders select a unit rented for an amount at or below Fair Market Rent (FMR), which is a rent ceiling set by HUD.<sup>284</sup> FMRs are generally calculated at the metropolitan level (i.e. Philadelphia's FMR for 2017 applies to the

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275 *Id.*

276 J. Rosie Tighe et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 8 (2017).

277 Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization*, 22 HOUSING POL'Y DEBATE 297, 297 (2012).

278 Lance Freeman & Yunjing Li, *Do Source of Income Anti-discrimination Laws Facilitate Access to Less Disadvantaged Neighborhoods?*, 29 HOUSING STUD. 88, 88, 101–02 (2014); Molly W. Metzger, *The Reconcentration of Poverty: Patterns of Housing Voucher Use, 2000 to 2008*, 24 HOUSING POL'Y DEBATE 544, 545–46 (2014).

279 Rahim Kurwa, *Deconcentration without Integration: Examining the Social Outcomes of Housing Choice Voucher Movement in Los Angeles County*, 14 CITY & COMMUNITY 364, 364, 380 (2015).

280 *Id.* at 380–85, 387.

281 Laurie A. Walker, *Resident Responses to Section 8 Relocation Outcomes: "If You're Gonna Move, You Want to Move Up"*, 11 J. EVIDENCE-BASED SOC. WORK 97, 97, 99, 104, 107, 110 (2014); DeLuca et al., *supra* note 265, at 268, 289.

282 DeLuca et al., *supra* note 265, at 268, 280–81, 288–89.

283 Desmond & Perkins, *supra* note 257, at 137.

284 *Id.* at 139–40.

entire Philadelphia-Camden-Wilmington Metropolitan Statistical Area (MSA)).<sup>285</sup> Due to the large and diverse areas for which FMRs are calculated, FMRs are generally higher than the market rents in high-poverty areas. Since these may be the areas in which voucher holders tend to live, landlords renting to voucher holders can charge them more than the market rate. This practice does not affect most voucher holders because they are generally only paying 30% of their income, and the PHA pays the remainder of the rent via the voucher.<sup>286</sup>

HUD recently issued a new rule and guidance stating that 24 metropolitan areas must use a small area FMR based on zip code, rather than the entire MSA.<sup>287</sup> This rule should help alleviate the issue of landlords overcharging voucher holders. It is suggested that preventing overcharging could make the HCV program more cost-effective and expansive.<sup>288</sup> The authors analyzing the Milwaukee study noted that overcharging “voucher holders costs taxpayers an estimated \$3.8 million each year in Milwaukee alone, the equivalent of supplying 620 additional families in that city with housing assistance.”<sup>289</sup>

Another area in which there is a lack of meaningful research is the impact of housing vouchers on private rents, and the research that does exist is mixed. At least one study found that cities with more vouchers had steeper rent increases, but some studies have found no relationship between the concentration of voucher holders and the price of rental housing in general.<sup>290</sup> The impact is unknown.<sup>291</sup>

While the HCV program is underfunded, it is the only major investment in the U.S. regarding rental support. While the literature debates whether or not the program allows for mobility,

285 *FY 2018 Fair Market Rent Documentation System*, U.S. DEPT HOUSING & URB. DEV., [https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2017\\_code/2017summary.odn](https://www.huduser.gov/portal/datasets/fmr/fmrs/FY2017_code/2017summary.odn) (last visited Dec. 7, 2018).

286 Desmond & Perkins, *supra* note 257, at 137.

287 Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, 81 Fed. Reg. 80,567, 80,568 (Nov. 16, 2016) (to be codified at 24 C.F.R. pt. 888, 982, 983, 985); OFFICE OF PUB. & INDIAN HOUS., U.S. DEPT OF HOUS. & URBAN DEV., NOTICE PIH 2018-01(HA), GUIDANCE ON RECENT CHANGES IN FAIR MARKET RENT (FMR), PAYMENT STANDARD, AND RENT REASONABLENESS REQUIREMENTS IN THE HOUSING CHOICE VOUCHER PROGRAM (2018).

288 Desmond & Perkins, *supra* note 257, at 137.

289 *Id.* at 138.

290 *Id.* at 141.

291 Desmond & Bell, *supra* note 103, at 18.

no one seems to argue that the impact is significant on the extensive margin. The few instances of tinkering with the program, such as requiring small-area FMRs, pursuing regional collaboration such as Baltimore did, or enacting source of income protections, shows that changes can incrementally improve program outcomes. More inventive ideas need to be experimented with, as we continue to evaluate the innovative ideas that are currently in place, so that mobility gains may be maximized.

## 2. *The Mortgage Interest Deduction*

Tax subsidies can add to the resources of home-seekers. In contrast to vouchers, the support for individual home ownership through the home MID has traditionally been available to virtually all comers. In 2015, the cost of the MID was \$70 billion, more than double the combined cost of LIHTC and the HCV program.<sup>292</sup> In 2016, the MID was the fifth largest tax break, at \$77 billion.<sup>293</sup> Despite its popularity, a policy favoring tax-payer subsidized home ownership over rental residency has contributed to poverty concentration and racial segregation, rather than to collective welfare.<sup>294</sup>

The majority of the MID goes to families with above average income. There are a few reasons for this phenomenon. First, wealthier families have larger mortgages, which translate to larger deductions. Second, the tax filer needs to itemize the deduction in order to claim it, something that the rich are more likely to do. Finally, homeowners are on average wealthier, and the MID does not help with paying a down payment, which is the biggest barrier to homeownership for the poor.<sup>295</sup>

There are studies to suggest that the MID does not achieve the goal of increasing homeownership.<sup>296</sup> Furthermore, some studies

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292 CAROL GALANTE ET AL., *THE FAIR TAX CREDIT: A PROPOSAL FOR A FEDERAL ASSISTANCE IN RENTAL CREDIT TO SUPPORT LOW-INCOME RENTERS* 14 (2016).

293 Drew DeSilver, *The Biggest U.S. Tax Breaks*, PEW RES. CTR. (Apr. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/04/06/the-biggest-u-s-tax-breaks/>.

294 BRIAN J. MCCABE, *NO PLACE LIKE HOME: WEALTH, COMMUNITY, AND THE POLITICS OF HOMEOWNERSHIP* 129–133 (2016).

295 Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html>.

296 Edward L. Glaeser & Jesse M. Shapiro, *The Benefits of the Home Mortgage Interest Deduction*, 17 TAX POL'Y & ECON. 37, 37 (2003).

suggest that eliminating the MID would “[cause] house prices to decline, [increase] homeownership, [decrease] mortgage debt, and [improve] welfare.”<sup>297</sup> A policy change in Denmark allowed for a quasi-experiment on what would happen if the MID were to be decreased significantly. The results suggest that the MID has “zero effect on homeownership.”<sup>298</sup> Harvard Economist Edward Glaeser called for the “killing (or maiming)” of the MID which he called “a sacred cow.”<sup>299</sup> It certainly must be considered when discussing the need for more public investment in affordable housing, integration, and support for low-income renters.

### 3. *The Earned Income (Housing) Tax Credit*

There is a solid empirical consensus that “the EITC has proved remarkably successful in reducing poverty.”<sup>300</sup> There is also some evidence that it is a force for better health (for example, infant health).<sup>301</sup> Survey research shows that the majority of EITC recipients use the money to pay debts.<sup>302</sup> Some who can afford using

297 See generally Kamila Sommer & Paul Sullivan, *Implications of US Tax Policy for House Prices, Rents, and Homeownership*, 108 *AM. ECON. REV.* 241, 241 (2018).

298 Jonathan Gruber et al., *Do People Respond to the Mortgage Interest Deduction? Quasi-Experimental Evidence from Denmark* 19 (Nat. Bureau of Econ. Research, Working Paper 23600, 2017).

299 Edward L. Glaeser, *Killing (or Maiming) a Sacred Cow: Home Mortgage Deductions*, *N.Y. TIMES: ECONOMIX* (Feb. 24, 2009, 7:40 AM), <https://economix.blogs.nytimes.com/2009/02/24/killing-or-maiming-a-sacred-cow-home-mortgage-deductions/>.

300 STEVEN HOLT, THE BROOKINGS INST., *THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW* 13–14 (2006). For a review of the literature, see Richard K. Caputo, *TANF and EITC: A Literature Review*, in *U.S. SOCIAL WELFARE REFORM* 81–103 (2011).

301 Sara Markowitz et al., *Effects of State-Level Earned Income Tax Credit Laws in the U.S. on Maternal Health Behaviors and Infant Health Outcomes*, 194 *SOC. SCI. & MED.* 67, 67, 68 (2017); HILLARY W. HOYNES ET AL., *CTR. FOR POVERTY RESEARCH, THE EITC: LINKING INCOME TO REAL HEALTH OUTCOMES*, [https://poverty.ucdavis.edu/sites/main/files/file-attachments/policy\\_brief\\_hoyes\\_eitc\\_1.pdf](https://poverty.ucdavis.edu/sites/main/files/file-attachments/policy_brief_hoyes_eitc_1.pdf) (last visited Jan. 4, 2019); *Earned Income Tax Credits*, *CTR. FOR DISEASE CONTROL & PREVENTION*, <https://www.cdc.gov/policy/hst/hi5/taxcredits/index.html> (last updated June 22, 2017).

302 Timothy M. Smeeding et al., *The EITC: Expectation, Knowledge, Use and Economic and Social Mobility*, 53 *NAT’L TAX J.* 1187, 1193, 1202 (2000); see Timothy M. Smeeding, Katherin Ross Phillips & Michael A. O’Connor, *The Earned Income Tax Credit: Expectation, Knowledge, Use, and Economic and Social Mobility*, in *MAKING WORK PAY: THE EARNED INCOME TAX CREDIT AND ITS IMPACT ON AMERICA’S FAMILIES* 1193, 1202 (2001).

the benefit for something other than paying debts use the EITC refund as a down payment for a house.<sup>303</sup> For others, given that missing a monthly rent or mortgage payment can initiate eviction or foreclosure proceedings, using the EITC for housing can be tricky. The ability to use the lump sum benefit toward housing depends upon the beneficiary's ability to save money throughout the year, or upon a landlord's agreement to take a lump sum to cover future months of rent.<sup>304</sup> Indeed, a study looking directly to estimate the effect of state EITC expansion on housing stability and foreclosure/eviction for single mothers found no significant relationship.<sup>305</sup> While the EITC might not have a direct estimated effect on housing stability, it is plausible to believe that by covering other expenditures it helps families pay rent.<sup>306</sup>

Because the EITC is a cash transfer mechanism that economists view as less distorting of the market than rent ceilings or minimum wages, and because of the growing need to help poor households pay for housing, some argue that the EITC could be reformed to take housing into account.<sup>307</sup> One of these proposals is the Federal Assistance In Rent (FAIR) Tax Credit. The FAIR credit is, in essence, using the tax code to create a universal housing voucher program. One way this proposal could work is by providing each family that earns less than 80% of the area median income the remainder between 30% of the household annual income and the small-area FMR.<sup>308</sup>

#### 4. *The Minimum Wage*

Inherent to the notion of housing affordability is how much people can pay. Parallel to the effort to reduce the cost burden of

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303 See, e.g., Jennifer L. Romich & Thomas Weisner, *How Families View and Use the EITC: Advanced Payment Versus Lump Sum Delivery*, 53 NAT'L TAX J. 1245, 1259 (2000).

304 See *id.* at 1259–60.

305 Natasha Pilkauskas & Katherine Michemore, *The Effect of Income on Housing Instability and Living Arrangements: Evidence from the Earned Income Tax Credit 2*, 5, 24 (Poverty Sols. at the Univ. of Mich., Working Paper No. 1-17, 2018).

306 See MICHAEL A. STEGMAN ET AL., THE BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, THE EARNED INCOME TAX CREDIT AS AN INSTRUMENT OF HOUSING POLICY 36 (2003).

307 See *id.*

308 TERNER CTR. FOR HOUS. INNOVATION, THE FAIR TAX CREDIT: A PROPOSAL FOR A FEDERAL ASSISTANCE IN RENTAL CREDIT TO SUPPORT LOW-INCOME RENTERS (2016), [http://turnercenter.berkeley.edu/uploads/FAIR\\_Credit.pdf](http://turnercenter.berkeley.edu/uploads/FAIR_Credit.pdf).

renters through decreasing the cost of housing should be an effort to increase disposable household income. One legal lever that was intended to achieve this goal is the minimum wage. However, the minimum wage sparked a heated debate within the discipline of economics about potential negative unintended consequences, mainly an unemployment effect.

The disconnect between the minimum wage and housing costs is striking. In no state does the minimum wage allow a full-time worker to pay less than 30% of annual income on a two-bedroom, at fair market rent.<sup>309</sup> Some cities are enacting living wages that are higher than the state minimum wage, with labor activists demanding at least \$15 per hour, typically.<sup>310</sup>

There is some epidemiology to suggest that a higher minimum wage is related to better health. Studies show that a higher minimum wage is associated with a reduced likelihood of unmet medical needs,<sup>311</sup> reduced heart disease,<sup>312</sup> reduced adolescent births,<sup>313</sup> reduced infant mortality,<sup>314</sup> and no effect on the rate of the uninsured.<sup>315</sup> We could not, however, find any peer-reviewed studies estimating the impact of an increase in the minimum wage on housing related outcomes—prices, rent, or affordability.<sup>316</sup>

309 See NAT'L LOW INCOME HOUS. COAL., *OUT OF REACH: THE HIGH COST OF HOUSING* (2017), [http://nlihc.org/sites/default/files/oor/OOR\\_2017.pdf](http://nlihc.org/sites/default/files/oor/OOR_2017.pdf).

310 Steven Greenhouse, *How the \$15 Minimum Wage Went from Laughable to Viable*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/03/sunday-review/how-the-15-minimum-wage-went-from-laughable-to-viable.html>.

311 Kelly P. McCarrier et al., *Associations Between Minimum Wage Policy and Access to Health Care: Evidence from the Behavioral Risk Factor Surveillance System, 1996–2007*, 101 AM. J. PUB. HEALTH 359, 366 (2011).

312 Miriam E. Van Dyke et al., *State-Level Minimum Wage and Heart Disease Death Rates in the United States, 1980–2015: A Novel Application of Marginal Structural Modeling*, 112 PREV. MED. 97 (2018).

313 Lindsey Rose Bullinger, *The Effect of Minimum Wages on Adolescent Fertility: A Nationwide Analysis*, 107 AM. J. PUB. HEALTH 447, 449–50 (2017).

314 Kelli A. Komro et al., *The Effect of an Increased Minimum Wage on Infant Mortality and Birth Weight*, 106 AM. J. PUB. HEALTH 1514, 1514–15 (2016).

315 Kelly P. McCarrier et al., *Associations Between Minimum Wage Policy and Access to Health Care: A Multi-Level Analysis of the 2004 Behavioral Risk Factor Survey*, 21 J. HEALTH CARE FOR THE POOR & UNDERSERVED 729, 744 (2010).

316 An Economic Policy Institute report does make the connection between the minimum wage and housing. The author argues that increasing the minimum wage to \$12 per hour would lead to a \$17 billion annual savings for public assistance spending, “enough to double housing assistance benefits.” DAVID COOPER, ECON. POLICY INST., *BALANCING PAYCHECKS*

### 5. *Protecting Lower-Income People from Predatory Lending*

While redlining is talked about as an issue of the past, racial bias in lending and access to credit persists.<sup>317</sup> An analysis of 31 million mortgage records in 61 metro areas in 2015 and 2016 found that black applicants were more likely to be denied a loan in 48 of the cities, and Hispanics were more likely to be denied in 25 cities.<sup>318</sup> An analysis of mortgages from 2015 conducted by the Pew Research Center found that black and Hispanic borrowers pay higher mortgage rates than white borrowers.<sup>319</sup>

When there is a pattern or practice of discrimination involving mortgage loans or home improvement loans, DOJ may file lawsuits under the Fair Housing Act and ECOA. In recent years, multiple banks entered settlements with DOJ to resolve allegations that they engaged in a pattern or practice of discrimination against African American and Hispanic borrowers in their mortgage lending. These settlements include amounts of \$335 million (Countrywide Financial Corporation),<sup>320</sup> \$175 million (Wells Fargo),<sup>321</sup> and \$21 million (SunTrust Mortgage, Inc.), among others.<sup>322</sup>

In addition, the CFPB has enforcement authority related to ECOA violations. CFPB and DOJ have filed multiple joint actions alleging discriminatory mortgage lending practices, at least two of which have been settled in recent years.<sup>323</sup> However, we are

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AND PUBLIC ASSISTANCE 24 (2016), <https://www.epi.org/files/2015/balancing-paychecks-and-public-assistance.pdf>.

- 317 ROTHSTEIN, *supra* note 109, at 109–13; *see generally* Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629 (2010).
- 318 Aaron Glantz & Emmanuel Martinez, *Keep Out: For People of Color, Banks Are Shutting the Door to Homeownership*, REVEAL NEWS (Feb. 15, 2018), <https://www.revealnews.org/article/for-people-of-color-banks-are-shutting-the-door-to-homeownership/>.
- 319 Drew DeSilver, *Blacks and Hispanics Face Extra Challenges in Getting Home Loans*, PEW RES. CTR.: FACT TANK (Jan. 10, 2017), <http://www.pewresearch.org/fact-tank/2017/01/10/blacks-and-hispanics-face-extra-challenges-in-getting-home-loans/>.
- 320 Consent Order at 2, 5, U.S. v. Countrywide Fin. Corp., No. 2:11-CV-10540-PSG-AJW (C.D. Cal. Dec. 28, 2011).
- 321 Consent Order at 1, 13, U.S. v. Wells Fargo Bank, N.A., No. 1:12-CV-01150-JDB (D.D.C. Sept. 21, 2012).
- 322 Consent Order at 10, U.S. v. Suntrust Mortgage, Inc., No. 3:12-CV-397 (E.D. Va. May 31, 2012).
- 323 *See e.g.*, Consent Order, Consumer Fin. Prot. Bureau v. Hudson City Sav. Bank, F.S.B., No. 15-7056 (D.N.J. 2015); Consent Order, Consumer Fin.

left wondering if larger banks and lending institutions consider the payment of fines and monetary settlements for discriminatory behavior to be just another cost of doing business.

The lack of accessible credit for the poor brought rise to payday lending—small loans that are repaid in bulk. Twelve million people use payday loans every year, spending much more in interest than in credit.<sup>324</sup> The large expenditure on interest often forces borrowers to forgo a large chunk of their paycheck to repay the loan and have to take another loan to meet other expenses<sup>325</sup>—for 1 in 10 borrowers, the first loan is for a housing related expense.<sup>326</sup>

Some argue that payday loans, while not ideal, are better than nothing. Without them, the poor would have no ability to borrow at all.<sup>327</sup> House repairs, car repairs, and medical bills are all examples of unforeseen and often unbudgeted expenses. Most Americans do not have the savings to recover from these kinds of budgetary strains.<sup>328</sup> It is for this type of consumption smoothing that loans exist. Internationally, there is ample evidence that small loans for low-income people help with this economic weathering and smooth shocks.<sup>329</sup> Others argue that payday loans harm the poor, and it is the role of law to mitigate that damage.<sup>330</sup> These types of laws that make payday loans less harmful cannot be viewed as out of scope when discussing the impacts of law on housing equity. A comprehensive systems view on housing affordability must take into consideration

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Prot. Bureau v. Bancorp South Bank, No. 1:16cv118 (N.D. Miss. 2016).

324 PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS (2013), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2013/pewpaydayoverviewandrecommendationspdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2013/pewpaydayoverviewandrecommendationspdf.pdf).

325 *Id.*

326 PEW CHARITABLE TRUSTS, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 14 (2012), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2012/pewpaydaylendingreportpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf).

327 Lisa Servon, *Are Payday Loans Harmful To Consumers?*, 36 J. POL'Y ANALYSIS & MGMT. 240 (2016).

328 PEW CHARITABLE TRUSTS, HOW DO FAMILIES COPE WITH FINANCIAL SHOCKS? 2–3 (2015), [http://www.pewtrusts.org/~media/assets/2015/10/emergency-savings-report-1\\_artfinal.pdf](http://www.pewtrusts.org/~media/assets/2015/10/emergency-savings-report-1_artfinal.pdf).

329 *E.g.*, Paul Gertler et al., *Do Microfinance Programs Help Families Insure Consumption Against Illness?*, 18 HEALTH ECON. 257, 269 (2009); Asadul Islam & Pushkar Maitra, *Health Shocks and Consumption Smoothing in Rural Households: Does Microcredit Have a Role to Play?*, 97 J. DEV. ECON. 232 (2012).

330 *E.g.*, Alex Horowitz, *Payday Loans Harm Consumers, but Reform is Possible*, 36 J. POL'Y ANALYSIS & MGMT. 248 (2016).

not only the impact of access to credit, but also the financial product that the credit allows access to.

### ***E. Domain 5: Governance and Planning***

The governance of housing markets is complex in itself, and the connection of housing as a basic need to other basic needs such as transportation, education, work, and recreation adds many more layers. Public housing is developed and managed by local public housing authorities, which often do not overlap geographically with other governing bodies. While there are 3,007 counties in the U.S.,<sup>331</sup> there are close to 3,400 public housing authorities.<sup>332</sup> Other actors, such as land banks and cooperatives, may work with housing authorities, developers, and planners. The AFFH rule was intended to incentivize regional collaboration by allowing multiple jurisdictions to submit an AFH together.<sup>333</sup> However, it is unknown to what extent this collaboration will occur, or whether any such collaboration will succeed past the AFH submission to HUD.

Some of the legal levers identified in this article are examples of efforts to adopt a regional approach in the housing context. For example, by creating an obligation for municipalities to have a fair share of the region's affordable housing, the Mt. Laurel doctrine brought light to the idea that a regional planning approach could be used to reduce exclusionary zoning practices.<sup>334</sup> In *Hills v. Gautreaux*, the U.S. Supreme Court upheld the Seventh Circuit's order that a comprehensive metropolitan area plan be adopted to desegregate the public housing system in Chicago.<sup>335</sup> As a result of that case, the first major housing mobility program in the U.S. was launched in the Chicago metropolitan area.<sup>336</sup> That program influenced other housing mobility efforts, including the Baltimore Housing Mobility

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331 *How many counties are there in the United States?*, U.S. GEOLOGICAL SURV., <https://www.usgs.gov/faqs/how-many-counties-are-there-united-states>.

332 U.S. DEPT OF HOUS. & URBAN DEV., U.S. HOUSING MARKET CONDITIONS SUMMARY (1995), <https://www.huduser.gov/periodicals/ushmc/spring95/spring95.html>.

333 24 C.F.R. § 5.156.

334 *S. Burlington Cty. NAACP v. Mt. Laurel*, 336 A.2d 713 (N.J. 1975); *S. Burlington Cty. NAACP v. Mt. Laurel*, 456 A.2d 390 (N.J. 1983).

335 *Hills v. Gautreaux*, 425 U.S. 284 (1976).

336 *The Supreme Court and the Gautreaux Assisted Housing Program*, BUS. & PROF'L PEOPLE FOR THE PUB. INTEREST: BPI BLOG (May 15, 2015), <https://www.bpichicago.org/blog/the-supreme-court-and-the-gautreaux-assisted-housing-program/>.

Program, which arose from *Thompson v. HUD*,<sup>337</sup> a case similar to *Gautreaux*.<sup>338</sup> These types of mobility programs make it easier for someone to use a housing voucher in the larger metropolitan region, rather than only within the city limits, thus providing opportunity to live in better neighborhoods.

In the U.S., the challenge of integrating action on housing, economic development, transportation, education, population growth, and urban design across city, county, and school district lines is vested, if anywhere, in regional planning entities with varying degrees of legal authority. Most states have laws that enable regional activity.<sup>339</sup> California law provides for the creation of regional planning districts, which prepare regional plans that seek to harmonize the general plans of cities and counties within the region. These districts are authorized to offer facilities and services to help solve problems related to physical development that involve two or more governing bodies, planning commissions, or agencies.<sup>340</sup> In Pennsylvania, the governing bodies of two or more municipalities may establish regional planning commissions to provide planning services to any municipality in the region.<sup>341</sup>

The federal government can play a role in helping to build regional collaborations and regional planning efforts.<sup>342</sup> In addition to the AFFH rule, HUD has used funds to incentivize collaboration. For example, in its Sustainable Communities Initiative, HUD awarded

337 *Thompson v. U.S. Dep't. of Hous. and Urban Dev.*, 348 F. Supp. 2d 398 (2005).

338 LORA ENGBAHL, *NEW HOMES, NEW NEIGHBORHOODS, NEW SCHOOLS: A PROGRESS REPORT ON THE BALTIMORE HOUSING MOBILITY PROGRAM* 11 (2009), <http://www.prrac.org/pdf/BaltimoreMobilityReport.pdf>.

339 Ohm, *supra* note 134, at 41; David N. Bengston et al., *Public Policies for Managing Urban Growth and Protecting Open Space: Policy Instruments and Lessons Learned in the United States*, 69 *LANDSCAPE & URB. PLAN.* 271, 272–73 (2004). Of course, states have potentially many laws that are relevant to local planning, if not helpful. See, e.g., David L. Prytherch, *Where a Subdivision is not a "Subdivision": State Enabling Statutes and the Local Regulation (or not) of Land Division in the United States*, 37 *J. PLAN. EDUC. & RES.* 286 (2017) (mapping state laws on land division that may allow developments that would be differently governed under state law).

340 CAL. GOV'T CODE § 65065.1 (West 2018).

341 53 PA. STAT. ANN. §§ 2341, 2344(a), 2345(b) (2018).

342 Lavea Brachman, *New State and Federal Policy Agendas: Realizing the Potential of America's Legacy Cities and Their Regions*, in *REBUILDING AMERICA'S LEGACY CITIES: NEW DIRECTIONS FOR THE INDUSTRIAL HEARTLAND* 276–77 (Alan Mallach ed., 2012).

Regional Planning Grants and Community Challenge Planning Grants through a competitive process. These grants “supported regional and local planning efforts that helped communities integrate housing, transportation, infrastructure, and environmental goals . . . .”<sup>343</sup>

There is a long and diverse history of research on urban planning and development, which is beyond the scope of this article to describe. We were unable to locate studies focusing particularly on the efficacy of planning mechanisms on affordable housing as such.

## V. Conclusion

Assuring safe and healthy housing to Americans has emerged as an urgent, but wicked problem. The nation has thrown a great deal of law at housing, discrimination, and poor neighborhoods for a generation, with unsatisfying results. We have proposed an approach to the problem rooted in legal epidemiology.<sup>344</sup> We have argued that attaining this goal requires a systems approach, and have offered a heuristic model of legal levers that have the potential to promote this goal. Our goal, and our evocation of a systematic approach, can easily be dismissed as inconsistent with current political reality—but that objection misses the point. There is clearly a need to rebuild public faith in collective problem solving and government action—indeed, in the necessity and practicality of rational planning itself. This process is long-term.

A good place to start is with correctness about our prescriptions and deftness with our tools. This is where the overview of evidence in Part IV came in. We looked at a range of legal levers that are often in intense use, and found that the deftness was, in most cases, missing. Some levers, like the implied warranty of habitability, may never have been widely implemented. There are some working levers, like housing code enforcement to preserve affordable units,

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343 *Regional Planning Grants and the SCI*, HUD EXCHANGE, <https://www.hudexchange.info/programs/sci/> (last visited May 30, 2018).

344 Legal epidemiology is the growing discipline that is defined “as the scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population.” A methodology that is central to legal epidemiology is “policy surveillance, the ongoing, systematic collection, analysis, and dissemination of information about laws and other policies of importance to health.” Scott Burris et al., *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 ANN. REV. PUB. HEALTH 135, 139 (2016).

which may not be working well, suffering from under-investment in enforcement and regulatory innovation. Others, such as housing vouchers, may be working well, but fail perennially to scale. Finally, there are levers, like LIHTC, that succeed splendidly on their own terms, but may not be properly designed or managed to promote other important system goals, highlighting that even more important than the questions about individual levers is the unexplored question of how the levers interact in the system, or could. Governing the many elements of the system so that housing is built in the right places and at the right prices to support healthy and economically vibrant communities is a challenge this country continues to struggle with. Few clearly successful models exist.

Policy debates under these circumstances can easily miss the point. The empirical objection to many of the devices is that they interfere with the market. This point is likely true, but if one allows it to be permissible as a mechanism for advancing social welfare—let alone if one believes that regulating markets is essential for social welfare—the important empirical questions have to do with harmonizing the benefits of market mechanisms with those of regulation. This inquiry, in turn, will tend to turn on questions both of optimal investment—are we spending enough to get the optimal benefits (a question, say, with LIHTC or vouchers)—or whether we are using the right mix of specific regulatory levers, the sort of question that arises with inclusionary zoning and housing code enforcement.

Lack of legal nuance is also a problem in assessing existing options. Many of the legal levers are complicated (housing codes, for example), and can vary from jurisdiction to jurisdiction. We do not know enough about what regulatory approaches or mechanisms work best for, say, inclusionary zoning. That question, rather than whether inclusionary zoning “works,” is the key question now. Likewise, it is stimulating, but not illuminating, to contend over whether housing code enforcement is pro- or anti-tenant. The important challenge is to more assiduously investigate what approaches to enforcement best serve landlords, tenants, and the public under various housing market conditions.

The set of questions raised by reviewing gaps in existing knowledge is a blue-print for strategic thinking and immediate action to develop and test better ways to use and combine legal levers. Two generic practices are, we think, clearly indicated by the current state of play. First, innovation, advocacy, implementation,

and evaluation should be planned together as much as possible.<sup>345</sup> If a city or (ideally) a collaborative group of cities undertake to develop new approaches to the content and enforcement of their housing codes (for example), foundations or other funders with an interest in better enforcement (or even the cities themselves) can support the infrastructure and processes needed to develop a plausible approach, overcome opposition to its enactment, and properly implement it. Evaluation should start at implementation, so as to determine what works and what needs to be refined as quickly as possible. Results can feed back into advocacy for scaling up what works. None of this brings change overnight, but if the time to create, identify, and diffuse better legal models can be cut from two decades to one, the savings can be measured in human thriving and prevented harm. The need for this sort of strategic discipline is evident in housing, where large scale legal interventions have gone decades without the evaluation work that would show remediable weaknesses or clear failures. Law that does not work is more than useless; it creates harm by suggesting that problems have been solved. Strategy is only in part a function of thought; it depends to a considerable degree on resources and leadership from committed organizations and individuals. Those resources exist.

Second, research must do more to identify the effects of specific variant features in general legal models, while also building toward rigorous study of the interactions of policies and policy elements within a system. This matter is one of nuance and of the development of knowledge over time. On the one hand, no one is exposed to, say, an “inclusionary zoning policy.” Rather, in each jurisdiction, there is a form of the approach with more particular characteristics—mandatory versus voluntary, density-bonuses or not, etc.—that will influence the program’s outcomes. On the other hand, no one is exposed to just one housing policy at a time. Inclusionary zoning, LIHTC, and regional plans may all interact to produce results that differ across jurisdictions. Tools and methods for this kind of empirical legal research are available and becoming better with the advent of machine-assisted research.<sup>346</sup>

Wicked problems are not insoluble, any more than well-

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345 Cf. Scott Burris et al., *Better Health Faster: The 5 Essential Public Health Law Services*, 131 PUB. HEALTH REP. 747 (2016) (describing essential elements of public health law intervention).

346 See Scott Burris et al., *Policy Surveillance: A Vital Public Health Practice Comes of Age*, 41 J. HEALTH POL., POL’Y & L. 1151 (2016).

funded and systematic efforts to weaken government and prevent collective problem solving are unstoppable. Carefully borrowing from Socrates, we can improve sustained, strategic efforts to promote health equity in housing by owning our own ignorance about the legal levers at hand. From that, we can also perhaps extract enough hope to abstain from drinking the hemlock.