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HOUSING, HEALTHISM, AND THE HUD SMOKE-FREE POLICY

Dave Fagundes & Jessica L. Roberts

ABSTRACT—On July 30, 2018, the U.S. Department of Housing and Urban Development (HUD) rule prohibiting residents of public housing from smoking within twenty-five feet of any housing project took effect. These new regulations—HUD's "smoke-free policy"—received near-universal acclaim as a means to improve public health, in particular by reducing vulnerable populations' exposure to secondhand smoke. This Essay analyzes the smoke-free policy from the perspective of healthism—discrimination on the basis of health status. We argue that banning public housing residents from smoking is unfairly discriminatory for a variety of reasons. To start, the rule may not achieve its desired effects. Because a violation could lead to eviction, the policy may well push many public housing residents out onto the street, ironically worsening health outcomes. The rule also intrudes into the private lives of smokers in public housing by forbidding them from engaging in lawful conduct in the sanctity of their homes. It singles out smokers for regulation in a way that validates stigma. Finally, HUD's smoke-free policy poses unappreciated distributional concerns, with the heaviest burdens falling on historically disadvantaged populations like the elderly, people with disabilities, certain racial and ethnic minorities, and the poor. The Essay concludes by attempting to salvage the rule by reflecting on how HUD might modify its policy to improve compliance and avoid discrimination, including smoking shelters, smoking cessation support, and incentive structures.

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INTRODUCTION

On July 23, 2018, six smokers sued the Department of Housing and Urban Development (HUD) and HUD Secretary Ben Carson.[1] The plaintiffs are challenging HUD's recent smoke-free policy, a rule that requires public housing authorities (PHAs)[2] to restrict residents from smoking in all indoor areas—including private residences—and within twenty-five feet of any PHA-owned building.[3] Among other claims, the lawsuit alleges that the regulations are unconstitutional, violating key provisions of the Tenth, Fourth, Fifth, and Fourteenth Amendments.[4] This Essay lodges yet another set of critiques at HUD's smoke-free policy: it is discriminatory and imposes overlooked distributional concerns. Consequently, instead of improving public health, the new rule threatens to disadvantage and jeopardize the health of already vulnerable populations.

[1] Complaint at 1, NYC C.L.A.S.H., Inc. v. Carson, No. 1:18-cv-1711 (D.D.C. July 23, 2018).

[2] A public housing authority is an entity that owns and manages low income housing. Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 499 (1993). These entities are either state agencies or not-for-profit entities that work closely with the state to allocate public housing to qualified individuals and to regulate public housing in accordance with applicable federal, state, and local law.

[3] 24 C.F.R. §§ 965.653 (discussing smoke-free housing provisions in Subpart G), 966.4(f)12(i) (discussing lease requirements and enforcement) (2017).

[4] *See* Complaint, *supra* note 1, at 44–48.

This Essay analyzes the new rule through the lens of "healthism," or discrimination on the basis of health status.[5] Healthism as a theory considers when the law should regulate policies that disadvantage people who are considered unhealthy. It uses four guiding principles to discern whether a given intervention is healthist: (1) health welfare, (2) health liberty, (3) health equality, and (4) health justice.[6] This framework acknowledges the necessity of making some distinctions based on health status, such as risk rating in private health insurance.[7] Yet it argues that some distinctions are unduly burdensome, like bans on hiring overweight workers.[8]

The HUD smoke-free policy provides an ideal case study for healthism. Society generally regards smokers as unhealthy and they face fairly widespread social stigma as a result.[9] They are frequently the target of health policies, such as sin taxes,[10] insurance surcharges, and anti-smoking ordinances.[11] In short, interventions that disadvantage smokers are ubiquitous. However, there are good reasons for encouraging people to quit smoking. Tobacco use generally and smoking specifically are linked to a variety of ailments, including mouth, throat, and lung cancers, coronary artery disease, high blood pressure, emphysema, and stroke.[12] Secondhand exposure to smoke has its own deleterious effects, especially on small children, including increased risks of asthma, bronchitis, ear and respiratory infections, cancer, and even SIDS.[13] Hence, reducing smoking can have positive health effects for individuals and their families. So the question

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[5] Co-author Jessica L. Roberts' initial work on this topic includes *'Healthism': A Critique of the Antidiscrimination Approach to Health Insurance and American Health Care Reform*, 212 ILL. L. REV. 1159 (2012) and *Healthism and the Law of Employment Discrimination*, 99 IOWA L. REV. 571 (2014). Her more recent work on this topic was co-authored with Elizabeth Weeks of the University of Georgia School of Law. *See* Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't) Healthism*, 50 GA. L. REV. 833 (2016); JESSICA L. ROBERTS & ELIZABETH WEEKS, HEALTHISM: HEALTH-STATUS DISCRIMINATION AND THE LAW (2018).

[6] *See* ROBERTS & WEEKS, *supra* note 5, at 24–52.

[7] *See id.*

[8] *See id.* at 181–83.

[9] Jessica L. Roberts & Elizabeth Weeks, *Stigmatizing the Unhealthy*, 45 J.L. MED. & ETHICS 484, 485 (2017).

[10] For example, an excise tax on items considered harmful or undesirable such as cigarettes, liquor, unhealthy food, or gambling.

[11] *See, e.g.*, *Tobacco Initiatives*, AM. LUNG ASS'N, http://www.lung.org/our-initiatives/tobacco/ [https://perma.cc/R46C-QN55] (discussing legislative efforts and community programs by the association to curb tobacco use).

[12] *See Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [https://perma.cc/66FC-LAVS].

[13] *Id*.

emerges: is HUD's smoke-free policy discriminatory or is it sound public policy?

We ultimately conclude the former. The smoke-free policy implicates all four of healthism's guiding principles. With respect to health welfare, noncompliance risks eviction. Ironically then, the policy could reduce net social welfare. Pushing smokers—and their families—onto the streets will harm public health because homelessness poses even more immediate health risks than smoking. Next, singling out smokers while leaving other legal health risky behavior untouched raises health equality concerns. Regulating private, lawful conduct within the home also violates health liberty because the American property tradition has long afforded the home special status as a sanctuary against paternalist regulation. Finally, the smoke-free policy raises the kinds of distributional concerns captured by health justice. Historically disadvantaged groups such as people with disabilities, the elderly, and the poor are more likely to smoke, and are also more likely to live in public housing. Thus, the smoke-free rule uniquely burdens these populations. Moreover, quitting smoking is no easy task. It may take up to thirty attempts to successfully quit smoking.[14] Making matters worse, members of historically disadvantaged groups are also more likely to lack access to the kind of resources and support that would enable them to successfully overcome a serious addiction.[15] We therefore assert that HUD's smoke-free policy in its current iteration is healthist.

However, healthism exists on a continuum. As noted, reducing smoking and secondhand smoke in public housing is a commendable goal, especially where children are concerned. We therefore attempt to rehabilitate the HUD smoke-free policy by offering some alternative, non-discriminatory pathways to reduce smoking in public housing, such as giving non-smokers a small but visible rent reduction, or providing support groups, access to "quit lines," and other cessation tools.

This Essay proceeds in three parts. First, it outlines both the smoke-free policy and healthism's theoretical framework. Second, it applies healthism to the HUD smoke-free policy, concluding that the policy discriminates unfairly. And finally, it explores some nondiscriminatory policy interventions to encourage public housing residents not to smoke.

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[14] Michael Chaiton et al., *Estimating the Number of Quit Attempts It Takes to Quit Smoking Successfully in a Longitudinal Cohort of Smokers*, BMJ OPEN (June 9, 2016), https://bmjopen.bmj.com/content/bmjopen/6/6/e011045.full.pdf [https://perma.cc/C6MW-AFUV].

[15] *See infra* Section II.D.

I. THE SMOKE-FREE POLICY AND THE HEALTHISM FRAMEWORK

Anti-smoking regulations typically make good public policy. Such measures have a longstanding history in the United States and frequently enjoy widespread, bipartisan support. The HUD smoke-free policy has been no exception. Even in a time of political strife when almost no Obama-era regulations have survived into the Trump presidency, the smoke-free policy is the rare regulation to persist into the new administration. This Part briefly summarizes the HUD smoke-free policy, including the recent lawsuit by smokers against HUD and Secretary Carson. It then turns to the theoretical framework for healthism, laying the grounds for our analysis in Part II.

A. HUD's Smoke-Free Policy

Smoking has declined in popularity over the last forty years since the Surgeon General publicly announced the connection between smoking and lung cancer in 1964.[16] Still, around the turn of the last century, smokers numbered about one quarter of all adult Americans.[17] These numbers started decreasing sharply in the early 2000s when major cities including New York City and Los Angeles passed laws banning smoking in private establishments, like bars and restaurants, and in public areas, like parks and train stations.[18] As the social consensus against smoking gathered momentum, the federal government got into the act when, in 2009, the new Obama-era HUD issued a statement encouraging PHAs to restrict smoking

[16] *See, e.g.*, Anthony Komaroff, *Surgeon General's 1964 Report: Making Smoking History*, HARV. HEALTH PUBL'G: HEALTH BLOG (Jan. 10, 2014, 11:00 AM), https://www.health.harvard.edu/blog/surgeon-generals-1964-report-making-smoking-history-201401106970 [https://perma.cc/DT2S-6TFB] (noting that the percentage of Americans who smoke dropped from 42% in 1964 to 18% at the time of the writing of the article); *see also* U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SMOKING & HEALTH: A REPORT TO THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, PUB. HEALTH SERV. PUBL. NO. 1103 (1964) (publicly announcing the connection between smoking and lung cancer); Theodore R. Holford et al., *Tobacco Control and the Reduction in Smoking-Related Premature Deaths in the United States, 1964-2012*, 311 J. AM. MED. ASS'N 164, 169 (2014) (estimating that tobacco control stemming from the surgeon general's report in 1964 helped prevent around 8,000,000 premature smoking-attributable deaths).

[17] *See Trends in Current Cigarette Smoking Among High School Students and Adults, United States, 1965-2014*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/tables/trends/cig_smoking/index.htm [https://perma.cc/5ZU6-UD58] (showing that around 24.7% of adult Americans were reported smokers in the late 1990s).

[18] *See, e.g.*, Smoke-Free Air Act, N.Y.C. ADMIN. CODE §§ 17-501 to 504 (2018) (current New York City law barring smoking in all private workplaces); *Existing New York City Legislation*, NYC SMOKE-FREE, http://nycsmokefree.org/legislation [https://perma.cc/3SB9-TLLS] ("The Smoke Free Air Act (SFAA), which went into effect on March 30, 2003, prohibited smoking in virtually all workplaces and indoor recreational venues."); *see also* L.A. MUN. CODE § 63.44(B)(24) (2007) (Los Angeles law banning smoking in city parks).

in private as well as public areas of their buildings.[19] Some PHAs, in cities such as Boston and Detroit, voluntarily instituted such restrictions, though most did not.[20]

Then, in 2015, HUD issued a Notice of Proposed Rulemaking that would require all PHAs subject to federal funding to prohibit residents from smoking in any private or public areas of any housing development, or within twenty-five feet of the housing.[21] Significantly, the policy does not ban leasing to smokers, or even smoking per se. Instead, it just requires that residents smoke off-site. In November 2016, it presented a proposed rule in substantially the same form as originally proposed a year prior.[22] While HUD's smoke-free policy became effective February 3, 2017,[23] the rule included an eighteen-month implementation period, which gave PHAs until July 31, 2018 to comply.[24]

The newly minted regulations have been widely celebrated. Medical associations praised the rule's potential to cut down on smoking and reducing exposure to second-hand smoke to vulnerable groups like children, thereby generating positive health outcomes.[25] And despite grumbling from PHAs that the rule represented an unfunded mandate,[26] HUD emphasized the policy's potential to reduce maintenance costs by eliminating the expense of renovating smokers' units and by decreasing the risk of smoking-related

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[19] *See* DEP'T OF HOUSING & URBAN DEV., OFFICE OF PUBLIC & INDIAN HOUSING, NON-SMOKING POLICIES IN PUBLIC HOUSING 1–2, July 17, 2009 (memorandum), http://www.tcsg.org/sfelp/pih2009-21.pdf [https://perma.cc/5674-HTCY]. Somewhat ironically, Obama himself was, and may still be, a closet smoker. *See* Maya Rhodan, *Why It Matters If Obama Smokes (and Why It Doesn't)*, TIME (June 11, 2015), http://time.com/3916342/barack-obama-smoking/ [https://perma.cc/9ZKM-8YEF].

[20] *See* Katharine Q. Seelye, *Increasingly, Smoking Indoors Is Forbidden at Public Housing*, N.Y. TIMES (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/us/public-housing-authorities-increasingly-ban-indoor-smoking.html [https://perma.cc/9WEB-GBKC].

[21] Instituting Smoke-Free Public Housing, 80 Fed. Reg. 71,762, 71,766–67 (Nov. 17, 2015) (to be codified at 24 C.F.R. pts. 965–66).

[22] *See* Instituting Smoke-Free Public Housing, 81 Fed. Reg. 87,430 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66).

[23] *See Smoke-Free Public Housing and Multifamily Properties*, DEPT. OF HOUSING & URBAN DEV., https://www.hud.gov/program_offices/healthy_homes/smokefree [https://perma.cc/NFV4-GCW6].

[24] *Id.*

[25] *See* Mireya Navarro, *Public Housing Agencies Seek More Time to Enact Smoking Ban*, N.Y. TIMES (Feb. 4, 2016), https://www.nytimes.com/2016/02/05/nyregion/public-housing-agencies-seek-more-time-to-enact-smoking-ban.html [https://perma.cc/N7JS-6E72]; *see also, e.g.*, Melissa Jenco, *New Federal Rule Prohibits Smoking in Public Housing*, AM. ACAD. OF PEDIATRICS: NEWS (Dec. 1, 2016), http://www.aappublications.org/news/2016/12/01/SmokeFree120116 [https://perma.cc/83TG-JAYA] ("The move by [HUD] drew praise from the [American] Academy [of Pediatrics] as a measure that will protect the health of more than 760,000 children, including minorities who are impacted disproportionately.").

[26] *See* Navarro, *supra* note 25 ("'The rule is an unfunded mandate which adds considerable burden, financially and administratively, to programs that have consistently received wholly inadequate funding,' wrote Timothy G. Kaiser, the [Public Housing Authorities Directors Association]'s executive director.")

fires.[27] Perhaps the most telling indication of the smoke-free policy's broad appeal is that despite originating during Obama's presidency, the Trump administration has not sought to rescind it.[28]

However, the rule has not been without its critics. Commentators expressed various concerns, including with respect to the rule's enforcement. After a phase-in period, PHAs must enforce the smoke-free policy by means of lease enforcement actions (LEAs).[29] LEAs include a variety of enforcement options, from written warnings to fines to eviction.[30] Significantly, the regulations explicitly reserve discretion for PHAs to choose which LEAs to use.[31] The possibility of eviction led to particular concern during the comment period. Opponents of the rule stressed the harshness of inflicting possible homelessness on vulnerable individuals who engaged in legal behavior within their homes.[32] HUD, however, declined to revise its rule to take eviction off the table, instead stressing that the agency "believes that allowing a PHA to enforce its smoke-free policy through lease enforcement actions"—including eviction—"is the best way to ensure compliance with such policies."[33]

Strong criticism has also come directly from smokers living in public housing. On July 23, 2018, just one week before the implementation period ended, a group of litigants sued HUD and Secretary Carson in federal district

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[27] Instituting Smoke-Free Housing, 81 Fed. Reg. 87,430–32 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66) (extolling the policy upsides of the smoke-free policy in terms of resident health and lower cost to PHAs). Many public housing residents welcomed the change as well. Lesli Lino, a resident of Melrose Houses in the Bronx, complained that the odor of smoking in her building is "horrible," and that HUD's policy would be "a plus to [her]." Mireya Navarro, *Public Housing Nationwide May Be Subject to Smoking Ban*, N.Y. TIMES (Nov. 12, 2015), https://www.nytimes.com/2015/11/12/nyregion/public-housing-nationwide-may-be-subject-to-smoking-ban.html [https://perma.cc/D67W-28UB].

[28] The Trump Administration, by way of HUD Secretary Ben Carson, ultimately endorsed the smoke-free rule. *See* Ben Carson (@SecretaryCarson), TWITTER (July 31, 2018, 1:57 PM), https://twitter.com/secretarycarson/status/1024398660749197319 [https://perma.cc/8HYF-LDE4] ("Today, our smoke free rule went into full effect for public housing authorities nationwide. This means public housing agencies will save $153M every year in repairs & preventable fires, and our residents will be healthier as a result").

[29] Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,437.

[30] *See id*. at 87,436–40.

[31] *See* Smoke-Free Public Housing, 24 C.F.R §§ 965.653–55 (2018); *see also* Instituting Smoke-Free Public Housing, 81 Fed. Reg. at 87,437 (stating that "HUD has not included enforcement provisions in this rulemaking because lease enforcement policies are typically at the discretion of PHAs, and it is appropriate for local agencies to ensure fairness and consistency with other policies.").

[32] Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,437 (cataloguing various objections to eviction as remedy for violating smoke-free policy).

[33] *Id.* HUD did make some suggestions aimed at softening the impact of potential eviction, such as discouraging eviction as a remedy for first-time violators, but declined to revise the rule to eliminate eviction as a possible consequence of repeatedly violating the smoke-free policy. *Id.*

court.[34] The seven plaintiffs include a New York-based non-profit smoker's advocacy group and six smokers who currently live in public housing.[35] Of those plaintiffs, four are non-white, all are age forty and over, and two have disabilities that require them to rely on Social Security benefits.[36] The fifty-five page complaint challenges the smoke-free policy across a variety of metrics. The plaintiffs allege that (1) the smoke-free policy violates the Tenth Amendment, including the anti-commandeering doctrine; (2) the policy violates the Fourth Amendment by allowing PHAs to conduct unlawful searches and seizures in residents' homes; (3) the policy violates both Fifth and Fourteenth Amendment due process rights to be free from government intrusion in the home; (4) the policy conditions government benefits in exchange for giving up Fourth Amendment rights; (5) HUD lacks the legal authority and the jurisdiction to issue the rule because it involves activities that do not impact interstate commerce; (6) HUD lacks the legal authority and the jurisdiction to issue the rule because federal agencies cannot regulate tobacco use in private locations without executive or congressional authorization; (7) HUD lacks the legal authority and the jurisdiction to issue the rule because federal agencies cannot regulate indoor air quality on a national basis without executive or congressional authorization; (8) HUD lacks the legal authority and the jurisdiction to issue the rule because federal agencies cannot regulate tobacco use in any location without executive or congressional authorization; and (9) the policy is arbitrary, capricious, and an abuse of discretion.[37]

While our analysis includes similar points regarding privacy and the right to be free from government intrusion, we attack the new rule from a different vantage, arguing it discriminates unfairly against low-income minority smokers.

B. Healthism Theory

Discrimination is a necessary and inevitable feature of our legal system. Law cannot function without making some distinctions. Our Constitution mandates that only those above thirty-five years of age can become President.[38] Public universities typically offer lower tuition to in-state residents.[39] Citizens of closed-primary states may vote only for candidates of

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[34] Complaint *supra* note 1, at 1.

[35] *Id.* at 3–4.

[36] *Id.*

[37] *Id.* at 15–54. While the complaint contains nine "legal defects," it includes thirteen counts. *Id.*

[38] U.S. CONST. art. II, § 1, cl. 5.

[39] See Trends in Higher Education: 2018-19 Tuition and Fees at Public Four-Year Institutions by State and Five-Year Percentage Change in In-State Tuition and Fees, COLLEGEBOARD,

the political party for which the voter has registered.[40] These distinctions favor some groups over others but pose no legitimate legal problems. Other distinctions are not so innocuous. Jim Crow laws in the American South systematically excluded racial minorities from public places and public participation.[41] Laws used to limit the voting franchise and eligibility for jury service based on gender, race, and property-owner status. And recent Presidential Executive Orders have restricted foreign travel on the basis of individuals' status as a resident of a Muslim nation.[42] These laws raise normative objections and have duly been invalidated by U.S. courts.

Healthism introduces a novel category of potentially adverse social discrimination into the antidiscrimination canon: health status.[43] As a theory, healthism maintains that on certain occasions, policies that differentiate based on health status pose the kind of normative problems that warrant independent legal protection.[44] That said, many distinctions on the basis of health status are desirable and should be encouraged. For example, distinguishing based on health-related behaviors and attributes is essential to certain inventions, like tobacco cessation programs.[45] By contrast, workplace programs that disfavor or even bar obese people from employment may raise serious normative problems.[46] While such programs are nominally about avoiding insurance costs associated with unhealthy workers, there is evidence that they may actually be rooted in irrational animus toward certain

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https://trends.collegeboard.org/college-pricing/figures-tables/2018-19-state-tuition-and-fees-public-four-year-institutions-state-and-five-year-percentage [https://perma.cc/J6CU-C6R4] ("In 10 states, the average out-of-state tuition and fee prices are more than three times the in-state prices. In seven states, the out-of-state prices are less than twice the in-state prices.").

[40] *See Open and Closed Primaries*, FAIRVOTE, https://www.fairvote.org/open_and_closed_primaries [https://perma.cc/ZDS3-UAU4].

[41] *See, e.g.*, Gerald J. Postema, *Law's Ethos: Reflections on a Public Practice of Illegality*, 90 B.U. L. REV. 1847, 1849–50 (2010).

[42] *See, e.g.*, Exec. Order No. 13,769, Protecting the Nation from Foreign Terrorist Entry to the United States, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

[43] *See* Roberts & Weeks, *Stigmatizing the Unhealthy, supra* note 9, at 484; Roberts & Weeks, *What Is (and Isn't) Healthism*, *supra* note 5; Roberts, *"Healthism": A Critique of the Antidiscrimination Approach, supra* note 5, at 1159.

[44] *See* Roberts & Weeks, *What Is (and Isn't) Healthism*, *supra* note 5, at 856–58.

[45] Smoking cessation programs span a range of methods to help smokers quit, from self-help to individual or group counseling to medical treatment with over the counter or prescription drugs. *See How to Quit: Explore Quit Methods*, SMOKEFREE.GOV, https://smokefree.gov/tools-tips/how-to-quit/explore-quit-methods [https://perma.cc/2F7M-JKEE]. These methods can be used in combination, and are more effective when they are. *Id*.

[46] In 2012, the Citizens Medical Center, a county-run hospital, instituted a policy that barred hiring anyone with a body-mass index of thirty-five or more. Emily Ramshaw, *At Victoria Hospital, Obese Job Candidates Need Not Apply*, TEX. TRIB. (Mar. 26, 2012), https://www.texastribune.org/2012/03/26/victoria-hospital-wont-hire-very-obese-workers/ [https://perma.cc/8JLL-XAQT].

body types.[47] The healthism framework thus distinguishes beneficial health-based distinctions from those that are unfairly discriminatory.

Four guiding principles are at the heart of the framework: (1) health welfare, (2) health liberty, (3) health equality, and (4) health justice.[48] Health welfare looks to utilitarian considerations, raising the possibility that targeting health status may actually reduce social welfare.[49] Its primary concern is the efficient allocation of resources. Health liberty considers the importance of personal freedom and warns that regulating based on health status may threaten our right to be free from excessive state control.[50] Autonomy is therefore essential to health liberty. Health equality calls on the American legal tradition of equal treatment before the law and examines health-status regulations and policies for impermissible motivations like animus or social stereotypes.[51] Here basic human dignity is key. Finally, health justice looks at the distributional effects of health-status distinctions, making distributive justice its underlying concern.[52] Health justice may also implicate concerns related to welfare, liberty, and equality. As an antidiscrimination theory, healthism is value pluralist. No single guiding principle reigns supreme.

We now turn to the question of whether the HUD smoke-free policy is healthist.

II. APPLYING HEALTHISM TO THE SMOKE-FREE POLICY

HUD casts its smoke-free policy as a straightforward way to increase health and lower costs in public housing. It is also a law that overtly regulates and burdens a group based on its health status. HUD argues that the desirable effects of the policy outweigh these burdens. The healthism framework, though, casts the policy in a new light. It questions whether these new restrictions cross the line from the licit distinctions law must always draw to impermissible and harmful discrimination. This Part elucidates this argument in four steps, showing how the smoke-free policy, particularly because of its regulation of conduct within homes, raises concerns with all four parts of the healthism framework: (1) health welfare, (2) health liberty, (3) health equality, and (4) health justice.

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[47] Roberts, *Healthism and the Law of Employment Discrimination*, *supra* note 5, at 580–89 (discussing cost, stigma, and business-image motivations for health-based workplace distinctions).

[48] *See* ROBERTS & WEEKS, *supra* note 5, at 24.

[49] *See id.* at 179.

[50] *See id.*

[51] *See id.* at 179–80.

[52] *See id.* at 180; *see also infra* Section II.D.

A. Health Welfare

Public health policies typically seek to increase population health. That is, they seek to promote welfare. The notion of health welfare is rooted in the Benthamite utilitarian perspective that law and policy makers should evaluate their actions based on the net good or bad effects.[53] In other words, the benefits should outweigh the costs. Improving welfare via promoting health is HUD's leading justification for the smoke-free policy. Throughout the final rule, the agency emphasized that the policy's downsides were outweighed by its advantages, particular in terms of public health.[54] HUD therefore maintains the smoke-free policy will result in net welfare gains.

A closer look at the smoke-free policy, though, casts doubt on the conclusion that it will enhance net welfare. HUD's claims about the benefits of the policy assume it will achieve widespread compliance. For any given policy to actually increase welfare, it must be followed. However, public housing residents will have difficulty complying for a variety of reasons.

First, structural barriers will prevent many public housing residents from complying. Unlike most other place-based smoking restrictions, such as those banning smoking in restaurants or parks, public housing residents cannot comply by retreating to the privacy of their homes to smoke. Compliance requires quite the opposite: One must leave one's home, and indeed the building in which that home is located, to not breach the HUD rule. For some—say, an able-bodied thirty-year-old man—complying by smoking in more remote locations may present a simple solution.

For others, though, this will not prove so easy. Consider the elderly or people with disabilities. For members of these groups, getting out of their homes and into the approved smoking zone may be much more difficult, especially when inclement weather makes it even harder and threatens illness. Moreover, many PHAs are located in higher-crime areas.[55] Requiring that residents leave the premises—and indeed move some distance away from their building—to smoke thus exposes them to a higher risk of crime, particularly at night. This safety threat is heightened for certain groups that are statistically more likely to be crime victims, such as people with

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[53] *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 3–5 (Oxford: Clarendon Press 1907) (1823).

[54] Instituting Smoke-Free Housing, 81 Fed. Reg. 87,430–31 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66).

[55] *See generally Evidence Matters: Neighborhoods and Violent Crime*, U.S. DEP'T OF HOUS. & URB. DEV. (2016), https://www.huduser.gov/portal/periodicals/em/summer16/highlight2.html [https://perma.cc/C4NN-P5WL] ("Neighborhoods with more concentrated disadvantage tend to experience higher levels of violent crime.").

disabilities and women.[56] In light of these concerns, public housing residents may not comply with the smoke-free policy either because they are physically unable to do so, or because they reasonably prefer to risk sanctions rather than expose themselves to danger. Those individuals that do attempt to comply and risk their safety could experience significant welfare losses.

Of course, residents have another available option: quit smoking. Yet this alternative path to compliance is complicated by the chemical and psychological persistence of nicotine addiction.[57] The existence of a multi-million dollar industry devoted to smoking cessation (transdermal patches, therapy programs, etc.) attests to the difficulty of kicking a smoking habit. And while there are now more ex-smokers than current smokers in America, 85% of smokers have tried and failed to quit at least once.[58] In fact, while some smokers in public housing applauded the new HUD regulations in theory,[59] others insisted that even a federal law would not stop them from smoking in their homes. Seventy-seven-year-old Juan Manuel Cabrera explained that he had been smoking for sixty-seven years, and that no federal edict could get him to kick the habit.[60]

Second, compliance may be more unlikely because the smoking ban operates within the home. Smokers may be able to comply with workplace restrictions on smoking because they still retain the freedom to smoke within

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[56] *See Crimes Against People with Disabilities*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAM, OFFICE FOR VICTIMS OF CRIMES (2018), https://ovc.ncjrs.gov/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_VictimsWithDisabilities_508_QC.pdf [https://perma.cc/QX5M-W3WT] (discussing how individuals with disabilities were at two to three times higher than their non-disabled counterpart for both violent crimes or simple assault); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULL. NO. NCJ 250180, CRIMINAL VICTIMIZATION, 2015, at 8–9 (2016, *revised* 2018*)*, *available at* https://www.bjs.gov/content/pub/pdf/cv15.pdf [https://perma.cc/9R6X-TYYU] (indicating women were victimized more than men in 2015).

[57] *See* Neal L. Benowitz, *Nicotine Addiction*, 362 NEW ENG. J. MED. 2295, 2295–99 (2010); Amanda Chan, *Anatomy of Addiction: Why It's So Hard to Quit Smoking*, LIVE SCIENCE (Oct. 18, 2010), https://www.livescience.com/35062-tobacco-addiction-why-hard-quit-smoking.html [https://perma.cc/9AUC-YGSC].

[58] Frank Newport, *Most U.S. Smokers Want to Quit, Have Tried Multiple Times*, GALLUP (July 31, 2013), https://news.gallup.com/poll/163763/smokers-quit-tried-multiple-times.aspx [https://perma.cc/T3N4-VCFV].

[59] *See, e.g.*, David R. Martin & Jennifer C. Kerr, *Residents Mixed on Proposed Smoking Ban in Public Housing*, SEATTLE TIMES (Nov. 12, 2015), https://www.seattletimes.com/seattle-news/health/hud-seeks-smoking-ban-in-public-housing/ [https://perma.cc/6GS5-KFYS]; Brianna Owczarzak & James Felton, *Nationwide Smoking Ban for Public Housing Residents Takes Effect Tuesday*, WNEM (July 30, 2018), https://www.wnem.com/news/nationwide-smoking-ban-for-public-housing-residents-takes-effect-tuesday/article_20682315-bdae-5186-86af-bacdc0db7803.html [https://perma.cc/5DBR-LCHY]; Alessandra Potenza, *The US Plans to Ban Smoking in Public Housing—But Will it Work?*, VERGE (Dec. 17, 2016, 3:00 PM), https://www.theverge.com/2016/12/17/13987432/smoking-ban-public-housing-urban-development-health [https://perma.cc/44HP-LESF].

[60] Martin & Kerr, *supra* note 59.

the intimate space of their residences. The smoke-free policy, however, forecloses this option for public housing residents, forcing them into a deceptively difficult choice between the costs of smoking off-site and the longshot of overcoming a persistent addictive behavior.

Smokers in public housing may not comply with the policy for a third reason: symbolic refusal to obey a policy that they feel wrongly impinges on their personal liberty.[61] Without compliance, the HUD policy could have several possible consequences for health welfare. At a minimum, the policy will have no effect on welfare. However, the new rule could also significantly reduce welfare, which is far more troubling. Recall that the smoke-free policy grants PHAs broad authority to enforce the smoke-free policy through LEAs.[62] An LEA can range from an informal verbal admonition to stop smoking, to a written warning, to a fine, to eviction. While many groups have asked that HUD restrict enforcement of the smoke-free policy to fines and other less extreme remedies, HUD refused to take eviction off the table.[63] On the contrary, HUD's final rule even gave PHAs discretion to evict residents who permit third parties such as guests to smoke in their homes.[64] In addition, a single resident's noncompliance with the smoke-free policy could result in eviction of all residents within that unit, including non-smokers and/or small children.[65] And the early reaction of PHA managers indicates that they are eager rather than reluctant to use this remedy in the event of violations of the smoke-free policy. "The clock starts today," said Ed Cabrera, a HUD spokesman in San Francisco, and "[t]enants who don't comply and continue to smoke could face possible eviction."[66]

The final twist from the perspective of health welfare is that the difficulty of compliance combined with the possibility of eviction could turn the public health advantages of the smoke-free policy on its head. PHA

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[61] We explain in more detail below why the sense that the smoke-free policy infringes on liberty will lead to non-compliance. *See infra* Section II.B.

[62] *See supra* notes 29–31 and accompanying text.

[63] *See* Instituting Smoke-Free Housing, 81 Fed. Reg. 87,430, 87,440 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66) (responding to comments criticizing the use of eviction, HUD stated that it "encourages PHAs to use a graduated enforcement approach that includes written warnings for repeated policy violations before pursuing lease termination or eviction.").

[64] *Id.* at 87,444 (extending the restriction to guests under 24 C.F.R. § 966.4(f)(12)(i)(B)). The HUD policy not only applies to an individual smoking in their own dwelling, but also enables PHAs to engage in LEAs for any smoking that takes place there. *See id.* This could, in turn, lead to an even more extreme scenario where a resident is evicted because a guest smoked in their home without permission.

[65] Evictions by PHAs apply to leaseholders. *See id.* If, for example, a family of two parents and two children occupied a unit in public housing that had only the father's name on the lease, eviction would result under the policy even if it were only the mother who smoked. Under those circumstances, all four family members would be evicted, even though the offending smoker was not a leaseholder.

[66] Martin & Kerr, *supra* note 59.

residents typically have nowhere else to go when evicted, so the smoke-free policy could land entire families on the street. And the public health effects of homelessness dwarf those of smoking. Lack of shelter alone predicts poorer health, less access to health care, and higher risk of mortality.[67] In particular, homelessness has proven to lead to drug addiction, mental illness, and deadly health conditions including pneumonia, hypertension, and HIV infection.[68] People who are homeless also disproportionately tend to be victims of violence, and homeless women suffer a much higher rate of sexual assault.[69] The health costs of smoking are far from trivial, but the direct and immediate mortal threats raised by homelessness eclipse the increased systemic risk of cancer and pulmonary disease due to tobacco use.[70] And especially given recent research that the health costs of secondhand smoke may be overstated,[71] this analysis suggests that the unappreciated health costs of the smoke-free policy may be greater than the much-touted health benefits.

B. Health Liberty

The next principle of the healthism framework to apply to the smoke-free policy is health liberty. HUD's policy plainly limits personal freedom by prohibiting PHA residents from smoking within their homes. This limitation represents a particularly striking impingement on personal freedom for two reasons.

First, it operates inside the home. Law traditionally regards the home as a bulwark of personal liberty that is safe from state control, and people have very strong feelings of personal freedom when it comes to their homes. Many PHA residents—smokers and non-smokers alike—expressed the concern that the smoke free policy represented an ominous instance of state

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[67] *See generally* Ann Elizabeth Montgomery et al., *Homelessness, Unsheltered Status, and Risk Factors for Mortality: Findings from the 100,000 Homes Campaign*, 131 PUB. HEALTH REP. 765 (2016) (statistical study showing causal relationship between sheltered status and significantly worse health outcomes).

[68] Lisa Rosenbaum, *Liberty Versus Need—Our Struggle to Care for People with Serious Mental Illness*, 375 NEW ENG. J. MED. 1490, 1490 (2016).

[69] Elinore Kaufman et al., *Recurrent Violent Injury: Magnitude, Risk Factors, and Opportunities for Intervention from a Statewide Analysis*, 34 AM. J. EMERGING MED. 1823, 1823 (2016); Molly Meinbresse et al., *Exploring the Experiences of Violence Among Individuals Who Are Homeless Using a Consumer-Led Approach*, 29 VIOLENCE & VICTIMS 122, 131 (2014).

[70] Even in light of these harms to members of marginalized groups, one might respond that the overall benefits of the smoke-free policy remain positive. This may be the case. But the point of distributive justice analysis question whether certain groups should bear disproportionate costs in order to generate net social welfare.

[71] *See, e.g.*, Jacob Grier, *We Used Terrible Science to Justify Smoking Bans*, SLATE (Feb. 13, 2017), http://www.slate.com/articles/health_and_science/medical_examiner/2017/02/secondhand_smoke_isn_t_as_bad_as_we_thought.html [https://perma.cc/G2FZ-GJMZ] (citing and discussing this research).

intervention in private affairs within intimate space.[72] The notion that this opposition may lead residents to refuse to comply with HUD's policy is not merely hypothetical. For example, a Cincinnati public housing resident, 89-year-old grandmother Beluah Toombs, insisted "I think you can do whatever you want to in your home."[73] Toombs continued to smoke until her PHA kicked her out, even though she had nowhere else to go.[74]

Second, the policy bans an activity in the home that is otherwise legal. It is uncontroversial that the state may reach into people's homes to prevent illegal activities like illicit drug use. By contrast, the smoke-free policy represents a uniquely paternalistic incursion on PHA residents' freedom by prohibiting licit conduct within the private sphere. Restricting residents' conduct by reference to generally applicable criminal or civil prohibitions sets some intelligible limit on how far into one's home the state may reach, and subjects them to no different standards of conduct than they must comply with outside the home. But restricting residents' legal conduct inside the home sets no such limit, and raises the possibility that PHAs may regulate even trivial or intimate areas of residents' lives.

One may respond, though, that public housing is subsidized, so by footing the bill, PHAs reserve the right to regulate how their public housing is used. But residents typically pay some amount of money to live in public housing, and regardless of receiving subsidies, residents regard their public housing apartments as homes in the same way that the owner or tenant of a private dwelling would. And while private landlords may restrict conduct—including, often, smoking—by tenants, the functional equivalent of the landlord in the public housing context is the PHA, an agent of the state. State actors have many more coercive powers at their disposal in enforcing rules, and for that reason pose a greater threat to liberty and are subject to more regulation than private actors even in similar contexts.

Smoking and non-smoking PHA residents alike shared the reaction that the smoke-free policy harms individual liberty by reaching into private homes. For example, non-smoker Devante Barrett remarked, "I think it is completely bogus . . . You might as well have us all chained up in bondage now."[75] A particular concern many residents raised is that the smoke-free policy sets a dangerous precedent for other ways that PHAs could police residents' conduct inside their homes. Luis Torres complained, "[t]hat's

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[72] *See* Martin & Kerr, *supra* note 59.

[73] *89-Year-Old Woman Chooses Eviction Over Quitting Smoking*, CBS CLEVELAND (Apr. 21, 2014, 2:01 PM), http://cleveland.cbslocal.com/2014/04/21/89-year-old-ohio-woman-chooses-eviction-over-quitting-smoking/ [https://perma.cc/ZTJ3-WWYZ].

[74] *Id.*

[75] Martin & Kerr, *supra* note 59.

private. You can do everything you want in your apartment. Not what the government say . . . If you get sex with your wife, they're going to check your sex too? No way."[76] Baltimore PHA resident Shebra Johnson expressed the same concern: "What we do in our homes is private, that's what I think . . . Nobody should tell us what to do or not to do. If they get that passed, then they'll be telling us other things we can and cannot do in our home."[77]

C. Health Equality

Just as the smoke-free policy challenges the health liberty of smokers living in PHAs, the smoke-free policy also implicates health equality. As of June 2018, smoking hit an all-time low in the United States, with only 14% of adults identifying as smokers.[78] While U.S. law does not regard smokers as a protected class for antidiscrimination purposes, the healthism framework cautions against embracing health-status distinctions that may be partially rooted in bias against the regulated group. HUD's final rule does not, of course, evince explicit bias toward smokers. But it is possible that the policy was animated by implicit bias against this group. Fully 25% of Americans report having less respect for a person upon learning that they smoke.[79] These attitudes often translate into implicit bias in harmful ways, such as in health professionals' decisions to spend more treatment resources on non-smokers because they perceive smokers to have been responsible for their own health problems.[80] This evidence suggests a very real possibility that the smoke-free policy was animated, or at least facilitated, by anti-smoking implicit bias, which would render it suspect as a matter of health equality. And independently, HUD's policy stigmatizes smokers by forcing them outside their living spaces, and even their residential buildings, in order to engage in an activity that is increasingly socially marginalized. This policy renders their conduct both isolated and visible, and explicitly expresses that it is so undesirable that it cannot occur even near their homes.

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[76] *Id.*

[77] Colin Campbell, *Feds Propose Public Housing Smoking Ban*, BALTIMORE SUN (Nov. 13, 2015), http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-public-housing-smoking-20151112-story.html [https://perma.cc/7CZH-EV2Q].

[78] Mike Stobbe, *Smoking Reaching All-Time Low with U.S. Adults, Government Report Shows*, U.S.A. TODAY (June 19, 2018), https://www.usatoday.com/story/news/nation/2018/06/18/smoking-united-states-cigarette-sales/713002002/ [https://perma.cc/5LHQ-6LN2].

[79] Lydia Saad, *One in Four Americans Have Less Respect for Smokers*, GALLUP (Aug. 5, 2011), http://news.gallup.com/poll/148850/one-four-americans-less-respect-smokers.aspx [https://perma.cc/X2VU-CLBW].

[80] *See, e.g.*, Joar Björk et al., *Are Smokers Less Deserving of Expensive Treatment? A Randomized Controlled Trial that Goes Beyond Official Values*, 16 BMC MEDICAL ETHICS 28 (2015) (finding that medical professionals appear less likely to give smokers expensive treatment).

D. Health Justice

Viewing the smoke-free policy through the lens of the healthism framework reveals that it poses unappreciated problems in terms of heath welfare, health liberty, and health equality. The final perspective—health justice—draws on each of these notions to ask whether a health status distinction creates distributional problems as well. In particular, when a policy burdens historically disadvantaged or otherwise vulnerable groups, the policy raises distinct ethical concerns with respect to distributive justice.

First, certain historically disadvantaged groups are overrepresented among smokers.[81] Not all racial and ethnic groups smoke at the same rate. Two racial groups in particular smoke at a significantly higher rate than the general U.S. population: Native Americans and self-identified biracial people.[82] Of particular concern from an equality perspective, these groups are both less numerous and less visible, and therefore particularly disadvantaged at making their voices heard in the democratic process.[83] Other vulnerable groups also smoke at higher rates and are therefore disproportionately burdened by the smoking ban. Over 25% percent of Americans with disabilities smoke, and 21.6% of veterans of the U.S. Armed Forces smoke.[84] People with mental health issues smoke at the highest rate of all, 33%.[85]

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[81] As a background fact, as of 2016, about 15% of all U.S. adults (eighteen years or older) smoked regularly. CTRS. FOR DISEASE CONTROL & PREVENTION, CURRENT CIGARETTE SMOKING AMONG ADULTS IN THE UNITED STATES (2016), [hereinafter *CDC Report*] https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm [https://perma.cc/Z3PG-PWKB].

[82] These are the only two racial or ethnic groups that smoke at a greater than 20% rate. *See id.* (reporting that 32% of Native Americans and 25% of biracial people smoke).

[83] Native Americans in particular are vulnerable to discrimination because they comprise such a small percentage of the population and tend to live in concentrated, isolated places away from major population centers. *See* Matt Saccaro, *This Is What Modern Day Discrimination Against Native Americans Looks Like*, MIC (Oct. 20, 2014), https://mic.com/articles/101804/this-is-what-modern-day-discrimination-against-native-americans-looks-like#.1yJ2wk1HT [https://perma.cc/45L6-ZRT9] (discussing unique discriminatory burdens faced by Native American populations).

[84] *Cigarette Smoking Among Adults with Disabilities*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/smoking-in-adults.html [https://perma.cc/WUB7-7T9M]; *About Three in Ten U.S. Veterans Use Tobacco Products*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/media/releases/2018/p0111-tobacco-use-veterans.html [https://perma.cc/J8N7-ZXPX]. Thirty-six percent of public housing households include a person with a disability. *See Demographic Facts: Residents Living in Public Housing*, NAT'L CTR. FOR HEALTH IN PUB. HOUSING (May 31, 2016), https://nchph.org/wp-content/uploads/2016/07/Demographics-Fact-Sheet-2016-1.pdf [https://perma.cc/8NG6-9FWC]. For information on veterans and housing instability, see *Housing Instability Among Our Nation's Veterans*, NAT'L LOW INCOME HOUSING COALITION (Nov. 2013), http://nlihc.org/sites/default/files/NLIHC-Veteran-Report-2013.pdf [https://perma.cc/T7YT-EJCZ].

[85] William Wan, *New Ads Accuse Big Tobacco of Targeting Soldiers and People with Mental Illness*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/national/health-science/new-ads-

Second, this policy does not affect all smokers, but only those who live in public housing. It exclusively affects smokers at or around the poverty level, another group that smokes at a disproportionately high rate. Those living below the poverty level smoke at the rate of 25%.[86] And while those affected by the HUD regulations could theoretically avoid this problem by quitting smoking, this solution is hardly as simple as one may assume. As noted, physiological, psychological, and socioeconomic barriers may stand in the way of smoking cessation, especially for those affected by the HUD smoke-free policy who lack the necessary economic resources to successfully quit.[87]

The poor and near-poor smokers who reside in PHAs are at a unique disadvantage in relation to their wealthier counterparts. A wealthy smoker can simply buy a house and smoke there as much as they want, even as that activity becomes increasingly socially marginal and even illegal in many public places. But poorer smokers who reside in PHAs have no such recourse, and must run the gauntlet of compliance, quitting, or eviction for engaging in an entirely legal activity. And while smokers themselves may not amount to a historically disadvantaged group, we have also seen that other traditionally disadvantaged groups are overrepresented among the smoking population. This means that the burden of HUD's policy falls on the shoulders of Native American and biracial people as well as veterans, the elderly, and people with disabilities. And particularly because the result of the smoke-free policy is often eviction, the net effect of the HUD policy may be to inflict homelessness disproportionately on some of society's most traditionally disadvantaged and vulnerable groups. This outcome frustrates, rather than advances, the cause of health justice.

To sum up, HUD's smoke-free housing policy as written violates all four tenets of healthism. We therefore conclude that it unfairly discriminates on the basis of health status.

III. SALVAGING THE SMOKE-FREE POLICY

In concluding that HUD's smoke-free policy is healthist, the question remains as to what the best response to these objections would be. One option

accuse-big-tobacco-of-targeting-soldiers-and-people-with-mental-illness/2017/08/23/02bff930-8843-11e7-a50f-e0d4e6ec070a_story.html?utm_term=.abf8cf7e0627 [https://perma.cc/Q8SV-T7WA].

[86] CTRS. FOR DISEASE CONTROL & PREVENTION, CURRENT CIGARETTE SMOKING AMONG ADULTS IN THE UNITED STATES (2018), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm [https://perma.cc/Q5QQ-Q9D7]. People with mental health issues are also more likely to live in public housing. *See generally Recovery and Support: Housing*, MENTAL HEALTH AM., http://www.mentalhealthamerica.net/housing [https://perma.cc/6U6Q-Z62H].

[87] *See supra* Section II.A.

would be to rescind the regulations completely.[88] However, simply eliminating the policy would forfeit the significant upsides of improved health and reduced costs.

Some have suggested that the best way forward would be to enforce the policy but to remove eviction as an enforcement mechanism in favor of fines.[89] This option would ameliorate the worst impacts of the rule by reducing the risk that violations will lead to homelessness for smokers and their families. But even then, the policy may not have much impact. Fines for smoking could be unenforceable, since many PHA residents live paycheck-to-paycheck and simply cannot pay any meaningful amount. And even for those PHA residents who can afford them, fines may backfire because residents may regard them not as a deterrent, but merely as a price on smoking that they can factor into their rent payments.[90]

A less invasive option is to post signs around buildings to remind residents of the policy and of the serious health risks of smoking to themselves and others. But there is little evidence that these kinds of low-level interventions work, especially for a persistent addictive activity like smoking.[91] Other LEAs like written warnings and in-person admonitions from PHA officials are similarly unlikely to have much effect other than increasing resentment and generating stigma.

Smoking is a deeply engrained habit whose reduction calls for more sophisticated strategies than eviction, fines, or finger-wagging signage. In this Part, we offer ways that HUD could enforce the smoke-free policy without engaging in healthism. The first seeks to facilitate compliance by helping individuals overcome barriers, both internal and external, by

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[88] A judicial approach could arrive at roughly the same outcome. The Supreme Court's 2015 decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, upheld a violation of the Fair Housing Act (FHA) under disparate impact theory, so that even a facially neutral housing policy that disproportionately burdens FHA-protected groups could be construed as invalid. 135 S. Ct. 2507, 2525 (2015) ("The Court holds that disparate-impact claims are cognizable under the Fair Housing Act . . . ."). Several parties who objected to the smoke-free policy raised this concern. Instituting Smoke-Free Housing, 81 Fed. Reg. 87,430, 87,436 (Dec. 5, 2016) (to be codified at 24 C.F.R. pts. 965–66) ("[I]f families who are evicted as a result of this rule tend to fall into a protected class, there might be a disparate impact claim against the PHA or HUD.").

[89] Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,436.

[90] One famous study found that when parents were fined for picking up their children late from daycare, late pickups increased because parents regarded the fine as a price they were willing to pay in order to have more time to pick up their children. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 14 (2000).

[91] In fact, what evidence there is suggests that such warnings may increase smoking. One study found that dire warnings about the health effects of tobacco caused some smokers to be more likely to smoke because the practice calmed them when confronted by fear for their own mortality. Jochim Hansen et al., *When the Death Makes You Smoke: A Terror Management Perspective On the Effectiveness of Cigarette On-Pack Warnings*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 226, 228 (2010).

partnering with residents to encourage compliance. The second leverages insights from behavioral psychology that could improve compliance.

A. Partnering with Residents for Compliance

The problem with an enforcement strategy focused only on the coercive power of LEAs is that it does not fully account for the stickiness of smoking as a behavior. As noted, some 85% of Americans who still smoke have tried to quit.[92] Given the inelasticity of this behavior, effective enforcement will need to provide ways to facilitate residents' compliance, not just punishment for failure to comply.

One way to facilitate compliance is to reduce external barriers to compliance with HUD's smoke-free policy. For example, PHAs could allow those with limited mobility—the elderly or people with disabilities—to live in units on the first floor and closer to entrances to make it easier for them to comply with the mandated twenty-five-foot radius. Similarly, PHAs could provide heated, well-lit smoking shelters just outside the required twenty-five-foot radius. Smoking shelters would give smokers—especially those with physical impairments—a comfortable place to smoke. Assuring that the shelter is well-lit would also provide some degree of security from crime, as would monitoring it with conspicuous surveillance cameras and security personnel. These strategies would increase the likelihood of compliance without jeopardizing the health and safety of smokers.

Another strategy would be to reduce the internal barriers to compliance with HUD's smoke-free policy. For example, there is some evidence that quit lines, which provide smokers with a person to talk to when tempted to smoke, are effective in helping smokers resist temptation.[93] PHAs could provide a dedicated quit line for their residents who are trying to stop or reduce smoking, which could be publicized around the building to create a widespread understanding of their availability. Cessation programs that lead smokers through a curriculum designed to reduce tobacco use can also be helpful. PHAs could provide such programs to interested residents, which would have particular promise because the programs could be conveniently located in the participants' residence and could allow participants more easily to support each other's efforts to quit.[94]

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[92] *See* Newport, *supra* note 58.

[93] *See, e.g.*, Edward Lichtenstein et al., *Smoking Cessation Quitlines: An Underrecognized Intervention Success Story*, 65 AM. PSYCHOLOGIST 252, 253–55 (2010).

[94] HUD acknowledged the importance of these measures, but declined to provide any support for either in its final rule, noting merely that Medicaid provides some support for smoking cessation. Instituting Smoke-Free Housing, 81 Fed. Reg. at 87,435.

These interventions would encourage residents of public housing to quit smoking without offending healthism's four guiding principles. Removing external and internal barriers to compliance increases the likelihood the policy will have the desired welfare impacts. With respect to health liberty, although public housing residents are not able to smoke unencumbered, these suggestions give smokers more choices regarding how to react to the smoke-free policy. In terms of health equality, the policy itself still targets smokers. However, the smoking shelters and cessation programs are theoretically available to all and do not single out residents who smoke. Moreover, these strategies treat smokers with dignity, avoiding animus and stigma. Finally, by providing additional resources and support, these strategies avoid the distributional concerns associated with health justice.

B. Using Behavioral Psychology for Cessation

In addition to partnering with residents for compliance, behavioral psychology techniques could also provide effective enforcement mechanisms as alternatives to the LEAs proposed by the smoke-free policy.

Although attempts to simply pay people not to smoke have not proved effective,[95] there is evidence that framing payments as rewards which vest depending on meeting a condition can have more success in changing behavior.[96] One option in the public housing context would thus be to offer all residents in a given PHA a cash reward at the end of each lease term if they had abstained from smoking throughout the term.[97] This would have several upsides compared to traditional approaches. First, it would apply broadly to all residents, rather than singling out and stigmatizing smokers. Second, it would frame non-smoking as an achievement worthy of a prize rather than casting smoking as an undesirable behavior worthy of punishment, thereby operating as a more effective incentive.

Another option would be to require smoking PHA residents to put the amount of money they would normally spend toward tobacco products into

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[95] One study found that most smokers promised $100 not to smoke for thirty days were able to abstain for the month, but typically started smoking again soon after. *See* Kevin G. Volpp et al., *A Randomized Controlled Trial of Financial Incentives for Smoking Cessation*, 15 CANCER EPIDEMIOLOGY, BIOMARKERS, & PREVENTION 12, 15 (2006). *But see* Kevin G. Volpp et al., *A Randomized, Controlled Trial of Financial Incentives for Smoking Cessation*, 360 NEW ENG. J. MED. 699, 699 (2009) (finding an increased rate of smoking cessation when smokers were paid not to smoke for nine to twelve months).

[96] *But see* Uri Gneezy et al., *When and Why Incentives (Don't) Work to Modify Behavior*, 25 J. ECON. PERSP. 191, 204 (2011) (noting that studies that measure the long-term effects of reward programs to incentivize smoking cessation yield disappointing results).

[97] Verifying this would not, of course, be costless. A low cost but less effective approach would be to give the reward to all PHA residents who had not been cited under the policy during the lease term. A higher cost but more effective approach would be to test residents regularly to see if they had been smoking during the lease term.

a bank account earning modest interest. If after the lease term they had not been cited for violating the smoke-free policy, they would receive the money back with interest. Otherwise, they would forfeit the amount.[98] To make the incentive even greater, the program could require them to name a political or social cause they do not agree with, and then donate the money to that cause if they violated the policy during the lease term.[99] This strategy is promising for two reasons. First, it avoids the distributional concerns that have been raised about some behavioral psychology-inspired policy approaches.[100] Such a plan would cost smoking PHA residents no more than they would otherwise spend on tobacco products, and in the event they succeeded in complying, it would actually provide them with a reasonable return on that amount. Second, there is evidence that this approach is effective against the notoriously inelastic activity of smoking.[101]

These incentives are also desirable from a healthism perspective. They both increase the likelihood of compliance and remove the possibility of eviction, raising the chance that the smoke-free policy will have its desired welfare impacts. Additionally, these options are more desirable in terms of health liberty. Instead of outright punishing residents with LEAs in ways that decrease their autonomy and limit their choices, these enforcement mechanisms give residents who comply access to additional options and resources to choose from. Moreover, the cash reward is particularly appealing from a health equality perspective, as it would apply universally to all residents. That said, the savings plan targets smokers. However, healthism as a theory is value pluralist, so simply implicating one of the four guiding principles does not render a given intervention healthist. Finally,

[98] Such a program is uniquely feasible in the lease setting. Tenants often give landlords money up front to hold in escrow in the form of a security deposit. This option would require only asking for an additional amount in addition to the security deposit as a precommitment device to discourage smoking.

[99] This is the strategy encouraged by the website stickk.com, *FAQ–Commitment Contracts–Charities*, STICKK.COM, https://www.stickk.com/faq/charities/Commitment+Contracts [https://perma.cc/ZK53-BGTZ], and has much evidence to support it. *See, e.g.*, Scott D. Halpern et al., *Commitment Contracts as a Way to Health*, 344 BMJ e522 (Jan. 30, 2012) ("[T]here is great conceptual strength to the idea that commitment contracts can provide a way to health for the millions of people struggling to modify health behaviours . . . ."); Todd Rogers et al., *Commitment Devices: Using Initiatives to Change Behavior*, 311 J. AM. MED. ASS'N 2065, 2066 (2014) ("Patients are more successful at achieving their health goals when they have access to commitment devices . . . ."); *see also* Dan Ariely & Klaus Wertenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 PSYCHOL. SCI. 219, 224 (2002) (finding that procrastinators respond better to externally imposed deadlines than self-imposed ones.).

[100] Jessica L. Roberts, *Nudge-Proof: Distributive Justice and the Ethics of Nudging*, 116 MICH. L. REV. 1045, 1054–56 (2017) (raising a number of different distributive justice objectives to behavioral psychology-inspired "nudge" policies).

[101] Xavier Giné et al., *Put Your Money Where Your Butt Is: A Commitment Contract for Smoking Cessation*, 2 AM. ECON. J.: APPLIED ECON. 213, 228 (2010) (finding a significant and persistent amount of smoking cessation in participants in savings-account study along these lines).

these approaches steer clear of the distributive justice concerns associated with smoking and could actually have positive distributional effects by reallocating some resources toward smokers.

In Part II, we demonstrated that the HUD smoke-free policy is healthist on its face. Yet wholesale abandonment of the new rule would throw the baby out with the bathwater. These alternatives to the traditional LEAs in the policy's current form would allow PHAs to reap the benefits of the smoke-free policy without discriminating against their smoking residents.

CONCLUSION

Until the recent legal challenge, HUD's smoke-free policy has been almost above reproach. It received widespread support when it was developed during the Obama administration and continues to wend its way toward full implementation under President Trump. This Essay questions the widespread acceptance of the smoke-free policy by analyzing it through the lens of healthism. Applying the notion of healthism raises concerns about the policy along four different metrics: health welfare, health liberty, health equality, and health justice. The policy is problematic across all four of these metrics. These objections should give PHAs pause before enforcing the policy with penalties ranging from fines to eviction. However, we do not argue that HUD should simply abandon the smoke-free policy. On the contrary, we implore PHAs to adopt a more creative and nuanced approach to enforcement, one that takes into account residents' dignity and the uniquely persistent character of smoking. While the HUD smoke-free policy may be healthist on its face, PHAs are capable of enforcing the rule in a positive, non-discriminatory way to achieve the laudable goal of decreasing smoking in public housing.