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Indoor Smoking Regulations in Public Housing

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Although the hazards of tobacco smoke exposure are well established, and clean indoor air laws are widespread, private homes have long been considered spaces beyond the legitimate reach of regulation. Reflecting this view, the federal government has not required the residential units it subsidizes through its public housing programs to be smoke-free. The U.S. Department of Housing and Urban Development (HUD) historically has maintained a neutral stance, saying that although local Public Housing Authorities (PHAs) may opt to ban smoking, they are not required to do so.

This policy choice has significant public health implications, given the difficulty of containing smoke in multi-unit housing. Over 7 million people are served by public housing in the U.S.,[1] with 4 in 10 units occupied by families with children.[2] Thus far, residents have had little recourse when experiencing tobacco smoke exposure in their buildings. However, policy and practice in this area are changing.

Over the last few years, many private landlords have made the housing units they own smoke-free for reasons of consumer demand, health, reduced fire hazard, lower insurance costs, and decreased cleaning costs. A small number of local governments have gone further, banning smoking in multi-family residential buildings. In public housing, no-smoking policies are rare. To date, only about 140 PHAs across the country (about 4% of the total) have reported that they voluntarily banned smoking in the public housing units they manage.[3]

On July 17, 2009, a shift in federal policy occurred when a key department within HUD issued a memorandum strongly encouraging PHAs to implement no-smoking policies in some or all of their public housing units.[4] This important development makes it timely to critically examine the state of the law and policy in this area. In this article, we explore current law concerning residential smoking regulations and consider whether additional legal and policy changes are needed for public housing units. We discuss the advantages and drawbacks of the current, localized regulatory regime, whether it is likely to lead to nationwide smoking bans in public housing, and whether such an outcome would be desirable from an ethical perspective.

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Health Implications of Exposure to Tobacco Smoke in Residential Buildings

The National Toxicology Program has identified over 250 poisonous gases, chemicals and metals in tobacco smoke, 11 of which are class 1 carcinogens.[5] Numerous epidemiologic studies show that exposure to tobacco smoke causes lung cancer and cardiac disease in nonsmokers,[6] and the 2006 Surgeon General's report on involuntary smoking concluded that there is no safe level of exposure.[5] Even brief exposures to tobacco smoke can adversely affect non-smokers.[7] Elderly and disabled individuals with compromised cardiac or pulmonary function may be particularly susceptible. Children exposed to tobacco smoke suffer increased rates and severity of asthma, other respiratory illnesses, and sudden infant death syndrome.[5]

Smokers in one residential unit in multi-unit buildings put non-smoking residents in other units at risk.[8] Tobacco smoke can move along air ducts, through wall and floor cracks, through elevator shafts, and along plumbing and electrical routes to affect units on other floors far removed from the smoking area.[5,9,10] Increasingly, laws ban smoking in restaurants, bars, and workplaces, but the home remains a site of intense and consistent tobacco smoke exposure for nonsmoking children and adults.[11]

Recent research has documented the persistence of high levels of tobacco toxins in the indoor environment well beyond the period of active smoking—a phenomenon known as "third-hand smoke."[12,13,14,15] Tobacco toxins are distributed as volatile compounds and airborne particulate matter that are deposited onto indoor surfaces and continue to "off gas" into the air over a period of days to years, depending on the compound.[16,17] In households where individuals smoke, levels of the tobacco-specific carcinogen NNK are consistently higher in infants than nonsmoking adults, indicating either a differential response to the same toxin load or increased child exposure through closer contact with smoke-contaminated rugs, furniture, clothing, and floors.[18]

Tobacco smoke exposure in public housing is particularly troubling because it afflicts disadvantaged and vulnerable populations. In 2008–2009, 32% of households in public housing included elderly persons, 35% included disabled persons, and 41% included children.[19] Mean annual household income was $13,289. Adolescents in public housing are considered at high risk for early experimentation with cigarettes.[20]

No-smoking rules in homes have been associated with significantly lower levels of biochemical markers of tobacco exposure and lower health risks among non-smokers.[13,21,22,23,24] Such policies can also encourage smoking cessation among household members,[25,26,27,28,29,30] discourage initiation by youth,[31,32,33,34] and decrease the incidence of house fires.[35]

Smoke-free Housing and the "Right to Smoke"

Private owners of multi-unit residential buildings are beginning to respond to market demand and the prospect of reduced costs by voluntarily adopting no-smoking policies. A new, 440-unit high rise building in Chicago is the first in the city to prohibit smoking in all units, common areas and outside spaces.[36] In Oregon, a major property management company has adopted no-smoking policies for about 8,000 units.[37] The supply of smoke-free housing on the private market may have been spurred by findings that tenants are often bothered by tobacco smoke and that 4 out of 5 nonsmokers would prefer a smoke-free building policy.[38]

In addition to private initiatives, some local governments have begun to restrict smoking in multi-unit dwellings. Three California cities recently enacted ordinances prohibiting smoking in some or all units of multi-unit residential housing.[39] Since 2006, around a dozen diverse communities have debated smoking restrictions that would affect multi-unit dwellings.[40,41,42,43] The Utah state legislature passed a law in 1997 expressly permitting landlords to ban smoking within residential units.[44]

Despite the documented risks of tobacco smoke exposure, these initiatives are controversial.[45] Critics argue that neither governments nor landlords should interfere with residents' liberty to smoke and that such restrictions violate privacy rights.[46] However, the Due Process Clause of the Fifth and Fourteenth Amendments of the U.S. Constitution, which limits government interference in personal liberty and privacy, provides only the most minimal level of protection for smoking.[47,48,49] Courts evaluating privacy provisions in state constitutions have held similarly.[50,47] Neither the federal Americans with Disabilities Act nor other disability discrimination laws protect smokers as "disabled" persons.[51]

HUD has opined that PHAs may adopt no-smoking policies in public housing at their discretion, as long as state and local law permit, because no right to smoke is protected by federal law, including the Fair Housing Act and the Civil Rights Act of 1964.[52] These policies may be applied to both new public housing residents and existing residents, as long as the application to current residents is delayed for a reasonable period of time, such as until lease renewal.

To our knowledge, no state or local laws or judicial decisions prohibit property owners from restricting smoking in their rental properties.[53] In the absence of such laws, landlords are free to ban smoking in living units and common areas, just as they can ban pets or guests. Generally this is accomplished with new leases, lease renewals, or written notification to month-to-month tenants.

Regulation of Smoking in Public Housing

The decentralized nature of ownership and administration of public housing creates challenges for developing a cohesive smoking policy. Public housing takes a variety of forms, including publicly-owned and subsidized apartment buildings (housing approximately 2.1 million tenants) as well as voucher or "Section 8" programs for privately owned properties, through which 4.9 million tenants obtain a HUD subsidy to help cover their rent in private housing.[2] These programs are administered by separate departments within HUD, each of which sets its own policies. Additionally, states may offer supplemental public housing programs that operate without HUD funding. Thus, regulatory authority over public housing is fragmented, both at the federal level and between HUD and local PHAs.

This structure fosters inconsistency in the quality of programs and facilities provided, as well as the policy-making and enforcement practices across public housing programs and local housing authorities. Reflecting such variation, no-smoking policies are presently the rare exception rather than the rule among PHAs.

In recent years, HUD has made clear that it neither requires nor precludes PHAs from adopting smoke-free policies for their properties or programs.[52,54] HUD's July 17, 2009 notice signals an important change in the agency's historically quite neutral position. The notice stresses the health effects of environmental tobacco smoke exposure, particularly for children and the elderly, as well as the risk of fire-related deaths and injuries.[4] HUD directed PHAs implementing a smoking ban to formalize it by updating the annual PHA Plans they are required to file with HUD, which will enable HUD to track the response to its notice. It

also urged that smoking cessation counseling information, referrals, and support be provided to residents. The new policy applies only to the publicly-owned multi-unit housing administered by the department that issued it, the Office of Public and Indian Housing.

It is difficult to gauge how PHAs will respond to HUD's exhortations. Their market incentive to provide smoke-free housing is lower than private owners. Public housing tenants are often in a position where they cannot "vote with their feet" for smoke-free units as other consumers can. For the same reason, though, PHAs are well positioned to implement smoking restrictions notwithstanding community resistance.

Cost is also a consideration for PHAs, as full decontamination of a 2-bedroom unit can exceed $15,000[55] and even a simple cleaning of a smoking unit may cost 2 to 3 times as much as cleaning a non-smoking unit.[56] However, long-term cost savings may be realized through reductions in fire risk and avoidance of cleaning costs and other smoke-related facilities costs after initial policy implementation.

The greatest disincentive to smoke-free policy implementation by PHAs may be the challenge of enforcement. Effective monitoring and compliance reporting mechanisms would need to be established, along with a range of sanctions for noncompliance. The threat of eviction cannot be wielded lightly, both because the eviction process can be legally onerous and because eviction undermines the fundamental purpose of public housing programs, protecting vulnerable populations from homelessness. Although daunting, these enforcement challenges are not dissimilar to those faced in enforcing other rules of public housing, such as sanitary and clean air codes and anti-drug provisions.[57] Nevertheless, they may prove sufficient to dissuade PHAs from acting on HUD's recommendation to adopt smoke-free policies.

Is a Federal Ban Desirable?

Home exposure to tobacco smoke can only be fully avoided through implementation of a complete smoking ban.[11] Mitigation measures such as fans, air filters, and separation of smoking rooms are ineffective.[58] Ridding public housing of smoke would keep that setting in step with the trend toward no-smoking policies in workplaces, private housing, and even private vehicles.[59]

Tenants have few alternative legal remedies for exposure to tobacco smoke in multi-unit housing. They can sue their landlords, claiming that tobacco smoke constitutes a nuisance or violates the warranty of habitability and covenant of quiet enjoyment of housing, [53,60] but litigation is an unreliable and arduous approach to the problem.[61] Tenants with medical sensitivities to tobacco smoke may also be able to obtain legal relief (through litigation or HUD's complaints process[62]) under the federal Fair Housing Act, Americans with Disabilities Act, Rehabilitation Act, and state disability discrimination laws, but only if they can show that their reaction to the smoke substantially limits a major life activity and that the requested accommodation is not unduly burdensome.[63,64,61] Because other legal remedies are so limited and market remedies are unavailable to very low-income tenants, the onus arguably is on public housing regulators to ensure adequate protection from tobacco smoke.

A range of policy alternatives available to HUD are summarized in Table 1. First, HUD could take no further action other than to monitor PHAs' uptake of its recent exhortation to adopt smoke-free policies. It seems unlikely that such an approach will significantly accelerate the pace of local policy adoption, given that it is not accompanied by financial incentives or other mechanisms to influence PHAs' decision making. This approach would minimize the number of tenants potentially displaced by enforcement of smoke-free

policies, but would leave most residents at risk for injury caused by tobacco smoke exposure.

Second, HUD could take the simple step of formally interpreting its existing regulatory standard for air quality to include tobacco smoke. HUD regulations for all public housing and Section 8 programs provide that "HUD housing must be decent, safe, sanitary and in good repair" and specifically state that "All areas and components of the housing must be free of health and safety hazards. These areas include, but are not limited to, air quality…."[65] The regulations list a number of specific hazards that are prohibited, such as garbage, lead paint, mice, vermin, mold, and "odor (e.g., propane, natural gas, methane gas)." The omission of tobacco smoke from this list may have been deliberate, but the "odor" and "air quality" provisions may be broad enough as written for HUD to construe it as including tobacco smoke should it so choose. To send a clearer signal, HUD could amend the regulations to expressly list tobacco smoke as a prohibited hazard. This approach would tend to reduce exposure and empower residents of public housing to press for smoke-free policies to achieve compliance with these HUD standards. It could, however, lead to displacement of residents who refuse to comply with smoking restrictions.

Third, HUD could go further by including stipulations on future grants to PHAs that condition full funding for all programs, including Section 8, on submission of an acceptable plan to implement smoke-free policies over some defined time period. Such action could be achieved through federal legislation, an agency rulemaking process, or, perhaps, through a simple modification of grant documents. HUD utilized a variant of this approach in 2009 in connection with a funding opportunity under the federal stimulus package. PHAs applying for stimulus funds were awarded one point in the competitive application process for agreeing to make proposed projects smoke-free as part of a "Green Communities" incentive.[66] While not a federal ban on smoking in public housing per se, the conditioning of a substantial amount of grant funds on implementing smoke-free policies would likely have the same practical effect as a ban because PHAs can ill afford to lose program funds.

Such an outcome would protect the most residents from the harms caused by tobacco smoke exposure, but would constitute a significant burden on residents and prospective residents with nicotine addiction. On balance, this burden can be justified.[59] In other areas, the law allows burdens to be imposed on smokers for reasons less important than preservation of the health of others. For instance, under federal law and the law of many states, employers may fire or refuse to hire individuals because they smoke, and federal law allows health insurers to charge smokers higher premiums and levy financial penalties if smokers decline to participate in smoking cessation programs.[67] These employer and insurer actions are motivated by the desire to maximize worker productivity and contain costs. Arguably, the objective of protecting public housing residents, particularly children and the elderly, from the hazards of tobacco smoke is sufficiently weighty to justify even more burdensome policies. When the health of children is implicated, courts have permitted burdens to be imposed on people who smoke tobacco that are far weightier than loss of public housing, such as loss of child custody.[59]

One concern relates to smoke-free requirements for private landlords and the Section 8 Program. Would such a policy result in less housing available under Section 8? Would it effectively displace longtime market rate residents? One approach would be to provide a longer phase-in period for Section 8 programs during which all new leases would include no smoking provisions so that there is ample time for all parties to prepare. While landlords would be free to opt out of the program, the growing demand in the private market for smoke-free buildings suggests that this would not be a significant problem.

What is morally offensive to some about smoking restrictions in public housing is that they affect only the poorest individuals. Indeed, laws that disproportionately burden the most vulnerable segments of the population require strong justification. It should be recognized that public housing and other government benefit programs already impose many restrictions on the personal liberty of recipients (in the context of their use of the government benefits) that non-recipients do not have: for example, Women, Infants and Children (WIC) vouchers cannot be used to purchase certain unhealthful foods, and public housing tenants must abide by "house rules" that may be more restrictive than those in private leases. A smoking ban is harsher than these restrictions because the prohibited conduct cannot easily be avoided by tenants who are addicted to nicotine, but this problem is mitigated somewhat by the availability of other forms of nicotine, particularly nicotine replacement therapies, which enable smoke-free maintenance and treatment of the addiction.

The presence of denser tobacco marketing and availability in lower income communities tends to target vulnerable populations that would benefit the most from smoke-free public housing programs.[68] An astonishing 30% of Americans living below the federal poverty level are smokers.[69] A permissive smoking policy could be seen as facilitating the perpetuation of such disparities while also increasing tobacco smoke exposure of non-smokers in public housing who have few options available.

The vulnerability of children in public housing should also be considered. Arguably, no-smoking policies advance the principle of justice by addressing one aspect of their social disadvantage.[59] A counterargument is that indoor no-smoking policies may lead parents to smoke away from the immediate building premises, exposing children to risk from unsafe neighborhoods or lack of supervision in the home.

It is critical that no-smoking policies be accompanied by provision of evidence-based smoking cessation resources to public housing residents, particularly since most state Medicaid programs currently do not cover comprehensive tobacco-dependence treatments.[70] Additionally, ethical concerns can be minimized by prohibiting not the occupation of public housing units by people who smoke tobacco but the act of smoking on the premises. Such a policy would also maximize incentives for smoking cessation, since people who smoke tobacco would not be required to move out unless they continued to smoke at home.

Conclusion

Using federal regulatory or contractual mechanisms to ensure that PHAs implement no-smoking policies in public housing raises ethical concerns and practical challenges, but is justified in light of the harms of exposure to tobacco smoke, the lack of other avenues of legal redress for non-smoking public housing residents, and the languid pace with which PHAs have voluntarily implemented no-smoking policies. The same legal, practical, and health issues that have driven successful efforts to make workplaces, private vehicles, and private housing smoke-free militate in favor of extending similar protection to the vulnerable public housing population.

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Table 1

Table Assessing Costs and Benefits of Possible HUD Approaches to Smoking in Public Housing

Courses of Action	Costs	Benefits	Comment
HUD takes no regulatory action: PHAs regulate smoking policies on their own.	Long-term continued tobacco smoke exposure in most public housing settings for the foreseeable future.	Encourages more local control and fewer households with smokes would be at-risk for displacement.	The *status quo* will likely continue to result in more households below or near the poverty level suffering effects of tobacco smoke exposure than higher SES households due to lack of market forces in public housing.
HUD interprets existing air quality requirements to include tobacco smoke.	Without a clear directive to make programs non-smoking, many PHAs would likely maintain *status quo* resulting in continued exposure and resulting harm to residents. PHAs that take action may be forced to evict non-complying tenants.	Some PHAs may act on regulatory interpretation by prohibiting smoking and would be forced to respond to residents' complaints concerning air quality problems caused by tobacco smoke.	This intermediate step falls short of directing PHA policy but could lead to an increase in smoke-free public housing without the need for changes in HUD's granting requirements.
By conditioning full funding, HUD effectively requires all federally-funded public housing to phase-in 100% smoke-free policies.	HUD action would be controversial. Enforcement could require PHAs and Section 8 private landlords to evict non-complying tenants.	Would likely result in dramatic reduction of tobacco smoke exposure and resulting harm for a vulnerable population.	By conditioning full funding on policy compliance by PHAs, HUD is in a unique position to eliminate a major preventable cause of disease from the home where market forces have retarded adoption of such policies.