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AFFORDABLE HOUSING: OF INEFFICIENCY, MARKET DISTORTION, AND GOVERNMENT FAILURE

*Michael Diamond **

ABSTRACT

In this essay, I examine the types of costs that are imposed on society as a whole due to the absence of a sufficient number of decent housing units that are affordable to the low-income population. These costs present themselves in relation to health care, education, employment, productivity, homelessness, and incarceration. Some of the costs are direct expenditures while others are the result of lost opportunities.

My hypothesis is that these costs are significant and offer, at the very least, a substantial offset to the cost of creating and subsidizing the operation of the necessary number of affordable housing units that are currently missing. I suggest a series of reasons why, in the face of this potentially inefficient outcome, the market/society does not produce the required units.

The essay is conceptual in nature, not empirical. I recognize the issues associated with the quantification of often opaque costs and with their causal relationship to the lack of affordable housing. It is clear, however, that the costs are sizable and the correlations are strong and therefore, I believe, the hypothesis requires empirical study.

* Professor of Law, Georgetown University Law Center. I would like to acknowledge the generous contributions of Josh Teitelbaum, David Hyman, and Gregg Bloche who, through several discussions with each, helped me to refine ideas presented here. I would also like to acknowledge the valuable research assistance of Gabriel Angelo Quevedo and the tremendous editing support of Betsy Kuhn.

INTRODUCTION

This year 2018 marks the fiftieth anniversary of the Fair Housing Act (“FHA”).¹ While there has been some progress made in reducing discrimination in housing and even some progress in integrating residential communities, there remains a major problem in the availability of decent, affordable housing for low-income residents,² a disproportionate number of whom are people of color. The FHA does not address the shortage of housing, but that shortage has significant and negative effects on the very population that the FHA was designed to assist. In one way of thinking, albeit an unconventional one, this shortage might be interpreted as an economic anomaly, a failure of the market and the government to meet pent up demand when big picture economic indicators suggest the need should be met. The hypothesis of this essay is that the costs of constructing or renovating and subsidizing a sufficient number of affordable units will result in significant societal savings in a variety of other areas such as health care, education, employment, and productivity. To the extent these savings approximate or equal the cost of producing and maintaining the necessary units, on a purely economic basis, the units should be built.³

First, I will point out and attempt to broadly quantify the savings that might result from additional affordable housing. I also suggest some reasons why society, despite significant cost savings, fails to provide the necessary housing. These reasons include a collective action problem for developers of affordable housing and a public choice problem for policy makers. Finally, I attempt to connect these failures to problems that were thought to be addressed by the FHA.

The discussion in this essay will proceed as follows. In Part I, I discuss the nature of the affordable housing problem and the bar-

1. 42 U.S.C. §§ 3601–3631 (2012).

2. See Pamela Blumenthal et al., *The Cost of Affordable Housing: Does It Pencil Out?*, URBAN INST. & NAT’L HOUSING CONF. (July 2016), <https://apps.urban.org/features/cost-of-affordable-housing/> [<https://perma.cc/2L4P-RWC3>] (stating that for every 100 extremely low-income households, there are only twenty-nine adequate, affordable, and available rental units).

3. This hypothesis does not address what many (including myself) would call the moral obligation of the society to provide decent abodes and living conditions for its most economically vulnerable residents. I will return to this point in Part III of this essay.

riers to new affordable units entering the market. In Part II, I detail several of the costs that are borne by society due to the lack of a sufficient number of available affordable units and attempt to quantify those costs. Part III lays out and explains my theory of government and market failure in relation to the provision of a sufficient number of decent affordable units. I conclude with some final thoughts on the reasons for the long-standing and growing deficit of such units.

I. THE NATURE OF THE PROBLEM

A. *Brief Description of the Problem*

There is currently a shortage of millions of units of decent and affordable housing in the United States.⁴ The widely promulgated economic explanation for this shortage is that developers cannot recoup the costs of developing and maintaining such housing from the low-income households that would occupy it.⁵ On the surface, that explanation seems plausible. Low-income households have, by definition, a smaller amount of money to devote to housing costs and the amount is often insufficient to cover the costs of providing it. However, a more intensive and nuanced examination of the overall economics of providing a sufficient number of decent, affordable units casts doubt on the validity of this generally accepted explanation for the lack of such units.

First, it is important to note an important shift in the affordable housing crisis. It was once the case that the lack of decent, affordable units centered on the number of substandard accommodations in the market. Today, however, the problem rests more on the actual number of units available, the cost of obtaining a decent unit, and a household's ability to bear that cost. That is not to say that there is no longer a problem of deteriorated or obsolete housing units; they still exist to an unfortunate degree.⁶ However, the prob-

4. ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2* (2017), https://nlihc.org/sites/default/files/Gap-Report_2017.pdf [<https://perma.cc/4RGL-56U8>] (estimating that in 2017, there was a national shortage of 7.4 million affordable and available rental homes for extremely low-income renters alone).

5. *Id.* at 9, 13.

6. *See, e.g.*, FREDERICK J. EGGERS & FOUAD MOUMEN, *AMERICAN HOUSING SURVEY: HOUSING ADEQUACY AND QUALITY AS MEASURED BY THE AHS 2-3* (2013), <https://www.cens>

lem of households paying too much of their income for housing, regardless of quality, has become a much greater concern. Disproportionately large expenditures for housing costs leave many households with insufficient funds for other necessities, such as food, disease prevention and medical care, and educational enrichment. Of course, such households have precious little, if anything, left over for extras that much of the population takes for granted: computers and internet access, an occasional restaurant meal, a movie, or baseball game, for example.

Various studies have shown that in urban settings in the United States, a significant percentage of households with incomes below eighty percent of the area median income in their respective locations devote more than thirty percent of household income towards housing costs.⁷ Such households are called housing “cost burdened.”⁸ As one moves lower on the income distribution scale, a number of households pay more than fifty percent of their income to “housing” costs.⁹ These households are known as “severe[ly] cost-burdened.”¹⁰ In an attempt to stretch their already strained budgets, many cost-burdened households will move to substandard (albeit cheaper) accommodations or will double up, thereby putting added stress on buildings (standard or otherwise) and building systems designed for lower density occupancy.¹¹ Engaging in the latter strategy will typically speed up the deterioration of the unit,

us.gov/content/dam/Census/programs-surveys/ahs/publications/HousingAdequacy.pdf [https://perma.cc/4P9S-7FM8] (showing the decrease in the number of poor-quality housing units in the United States).

7. AURAND ET AL., *supra* note 4, at 2, 4–5 (“Seventy-one percent of extremely low income renter households are severely cost-burdened, spending more than half of their incomes on rent and utilities. They account for 72.7% of all severely cost-burdened renter households in the United States. Thirty-two percent of very low income, 8% of low income, and 2.3% of middle income renter households are severely cost-burdened.”).

8. *Id.* at 2, 5.

9. *Id.* at 2.

10. *See id.* at 5; LIZA GETSINGER ET AL., THE URBAN INST., THE HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS IN 2014, at 1 (2017), <https://www.urban.org/research/publication/housing-affordability-gap-extremely-low-income-renters-2014> [https://perma.cc/TAQ6-C4VL] (discussing the shortage of affordable housing for extremely low-income renters: “Nationwide, the market provides only 21 adequate, affordable, and available . . . units for every 100 renter households with income at or below 30 percent of the area median income”); ALLISON CHARETTE ET AL., JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., PROJECTING TRENDS IN SEVERELY COST-BURDENED RENTERS: 2015–2025, at 4 (2015), http://www.jchs.harvard.edu/sites/default/files/projecting_trends_in_severely_cost-burdened_renters_final.pdf [https://perma.cc/W4GC-FQ2N].

11. *See* Ahmad Abu-Khalaf, *State of the Nation’s Housing 2017 Report Highlights Continued Affordability Challenges, Increased Segregation by Income*, ENTERPRISE (June 16,

which often leads to a formerly standard unit becoming a distressed one. In addition to, and more importantly than, the stress placed on the buildings, the overcrowding places adds stress on the residents, which has its own implications, to be discussed below. These substandard and overcrowded units are frequently concentrated in communities with a significant percentage of low-income households, often communities of color.¹²

An additional and extreme effect of the increased cost of housing is homelessness. Homelessness today comprises a wide demographic: people with physical or emotional disabilities, people with substance abuse problems, veterans, families with children, and unaccompanied youth. While the number of people who have experienced homelessness in a year is disputed, there is little disagreement that the range begins at least in the mid-hundreds of thousands and rises to somewhat more than one million.¹³

Over the decades, particularly after the Great Depression, governments on the federal, state, and local level have attempted to provide some relief for low-income people in their search for ade-

2017), <https://www.enterprisecommunity.org/blog/2017/06/state-nations-housing-2017-report-highlights-continued-affordability-challenges> [https://perma.cc/ACG2-8ZTD]; ENTERPRISE CMTY. PARTNERS, INC., IMPACT OF AFFORDABLE HOUSING ON FAMILIES AND COMMUNITIES: A REVIEW OF THE EVIDENCE BASE 3 (2014), <https://homeforallsmc.org/wp-content/uploads/2017/05/Impact-of-Affordable-Housing-on-Families-and-Communities.pdf> [https://perma.cc/VU29-DLDH] (“Across the U.S., 10.9 million low-income renter households and 7.5 million low-income homeowner households are severely cost burdened—paying more than 50 percent of their income on housing costs. Another estimated 610,000 people (or 400,000 households) were homeless in 2013. This may underestimate the scale of the crisis because the industry lacks complete data on all forms of housing instability—households that miss rent payments, move involuntarily or double-up because they cannot afford to live on their own.”).

12. See ISAAC SHAPIRO ET AL., CTR. ON BUDGET & POLICY PRIORITIES, BASIC FACTS ON CONCENTRATED POVERTY 3 (2015), <https://www.cbpp.org/sites/default/files/atoms/files/11-3-15hou2.pdf> [https://perma.cc/6H62-6SUB]. “Concentrated poverty is overwhelmingly an urban and suburban phenomenon: 90 percent of extreme-poverty tracts are in metropolitan areas.” *Id.* at 2 (“The picture is worse for minorities than for whites: the concentrated poverty rate is 25.2 percent among African Americans and 17.4 percent among Hispanics, compared to 7.5 percent for whites Because these figures reflect the *share* of poor individuals living in areas of concentrated poverty, this disparity cannot be attributed to the fact that African American and Hispanic households are more likely to be poor. That is, minorities are more likely to be poor, *and* poor minorities are also more likely to live in extreme-poverty neighborhoods.”).

13. See E.W., *How Many Homeless People Are There in America?*, ECONOMIST (Feb. 22 2016), <https://www.economist.com/democracy-in-america/2016/02/22/how-many-homeless-people-are-there-in-america> [https://perma.cc/Z325-7GRS].

quate affordable housing. Programs such as Public Housing (originally providing government-owned, low-rent housing),¹⁴ and programs involving tax incentives,¹⁵ cash subsidies,¹⁶ mortgage interest rate subsidies,¹⁷ and zoning changes¹⁸ have been implemented to increase the number of units available to the poor and to subsidize the cost of units to low-income residents. While these programs did provide some relief, in recent decades, many of these programs have been frozen at funding levels inadequate to meet the need or have had their funding reduced or eliminated.¹⁹ At the same time, affordable units have been leaving the market at far more rapid rates than they enter the market.²⁰ These losses have resulted from many causes. In the 1950s and 1960s, for example,

14. 42 U.S.C. § 1437 (2012).

15. See I.R.C. § 42 (2012) (providing tax credits for qualified low-income housing).

16. The Housing Choice Voucher Program, originally known as the Section 8 program, provided direct cash payments to landlords to supplement the rent payments of eligible tenants. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUSING & DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/XRW6-AFSB>] (last visited Feb. 1, 2019). The tenant paid thirty percent of household income as rent and the subsidy made up the difference up to a cap of the "fair market rent." *Id.* Section 8 was originally added to the National Housing Act of 1937 in 1974. Housing Choice Voucher Program, Pub. L. No. 93-383, § 201(8), 88 Stat. 633, 662-66 (1974) (codified as amended at 42 U.S.C. § 1437f (2012 & Supp. V 2018)).

17. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 236, 82 Stat. 476, 498 (1968) (codified at 12 U.S.C. § 1715z-1 (2012 & Supp. V 2018)) (creating the Section 236 program); National Housing Act, 12 U.S.C. § 1715l (2012) (creating Below Market Interest Rate Program and providing subsidized mortgage rates to private developers constructing new or substantially renovated existing units for multifamily rental housing).

18. See, e.g., D.C. CODE §§ 6-1041.01-.09 (2018).

19. These restrictions have come as a result of budget constraints and political choices. See, e.g., JONATHAN HARRIS & STACY NAKINTU, NAT'L ASS'N CTYS., BUILDING HOMES: COUNTY FUNDING FOR AFFORDABLE HOUSING 3, 9 (2018), <https://www.naco.org/featured-resources/building-homes-county-funding-affordable-housing#after-related> [<https://perma.cc/N7LV-M5C7>] (discussing innovations counties must devise to meet reduced federal funding of affordable housing). For a chart showing the annual decline in federal funding for affordable housing between 2011 and 2016, see *Declining Federal Housing Funding*, INCLUSIONARY HOUSING (Apr. 12, 2016), <https://inclusionaryhousing.org/inclusionary-housing-explained/what-problems-does-iz-address/declining-federal-housing-funding/> [<https://perma.cc/RWH2-NG4V>].

20. *What Is Preservation?*, NAT'L HOUSING TR., <https://www.nationalhousingtrust.org/what-preservation> [<https://perma.cc/5VEA-T59Y>] (last visited Feb. 1, 2019).

many units were lost to highway construction²¹ and urban renewal.²² In the 1970s, urban unrest²³ and the beginnings of gentrification spurred additional waves of losses.²⁴ The 1980s and 1990s saw the acceleration of housing prices, rents, and gentrification.²⁵ In addition, throughout these decades, major public works were developed, often in formerly low-cost neighborhoods,²⁶ as well as the conversion of many existing housing structures to other uses. At the same time, the population, and especially the number of households, was growing, thereby exacerbating the problem.

21. Alexander von Hoffman, *Enter the Housing Industry Stage Right: A Working Paper on the History of Housing Policy* 45 (Joint Ctr. for Hous. Studies, Harvard Univ., Working Paper No. 08-1, 2008), http://www.jchs.harvard.edu/sites/default/files/w08-1_von_hoffman.pdf [https://perma.cc/F6RT-P9P2]. President Eisenhower pushed for a national highway system that was put in place through the passage of the Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (codified as amended in scattered sections of 23 and 26 U.S.C.); Press Release, President Dwight D. Eisenhower, Press Release to Congress (Feb. 22, 1955).

22. The Urban Redevelopment Program (the forerunner to Urban Renewal) was created in the Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413, 414 (amended by 42 U.S.C. § 5316 (2012)). For an interesting discussion of the Highway and Urban Renewal programs, see KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 190–218 (1985).

23. See, e.g., Marcus Casey & Bradley Hardy, *50 Years After the Kerner Commission Report, the Nation Is Still Grappling with Many of the Same Issues*, BROOKINGS INST. (Sept. 25, 2018), <https://www.brookings.edu/blog/up-front/2018/09/25/50-years-after-the-kerne-commission-report-the-nation-is-still-grappling-with-many-of-the-same-issues/> [https://perma.cc/KN8K-Z7QF].

24. See U.S. DEPT OF HOUS. & URBAN DEV., *DISPLACEMENT OF LOWER-INCOME FAMILIES IN URBAN AREAS REPORT 3* (2018), <https://www.huduser.gov/portal/sites/default/files/pdf/DisplacementReport.pdf> [https://perma.cc/72XE-XDCH] (“Federal and local spending on dog parks and bike shares, among other amenities, during the 1990s is likely to have influenced the urbanization of the young, college-educated demographic today. One particular redevelopment initiative, HUD’s Housing Opportunities for People Everywhere (HOPE VI), which began in 1992, may have influenced recent trends in changing communities. HOPE VI demolished 96,200 units of severely distressed public housing throughout the nation, with the goal of revitalizing public housing projects and deconcentrating poverty.”).

25. *Id.* (“A study on the impact of HOPE VI found that many severely distressed public housing projects were replaced with high-quality, lower-density, mixed-income housing that contributed to the revitalization of entire inner-city communities, along with improving conditions for surrounding neighborhoods. Several HOPE VI developments were successful in attracting a mix of market-rate, affordable, and low-income tenants. In all sites, most residents in new developments reported being satisfied with their units and neighborhoods. Revitalization efforts also led to new community amenities such as police substations, community centers, and job training centers.”).

26. *Id.*

B. *Barriers to Entry of New Affordable Units*

Despite the growing need for affordable units, very few new or restored units enter the market due to the many barriers to such entry. The obvious economic barrier is that there is typically insufficient return to developers to justify the investment. But there are also legal, political, and social barriers, many of which are heavily intertwined.

Jurisdictions often zone against affordable housing by requiring large lot sizes and low densities. They may have antiquated building codes, impose high property tax rates, or have other regulatory restrictions to new residential construction.²⁷ Socially, there has been significant community resistance to building affordable housing, where it otherwise might be legally permissible, from more affluent residents of those communities. Even in areas where there is neither legal impediment nor social resistance, there has been a political reluctance, or inability, to provide the funds needed for construction or renovation of units and the subsidies needed to allow low-income households to afford them. The following parts briefly explore some of these barriers.

1. Traditional Economic Barriers

The most obvious barrier to the creation of additional affordable housing is that potential developers of such housing do not see a pathway to a return that justifies their risk. The costs of developing any housing are significant. Such costs are divided into several discrete categories. There are development costs, planning costs, the cost of land, construction costs, and various fees, taxes, and miscellaneous costs. These costs are typically met by the infusion of some risk capital from the developer with the balance coming from various loans.

Once a development is complete, the project must be operated. Hence, there are operating costs, such as utilities, maintenance, salaries, taxes, and insurance. One must add to this the financing costs involved in the repayment of the development loans, funds

27. See, e.g., *NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 716–19 (N.J. 1975) (discussing a city ordinance that required large residential lot sizes and prevented lower income individuals from obtaining affordable housing in the city).

allocated to reserves, and owner profit. These costs ultimately must be met by the income of the project, which overwhelmingly come from rent. Low-income residents have, by definition, a capped ability to bear such costs. This fact severely limits the profit potential for a property owner. Moreover, if a renter devotes an excessive amount of income to housing costs, the renter has a greater risk of default in paying rent should any unanticipated expense arise. Thus, developer and property owners face significant obstacles in making a success of a low-income development. When these obstacles are juxtaposed against the opportunity costs of other potential investments by the developer, the problem comes into clear focus. In the absence of significant subsidies, developers generally lack economic incentive to construct and operate affordable housing.

Of course, there are locations in which the costs of development might be reduced by the surrounding economic conditions. In areas where there is a surplus of unused (or underused) land, the cost of acquiring property may be significantly reduced. Areas hard-hit by the mortgage foreclosure crisis come to mind as an example of this phenomenon. Similarly, subsidies provided by government in the form of the donation of public land or through various cash subsidies can reduce financing costs or bolster tenants' ability to pay a market required rent.²⁸ However, both land and subsidies are finite resources (in today's world) that limit the ability of governments to provide assistance.

Finally, there is the "trickle-down" theory (or supply side economics) popularized during the administration of President Ronald Reagan.²⁹ He used it to support his plan to lower taxes on high marginal bracket tax payers which he argued would produce economic benefits to those with lower incomes.³⁰ When applied to housing, the theory posits that construction of more high-cost housing units will ultimately benefit the low-income population.³¹ The trickle-down theory suggests that as more high-cost units are built, creating a surplus of such units, high-income residents will move

28. See *supra* notes 14–19 and accompanying text (discussing various subsidies the government provides to reduce costs to the landlord and increase the availability of affordable housing).

29. *Reaganomics*, U.S. HIST., <http://www.ushistory.org/us/59b.asp> [<https://perma.cc/L4ZA-BS6B>] (last visited Feb. 1, 2019).

30. *Id.*

31. See James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209, 239 (1982).

into these newer, more modern units causing a surplus of vacancies in the previously occupied units which will be filled by the next lower income level.³² This shift in occupancy will create a surplus of vacancies in units at this level, and so on down the scale. Theoretically, the surplus of units in any price range should depress the cost of such units thereby making better units available at lower cost to low-income households.

The trickle-down theory, used during the Reagan administration to justify tax relief for the wealthy, was heavily criticized, to the extent that then-Presidential hopeful George H.W. Bush called it “voodoo economics.”³³ In the housing context, the scholarly and popular literature has critiqued the theory.³⁴ My own concerns with the theory derive from the problem of pent-up demand in highly desirable locales. If many higher-income potential residents desire to live in a location with a constricted supply of housing, the increase in the supply will be eliminated, not necessarily by existing residents moving up to occupy the new units, but by new residents moving into the area. They thereby create additional competition for the new units which will push housing costs even higher. Some of those moves will open up vacant units in the mover’s original location, but some will not. New households created by people leaving family homes or shared households where other residents remain in place will absorb some of the surplus. Even for the units vacated by the move, the question of spatial mismatch between the units and potential residents in each subsequent lower-income strata may disrupt the movement of units to progressively lower income residents.

32. Anthony Downs, *Are Subsidies the Best Answer for Housing Low and Moderate Income Households?*, 4 URB. LAW. 405, 409–10 (1972).

33. See Paul Wiseman, *Trickle-Down Economics Gets New Life as Republicans Push Tax-Cut Plan*, USA TODAY (Nov. 19, 2017, 11:07 AM), <https://www.usatoday.com/story/money/2017/11/19/trickle-down-economics-gets-new-life-republicans-push-tax-cut-plan/878702001/> [<https://perma.cc/SG67-KCUS>] (“Voodoo economics was the derisive term George H.W. Bush applied to it in his failed 1980 bid for the Republican presidential nomination against Ronald Reagan, a supply-side enthusiast.”).

34. ERA DABLA-NORRIS, INT’L MONETARY FUND, CAUSES AND CONSEQUENCES OF INCOME INEQUALITY: A GLOBAL PERSPECTIVE 7–8, 30–32 (2015), <https://www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf> [<https://perma.cc/ZEW7-84T5>].

2. Legal Barriers

Legal barriers to the creation of additional housing take several forms, but for the most part, they can be summed up with the catchall phrase “regulatory barriers.” Many of these are familiar. For example, some jurisdictions, particularly in the suburbs, impose large minimum lot size requirements that have the effect of keeping density low and land costs high.³⁵ These are often accompanied by minimum set-back requirements that restrict the amount of land that can be used for habitation and have similar effects.³⁶ Additional restrictions include environmental regulations, impact fees, building codes, zoning, parking space requirements, labor requirements, and, in relation to many of these restrictions, bureaucratic delay. All of these, to some extent, impede development of housing by restricting land available for residential use and by adding to the cost of what is constructed.

While these regulatory barriers often raise the cost of housing, many of them also benefit society—most people would choose to impose these restrictions despite the cost. In such cases, the imposition on the cost of housing is offset by increases in other social utilities, in areas such as health, safety, or environmental benefits. For example, almost everyone would agree that requiring that builders to use fire retardant materials creates a social benefit that more than offsets the added cost of using such materials. Other barriers, such as minimum lot size, may involve little more than deadweight losses that increase housing cost without providing offsetting social benefit. The problem, of course, is that outside of the obvious examples, “[d]istinguishing between unnecessary regulatory barriers that should be removed and necessary or useful regulation that should be preserved is an extraordinarily difficult task.”³⁷

This part refers primarily to the unnecessary regulatory burdens. However, even when offsetting social benefits exist, the choice between imposing the cost to achieve the benefit and not doing so is not neutral. It is the product of a calculus that reflects

35. *See id.*

36. Michael H. Schill, *Regulations and Housing Development: What We Know*, 8 CITYSCAPE, no. 1, 2005, at 5, 7.

37. *Id.* at 6–7, 10–11.

the social, economic, and political preferences of policy setters and their constituents.³⁸

Many commentators have suggested the significant role that local regulation plays in affecting both the supply and the cost of housing. While other factors, such as topography, the degree of unionization of construction workers, and its concomitant effect on wage rates influence the supply of housing and its price, Gyourko and Molloy suggest that “regulation appears to be the single most important influence on the supply of homes.”³⁹

In a similar vein, the Spring 2018 edition of the United States Department of Housing and Urban Development (“HUD”) Evidence Matters, points out that:

Although affordability challenges in some areas of the country result primarily from low incomes and poverty, in other areas, particularly those with strong job and population growth, a constrained housing supply generates affordability challenges. In the latter locations, regulatory barriers such as density limitations, height restrictions, parking requirements, lengthy permitting and approval processes, and “not in my backyard” (NIMBY) opposition are the primary reasons for housing supply restrictions and increased housing costs.⁴⁰

Supply, of course, is a major determinant of price, which affects affordability. But the price of housing has a further, less articulated, external effect. Theory suggests that the amenities associated with housing (which include not only desirable features that have been built into the home but also external elements of open space, unobstructed and aesthetically pleasing views, and the accessibility of nearby goods, services, and cultural accoutrements) result in an economic sorting of residents which, in turn, leads to

38. See *infra* Part I.B.3.b. This discussion harkens back to the vast literature on the nature and use of power in society, a topic that I do not cover in depth in this essay but to which I have devoted attention in a series of earlier writings. For the most recent of these, see Michael Diamond, *The Transposition of Power: Law, Lawyers, and Social Movements*, 24 GEO. J. ON POVERTY L. & POL'Y 319 (2017).

39. See Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply* (Nat'l Bureau of Econ. Research, Working Paper No. 20536, 2014), <https://nber.org/papers/w20536.pdf> [<https://perma.cc/36NK-MPEC>].

40. See Regina C. Gray, *Regulatory Barriers and Affordable Housing: Problems and Solutions*, EVIDENCE MATTERS (U.S. Dep't of Housing & Urban Dev., D.C.), Spring 2018, at 2–3, <https://www.huduser.gov/portal/sites/default/files/pdf/EM-Newsletter-spring-2018.pdf> [<https://perma.cc/CPH4-ACJ5>].

economic and, often, racial segregation.⁴¹ As Michael Schill points out:

[O]ne is immediately drawn to the concept of economic efficiency. To the extent that the social costs of a regulation exceed its social benefits, it would seem . . . [to be] excessive and unnecessary. A more difficult question surrounds those regulations that are efficient but generate unsatisfactory distributional results. For example, some regulations may generate a surplus of benefits over costs, but the benefits will primarily inure to higher income families and the costs to low- and moderate-income families.⁴²

While one might quibble with the calculation of costs and benefits of any particular regulation, Schill is undoubtedly correct in pointing out distributional consequences of regulations that restrict the development of housing and, thereby, raise the price of existing units and increase the cost of producing new units.⁴³ This effect may, in fact, have been the motivating factor for the adoption of the regulation in the first place. As Schill himself points out, “[t]he question of whether a regulation constitutes a barrier that needs to be removed may sometimes depend on how much housing is valued compared to other social objectives.”⁴⁴

3. Political Barriers

This brings us to the question of political barriers. Why, one might ask, would local jurisdictions impose barriers to the creation of additional housing? To the extent that restrictive regulations do not have an offsetting social benefit, they impose deadweight loss and distort the market. That is to say that but for the restricting regulation, developers would create more housing in the jurisdiction. A number of theories have been suggested for why such regulations exist.

41. See Schill, *supra* note 36, at 7 (“Increased demand induced by the greater amenities required by the laws may generate price increases[;] . . . many of these same regulations can be used . . . to promote social or racial homogeneity.”).

42. *Id.*

43. See *id.* at 9.

44. *Id.* at 8.

a. Nimbyism

Perhaps the most accessible theory is the not in my backyard (“NIMBY”) syndrome. This phenomenon takes two distinct but related forms. The first, and more visible, form involves organized opposition to an unwanted project proposed to be placed in or adjacent to one’s neighborhood.⁴⁵ This could range from opposing a nuclear energy plant being built nearby, to opposing a homeless shelter being placed in the neighborhood, to opposing affordable housing being built nearby.

The second, and less visible, form involves local residents voting for elected officials who will impose development-restricting regulations for the area.⁴⁶ Here, the effect of the opposition is widespread. It does not pertain to a particular unwanted development but to essentially all development. What is the rationale for such a position? The most common answer is that voters, particularly local homeowners, are voting to protect the value of their investment. This is true even if a potential development is not otherwise objectionable to the homeowner.⁴⁷ Merely by increasing the supply of housing, a downward pressure would normally be imposed on the value of existing homes. “Land use rules are largely determined, directly or indirectly, by existing homeowners desiring to keep their property values high, and the potential beneficiaries of looser restrictions do not (yet) live or vote in those jurisdictions.”⁴⁸

For the individual homeowner, this opposition, which, again I am assuming creates deadweight loss for the society, may make economic sense. As a group, homeowners reap essentially all of the benefit of the restrictive policies, most directly through higher values for their homes. They bear, however, only a small percentage

45. See generally Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS’N 288, 290 (1992).

46. *Id.*; see Regina C. Gray, *Exploring the Current State of Knowledge on the Impact of Regulations on Housing Supply*, EVIDENCE MATTERS (U.S. Dep’t of Hous. & Urban Dev., D.C.), Spring 2018, at 11, 12, <https://www.huduser.gov/portal/sites/default/files/pdf/EM-Newsletter-spring-2018.pdf> [<https://perma.cc/BQT4-XJ8Z>].

47. See Roger K. Lewis, *Not in Your Back Yard? Think Twice Before You Demonize All Change*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/realestate/not-in-our-back-yard-think-twice-before-you-demonize-all-change/2016/11/17/e6e3fa0e-a5d0-11e6-8042-f4d111c862d1_story.html [<https://perma.cc/MA65-ULS6>].

48. See Gray, *supra* note 40, at 6.

of the total societal cost imposed due to the absence of such housing.⁴⁹

There is a second economic benefit that homeowners derive from development restrictions. The local costs associated with development—including congestion, pollution, providing new infrastructure—and, to the extent potential development brings in families with children or lower-income families, there are also added costs for schools and perhaps for a greater degree of social services. Yet older, wealthier homeowners have little need or desire for these effects. Thus development would impose on preexisting homeowners a share of costs for which they would receive a much smaller share of the benefit.

b. Public Choice

The NIMBY syndrome purports to explain why residents of a jurisdiction might oppose certain development projects or policies.⁵⁰ It does not explain why local legislators vote against such projects or policies. While this will be discussed in more depth in Part III, it would be useful to have a short discussion of public choice theory here. The essence of the public choice concept involves the application of economic theory to political actors.⁵¹ It assumes that such actors are rational and make decisions that enhance their own preferences.⁵² For many political actors in elected office, the primary goal is to remain in office. The decisions they make and actions they take are designed to further that goal even if the decisions or actions undermine the preferences they might

49. See, e.g., Richard Florida, *Anatomy of a NIMBY*, CITYLAB (Feb. 23, 2017), <https://www.citylab.com/equity/2017/02/california-land-use-housing-affordability/517320/> [<https://perma.cc/KE8M-ZHHN>] (“A 2015 study estimated that land use restrictions costs the United States upwards of \$1.5 trillion in lost productivity.”). In 2016, President Obama called for comprehensive reform of zoning and land use restrictions to work against high economic rents, build more affordable housing, and stimulate the economy. CHAIR OF THE COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 44, 87–89 (2016). Of course, the loss in overall productivity is merely one of the costs that society bears due to the inadequate supply of decent, affordable housing.

50. Dear, *supra* note 45, at 288.

51. James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE—II*, at 11, 13 (James M. Buchanan & Robert D. Tollison eds., The Univ. of Mich. Press 1984).

52. *Id.*

pursue in a private capacity.⁵³ James Buchanan, one of the progenitors of public choice theory, has said:

Public choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us.⁵⁴

Assume, as Buchanan does, channeling economist Duncan Black and Nobel Laureate Kenneth Arrow, that a group of electors deciding among an array of possible choices cannot create a firm majority position ordering such choices. To the extent that the decision is taken in a town hall setting, electors are likely to make compromises in line with some calculus involving their own preference orders. If, however, the choices are made by a representative assembly elected by the electors, a different calculus arises.

Even if we take only the single step from town-meeting democracy to representative democracy, we must introduce the possible divergence between the interests of the representative or agent who is elected or appointed to act for the group and the interests of the group members themselves.

It is at this point that electoral competition, as an institution, plays a role that has some similarities with that played by market competition in the economy.⁵⁵

If the political arena is merely a subset of the market, and if political actors are merely self-interested participants, the concept of the public good, as indeterminate as it generally is, becomes even more amorphous. In the next part, I discuss the costs that a society imposes on itself when it fails to provide a sufficient number of decent, affordable housing units for lower-income households.

II. SOCIETAL COSTS ATTRIBUTABLE TO THE ABSENCE OF AFFORDABLE HOUSING

The part of this story that describes the lack of decent, affordable housing units for low-income households is not new. It has been

53. *Id.*

54. *Id.* at 11.

55. *Id.* at 18.

written about by many commentators, including myself, from a variety of perspectives. There is, however, another part of the story that has not been fully examined and is not widely considered. That involves the costs imposed on society by the deficit of affordable units. It is the examination of these costs that I take up here.

The costs imposed by a shortage of affordable units fall on both the households seeking such units and on the society that fails to provide them. The costs on households has been well documented and include: excessive rent burdens on households to secure such housing; doubling up in and overcrowding such units to be able to afford them; negative health effects due to housing conditions and cost burdens; lack of funds, due in part to excessive spending on rent, for health and wellness care; educational deficiencies for children due to physical illness, overcrowding, and stress; environmental issues such as noise, lack of privacy, lead paint, and mold; and losses in job productivity.⁵⁶

What is less widely understood is the cost that the lack of units imposes on society as a whole. While the public generally recognizes some of the cost creating factors, such as those associated with homelessness or emergency room visits, many other costs are not well understood by the public or by policy makers. These include costs are associated with health care, educational achievement, employment and productivity, and opportunity losses.

Several obstacles impede the general understanding of the societal costs imposed by an inadequate supply of affordable housing. One obstacle is the fact that each area of cost has been studied largely in a silo, detached from studies of other relevant cost areas. Another confounding factor in constructing a clear picture of the societal burden is that while many researchers recognize the existence of societal costs, they have not, in many cases, been able definitively to quantify them. Moreover, while there is a clear correlation between various social costs and the absence of a sufficient number of affordable units, researchers have not been able to isolate a direct causal connection between the absence of units and many of the costs imposed on society.

56. Latisha Johnson, *Who's Hit Hardest by the Affordable Housing Shortage?*, GREATER WASH. (Jan. 10, 2019), <https://ggwash.org/view/70436/the-affordable-housing-shortage-explained> [<https://perma.cc/ZY9P-X7HK>].

For purposes of this essay, the absence of precise quantification and of a firm causal relationship between the lack of affordable housing units and many of the social costs are not disqualifying. The argument I make here is conceptual rather than quantitative. While more research is needed on both quantification and causality, it is quite clear that some significant societal cost could be alleviated with the provision of decent affordable units. My goal is to point out some of the areas of cost and to emphasize the connection between these apparently disparate areas. When these costs are aggregated, they are likely to be substantial and to serve at least as a major offset to the cost of creating and subsidizing on an ongoing basis enough units of affordable housing to close the housing gap. If this economic argument survives empirical analysis, it will only enhance what I consider to be a moral obligation of society to provide for those the market has left behind.

A. *Homelessness*

Of the various costs I will discuss, those associated with homelessness are among the most visible and, to some extent, the most easily tied to a causal situation. I say “to some extent” because many of the costs associated with homelessness are just as hidden as are some of the others I will discuss in this part. The ones that are most accessible include the cost of providing shelters, policing and incarceration, and health care, especially emergency room visits.⁵⁷ For example, Philip Mangano, the policy chief of President George W. Bush’s homelessness program, indicated that “the cost of keeping people on the street added up to between \$35,000 and \$150,000 per person per year.”⁵⁸ He went on to indicate that the cost of keeping formerly homeless people housed under the housing-first programs ranged between \$13,000 and \$25,000 per person

57. See Molly Moorhead, *HUD Secretary Says a Homeless Person Costs Taxpayers \$40,000 a Year*, POLITIFACT (Mar. 12, 2012, 3:59 PM), <https://www.politifact.com/truth-o-meter/statements/2012/mar/12/shaun-donovan/hud-secretary-says-homeless-person-costs-taxpayers/> [https://perma.cc/9JR4-ZQXB] (“The thing we finally figured out is that it’s actually, not only better for people, but cheaper to solve homelessness than it is to put a band-aid on it . . . Because, at the end of the day, it costs, between shelters and emergency rooms and jails, it costs about \$40,000 a year for a homeless person to be on the streets.”). The story was reporting on a March 5, 2012, interview with HUD Secretary Shaun Donovan on “The Daily Show.” *Id.* For a narrative presentation of a bit of one man’s life on the streets, see Malcom Gladwell, *Million Dollar Murray*, NEW YORKER, Feb. 23, 2006, at 96, 92.

58. Moorhead, *supra* note 57.

per year.⁵⁹ With an estimate of more than one-half million people being homeless as of January 2017,⁶⁰ even at the low end of the cost range proposed by Shaun Donovan or Philip Mangano, the costs of sheltering, incarcerating, and policing the homeless are in excess of \$17.5 billion per year.⁶¹ These costs are borne by society as a whole with the brunt of the costs placed on state and local governments and their respective taxpayers. While there are some disputes concerning the savings associated with the use of Housing First programs, there is widespread agreement that there are significant savings.⁶²

I stated that there were other, less accessible costs associated with homelessness. Some of these costs are connected to more or less objective, albeit hard to measure, manifestations. Consider the financial and environmental costs concerning the presence of trash and human waste in local encampments and public areas, and quality of life costs to those experiencing homelessness and to other residents of areas where homelessness is prevalent (such as, for example, reduced accessibility to public space). Consider also costs that are much harder to see, not to mention quantify. These involve human suffering, lost productivity from those who experience

59. *Id.* The Housing First program, which provides housing to homeless individuals and families without requiring that they first engage in treatment programs for substance abuse or mental health problems, began as a series of experimental programs in several states and local jurisdictions. The federal government entered the experimental arena when Congress in 2008 appropriated \$25 million for McKinney-Vento Homeless Assistance Grants to aid rapid rehousing. *Rapid Re-Housing: A History and Core Components*, NAT'L ALL. END HOMELESSNESS (Apr. 22, 2014), <https://endhomelessness.org/resource/rapid-re-housing-a-history-and-core-components/> [<https://perma.cc/BCF4-2QDC>].

60. *See State of Homelessness*, NAT'L ALL. END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/> [<https://perma.cc/VPQ6-TJUC>] (last visited Feb. 1, 2019).

61. Moorhead, *supra* note 57. The \$17.5 billion is the total cost of providing service for homeless persons \$35,000 per person per year cost estimate for “sheltering, incarcerating, and policing” homeless individuals multiplied by the approximately 500,000 homeless individuals on any given night.

62. *See, e.g.*, Angela Ly & Eric Latimer, *Housing First Impact on Costs and Associated Cost Offsets: A Review of the Literature*, 60 CAN. J. PSYCHIATRY 475, 475–76, 482, 485–86 (2015) (“While our review casts doubt on whether [Housing First] programs can be expected to pay for themselves, the certainty of significant cost offsets, combined with their benefits for participants, means that they represent a more efficient allocation of resources than traditional services.”); *see also* Mary E. Larimer et al., *Health Care and Public Service Use and Losses Before and After Provision of Housing for Chronically Homeless Persons with Severe Alcohol Problems*, 301 JAMA 1349, 1349, 1355–56 (Apr. 1, 2009) (“The provision of housing reduces hospital visits, admissions, and duration of hospital stays among homeless individuals, and overall public system spending is reduced by nearly as much as is spent on housing.”).

homelessness, and educational losses for homeless children that often translate into long-term losses to society from what the affected children might otherwise have achieved.

B. *General Health*

For many years, I have shared my fundamental belief that housing is a critical vaccine that can pave the way to long-term health and well-being.⁶³

[R]eactive medical treatments—i.e., those that treat the symptoms rather than the root causes—are both expensive and ineffective.⁶⁴

Homelessness is not the only source of increased health risks among people with low incomes. Even for those who have housing, the risks for low-income households are significantly higher than for higher income households. These increased risks come primarily from three major sources. The first of these derives from residing in substandard units with a concomitant increased susceptibility to illness and injury. The second derives from low-income households spending too high a percentage of their income on housing, thus leaving too little of their income available for health related issues such as wellness activities, treatment for illness or injury, prescription or over the counter medication, and nutrition, not to mention recreational activities. As a corollary (and theoretical antidote) to the high level of spending, many families doubleup in units in order to be able to afford them, thus creating overcrowded conditions with its own set of dangers. While remaining in a crowded unit presents risks to residents, making frequent moves into new units brings risks as well.⁶⁵ The third source of health-related effects derives from the first two: due to substandard or overly expensive units, low-income households often suffer from housing insecurity in which the household moves several times within a relatively short period. In the following parts, I will

63. Megan T. Sandel, *Housing Is a Critical Vaccine*, ENTERPRISE (Feb. 25, 2016), <https://www.enterprisecommunity.org/2016/02/housing-critical-vaccine> [<https://perma.cc/CC43-S8EW>].

64. MACARTHUR FOUND., *HOW HOUSING MATTERS 6* (2016), https://www.macfound.org/media/files/How_Housing_Matters_in_Chicago_Conference_White_Paper1.pdf [<https://perma.cc/5VHA-V4ZR>].

65. See Virginia A. Rauh et al., *Housing and Health: Intersection of Poverty and Environmental Exposures*, 1136 ANNALS N.Y. ACAD. SCI. 276, 277 (2008) (“Residential stability has been identified as one of the most important predictors of community health—even more important than standard sociological variables, such as poverty and racial composition.”).

discuss some of the health related risks associated with each of these sources and point out how much of the costs associated with these risks is externalized to the society in general.

1. Substandard Units

“A substantial body of literature demonstrates that poor housing can contribute to infectious disease transmission, injuries, asthma symptoms, lead poisoning, and mental health problems”⁶⁶ As I have mentioned, living in substandard housing increases the risk of injury and illness. Such units are likely to include several risk enhancing features and to lack several risk reducing ones⁶⁷ due to shoddy construction, seriously deferred maintenance, or obsolescence. The resulting structural defects manifest themselves in ways that impact health.

The range of potential hazards include (among others), damp, mould, excess cold or heat, danger of fire, carbon monoxide, poor lighting, danger of falls, noise overcrowding and inadequate space, and structural integrity of the building. The type of risks to health stemming from these hazards include respiratory and asthmatic conditions, infections and other chest conditions, coronary disease and strokes, as well as fractures, burns, and a range of psychological and mental health conditions that can be exacerbated by poor conditions.⁶⁸

Some of these defects, those contributing to diseases such as asthma and mold related respiratory issues, allergies, and lead

66. See Susan C. Saegert et al., *Healthy Housing: A Structural Review of Published Evaluations of US Interventions to Improve Health by Modifying Housing in the United States, 1990–2001*, 93 AM. J. PUB. HEALTH 1471, 1471 (2003).

67. For example, take the problem of a unit with inadequate heating. If a central heating system is malfunctioning, residents may attempt to heat a unit by using an oven or space heater. Both of these responses involve substantial danger. The use of ovens or space heaters create additional utility expense on an already strapped budget, further reducing funds available for other essential uses. On a more direct level, ovens used as heating devices increase the risk of burns, especially for children, and, if the oven is gas fueled, of gas related accidents. The use of electric space heaters also risks overloading the unit's electrical system causing risk of electrical fires. Similarly, such units may lack smoke detectors, have exposed wires, or have leaking roofs, all of which may contribute to disease or accidental injury.

68. See DANNY FRIEDMAN, ECOTEC, SOCIAL IMPACT OF POOR HOUSING 14 (2010), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.476.9406&rep=rep1&type=pdf> [<https://perma.cc/5N83-J75D>].

paint poisoning are rather easily corrected.⁶⁹ The illnesses and accidents add to the burdens on the health care system. Much of the costs of such illnesses and injuries falls on the public through Medicare, Medicaid, and emergency room visits. Some portion of the cost falls on the low-income victim of the injury or illness who first suffers the incident and then may not seek health care due to the expense.⁷⁰ Yet another portion of the costs falls on society when untreated ailments become more severe, leading to ultimately greater costs. In the aggregate, the societal costs associated with poor housing are very high. A 2010 study in the United Kingdom estimated these costs at nearly £2.5 billion.⁷¹ There is also the more indirect cost to society due to the drop in productivity of workers who are fully or partially incapacitated by the ailment. This point will be further discussed in Part D.

2. Cost Burden

A significant percentage of low-income households devote too large a portion of their incomes to housing costs.⁷² In some of these situations, the household makes a conscious choice to pay more in order to secure a better unit, neighborhood, or school. In other circumstances, the decision is merely the reflection of the costs associated with the local housing market, regardless of quality or neighborhood. In either case, the excess amounts paid for rent deprives the household of some benefit that might otherwise have been obtained.⁷³

69. For example, one might put smoke or carbon monoxide detectors in units, repair broken windows or light fixtures, or repair or replace handrails.

70. See AURAND ET AL., *supra* note 4, at 6.

71. FRIEDMAN, *supra* note 68, at 15. The cost assessment produced by this study is only illustrative of the magnitude of the cost in the United States. See Cesar Aquino, *Brief Comparison-UK Healthcare System vs. U.S. Healthcare System*, HEALTHCAREADMINISTRATION.COM, <http://www.healthcareadministration.com/brief-comparison-uk-healthcare-system-vs-u-s-healthcare-system> [https://perma.cc/CT8X-A3NV] (last visited Feb. 1, 2019). The United Kingdom, with a much smaller population, also functions with a nationalized health care system that is much more highly regulated than the private system in the United States. See Josh Chang et al., *The UK Health Care System* (2015), <http://assets.ce.columbia.edu/pdf/actu/actu-uk.pdf> [https://perma.cc/A5GM-LMZV]; REBECCA K. TUNSTALL, BROOKINGS INST., AMERICANS AND BRITONS: KEY POPULATION DATA FROM THE LAST THREE U.S. AND U.K. CENSUSES (2005), https://www.brookings.edu/wp-content/uploads/2016/06/20050208_tunstallsurvey.pdf [https://perma.cc/Y36T-4JSN].

72. See *supra* notes 7, 9 and accompanying text.

73. See NABIHAH MAQBOOL ET AL., CTR. FOR HOUS. POLICY, *THE IMPACTS OF AFFORDABLE HOUSING ON HEALTH: A RESEARCH SUMMARY 2* (2015), <https://www.rupco>.

As an alternative to absorbing some or all of the excessive rent burden, some households may decide to double up and share housing expenses. While this tactic reduces a household's housing expenditure, it does not necessarily reduce a household's housing cost to no more than thirty percent of income.⁷⁴ At the same time, it may impose other difficulties on overcrowded residents. For example, overcrowding may lead to increased stress and feelings of helplessness for all residents, behavioral problems for children, and increased exposure to infectious diseases.⁷⁵

All of these effects impose costs on society, either directly through medical costs, often incurred by emergency room visits, or indirectly through absenteeism at the workplace or suboptimum production when present.⁷⁶ Many studies have found that the provision of affordable housing can reduce these costs.⁷⁷ Living in overcrowded conditions also creates a significant educational deficit on children. I will discuss this later issue further in Part C.

3. Housing Insecurity

The term "housing insecurity" covers a wide variety of housing problems, some of which were discussed in previous parts.⁷⁸ In this

org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf [https://perma.cc/ZC2H-R5ZH] ("Families paying excessive amounts of their income for housing often have insufficient resources remaining for other essential needs, including food, medical insurance, and health care.").

74. *Id.* at 2.

75. *Id.* at 7.

76. *Id.* at 2 ("[A]dults living in unaffordable housing are more likely to describe themselves as being in fair or poor health compared to similar individuals living in affordable housing. Cost burdened adults are also more likely to report failure to fill a prescription or adhere to health care treatments as a result of cost.").

77. *See, e.g.*, Lauren Taylor, *Housing and Health: An Overview of the Literature*, HEALTH AFFAIRS (June 7, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180313.396577/full/> [https://perma.cc/SXY2-WELY] ("[P]roviding access to stable housing can improve health and reduce health care costs. Within a population of nearly 10,000 people in Oregon with unstable housing, the provision of affordable housing decreased Medicaid expenditures by 12 percent. At the same time, use of outpatient primary care increased by 20 percent and emergency department use declined by 18 percent for this group.").

78. *See, e.g.*, Robynn Cox et al., *Measuring Population Estimates of Housing Insecurity in the United States: A Comprehensive Approach 1* (Dec. 2017) (unpublished working paper) (on file with Washington Center for Equitable Growth), <https://equitablegrowth.org/wp-content/uploads/2017/12/12192017-WP-measuring-housing-insecurity.pdf> [https://perma.cc/LM4F-AKVS].

To better describe and understand the condition of housing for U.S. households, Cox et al. (2017) propose a new definition of housing security to unify

part, I will focus primarily on the loss of, or significant threat of losing, a home. Some commentators have referred to this situation as “pre-homelessness.”⁷⁹ The result of housing insecurity is often a move, and in some cases, many moves, by a household within a short period of time. In other cases the insecurity manifests itself as psychological pressure and, occasionally, physical illness due to the constant threat of losing their home.

A study of more than 22,000 low-income families, interviewed across five urban medical centers between 2009 and 2015, found that thirty-four percent had been either homeless, behind in rent, or had made multiple moves (with eighty-six percent experiencing only one of these conditions).⁸⁰ In the families reporting at least one adverse housing condition, as compared with families with a stable housing situation, the health results showed: a significant percentage of caregivers suffered from depression; children suffered from lifetime hospitalizations and fair and/or poor child health; and households suffered from material hardships.⁸¹ One commentator points out that:

Children without stable housing were more likely to use emergency department services as a result of a lack of a regular health care provider. Children under three years who had moved two or more times in the previous year were found to have lower weight for their age . . .

past concepts and develop a comprehensive measure that captures the multiple dimensions of housing. The new definition for housing security is the ‘Availability of and access to stable, safe, adequate, and affordable housing and neighborhoods regardless of gender, race, ethnicity, or sexual orientation’ . . . For housing, the above inclusive definition improves upon prior conceptualizations by capturing multiple facets of being housed. The new definition presents housing insecurity as a continuum of housing-related issues among seven dimensions—housing stability, housing affordability, housing quality, housing safety, neighborhood safety, neighborhood quality, and homelessness—with homelessness being the most severe form of housing insecurity.

Id.

79. See BROOKE SPELLMAN ET AL., U.S. DEP’T OF HOUS. & URBAN DEV., COSTS ASSOCIATED WITH FIRST-TIME HOMELESSNESS FOR FAMILIES AND INDIVIDUALS A-14 (2010), https://www.huduser.gov/portal/publications/pdf/Costs_Homeless.pdf [<https://perma.cc/C7ZR-HXE9>] (“Mainstream service costs were analyzed for the periods before, during and after homelessness. The pre-homelessness period was defined as the 12 months prior to the first homeless program entry for an individual in the study cohort. During homelessness was defined as the period between a cohort member’s initial entry into a homeless program and his or her final exit from a homeless program. The after homelessness period was defined as the period between a person’s final program exit date and the end of the study period . . .”).

80. Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS 1, 7 (2018).

81. *Id.* at 4.

and they were at greater risk of developmental problems. Among adolescents, a significant association was found between early use of illicit drugs and moving four or more times before the age of sixteen years.⁸²

The authors go on to highlight what is an obvious but often overlooked advantage of having a stable housing situation: greater access to social services and health care.⁸³ Each of the effects of housing instability mentioned in this part result in costs, directly or indirectly to the economy through government expenditures for the cost of health care, lost productivity on the job, and lost horizons for many children saddled with the result of the insecurity.

C. *Educational Losses*

The discussion in the previous part concerning the effect of inadequate, unaffordable, and unstable housing on the health of children has an additional dimension. There is also a demonstrated effect on the educational attainment of children exposed to these housing risks.⁸⁴ Much of the effect is as a result of health related problems, both physical and emotional.⁸⁵ Some of this effect is due to absence from school due to illness or injury.⁸⁶ Much of the effect is due to other factors: stress derived from parents; stress derived from too frequent moves; and the absence, or disruption, of strong relationships and networks.⁸⁷

For children in school, moving is often detrimental. Studies suggest that children who move, particularly those who move frequently, suffer declines in educational achievement.⁸⁸ The educational consequence of these effects is not limited to the student

82. MAQBOOL ET AL., *supra* note 73, at 3.

83. *Id.* at 5.

84. MACARTHUR FOUND., *supra* note 64, at 7–8.

85. See MAYA BRENNAN ET AL., CTR. FOR HOUS. POLICY, *THE IMPACTS OF AFFORDABLE HOUSING ON EDUCATION: A RESEARCH SUMMARY 7* (2014), <https://www.nhc.org/wp-content/uploads/2017/03/The-Impacts-of-Affordable-Housing-on-Education-1.pdf> [<https://perma.cc/ZQ6H-EAPE>]; Rebekah Coley et al., *Relations Between Housing Characteristics and the Well-Being of Low-Income Children and Adolescents*, 49 DEV. PSYCHOL. 1775, 1776, 1785 (2013).

86. See BRENNAN ET AL., *supra* note 85, at 7.

87. See MACARTHUR FOUND., *supra* note 64, at 4. “Housing instability leads to truancy, and moving three or more times between third and sixth grade decreases students’ test scores by 20 points, on average. . . . [C]hronic parent stress in poor living conditions has severe negative impacts on children’s ability to adjust socially.” *Id.*

88. See BRENNAN ET AL., *supra* note 85, at 2–3. The authors point out, as I mentioned

suffering from housing instability. The “churn in the classroom has been shown to impact not only the students facing homelessness, but their peers, as well.”⁸⁹ What has society lost when a student’s opportunity to be educated is compromised? What contributions might have been made that will not be due to the insecurity, economic or qualitative, of that student’s housing situation? These costs are certainly more opaque than the direct health care costs but they are real and, one might imagine, significant.

D. *Productivity*

Once again, there is a significant overlap between losses in employment related productivity and health; and, once again, the casual observer is likely to miss much of the nuance associated with this loss. What we see is the absenteeism of workers that derives from illness, physical or psychological, or injury.⁹⁰ Much of this problem can be attributed to inadequate or unaffordable housing.⁹¹ What is less apparent is the loss that occurs when employees, while on the job, function at less than an optimal level due to illness or injury.⁹² Even less amenable to precise calculation is the loss to

in Part II.B.2, that some households move to access a better school or neighborhood even though it results in a cost burden. The effects mentioned here are often less severe or even nonexistent for those families. *Id.*

89. MACARTHUR FOUND., *supra* note 64, at 8.

90. See MAYO CLINIC HEALTH SOLS., THE TRUE COST OF POOR HEALTH 1 (2008), http://www.mywellbeingjourney.com/PDF/Marketing/Mayo-True_Cost_of_Poor_Health.pdf [<https://perma.cc/NT3Q-SS2T>].

91. See MAQBOOL ET AL., *supra* note 73, at 4–7.

92. See, e.g., MAYO CLINIC HEALTH SOLS., *supra* note 90, at 1 (discussing the business costs of poor health).

[M]any organizations currently don’t pay enough attention to the hidden costs of avoidable sick days and presenteeism—the cost of employees who are on the job but not fully functioning because of real illnesses and medical conditions, including asthma, seasonal allergies, arthritis, migraines, depression, back pain, gastrointestinal disorders and diabetes.

Depression costs U.S. employers more than \$35 billion a year in reduced performance at work. On-the-job pain (including back pain, headaches and arthritis) costs employers nearly \$47 billion a year in productivity loss. In one study, chronic conditions alone were estimated to cost The Dow Chemical Company more than \$100 million annually in lost productivity for its U.S. work force—the equivalent of 6.8 percent of total lab costs for the company in 2002. One research team calculated the total cost of presenteeism in the United States to be greater than \$150 billion per year.

Id.

Of course, not all of these costs are associated with poor or unaffordable housing (although some of them surely are), but the numbers provide an idea of the magnitude of the cost of

society and its workforce when health related issues deprive young people of an adequate education and job training.

While it is very difficult to quantify these losses, (although it is clear that they are very large) and difficult to verify a causal link to inadequate or unaffordable housing, it is more than plausible to consider a portion of the losses to be caused by the lack of such housing. It is also plausible to consider the losses due to inadequate training and poor health to be ongoing until the underlying problem is solved. Society, directly, through actual expenditures, and indirectly, through productivity and opportunity losses, bears these costs.

III. GOVERNMENT AND MARKET FAILURE

If it is the case that the lack of affordable housing imposes significant costs on society, one might ask why society has not rectified this problem. One answer could be that society is not fully aware of the magnitude of the costs. Alternatively, the costs may be recognized but are not as large as the costs of remedying the problem. Both of these answers are conceivable, but with the level of research that has been done, policy makers and professionals are presumably aware that there are hidden costs associated with the lack of a sufficient number of decent, affordable housing units. While the total of all the costs has not been calculated, the nature of the costs is surely understood, thus suggesting a response to the former rationale: society is aware of the costs.

The latter problem, the relative level of costs, is more difficult—both because the total amount of the costs imposed and their causal connection to housing is contestable. For the purpose of the remainder of this discussion, I will assume the costs imposed are large, but without attempting to quantify them, and that large

poor health in one sector of society. *See also* Bruce Japsen, *U.S. Workforce Illness Costs \$576B Annually from Sick Days to Workers Compensation*, FORBES (Sept. 12, 2012, 8:02 AM), <https://www.forbes.com/sites/brucejapsen/2012/09/12/u-s-workforce-illness-costs-576b-annually-from-sick-days-to-workers-compensation/> [<https://perma.cc/GJ47-LRU6>] (“The Integrated Benefits Institute, which represents major U.S. employers and business coalitions, says poor health costs the U.S. economy \$576 billion a year, according to new research. Of that amount, 39 percent, or \$227 billion is from ‘lost productivity’ from employee absenteeism due to illness or what researchers called ‘presenteeism,’ when employees report to work but illness keeps them from performing at their best.”).

costs are attributable, to some significant extent, to the lack of adequate, affordable housing for low-income residents. Once again, I will leave out of this discussion, although I believe it is crucial to include in any national debate, the question of society's obligation to provide for, at least, the basic needs of its members. Given these parameters, I would like to discuss two theories that might explain society's pursuing a more costly path than it needs to. The first of these theories is the collective action problem highlighted by Mancur Olson. The second involves the theory of public choice, brought to the attention of the public largely through the work of James Buchanan.

A. *Collective Action*

Mancur Olson examined the behaviors of theoretically rational members of a group seeking some common good.⁹³ His theory involves the problem of collective behavior.⁹⁴ Assume the existence of a large group, such that no single member's contribution to the group (or, for that matter, withdrawal from the group's effort) will be noticed (or missed) and assume further that the benefit, once achieved, will be available to all members, regardless of whether they contributed to obtaining the benefit.⁹⁵ Olson's view is that rational members of the group will not make the contribution necessary to achieve the benefit assuming that they will receive it for free once it is achieved.⁹⁶ Of course all members of the group will make the same calculation with the result that no one will make a contribution and the benefit will not be obtained by anyone.⁹⁷ He continues:

When there is no pre-existing organization of a group, and when the direct resource costs of a collective good it wants are more than any single individual could profitably bear, additional costs must be incurred to obtain an agreement about how the burden will be shared and to coordinate . . . the effort to obtain the collective good.⁹⁸

93. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1–2 (1971).

94. *Id.*

95. *Id.* at 15–16.

96. *Id.*

97. *Id.* at 16.

98. *Id.* at 47.

Olson's theory has some resonance concerning the problem of affordable housing. First, for the vast majority of those in our hypothetical rational society, there is relatively minor benefit from the provision of more affordable units. For them, the benefit would be some share of the societal cost savings achieved by reducing and eliminating some of the costs of the negative externalities associated with the lack of affordable units. The bulk of the benefits would, of course, go to the poor who would obtain better, more affordable units along with the positive externalities that come with them. Others, however, would bear the initial costs of providing the additional units.

But here we confront one of Olson's major concerns. There is no adequately large organization currently in place to advocate for the provision of housing and no person or organization who could affect the economic landscape by providing a sufficient number of units. Who is likely to bear the costs of organizing such a group and who is likely to contribute to it when each person's share of the resulting benefit would be infinitesimally small, if recognized at all? Certainly, the market is not an answer. The market has failed to provide the units which, in classical economic theory, makes sense. Rational developers of units do not see a return commensurate with their costs sufficient to induce them to develop units for low-income residents. The only player capable of influencing the market, by financial incentives or by compulsion, is the government. That, of course, connects collective action theory to public choice and brings us to the question of why government has not created sufficient incentive or sufficient compulsion to have such units built. It is questions such as these that the public choice theory attempts to answer.⁹⁹

99. It is important to note here that there are critics of Olson's theory. One such critic, Gunnar Trumball, has pointed out that while Olson and others have argued that concentrated and narrow interest groups dominated political action, "diffuse interests have historically nearly always found representation in public policy. Across the advanced democracies, diffuse groups like retirees, patients, and consumers enjoy strong protections—protections that were opposed by industry." GUNNAR TRUMBALL, *STRENGTH IN NUMBERS: THE POLITICAL POWER OF WEAK INTERESTS 1* (Harvard Univ. Press 2012).

B. *Public Choice*

It seems to be nothing more than simple and obvious wisdom to compare social institutions as they might be expected to actually operate, rather than to compare romantic models of how such institutions might be hoped to operate.¹⁰⁰

Basically, public choice is a theory that attempts to apply economic principles to political institutions and actors.¹⁰¹ The traditional public choice theory posited that political participants, voters, candidates, legislators, and officials, all were “rational, utility maximizers.”¹⁰² Thus, political actors would be expected to maximize their own utility when faced with decisionmaking situations and, more subtly, to manipulate agendas such that their utility is likely to be maximized.¹⁰³ For individual voters, one might expect votes in favor of their own interests.

This position is complicated by several constraints. First, each voter typically has a number of issues that might enhance his or her utility. Candidates might be split on supporting these issues such that no single candidate would support all of a voter’s preferences. Moreover, within a candidate’s constituency, blocs of voters will differ on particular issues while the blocs themselves are quite fluid such that someone who agreed with bloc A on a particular issue might disagree with bloc A on another issue.

How, then, should a candidate respond to this level of indeterminacy? Economic theory, including Buchanan’s unromantic candidate, would expect the candidate to take positions that would maximize the candidate’s own utility, that is, to get elected. Therefore the candidate will engage in a calculation as to which combination of positions will garner him or her the most votes. This is likely to be true regardless of what the candidate’s personal view is as to the issues in question. Unless the candidate feels very strongly about one or more particular issues, his or her personal feelings about an issue are likely to offer less utility than his or her desire to get elected (or, as we shall see, reelected).

100. Buchanan, *supra* note 51, at 12.

101. *See id.* at 12–13.

102. Dennis C. Mueller, *Public Choice: A Survey*, in *THE THEORY OF PUBLIC CHOICE—II*, *supra* note 51, at 23, 23.

103. *See* Buchanan, *supra* note 51, at 19.

The elected official has similar motivations to those of the candidate. If he or she wants to be re-elected and to remain in power, he or she will take actions best calculated to maximize that utility. Again, this is typically without regard to how the official feels personally about the issue in question. However, more and more we see that ideology plays some role in how candidates and officials present themselves and how they decide issues. Therefore, one might consider that ideology is a significant component in how a candidate or an official maximizes the utility of being elected or re-elected.

C. *The Political Economy of Affordable Housing*

Housing is a significant component of human existence for everyone.¹⁰⁴ It is also a political issue with particular import for low-income residents. But the political issue has, for the most part, been neglected by society. While candidates for public office and policy makers occasionally point out the nature of the affordable housing problem, they rarely follow through on a significant level. This should not be very surprising.

1. Neutral Rationality

On the surface, there is almost no economic incentive for the private market to engage in developing affordable housing. While there are several mission driven private developers, primarily non-profits,¹⁰⁵ that engage in such development, and there are a few federal programs¹⁰⁶ and programs in some state and local jurisdictions¹⁰⁷ that subsidize both non-profit and for-profit developers to

104. See, e.g., J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 527 (2007) (“Housing provides a necessary foundation for physical and social life. It provides shelter, security, recreation, and wealth. It plays a central role in the health and well-being of its occupants and also supports their employment and educational endeavors.”).

105. Two that operate in the District of Columbia are the National Housing Trust and the Community Preservation and Development Corporation. See *Impact*, NAT'L HOUSING TR., <https://www.nationalhousingtrust.org/impact> [<https://perma.cc/7GGM-DYT6>] (last visited Feb. 1, 2019); *What We Do*, COMMUNITY PRESERVATION & DEV. CORP., <https://www.cpdc.org/about-us/what-we-do/> [<https://perma.cc/2N3T-2XE8>] (last visited Feb. 1, 2019).

106. See, e.g., Low-Income Housing Credit, 26 U.S.C. § 42 (2012 & Supp. V 2018).

107. See, e.g., Housing Production Trust Fund, D.C. CODE § 42-2802 (2019).

build affordable units, the magnitude of affordable housing development is nowhere near the need and the gap of available affordable units grows by the year. Therefore, the only actor who is able to fund the development of massive amounts of units is the federal government.¹⁰⁸

But the various individuals and institutions responsible for developing policy at the federal level do not have a constituency that would motivate them to pursue an affordable housing agenda. A part of the reason for this is that low-income people, the primary beneficiaries of more affordable housing, vote less frequently than higher income individuals.¹⁰⁹ And, of course, they do not have the funds to mount a lobbying campaign likely to produce the number of affordable units that are needed. Moreover, those with the funds for lobbying do not typically have affordable housing as a high priority on their political agendas. But, perhaps they should.

If it is true that there is a cost associated with the absence of affordable units, one would expect that an economically rational society would correct for that defect. The fact that the problem has not been corrected suggest several responses. The first, of course is that the cost of correction exceeds the benefit derived from a correction; that is, that society has made the economically rational choice. The second is that benefits exceed costs and society has made an irrational decision which might be susceptible to correction. A third option is that there is another utility function in play which might be an antipathy, conscious or unconscious toward the poor or people of color. Such a hypothesis would bring us full circle to the beginning of this essay recognizing the fiftieth anniversary of the FHA.

108. State governments are much less able to make a significant impact on the problem. Each is faced with a collective action problem; that is, each will receive some benefit from the development of affordable housing but each also calculates that if they build the units, low-income residents from other jurisdictions will absorb some of the units while if they let other states build the housing, the state can free-ride on that effort and have some of its low-income residents relocate to other states.

109. See, e.g., Sam Fulwood III, *Why Young, Minority, and Low-Income Citizens Don't Vote*, CTR. AM. PROGRESS (Nov. 6, 2014, 10:37 AM), <https://www.americanprogress.org/issues/race/news/2014/11/06/100627/why-young-minority-and-low-income-citizens-dont-vote/> [<https://perma.cc/72T8-BXRG>].

2. Power, Agendas, and the Conflict of Competing Goods

I have written a good deal on questions of power and powerlessness in society and argued that power is much more subtle than the use or threatened use of force.¹¹⁰ Some commentators have argued that the ability to set an agenda and determine what is brought to the public for debate is the essence of power.¹¹¹ Others have argued that power is the ability to shape the desires and beliefs of the society.¹¹² These theories make it conceivable that the reluctance of many to invest in affordable housing, despite the possibility of personal (albeit indirect) benefit from doing so, is the result of a long-established cultural norm concerning the “undeserving” nature of the poor and people of color. There is value to some to perpetuate an underclass. Perhaps even more importantly, there may be value to some to have conflict and competition between races and among lower-income groups. Thus, the ability to inculcate a series of cultural norms and to set the agenda of public discourse enhances the benefits to be derived by those with such a set of utilities, those with power.

Even without a theory of issue suppression and agenda setting by the powerful, there is a significant obstacle to the mobilization of an affordable housing movement. While housing is a central issue for many, it is not the only central issue. Health care, education, or national defense, among other issues, may all have a high priority among well-meaning, rational utility maximizers. This problem was identified by Kenneth Arrow, who theorized that when a large group of voters must choose among more than two possible outcomes, there is no democratic voting system that can produce a reasonable prioritization of preferences.¹¹³ Voters asked to create a priority order of their choices will continually “cycle” the

110. See, e.g., Michael Diamond, *Community Economic Development: A Reflection on Community, Power and the Law*, 8 J. SMALL & EMERGING BUS. L. 151 (2004); Michael Diamond, *Community Economic Development and the Paradox of Power*, 1 IRISH REV. COMMUNITY ECON. DEV. L. & POL'Y 5 (2012); Michael Diamond, *The Transposition Of Power: Law, Lawyers, and Social Movements*, 24 GEO. J. ON POVERTY L. & POL'Y 319 (2017).

111. See Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 947–48, 952 (1962).

112. Steven Lukes, *Introduction to POWER* 1, 10 (Steven Lukes ed., 1986) (“[P]ower may operate to shape and modify desires and beliefs in a manner contrary to people’s interests.”).

113. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 1–6 (1951). Arrow’s hypothesis is often called Arrow’s theorem or the “impossibility theorem.” *Id.*

choices without coming up with an acceptable array.¹¹⁴ I have also written about the problem of multiple competing options. In doing so, I have examined the question of how a society ought to make choices when faced with competing options that most in the society would consider social goods and where there are finite resources such that all of the goods cannot be realized.¹¹⁵ The answer is far from clear. Arrow would say that in a democracy, there is no possible solution to the problem of ordering fairly the preferences of multiple parties. I am a bit more optimistic.

CONCLUSION

Housing is a fundamental building block for a well-functioning civil society. It affects all aspects of human existence and interaction. Because the market has failed to provide decent affordable housing for low-income households, the government is the only institution that can fill the void and, I believe, it has a moral obligation to do so. This essay, though, makes an additional argument. It examines the costs to society of fulfilling its moral obligation to provide affordable housing and suggests that the true cost of accomplishing this goal is considerably less than is popularly believed. Providing additional affordable units may even result in a net savings to society.

The creation and operation of housing, though, is an expensive undertaking which, without subsidy, cannot be supported by the financial contributions of low-income individuals. Society may, however, have the means of providing that subsidy through its own investment in housing and through the resulting savings from a reduction of externalized costs. More empirical research is needed to quantify the costs and savings but, once that is done, we, as a society, will have another major data point to consider in addressing the social choices we need to make. This process, however, does not address the political/economic problem of public choice, or the issue of conflicting social goods. Resolving those problems is grist for another essay.

114. See Michael Morreau, *Arrow's Theorem*, STAN. ENCYCLOPEDIA PHIL. (Oct. 13, 2014), <https://plato.stanford.edu/entries/arrows-theorem/> [<https://perma.cc/KPR8-82TQ>] (giving a brief explanation of Arrow's theory).

115. Michael Diamond, *Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma*, in AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS 12, 12 (Nestor M. Davidson & Robin Paul Malloy eds., Routledge 2016) (2009).