FOCUSING ON EQUITY AND INCLUSION
WHEN WE WORK ON PUBLIC HEALTH LAWS

Introduction

Law and policy are essentials tool for improving public health and addressing the social determinants of health. Laws, in the form of statutes or codes, ordinances, and administrative or agency rules, are a particularly potent type of policy because they have the power of government behind them. Laws are also powerful because they reflect and help to shape and reinforce social norms.

Law impacts our health and our opportunities to lead healthy lives in multi-layered ways. It regulates our access to healthcare services, which directly affects our health. Law also impacts our health in less direct but still significant ways by shaping where we live and what our physical environment is like (is there safe tap water to drink? clean air to breathe? safe places to walk outside?), and restricting or widening the choices and opportunities that are available to us (can we get appealing, nutritious food? can we get a job that pays a living wage? can we use public restrooms?). In other words, the law is a key force for *equity* and *health equity*, both for good and for ill.

There are many helpful ways to explain what equity means. PolicyLink provides this concise and inspiring definition: "This is equity: just and fair inclusion into a society in which all can participate, prosper, and reach their full potential. Unlocking the promise of the nation by unleashing the promise in us all."[1] In turn,

Law is a key force for equity and health equity, both for good and for ill.

Dr. Paula Braveman describes the pursuit of health equity as striving for the highest possible standard of health for all people and giving special attention to the needs of those at greatest risk of poor health, based on social conditions.[2] Right now, the leading causes of poor health and death in the U.S. are chronic diseases that are largely preventable—cancer, heart disease, high blood pressure, and diabetes. As Dr. Georges C. Benjamin, Executive Director of the

American Public Health Association, has noted, "The root causes of many of these health threats are inextricably linked to the social determinants of health and the conditions that shape a person's opportunity to attain good health and adopt healthy behaviors. These social determinants include access to safe housing, good jobs with living wages, quality education, affordable health care, nutritious foods, and safe places to be physically active. They also include racism, discrimination, and bias."[3]

Law and Equity

In the U.S., the law and equity have not gone hand in hand, especially when it comes to the social determinants of health. There are many reasons for the disconnect. One likely reason is that the elected officials who tend to make up U.S. policy making bodies—from city councils to state legislators to Congress—disproportionately come from groups for whom the social determinants of health are typically positive. These legislative bodies, particularly at the state and federal levels, are predominantly white, male, Christian, heterosexual, able-bodied, with higher levels of education and income compared to the general population.[4]

Add to this fact that one of the basic principles of our legislative system is that lawmakers do not have to do the "best" thing or choose the policy option that is backed by evidence. They must only be able to show that they are not acting on a whim; in legal terms, that they are not arbitrary or capricious. When a law is challenged, if legislators can point to some "rational basis" for their decisions, that is usually enough. A rational basis standard sounds good, but it is a low threshold. What passes for common sense at the time to legislators and judges often passes this test. Exceptions to this standard have evolved—for example, laws that make race, gender, or religious classifications, and laws that infringe upon rights protected by the Bill of Rights (such as the right to be free of government restrictions on speech), must pass much harder tests. But generally, much to the dismay of many public health researchers, lawmakers do not have to base their policy decisions on recommended best practices or evidence-based approaches. Of course, what is common sense to some is often neither common nor sensible to everyone. Although there are usually opportunities for community members to share alternative views of common sense, people dealing with negative impacts from social determinants of health face greater barriers to participation, including lack of access, time, money, and good health.

The public health law sector aims for something more than common sense justifications for law and policy, which is probably a good thing. Many of the individual behaviors that are linked to chronic diseases are driven by larger policy choices and system designs that have become so normal they are invisible to us—they are the common sense. When public health

proponents in turn propose policy and systems changes to create a healthier "normal," these proposals often draw charges of government overreach into individual liberties and rights. Having some kind of evidence to support the need for proposed policy changes can help to counteract these concerns. But scientific evidence is not enough—these policy proposals must also incorporate the priorities and values of, and be supported by, the community members who will be affected by them.

The Five Essential Services for Public Health Law – A Public Health Policy Development Framework

The "Five Essential Public Health Law Services Framework" is an example of how public health law academics and advocates are thinking seriously and methodically about public health law development. The Framework is a tool that defines and describes the "observable, improvable, services required for health agencies and systems to develop and enforce laws to improve public health."[5] The Framework divides these "services" into five categories: access to evidence and expertise to support legal policy development; expertise in design of legal policy solutions; collaboration in building political will and partnerships across community stakeholders; support for implementation, enforcement, and defense of legal solutions; and monitoring of policy adoption across jurisdictions and evaluation of

impacts. Although the order in which these "services" are stated is consistent with how policy development happens in theory, in practice, policy development is a dynamic process that can start at different points, stop, restart, loop back; the legislative process is referred to as sausage making for a reason. Similarly, the Framework developers acknowledge that the "services" must be viewed as iterative and as "general capacities that are needed to operate and be in readiness at all times."[6]

In recent years there has been a widespread resurgence of calls for the public health sector to do better in addressing how racism and other social determinants of health impact our work. In turn, we are paying more attention to how laws and legal systems have been (and continue to be) used to create and perpetuate systemic oppression and health inequities, and building our understanding that changing these systems requires not just repeal or amending of harmful laws, but a holistic approach that keeps the social determinants of health, and equity impacts, squarely in focus.

We must keep the social determinants of health, and equity impacts, squarely in focus.

These efforts have led to the development of several thoughtful guides and toolkits to support policymakers, advocates, and public health staff in thinking through equity considerations as part of policy development processes. This guide draws upon these resources and applies principles from them to the Framework. In particular, we drew upon RaceForward's Racial Equity Impact Assessment Guide and the Local and Regional Government Alliance on Race & Equity's Racial Equity Toolkit (see Key Sources and Additional Resources section).

Elevating Equity Considerations Across the Five Services

This resource offers guidance on how to use the Framework in a way that maintains focus on equity goals and concerns, primarily through a focus on authentic engagement and inclusion of community members throughout the policy identification, development, design, adoption, implementation, and enforcement process. For each "service" or capacity, questions are provided to help prompt readers to think about how perspectives, voices and experiences of community members—and particularly, those of priority populations—are or should be integrated into each area.

Priority populations include: racial and ethnic minority groups; American Indians and Alaska Natives; low-income groups;

women; children; older adults (age 65 and over); rural communities; individuals with special health care needs including individuals with disabilities and individuals who need chronic care or end-of-life care; LGBTQ populations, and others who are socially disadvantaged or marginalized. [7]

Several of the questions are relevant to more than one "service" but we did not repeat them. We provided objectives to help frame categories of questions within each "service" to help readers think about how they would use the answers to the questions to inform their policy development processes. We also adjusted the order in which the "services" are presented to reflect that community members must help to identify the problem and possible solutions from the outset.

These questions should be viewed as a starting point; they also are a work in progress. As noted by Dr. Shiriki Kumanyika, "The efforts to identify systemic factors that allow inequities to arise and persist are a critical first step and will prove worthwhile when they lead to actions and accountability for changing these factors." [8] We hope these questions will prove worthwhile, and we welcome your feedback and ideas about how we could add to or improve them.

KEEPING THE FOCUS ON EQUITY AND INCLUSION WITHIN THE FIVE ESSENTIAL SERVICES FOR PUBLIC HEALTH LAW

Guiding principle: "Nothing about us without us."

Service: Collaboration in Building Partnerships/Forming Political Will
For example, community organizing, education, advocacy or lobbying.

Objective: Identify priority populations to be helped by addressing the problem, the specific issues to be addressed, and ways to frame the issues to build collaborative will.

- Which groups are most burdened by the problem? How are they burdened?

- Who benefits from the current situation? How do they benefit? How are their interests served or not served by maintaining the status quo?

- How can you frame the policy idea as addressing a universal goal that also provides a targeted solution for the people or groups who are the intended beneficiaries?

- What specific, concrete actions are you taking to learn about what/who you don't know, including from potential allies as well as potential adversaries?

Objective: Assess whether and to what degree community members view the problem and potential policy solutions to be a priority, and what that means for political will to move the policy idea.

- Who identified the problem and the policy ideas to pursue? Did the policy idea or problem identification come from top down, or outside of the community, from affected community members, or some combination?

- What does the origin of the ideas mean for what you should or must do to support or promote engagement and inclusion with community members, and especially priority populations?

Service: Collaboration in Building Partnerships/Forming Political Will
For example, community organizing, education, advocacy or lobbying (continued).

Objective: Cultivate adequate and appropriate engagement with and inclusion of community members, especially intended beneficiaries of the policy solution idea, to support the development of a policy solution that will be responsive to community goals and needs.

- What can you do to support collaborations that build and strengthen interpersonal relationships, acknowledge bias, and recognize the strengths and assets that community members bring to the table for the policy design, adoption, implementation, and evaluation processes?

- What steps can you take to ensure that representatives from the groups who are the hoped-for beneficiaries of the policy solution are meaningfully involved and authentically represented in the policy development, adoption, implementation, and evaluation processes? Who can you partner with to help build relationships?

- What are you doing to meet people where they are, literally and metaphorically?

- How will you assess the level, range, and quality of community and stakeholder engagement throughout the process?[9]

- How are you identifying leaders or spokespeople from impacted communities, to include both those who have titles (such as Executive Director, or Chair) or formal educational degrees, and those who may not have titles or degrees, or who may not be part of a formal organization?

Objective: Identify and anticipate the likely opposition to policy change and take steps to neutralize or mitigate potential opponents.

- If this policy solution were to be challenged in court, who would be likely to challenge it? What groups are they likely to seek support from or to ally with?

- If you had to defend it, whom would you want as allies?

- What can you do to build buy-in so that the intended community beneficiaries will want to ally with you?

Service: Accessing Evidence and Expertise
For example, epidemiological or behavioral data, best practices, political judgments,
community knowledge, or practical experience about a problem and possible solutions.

Objective: Search out evidence and expertise from community sources and lived experiences in addition to classic sources of research and expertise.

- How are you defining "evidence" and "expertise"? Does the definition include lived experiences of community members who are impacted by/likely to be impacted by the policy area? Does it include practice-based evidence?

- What community-based organizations can you reach out to help you connect with community sources of expertise?

- There are significant research gaps with respect to many priority populations—what are the limits or shortfalls of the known evidence? How can you address or mitigate these knowledge gaps in the policy development process? For example, is there "grey literature" or other helpful sources?

Objective: Identify and navigate blind spots and potential bias in sources of evidence and expertise.

- Where did the evidence and expertise that you are relying on come from? For example, through community-based research practices? By researchers who have some connection with the community being studied? By researchers with no connection? From community leaders and spokespeople? (See question above about how leaders and spokespeople are identified.)

- How has the law, both historically and currently, affected the availability of research or expertise about the issue area or about impacts on priority populations?

- Communities and populations are not monolithic—how does the evidence or experts you are relying on reflect the diversity of experiences within specific communities/populations?

Service: Designing Legal and Policy Solutions
(including both substantive and technical aspects of policy drafting)
For example, helping people pick the best legal mechanism for a policy
(e.g., law, regulation; state law or local law) or drafting model laws.

Objective: Understand the social and legal landscape that should inform your policy solution idea(s).

- How does the policy solution incorporate and reflect the experiences, values, and goals of priority populations who are likely to be affected by the policy?

- How will the policy fit in or interact with other laws and regulations in the jurisdiction?

Objective: Assess predicted potential impacts so you can adjust your policy solution idea as needed to mitigate or avoid negative unintended impacts.

- How are different groups within a jurisdiction (or community) likely to be impacted by the policy solution, both positively and negatively?

- What positive impacts on equity and inclusion are likely to come from this proposal? How can you maximize the opportunities for positive impact?

- Are there better ways to reduce disparities and advance equity? What provisions could be changed or added to ensure or enhance positive impacts on equity and inclusion? [10]

- What other laws or policies should be changed to help your policy solution idea be more effective, or to mitigate unintended burdens that your policy solution idea would create?

Objective: Plan for implementation, enforcement, and monitoring to strengthen the likelihood that the policy will work effectively and as intended.

- Who will implement and/or enforce this policy? Will the implementers or enforcers have the capacity, tools, or resources they need to do a good job? Is funding or some other kind of support important or necessary to ensure successful implementation and enforcement, and if so, will that support be available?

- What kind of monitoring process could you build into the policy so that you can learn—without creating more burden for impacted community members—whether the policy is actually doing what you hoped it would?

- What provisions can you include to facilitate or ensure ongoing data collection about implementation and enforcement activities, public reporting about these activities, stakeholder and community participation in reviewing efforts, and other types of public accountability? [11]

Service: Implementing, Enforcing and Defending Legal Solutions
For example, devising enforcement strategies or filing an amicus brief to help defend a law that is being challenged in court.

Objective: Understand the history and current experiences that are likely to inform how community members will perceive implementation and enforcement efforts related to the policy solution idea.

- What is the experience of community members, and priority populations in particular, with the implementation and enforcement of this kind of policy, or with this policy area, historically and currently? Does the data show disparate impacts?
- How is this history or experience viewed by representatives of these groups?

Objective: Design implementation and enforcement strategies that reflect community values and will not contribute to systemic oppression or disadvantage to priority populations.

- How can you incorporate the experiences, values, and goals of priority populations who are likely to be affected by the policy solution into the implementation and enforcement plans and processes?
- How can implementation and enforcement be carried out so as to not contribute to adverse impacts or negative outcomes for priority populations within the jurisdiction?

Service: Surveying and Evaluating Policies
For example, evaluating the implementation or impact of a policy, and/or systematically
tracking the adoption or repeal of new laws by communities over time.

Objective: Design measures and evaluations that focus on how much the policy solution is likely to improve health equity and to effectively address other equity goals.

- What positive, negative or unintended impacts on equity and inclusion, if any, could result from the policy solution? How can these impacts be measured and documented? [12]
- What factors are most relevant for understanding the potential policy's impact on the causes of inequity (such as structural racism, economics and employment, social isolation and housing segregation, structural sexism, poverty, lack of educational opportunities, Adverse Childhood Experiences, [13] and other social determinants of health)?
- How do your evaluation benchmarks or other measure of progress reflect the experiences, values, and goals of priority populations who are likely to be affected by the policy solution idea?
- What can you do to make sure that the surveying or evaluation does not create unnecessary burdens for community members?

Key Sources and Additional Resources:

- The Local and Regional Government Alliance on Race & Equity has several resources[14] to help local governments create policies with an equity focus, including a Racial Equity Toolkit.[15]

- RaceForward's Racial Equity Impact Assessment Toolkit[16] can help with doing a systematic analysis of how different racial and ethnic groups will likely be affected by a proposed action or decision.

- The Centers for Disease Control and Prevention has an in-depth resource to support authentic community engagement in public health policy making and program planning processes (including case studies), called Promoting Health Equity, A Resource to Help Communities Address Social Determinants of Health (2008).[17]

- The Collaborating for Equity and Justice Toolkit includes case studies, resources and tools to support collaborations for equity that go beyond the idea of "collective impact."[18]

- The Minnesota Department of Health maintains a library of resources to support advancing health equity in public health.[19]

- The National Association of County and City Health Officials has created a Health Equity and Social Justice Toolkit to help local health departments explore and address the root causes of health inequities.[20]

- The Public Health Law Center has a resource on Drafting Effective Laws and Policies (2014).[21]

Last updated: September 2018

Endnotes

1 PolicyLink, The Equity Manifesto, http://www.policylink.org/about/equity-manifesto (accessed on Sept. 24, 2017).

2 Paula Braveman, *What are Health Disparities and Health Equity? We Need to Be Clear*, 129 Pub. Health Report 5–8 (2014).

3 Georges C. Benjamin, *Health Equity and Social Justice: A Health Improvement Tool*, Grant Makers in Health (May 19, 2015), https://www.apha.org/~/media/files/pdf/topics/equity/health_equity_social_justice_apha_may_2015.ashx.

4 For some data on local policymakers, see Nat'l League of Cities, City Councils, http://www.nlc.org/city-councils. For data about state legislatures, see Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, State Legislatures Mag. (Nat'l Conference of State Legislatures, Dec. 1, 2015), http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx; Pew Charitable Trusts, *Unrepresentative: The Demographics of State Legislatures* (Dec. 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/about/unrepresentative-the-demographics-of-state-legislatures. For demographic data about Congressional members, see Jennifer E. Manning, Membership of the 115th Congress: A Profile (Congressional Research Serv. Mar. 13, 2017), https://fas.org/sgp/crs/misc/R44762.pdf. For demographic information about LGBTQ legislators, see Andrew Reynolds and Charles W. Gossett, *The U.S. Elected Fewer Openly LGBT Legislators This Cycle Than Last. Again*, Washington Post (Nov. 11, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/11/the-u-s-elected-fewer-openly-lgbt-legislators-this-cycle-than-last-again/?utm_term=.3b958272ff20. It is difficult to find demographic data relating to disability status for policymakers, particularly at state and local government levels. Pew reports that about 19% of Americans have some kind of disability. Ruth Igielnik, A Political Profile of Disabled Americans (Pew Research Ctr, Sept. 22, 2016), http://www.pewresearch.org/fact-tank/2016/09/22/a-political-profile-of-disabled-americans/. *Compare* Lewis Kraus, 2016 Disability Statistics Annual Report (2017), https://disabilitycompendium.org/sites/default/files/user-uploads/2016_AnnualReport.pdf (reporting that about 13% of Americans have a disability).

5 Scott Burris, Marice Ashe, Doug Blanke et al., *Better Health Faster: The 5 Essential Public Health Law Services*, 131 Pub. Health Reports 747, 748 (2016).

6 Scott Burris, Marice Ashe, Doug Blanke et al., *Better Health Faster: The 5 Essential Public Health Law Services*, 131 Pub. Health Reports 747, 748 (2016).

7 This definition is based on how the federal Healthcare Research and Quality Act of 1999 (Public Law 106-129) defines "priority populations."

8 Dr. Shiriki K. Kumanyika, *Health Equity is the Issue We Have Been Waiting For*, 22 J. Pub. Health Management Practice S8, S8 (2016).

9 Adapted from Race Forward, Racial Equity Impact Assessment Guide, Section 10.

10 Adapted from Race Forward, Racial Equity Impact Assessment Guide, Section 8.

11 Race Forward, Racial Equity Impact Assessment Guide, Section 9.

12 Adapted from Race Forward, Racial Equity Impact Assessment Guide, Section 7.

13 Adverse Childhood Experiences (or ACEs) refers to a set of negative experiences in childhood that show a strong association with poorer health outcomes for adults. These experiences include: sexual abuse; physical abuse; emotional abuse; witnessing domestic violence; household substance abuse; mental illness in the household; parents were separated or divorced; and having an incarcerated household member. Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am. J. Preventative Med. 245 (1998).

14 http://www.racialequityalliance.org/tools-resources/

15 http://www.racialequityalliance.org/resources/racial-equity-toolkit-opportunity-operationalize-equity/

16 https://www.raceforward.org/practice/tools/racial-equity-impact-assessment-toolkit

17 https://www.cdc.gov/nccdphp/dch/programs/healthycommunitiesprogram/tools/pdf/sdoh-workbook.pdf

18 https://www.myctb.org/wst/CEJ/Pages/home.aspx

19 http://www.health.state.mn.us/divs/opi/healthequity/resources/index.html#work-policy

20 http://archived.naccho.org/topics/justice/hesj-tools.cfm

21 http://www.publichealthlawcenter.org/sites/default/files/resources/Drafting%20Effective%20Policies.pdf