

“Nudging” Section 8 Recipients Out of the Ghetto

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INTRODUCTION

The nation's largest housing assistance program, the Housing Choice Voucher Program (Section 8)¹ annually provides housing vouchers to over 2 million eligible households for use in the private rental market.¹ While Congress intended for the program to “aid low-income families in obtaining a decent place to live and...promote economically mixed housing,”² in its almost forty year tenure, Section 8 has largely failed to improve locational outcomes or increase integration.³ Voucher recipients remain concentrated in moderate to high poverty neighborhoods with predominantly minority populations.⁴ This geographic distribution of vouchers perpetuates segregation, exacerbates the problems of poverty (joblessness, crime, delinquency, broken families, low educational attainment, etc.), and leads to poor individual outcomes.⁵ It also contravenes the Section 8 program's stated goal of improving locational outcomes,⁶ the Fair Housing Act's mandate to affirmatively further fair housing in the administration of all federal housing programs,⁷ and finally the Fair Housing Act's prohibition on even facially neutral housing practices that perpetuate segregation.⁸

Recognizing the pernicious effects of segregation and concentrated poverty, familiar policy proposals aim to improve the locational distribution of Section 8 vouchers by increasing take-up rates in low-poverty, integrated (“opportunity”) neighborhoods. Two proposals predominate. Demand-side “exit-only” voucher reforms would give Section 8 participants

¹XAVIER DE SOUZA BRIGGS, SUSAN J. POPKIN & JOHN GOERING, *MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT GHETTO POVERTY* 42 (2010).

²United States Housing Act of 1937, 42 U.S.C. § 1437f(a) (2006).

³ALEX F. SCHWARTZ, *HOUSING POLICY IN THE UNITED STATES* 175 (2006).

⁴Judith D. Feins & Rhiannon Patterson, *Geographic Mobility in the Housing Choice Voucher Program*, 8.2 CITYSCAPE 21, 22 (2005).

⁵ See *infra* Section I.A(3).

⁶Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(c)(6), 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301(c)(6) (2006)).

⁷Fair Housing Act, 42 U.S.C. § 3608(e)(5) (2006).

⁸Fair Housing Act, 42 U.S.C. § 3604 (2006) (as interpreted at Section 8 Housing Choice Voucher Program – Demonstration Project of Small Area Fair Market Rents in Certain Metropolitan Areas, Discussion of Comments, and Request for Participants, 76 Fed. Reg. 22122, 22124 (Apr. 20, 2011)).

housing subsidies for exclusive use in racially and/or economically integrated neighborhoods. By contrast, supply-side reforms would seek to expand the supply of affordable units available for lease-up, particularly in integrated, low-poverty areas, and thereby enable voucher recipients to move to previously inaccessible neighborhoods.

Each of these proposals embodies a normative framework for Section 8 reform, as well as a demand-side or supply-side understanding of segregation's causes. Exit-only vouchers are justified by reference to an antighettoization paradigm, which holds that justice requires affirmative action to eradicate racially concentrated ghettos and thereby dismantle the existing racial caste system. By contrast, a choice-based theory of justice – ghetto residents should be able to choose their own fates and remain in their neighborhoods – underlies supply-side and status quo recommendations.

But recent research evidence, namely data showing exit-only vouchers' limited efficacy and behavioral economics findings regarding the mutability of preference, necessitates rethinking existing reform proposals and the normative frameworks behind them. This Article rejects exit-only voucher reforms and the related antighettoization paradigm, as well as the locational status quo and its myopic focus on choice. In their emphasis on improving outcomes, exit-only voucher proposals devalue minority culture and wrongly constrain recipients' choice – an infringement not justified by exit-only vouchers' limited success. Similarly, in their focus on recipient choice, supply-side and status quo proposals ignore the role of background conditions, information poverty, and cognitive biases in shaping participants' preferences and housing authorities' complicity in compounding recipients' biases toward ghetto neighborhoods through existing defaults. Both of these dominant models fall short.

This Article instead urges a “nudge” framework, which advocates the use of both conventional and behavioral economic approaches to steer Section 8 recipients to welfare-maximizing opportunity neighborhoods without constraining their freedom of choice. I argue that, in contrast to antighettoization and choice-based paradigms, the “nudge” framework is both the normatively and legally correct approach to Section 8 reform. Building on prior scholars’ suggestions that behavioral economics strategies should be applied to Section 8 policy design, the Article then recommends concrete ways to utilize the techniques of choice architecture to improve locational outcomes. This Article’s original contribution lies in its delineation and subsequent defense of a “nudge” framework for Section 8 reform and its fuller development of policy recommendations in keeping with this framework. These conclusions have considerable implications for Section 8 reform and residential integration efforts more generally.

I. “GHETTOS” AND THEIR CRITICS

This Section documents the United States’ continuing residential segregation, both among the general population and Section 8 recipients, and details ghettos’ detrimental social and economic effects. It then explores potential explanations for these locational patterns and outlines familiar proposals intended to promote deconcentration.

Throughout this Article, I use the term “ghetto” to refer to segregated neighborhoods of concentrated poverty. While cognizant of its inflammatory potential, I have chosen to use the word “ghetto” both because “segregated neighborhoods of concentrated poverty” is linguistically awkward and because “ghetto” is the accepted term among sociologists, economists, legal scholars, and other academics writing about the problems of the inner-city poor.

A. *The Perceived Problem*

1. Geographic Segregation by Race and Income

More than forty years after the Fair Housing Act's passage, residential segregation by race and income persists. While Edward Glaeser and Jacob Vigdor's analysis of 2010 census data found the nation's cities are more racially integrated than at any point in the past century,⁹ it is too soon for celebration. Blacks remain far more segregated from whites than do Hispanics or Asians.¹⁰ The average black resident still lives in a neighborhood that is 45 percent black and 35 percent white (the same percentage of whites as in 1950),¹¹ while the average white lives in a neighborhood that is 78 percent white and 7 percent black.¹² The national dissimilarity (or segregation) rate remains 55 percent for African-Americans, meaning 55 percent of blacks would have to relocate to neighborhoods with more non-blacks in order to evenly distribute African-Americans across the metropolitan area.¹³

Additionally, while racial segregation has decreased, income segregation has worsened.¹⁴ Between 1970 and 2007, the percentage of families living in poor neighborhoods, where the average income is less than 67 percent of the metropolitan median, more than doubled,

⁹EDWARD GLAESER & JACOB VIGDOR, MANHATTAN INST., *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA'S NEIGHBORHOODS, 1890-2010* 1 (2012), available at http://www.manhattan-institute.org/pdf/cr_66.pdf. Glaeser and Vigdor relied on the two most common segregation indexes, dissimilarity and isolation, to reach their conclusion that racial segregation is at its lowest level since 1910. The dissimilarity index measures the proportion of blacks and/or whites that would have to relocate in order to bring about perfect integration. The isolation index measures the tendency for members of one group to live in neighborhoods where their group is disproportionately represented. *Id.* at 2-3. Glaeser and Vigdor attribute the decline in racial segregation to changes in federal housing policy, declining racial discrimination, and the recent black migration from inner-city ghettos to the less segregated Sun Belt. *Id.* at 2.

¹⁰ Sam Roberts, *Segregation Curtailed in U.S. Cities, Study Finds*, N.Y. TIMES, Jan. 30, 2012.

¹¹JOHN. R. LOGAN & BRIAN STULTS, *THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 2-3 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

¹² Roberts, *supra* note 10.

¹³GLAESER & VIGDOR, *supra* note 9, at 4. Fifty-five percent is a substantial decrease from 80 percent in 1970. *Id.*

¹⁴ Paul Jargowsky, *Take the Money and Run: Economic Segregation in U.S. Metropolitan Areas*, 61 AM. SOC. REV. 984, 997 (1996). Increasing income inequality accounts for between 40 and 80 percent of the increase in income segregation between 1970-2000. Sean F. Reardon & Kendra Bischoff, *Income Inequality and Income Segregation* 116.4 AM. J. SOC. 1092, 1138 (2011).

increasing from 8 percent to 17 percent.¹⁵ One in eleven residents of American metropolitan areas, or 22.3 million people, now reside in high-poverty neighborhoods, where more than 30 percent of the population lives in poverty – an increase of nearly five million since 2000.¹⁶ Stanford University sociologists Sean Reardon and Kendra Bischoff also document a significant increase in the segregation of poverty, i.e. the extent to which families in the 10th percentile or below of the metropolitan income distribution are completely isolated from higher-income families.¹⁷

Growth in income segregation has been particularly pronounced among minority populations. While income segregation among blacks was less than among whites in 1970, income segregation among black families is now 60 percent greater than among white families.¹⁸ This rapid rise in African-American income segregation exacerbated poor black families' concentration in inner-city, high poverty neighborhoods.¹⁹ Between 1970 and 2000, the number of metropolitan ghetto census tracts (defined as those with poverty rates of 40 percent or more) doubled, from approximately 1,100 to 2,200, and the number of black residents in metropolitan ghettos grew from less than 2.5 million to over 2.8 million.²⁰ Indeed, one in four African-Americans resides in a high-poverty neighborhood, as compared to one in 25 non-Hispanic

¹⁵SEAN F. REARDON & KENDRA BISCHOFF, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970-2009 11 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report111111.pdf>.

¹⁶ROLF PENDALL ET AL., URBAN INST., A LOST DECADE: NEIGHBORHOOD POVERTY & THE URBAN CRISIS 2-3 (2011).

¹⁷REARDON & BISCHOFF, *supra* note 15, at 16. Between 1970 and 2007, the segregation of poverty increased from .112 to .158 percent on the rank-order information theory index, which compares the household income variation within a census tract with household income variation in the metropolitan area. *Id.* at 28.

¹⁸*Id.* at 23-24. In 1970, income segregation among blacks was lower than income segregation among whites. The growth in income inequality among black families, specifically the growth of the black middle class, and the decrease in housing discrimination likely explain the dramatic increase in income segregation among African-Americans. *Id.* at 23.

¹⁹*Id.* at 23.

²⁰Alex Polikoff, *A Vision for the Future: Bringing Gautreaux to Scale*, in *KEEPING THE PROMISE: PRESERVING AND ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM* 137, 141 (Philip Tegeler et al. eds., 2005), available at <http://www.prrac.org/pdf/KeepingPromise.pdf>.

whites.²¹ Blacks also comprise a disproportionate 40 percent of residents of extreme-poverty neighborhoods.²²

2. Clustering of Section 8 Vouchers in Poor, Minority Areas

The Housing Choice Voucher (HCV) program, more commonly known as the Section 8 program, was launched in 1974 with the lofty goal of “aiding low-income families in obtaining a decent place to live and...promoting economically mixed housing.”²³ The largest federal housing assistance program, it annually provides over 2 million families with housing assistance vouchers at a cost of about \$16 billion a year.²⁴ But in its almost forty year tenure, the Housing Choice Voucher program has largely failed to improve locational outcomes or increase integration.²⁵ The average neighborhood minority population for voucher recipients is almost identical to that of eligible non-recipient households.²⁶ Recipient households who move upon entering the Section 8 program are only slightly more likely than comparable non-recipient households to avoid moderate to high-poverty neighborhoods.²⁷ And though Section 8 somewhat

²¹PENDALL ET AL., *supra* note 16, at 2-3.

²²*Id.* at 3. Moderate poverty neighborhoods are those where over 20 percent of population lives in poverty. High poverty neighborhoods are those where over 30 percent of population lives in poverty. Extreme poverty neighborhoods are those where over 40 percent of population lives in poverty. *Id.* at 6.

²³United States Housing Act of 1937, 42 U.S.C. § 1437f(a) (2006).

²⁴BRIGGS, POPKIN & GOERING, *supra* note 1, at 42.

²⁵SCHWARTZ, *supra* note 3, at 175.

²⁶MARTHA GALVEZ, WHAT DO WE KNOW ABOUT HOUSING CHOICE VOUCHER PROGRAM LOCATIONS?6 (2010), available at <http://www.urban.org/UploadedPDF/412218-housing-choice-voucher.pdf>. Both voucher recipients and eligible non-recipients experience a 51 percent average neighborhood minority population share. *Id.*

²⁷DEBORAH J. DEVINE ET AL., U.S. DEP'T. OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER LOCATION PATTERNS: IMPLICATIONS FOR PARTICIPANT AND NEIGHBORHOOD WELFARE ix (2003), available at http://www.huduser.org/publications/pdf/Location_Paper.pdf (analyzing the Section 8 program's impact in fifty metropolitan areas). The average neighborhood poverty rate for voucher holders was 19.5 percent, as compared to 22 percent for similarly poor households not receiving assistance. *Id.* Cf. Molly Metzger, *The Reconcentration of Poverty: Patterns of Housing Voucher Use, 2000-2008* 14-15 (Northwestern Univ. Inst. for Pol'y Res., Mar. 14, 2011), available at <http://www.sesp.northwestern.edu/docs/publications/8563752464e6bb87d56cec.pdf> (finding voucher holders are more concentrated in poor and predominantly minority census tracts than are their eligible counterparts); Martha M. Galvez, *Defining “Choice” in the Housing Choice Voucher Program: The Role of Market Constraints and Household Preferences* (May 2011)(unpublished Ph.D. dissertation, New York University) (finding neighborhood quality for voucher holders is no better than that of similarly poor households or LIHTC residents). Black voucher households, however, live in lower-poverty neighborhoods than similar Black non-recipient

improves on the geographic distribution of project-based subsidies, e.g. public housing and low-income housing tax credit (LIHTC) properties,²⁸ voucher holders are still concentrated in moderate to high poverty neighborhoods with large minority populations.²⁹ The average voucher holder lives in a neighborhood with a poverty rate of approximately 20 percent and a minority rate of 51 percent.³⁰ Nearly ten percent of voucher holders reside in extreme-poverty neighborhoods with poverty rates above forty percent; approximately 22 percent of recipients live in high-poverty neighborhoods with poverty rates above 30 percent.³¹ Highly clustered tracts (where Section 8 recipients comprise more than 10 percent of residents) feature an average 27 percent poverty rate and 68 percent minority rate.³²

Racial disparities in voucher recipients' locational outcomes remain stark. As of 2004, black and white households each accounted for approximately 48 percent of voucher holders; 16 percent of recipients were Hispanic, and three percent were Asian.³³ But 25 percent of African-American and 27.9 percent of Hispanic voucher households resided in high poverty

households, while White recipients live in higher-poverty neighborhoods than their similarly poor White counterparts. GALVEZ, *supra* note 26, at 7.

²⁸ See, e.g., Lang Deng, *Comparing the Effects of Housing Vouchers and Low-Income Housing Tax Credits Neighborhood Integration and School Quality*, 27 J. PLAN. EDUC. & RES. 20, 26-27 (2007) (finding that voucher holders on average lived in more integrated neighborhoods than did LIHTC residents and were less likely than LIHTC residents to live in very low-income neighborhoods but more likely to live in low-income neighborhoods); G. Thomas Kingsley, Jennifer Johnson & Kathryn L.S. Pettit, *Patterns of Section 8 Relocation in the HOPE VI Program*, 25 J. URB. AFF. 427, 444 (2003) (finding that the majority of public housing relocatees given Section 8 vouchers moved to neighborhoods with lower poverty rates and minority concentrations than those they left behind). Cf. GALVEZ, *supra* note 26, at 8 (LIHTC unit residents and voucher recipients experience similar rates of neighborhood poverty).

²⁹ Feins & Patterson, *supra* note 4, at 22.

³⁰ GALVEZ, *supra* note 26, at 5-6.

³¹ DEVINE ET AL., *supra* note 27, at vii, 27. More than one-third of voucher recipients living in central cities, however, reside in neighborhoods with poverty rates above 30 percent; only six percent of voucher recipients living in the suburbs experience similar neighborhood poverty rates. *Id.*

³² Kingsley, Johnson & Pettit, *supra* note 28, at 444.

³³ GALVEZ, *supra* note 26, at 6.

neighborhoods, as compared to six percent of whites.³⁴ Black and Hispanic households are also less than half as likely as White households to live in low-poverty tracts.³⁵

3. The Negative Effects of Ghettos

Over the past four decades, significant research attention has been devoted to chronicling the effects of neighborhood-level factors on individual economic and social outcomes.³⁶ By some analyses, a person's neighborhood ranks behind only family and genetics as the most important determinant of life opportunities.³⁷ Such findings have made the persistence of residential segregation by race and income cause for alarm. But as Glaeser, Cutler, and Vigdor document, geographic segregation produces differential effects depending on occupants' human capital.³⁸ Residential segregation is correlated with slightly improved outcomes among whites and affluent, educated groups,³⁹ but blacks and low-income individuals are significantly worse off in racially and socioeconomically segregated communities.⁴⁰

Numerous studies indicate a relationship between residence in racially segregated neighborhoods of concentrated poverty, or "ghettos," and poor individual outcomes.⁴¹ Ghettos

³⁴DEVINE ET AL., *supra* note 27, at 28.

³⁵*Id.* (finding that 48.8 percent of non-Hispanic Whites voucher recipients live in neighborhoods where less than 10 percent of population lives below the poverty line, while only 24.3 of Black households and 21.2 percent of Hispanic households do).

³⁶ For a review of recent literature on neighborhood effects, see Jacob L. Vigdor, *Peer Effects in Neighborhoods and Housing*, in DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH: PROBLEMS AND SOLUTIONS (Kenneth A. Dodge et al., eds. 2006).

³⁷ Sara Aronchick Solow, Note, *Racial Justice at Home: The Case for Opportunity Vouchers*, 28 YALE L. & POL'Y REV. 481, 493 (2010).

³⁸ David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *When Are Ghettos Bad?: Lessons from Immigrant Segregation in the United States*, 63 J. URB. ECON. 759, 779 (2008). Whereas Glaeser, Cutler, and Vigdor define "ghettos" as racially segregated communities, regardless of average income, this Article instead uses the term "ghetto" to denote high-poverty, predominantly minority neighborhoods.

³⁹*Id.* at 770.

⁴⁰ David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?* 112 Q. J. ECON. 827, 828 (1997) ("as segregation increases, blacks have lower higher school graduation rates, are more likely to be idle..., earn less income, and are more likely to be single mothers"); Cutler, Vigdor & Glaeser, *supra* note 38, at 772.

⁴¹ For a review of the literature on the relationship between ghetto residence and poor outcomes, see Xavier de Souza Briggs, *Moving Up versus Moving Out: Neighborhood Effects in Housing Mobility Programs*, 8 HOUSING

are not simply home to at-risk individuals; rather, the concentration of poverty makes both the experience of poverty and the odds of escaping poverty particularly bad for ghetto residents.⁴² As William Julius Wilson hypothesized, geographic concentrations of poverty magnify the problems of poverty – joblessness, crime, delinquency, broken families, low educational attainment, etc. – and hence further disadvantage poor adults and children.⁴³ Even controlling for family characteristics, children growing up in ghetto neighborhoods on average experience lower educational attainment,⁴⁴ increased criminal involvement (both as victims and perpetrators),⁴⁵ more teenage pregnancy,⁴⁶ greater unemployment,⁴⁷ and reduced earnings potential.⁴⁸ Adults residing in ghetto neighborhoods report employment outcomes worse than those of similarly situated peers.⁴⁹ These findings hold for Section 8 voucher recipients. Recipients living in lower-poverty neighborhoods tend to work more often and receive higher wages than do recipients residing in higher-poverty neighborhoods; they are also less likely to receive Temporary Assistance to Needy Families (TANF).⁵⁰ Neighborhood poverty levels exert a greater impact on Black and Hispanics recipients' employment and income than that of White recipients.⁵¹

While ghettos' negative effects are well documented, how ghettos produce such outcomes remains unclear. Prominent sociologists have offered various explanations. In his

POL'Y DEBATE 195 (1997). The difficulty of disaggregating effects of neighborhoods from effects of families or social networks suggests these results should be approached with some caution. *Id.* at 197.

⁴²BRIGGS, POPKIN & GOERING, *supra* note 1, at 39.

⁴³WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING POOR AND BLACK IN THE INNER-CITY 29 (2009).

⁴⁴ Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 AM. J. SOC. 353, 374 (1993).

⁴⁵ Anne C. Case & Lawrence F. Katz, *The Company You Keep: The Effects of Family and Neighborhood on Disadvantaged Youth* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 3705, 1991).

⁴⁶ Brooks-Gunn et al., *supra* note 44, at 374.

⁴⁷ Christopher Jencks & Susan Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, in INNER-CITY POVERTY IN THE UNITED STATES 111, 175 (Nat'l Res. Council ed., 1990).

⁴⁸*Id.* at 175.

⁴⁹ Ingrid Gould Ellen, *Does Neighborhood Matter?: Assessing Recent Evidence*, 8 HOUSING POL'Y DEBATE 833, 854 (1997).

⁵⁰DEVINE ET AL., *supra* note 27, at 53.

⁵¹*Id.* at 53.

groundbreaking work, *The Truly Disadvantaged*, William Julius Wilson hypothesized that long-term isolation from work, job networks, and mainstream individuals – a direct result of the migration of jobs away from inner-city black communities – caused a particularly durable form of poverty and social dysfunction marked by low levels of social control, out-of-wedlock births, crime and gang violence, poor educational outcomes, etc.⁵² In other words, structural constraints and cultural transmission together produce the ghetto-related behaviors tied to poor social outcomes.⁵³ By comparison, Douglas Massey and Nancy Denton’s *American Apartheid* emphasized the structural barriers facing the inner-city poor. In their view, racial segregation brought about concentrated minority poverty and perpetuates formal and informal barriers, including but not limited to isolation from job opportunities and networks, limited political influence, and minimal public investment.⁵⁴ Harvard economists David Cutler and Edward Glaeser found empirical support for hypotheses that ghetto residents’ segregation from positive role models leads to worse outcomes (“demonstration effects”) and that segregation leads to “spatial mismatch” between where blacks live and the location of jobs, but concluded these factors only partially explained segregation’s effects on outcomes.⁵⁵

Drawing on Wilson, Massey, Denton, Cutler, Glaeser, and other contributions, Ingrid Gould Ellen and Margery Austin Turner isolated six mechanisms through which neighborhoods influence their residents: quality of local schools and services, children’s socialization by adults, peer influences, social networks, exposure to crime and violence, and physical distance and isolation, particularly from employment opportunities.⁵⁶ The current consensus view holds that

⁵²WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 143 (1990).

⁵³WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 55 (1996).

⁵⁴DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICA APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

⁵⁵ Cutler & Glaser, *supra* note 40, at 828-29.

⁵⁶ Ellen, *supra* note 49, at 837.

each of these factors plays some role in producing ghetto residents' poor outcomes.⁵⁷ But social scientists have been largely unsuccessful in determining the relative weight of each causal mechanism – a seemingly necessary precursor to designing place-based interventions effective in improving outcomes.⁵⁸

The mounting empirical evidence of ghettos' negative effects and the limited understanding of the causal mechanisms behind these effects perhaps accounts for the popularity of mobility programs. Rather than attempting to revitalize poor neighborhoods, mobility programs relocate ghetto residents to higher income and/or more racially integrated neighborhoods. These programs are premised on the assumption that participant families will benefit from having more affluent neighbors and greater access to opportunity.⁵⁹ Section I.C outlines familiar mobility programs, while Section II.B analyzes these programs' success in improving participant outcomes.

B. Explanations for Ghettos' Formation and Section 8 Clustering

Policymakers and academics alike have struggled to definitively explain what accounts for the clustering of Section 8 vouchers in poor, minority areas and for the formation and continuation of racially concentrated ghettos more generally. Central to the debate is the role that choice and opportunity play in producing this configuration. Two primary narratives have emerged: the demand-side explanation and the supply-side explanation.⁶⁰

⁵⁷ GALVEZ, *supra* note 26, at 1.

⁵⁸ Briggs, *supra* note 41, at 200; Ellen, *supra* note 49, at 836; GALVEZ, *supra* note 26, at 1.

⁵⁹ Briggs, *supra* note 41, at 201.

⁶⁰ To the author's knowledge, no academic or advocate wholeheartedly embraces one narrative to the exclusion of the other, but the arguments will be separated here for logistic clarity.

1. Demand-side Arguments

The strong (or unqualified) version of the demand-side narrative postulates that the current geographic distribution of Section 8 vouchers reflects recipients' preferences, specifically their desire to reside in inner-city ghettos.⁶¹ While parents want safe neighborhoods for their children, they also want the comfort of familiarity, racial acceptance, and family support found in their current neighborhoods and are willing to forego more prosperous locations for these advantages.⁶² Survey research by Reynolds Farley, among others, indicates that individuals, including minorities, prefer to live in neighborhoods where their ethnic group comprises a majority of the population.⁶³ Similarly, concerns about local status and relative economic standing create strong pressures to cluster based on income.⁶⁴ Low-income recipient households also need public transportation and other social service supports that are less common in more well-to-do suburban neighborhoods.⁶⁵ Therefore, families will only integrate when required by government planners to do so as a condition of receiving housing assistance.⁶⁶

2. Supply-side Arguments

The strong supply-side explanation asserts that Section 8 recipients are actually desperate to live in opportunity neighborhoods, but landlord discrimination against voucher holders and/or

⁶¹BRIGGS, POPKIN & GOERING, *supra* note 1, at 231.

⁶²*Id.*

⁶³*See, e.g.,* Reynolds Farley, Elaine F. Fielding & Maria Krysan, *The Residential Preferences of Blacks and Whites: A Four-Metropolis Analysis*, 8 HOUSING POL'Y DEBATE 763, 763 (1997) (finding that whites' preference for neighborhoods is directly related to the percentage of whites living there, while blacks prefer integrated neighborhoods where they comprise a majority of the population); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?*, 80 SOC. FORCES 937, 937 (2002) (finding that blacks prefer integrated neighborhoods where they comprise a majority of the population but that blacks' preferences "are driven not by solidarity or neutral ethnocentrism but by fears of white hostility"). Cf. INGRID GOULD ELLEN, SHARING AMERICA'S NEIGHBORHOODS: THE PROSPECTS FOR STABLE RACIAL INTEGRATION 131-51 (2000) (citing significant evidence that African-American households place little weight on neighborhoods' racial composition when choosing where to move).

⁶⁴ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 7-9 (1985).

⁶⁵ Xavier de Souza Briggs, Assoc. Professor of Sociology and Planning, Ma. Inst. of Tech., Testimony before the National Commission on Fair Housing and Equal Opportunity 4 (Sept. 22, 2008), *available at* http://www.prrac.org/projects/fair_housing_commission/boston/de-souza-briggs.pdf.

⁶⁶BRIGGS, POPKIN & GOERING, *supra* note 1, at 231.

racial minorities and the scarcity of affordable units in good neighborhoods prevent them from doing so.⁶⁷The Section 8 program compounds these problems by setting voucher amounts at a level too low to enable recipients to rent in opportunity neighborhoods and creating administrative hassles that discourage suburban landlord participation.⁶⁸In this narrative, the inadequate supply of affordable units in high-opportunity neighborhoods available to voucher holders leaves recipients with little meaningful choice.⁶⁹ This story can also be applied to ghettos' continuation more generally: landlord discrimination against low-income, minority individuals left them stranded in ghetto communities, and, without Section 8 vouchers, adequate units in well-to-do neighborhoods were even more out of reach for non-recipients.

C. Familiar Policy Proposals

Conceptualizing Section 8 clustering as a demand-side vs. supply-side phenomenon leads to vastly different policy prescriptions. Demand-side devotees urge “exit-only” vouchers, for exclusive use in opportunity neighborhoods, while proponents of supply-side explanations recommend expanding the supply of units available and affordable to voucher holders in affluent, integrated neighborhoods. In contrast, supporters of the locational status quo either deny that Section 8 clustering is in fact a problem or maintain that encouraging deconcentration is not the best use of scarce government resources.

1. Exit-Only (or Opportunity) Vouchers

Recognizing the pernicious effects of segregation and concentrated poverty, and believing that recipients' ill-informed neighborhood preferences contribute to the current clustering of Section 8 vouchers, policymakers and civil rights advocates have championed

⁶⁷*Id.*

⁶⁸ Philip D. Tegeler, Michael H. Hanley, & Judith Liben, *Transforming Section 8: Using Federal Housing Subsidies to Promote Individual Housing Choice and Desegregation*, 30 Harv. C.R.-C.L.L. Rev. 451, 477 (1995).

⁶⁹BRIGGS, POPKIN & GOERING, *supra* note 1, at 231.

“exit-only” or “opportunity” voucher programs.⁷⁰ “Exit-only” voucher programs allocate Section 8 subsidies to poor, often minority, ghetto residents, with the proviso that the voucher may only be used in low-poverty, integrated, and/or “opportunity” communities.⁷¹

The first “assisted housing mobility” or “exit-only” voucher program originated in the late 1970s under a court-ordered remedy in the nation’s first successful public housing desegregation lawsuit, *Gautreaux v. Chicago Housing Authority*.⁷² The Supreme Court affirmed the lower court’s holding that HUD had intentionally perpetuated segregation in its administration of the Chicago public housing program and, under the Equal Protection Clause, was required to remedy its past EPC violations by providing “desegregative” housing opportunities to current and former residents of Chicago public housing.⁷³ The resulting program helped 7,100 black families relocate using housing vouchers to predominantly white, typically suburban neighborhoods.⁷⁴ The *Gautreaux* model also inspired other courts adjudicating public housing desegregation lawsuits to order similar deconcentration programs.⁷⁵

While popular as a judicial remedy, *Gautreaux*-style policy proposals enjoyed little political support during the 1980s.⁷⁶ The political dynamic changed when sociologists James Rosenbaum and his collaborators produced survey evidence that the *Gautreaux* program yielded significant socioeconomic gains for participating families.⁷⁷ Children of *Gautreaux* families who relocated to majority white, low-poverty suburbs, and who remained in these neighborhoods for

⁷⁰ This Article uses the terms “exit-only,” “deconcentration,” and “housing mobility” interchangeably. All three terms are intended to refer to government policies that provide poor and/or minority residents of racially and/or economically segregated areas with housing subsidies for use in low-poverty, integrated, and/or opportunity areas.

⁷¹ Solow, *supra* note 37, at 504.

⁷² BRIGGS, POPKIN & GOERING, *supra* note 1, at 49.

⁷³ *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976).

⁷⁴ *Gautreaux v. Landrieu*, 523 F. Supp. 665, 674-80 (N.D. Ill. 1981). See also Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL’Y 35, 58-59 (2002) (detailing the consent decree).

⁷⁵ See Florence Wagman Roisman & Hilary Botein, *Housing Mobility and Life Opportunities*, 27 CLEARINGHOUSE REV. 335 (1993) (surveying the outcomes of about a dozen court-ordered deconcentration programs).

⁷⁶ BRIGGS, POPKIN & GOERING, *supra* note 1, at 49.

⁷⁷ *Id.*

seven to ten years, were more likely to finish high school and attend college than were peers who remained in inner-city Chicago.⁷⁸ *Gautreaux* parents who relocated to suburban areas were more likely to be employed and less likely to receive welfare than their neighbors left behind.⁷⁹

The *Gautreaux* program's encouraging returns and the dedicated lobbying efforts of Rosenbaum and *Gautreaux* lead attorney Alexander Polikoff spurred Congress to allocate \$80 million for an "exit-only" voucher demonstration project in October 1992.⁸⁰ The Clinton administration's enthusiastic support transformed the just-authorized project into one of the most ambitious social experiments ever attempted.⁸¹ Moving to Opportunity (MTO), as it came to be known, launched in 1994.⁸² MTO enrolled almost 5,000 very low-income, mostly black and Hispanic, residents of public housing in inner-city Baltimore, Boston, Chicago, Los Angeles, and New York.⁸³ One-third of participants remained in public housing, the second third were given Section 8 vouchers with no geographic limitations, and the final "experimental" group received MTO vouchers for use in low-poverty neighborhoods, as well as optional search assistance and housing mobility counseling.⁸⁴

Designed as a "research platform," MTO strictly adhered to the methodological requirements of a social experiment – random assignment, baseline surveys, and long-term

⁷⁸ Leonard S. Rubinowitz & James E. Rosenbaum, *Schooling*, in *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 127, 128 (2000).

⁷⁹ James E. Rosenbaum & Susan J. Popkin, *Employment and Earnings of Low-Income Blacks Who Move to Middle Class Suburbs*, in *THE URBAN UNDERCLASS* 342, 348 (Christopher Jencks ed., 1991) (finding suburban relocates were 13 percent more likely to be employed than were city movers); Susan T. Popkin, James E. Rosenbaum & Patricia M. Meaden, *Labor Market Experiences of Low-Income Black Women in Middle-Class Suburbs: Evidence from a Survey of Gautreaux Program Participants*, 12 *J. POL'Y MGMT. & ANALYSIS* 556, 570 (1993) (finding that suburban relocates were less likely to receive welfare than neighbors left behind and that welfare recipients who had never worked saw the biggest increase in employment levels among all populations upon relocation).

⁸⁰ BRIGGS, POPKIN & GOERING, *supra* note 1, at 50-51.

⁸¹ *Id.* at 51.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 54. MTO defined eligible receiving low-poverty neighborhoods as those areas with a poverty rate of 10 percent or lower. Fearing legal and/or political opposition, MTO planners did not dictate the racial composition of receiving neighborhoods but assumed that the program would have the incidental effect of increasing integration; the 1990 census showed that many low-poverty tracts were racially mixed. *Id.*

tracking of participants – in order to accurately gauge “exit-only” vouchers’ effects.⁸⁵ But even before the final results were in, academics and advocates were calling for more ambitious deconcentration initiatives. Yale Law School professor Owen Fiss proposed a \$50 billion voucher program to enable black families living in ghetto neighborhoods to move to integrated suburban neighborhoods.⁸⁶ *Gautreaux* lawyer Alexander Polikoff called for 500,000 housing vouchers over ten years earmarked for black families living in urban ghettos of the 125 largest metropolitan areas and for exclusive use in census tracts that are not minority impacted and boast a poverty rate below 10 percent.⁸⁷ Most recently, former Obama staffer Sara Aronchick Solow suggested an “opportunity-housing vouchers” program,⁸⁸ whereby minority residents of inner-city ghettos would receive Section 8 vouchers to be used only in “communities of opportunity” with available jobs, high quality schools, low crime levels, and other healthful characteristics.⁸⁹

2. Expand Supply of Available Units

Proponents of supply-side explanations for Section 8 clustering propose to improve locational outcomes and recipients’ welfare by expanding the supply of affordable units available for lease-up, particularly in integrated, low-poverty areas.⁹⁰ Studies document that there is far too little affordable housing and what exists is concentrated in predominantly minority, distressed

⁸⁵BRIGGS, POPKIN & GOERING, *supra* note 1, at 66.

⁸⁶Owen Fiss, *What Should Be Done for Those Who Have Been Left Behind*, in *A WAY OUT*, 3, 66 (Joshua Cohen et al. eds., 2003).

⁸⁷ Polikoff, *supra* note 20, at 141. Polikoff also proposes allocating an additional 50,000 “regular” vouchers per year to entering families ineligible for the mobility program or who prefer to remain in their neighborhoods. *Id.* at 142.

⁸⁸ Solow, *supra* note 37, at 483.

⁸⁹*Id.* at 504. Solow borrows the idea of “communities of opportunity” from John A. Powell, a law professor and housing scholar, who has created “opportunity maps” for regions nationwide. These maps denote various census tracts as “communities of opportunity” based on indicators like economic health, educational quality, crime and violence, etc. John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 18 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 145, 154 (2009).

⁹⁰BRIGGS, POPKIN & GOERING, *supra* note 1, at 232 (“Expanding the choice set for the voucher program calls for expanding and accelerating the focus on supply-side strategies with an inclusionary approach in many markets”).

neighborhoods or inner-ring suburbs vulnerable to decline.⁹¹ Indeed, the shortage of affordable units in healthy neighborhoods limited prior mobility programs' success.⁹² But even in housing markets with high vacancy rates, Section 8 recipients often have difficulty leasing habitable units in good neighborhoods. Voucher amounts are typically too low to enable Section 8 recipients to rent in opportunity neighborhoods.⁹³ Additionally, suburban landlords are often unwilling to rent to voucher holders, either because of discriminatory attitudes or a general reluctance to deal with inefficient housing authorities.⁹⁴ Recognizing these problems, familiar policy proposals to expand the supply of units available to Section 8 voucher holders target one of two objectives: (1) ensure that existing affordable units are available to voucher holders; and (2) remove barriers to construction of affordable housing, particularly in suburban locations.

Increasing the voucher amount appears the most straightforward mechanism to expand the supply of existing affordable units available to voucher holders. Current law provides public housing authorities (PHAs) with the discretion to set payment levels for Section 8 vouchers at up to 110% of "fair market rent" (FMR), HUD's estimate of the cost of rent and utilities for 40% of recently rented units in the metropolitan area.⁹⁵ At present, FMRs are too low to enable voucher recipients to move to opportunity neighborhoods and instead effectively confine recipients to poorer, often predominantly minority neighborhoods where housing costs are lower, perpetuating

⁹¹*Id.* at 16.

⁹²*Id.*

⁹³ Tegeler, Hanley & Liben, *supra* note 68, at 478.

⁹⁴*Id.* at 477. Two primary reasons account for landlord reluctance to accept Section 8 vouchers as payment: (1) perceptions of recipients as undesirable tenants; and (2) unwillingness to incur the administrative burdens common to the Section 8 program (e.g. federal eviction standards, one year lease requirement, housing quality inspections, rent reasonableness assessments) and/or risk the late payments characteristic of some housing authorities. Mark. A. Malaspina, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287, 311-13 (1996).

⁹⁵CTR. ON BUDGET & POLICY PRIORITIES, INTRODUCTION TO THE HOUSING VOUCHER PROGRAM 4 (2009), <http://www.cbpp.org/cms/index.cfm?fa=view&id=2817>. In a limited number of metropolitan areas where HUD believes the 40th percentile calculation to be too low to allow families to live outside a handful of high-poverty neighborhoods, HUD sets the FMR at the 50th percentile instead. *Id.*

segregation.⁹⁶ Two factors account for this mismatch. One, FMRs are determined based on regional averages; “when much of a region’s rental housing is located in poorer city neighborhoods where lower rental rates prevail, regional FMRs may not be high enough to allow access to many suburban apartments.”⁹⁷ Two, funding constraints prevent many PHAs from offering payment rates above 100% of the FMR.⁹⁸ While an easy fix with unlimited funding, increasing the voucher amount is politically unlikely in this era of fiscal austerity, especially since more money would not necessarily produce better recipient outcomes. During the summer of 2010, as it worked to adjust to post-Hurricane Katrina realities, the Housing Authority of New Orleans (HANO) issued Section 8 vouchers worth approximately 120% of fair market rent.⁹⁹ Despite their greater purchasing power, voucher recipients remained concentrated in predominantly minority ZIP codes with high poverty rates,¹⁰⁰ while savvy landlords inflated their rents to HANO levels, reaped the benefits of the increase, and thus harmed the 75 percent of renters who did not receive Section 8 assistance.¹⁰¹

Increasing landlord participation in the Section 8 program would also expand the supply of existing affordable units available to voucher recipients. At present, upwards of eighty percent of landlords in some jurisdictions refuse to accept Section 8 vouchers as a source of

⁹⁶ Tegeler, Hanley & Liben, *supra* note 68, at 478.

⁹⁷ *Id.*

⁹⁸ Barbara Sard, *Summary Table: Housing Voucher Program Policies that Influence Housing Voucher Mobility*, in *KEEPING THE PROMISE: PRESERVING & ENHANCING HOUSING MOBILITY IN THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM* 73, 73 (Philip Tegeler, Mary Cunningham & Margery Austin Turner, eds., 2005).

⁹⁹ Email from Alice Riener, Special Projects Manager for the Housing Choice Voucher Program, Housing Authority of New Orleans, to author (Feb. 25, 2012) (on file with author).

¹⁰⁰ Citing privacy concerns, HANO will only release ZIP code level assessments of Section 8 voucher distribution. See Appendix A for a map showing the number of vouchers in use per ZIP code in New Orleans in November 2010.

¹⁰¹ Katy Reckdahl, *HANO Subsidies May Be Driving Up Rental Rates in New Orleans*, *TIMES PICAYUNE*, Jan. 9, 2011. Several factors account for why Section 8 deconcentration failed to materialize. First, and most importantly, HANO continued to steer families towards high poverty neighborhoods through its listings. HANO also did not provide any mobility counseling to encourage residents to look beyond posted listings. Riener, *supra* note 99. Finally, landlords in more affluent areas engaged in rampant discrimination against voucher holders, due to racism, an unwillingness to incur the administrative burdens of dealing with HANO, and a surplus of available tenants with cash due to FEMA vouchers. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *HOUSING CHOICE IN CRISIS 8* (2009), available at <http://www.gnofairhousing.org/wp-content/uploads/2011/09/HousingChoiceInCrisis2009.pdf>.

payment.¹⁰² Such “source of income discrimination” by private landlords is legally permissible.¹⁰³ Three strategies for increasing landlord participation dominate the academic discussion: (a) amend the Fair Housing Act to prohibit source-of-income discrimination by private landlords;¹⁰⁴ (b) use existing Fair Housing Act provisions to challenge source-of-income discrimination;¹⁰⁵ and (c) remove or streamline administrative burdens that discourage landlord participation.¹⁰⁶ Option (c) – remove or streamline administrative burdens that discourage landlord participation – would likely produce only a minimal increase in available units but is good policy regardless. Options (a) and (b) are more controversial. A federal source-of-income discrimination statute is both politically infeasible and, based on state and localities’ experiences, unlikely to produce results.¹⁰⁷ Due to widespread landlord disregard,¹⁰⁸ inadequate enforcement resources,¹⁰⁹ and judicial overruling,¹¹⁰ state and local source-of-income discrimination laws

¹⁰² For example, in an audit conducted by the Greater New Orleans Fair Housing Action Center of New Orleans landlord, 82 percent of landlords surveyed refused to rent to voucher holders. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *supra* note 101, at 8. Similarly, only 9 percent of 415 New York City landlords contacted accepted vouchers. Jenna Bernstein, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1413 (2010).

¹⁰³ While the Fair Housing Act, 42 U.S.C. § 3604(a)–(f) (2006), prohibits landlord discrimination on the basis of race, sex, familial status, disability, and other protected categories, it does not as a general matter prohibit landlord discrimination on basis of income. Federal law does, however, ban source-of-income discrimination by project-based developments receiving federal funds, i.e. low-income housing tax credit properties, project-based Section 8 developments, etc. Malaspina, *supra* note 94, at 314.

¹⁰⁴ *See, e.g.*, Kim Johnson-Spratt, *Housing Discrimination and Source of Income: A Tenant’s Losing Battle*, 32 IND. L. REV. 457, 458 (1999).

¹⁰⁵ *See, e.g.*, Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 771 (2010) (recommending that advocates challenge landlord source-of-income discrimination as disparately impacting minorities in violation of the FHA’s antidiscrimination provisions).

¹⁰⁶ *See, e.g.*, Malaspina, *supra* note 94, at 289 (“the federal government should....reduce undue regulatory burdens currently placed on landlords”).

¹⁰⁷ Twelve states and several municipalities have adopted statutes banning landlord discrimination based on source of income. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *supra* note 101, at 6.

¹⁰⁸ A recent survey of New York City Craigslist posting found a significant percentage of affordable listings explicitly provided that Section 8 vouchers were not accepted; presumably, an even larger percentage of NYC landlords engage in more covert illegal discrimination against voucher recipients. FRED FREIBERG & DIANE L. HOUK, NO LICENSE TO DISCRIMINATE: REAL ESTATE ADVERTISING, SOURCE OF INCOME DISCRIMINATION, AND HOMELESSNESS IN NEW YORK CITY4 (Fair Housing Justice Center 2008).

¹⁰⁹ FREIBERG & HOUK, *supra* note 108, at 11-14.

¹¹⁰ *See, e.g.*, Knapp v. Eagle Prop. Mgmt. Corp., 54 F. 3d 1272, 1283 (7th Cir. 1995) (holding that a Wisconsin statute prohibiting source of income discrimination did not compel landlords to accept Section 8 vouchers); Babcock

have largely failed to increase the supply of housing available to voucher holders.¹¹¹ Existing federal laws have, however, provided the basis for successful challenges against landlord source-of-income discrimination. The Ninth Circuit,¹¹² among other courts, has upheld claims that source-of-income discrimination served as a proxy for impermissible discrimination on the basis of race, sex, and familial status,¹¹³ but scarce enforcement resources and the difficulty of teasing out the causal factors behind a landlord's refusal to rent render such precedents limited. More commonly, courts have found that a landlord's policy of refusing to accept welfare or housing benefits has a disparate impact on women and/or minorities and therefore violates the Fair Housing Act.¹¹⁴ Still, such wins are few and rarely prompt widespread changes in landlord behavior.¹¹⁵

The last common policy proposal to ensure that existing affordable units are available to voucher holders recommends improving the ease of voucher portability. The current portability statute and accompanying regulations provide that, subject to certain conditions, "a voucher-holder or participant family has the right to receive tenant-based voucher assistance in accordance with the requirements of this part to lease a unit outside the initial PHA jurisdiction,

v. BBY Chestnut Ltd. P'ship, No. CX-03-90, 2003 WL 21743771, at *1-2 (Minn. Ct. App. July 29, 2003) (finding that a landlord's decision not to accept Section 8 vouchers is not a per se violation of the Minnesota Human Rights Act provision outlawing discrimination against persons who receive public assistance). Landlord challenges to local source-of-income discrimination laws as preempted by the Supremacy Clause, given Congress' implied intent to make landlords' participation in the Section 8 program voluntary, have met with less success. The highest courts of Massachusetts, New Jersey, Connecticut, and Maryland upheld these laws. Bernstein, *supra* note 102, at 1418.

¹¹¹ Daniel, *supra* note 105, at 771.

¹¹² For instance, in *Gilligan v. Jamco*, the Ninth Circuit held that a landlord's refusal to rent to households receiving Aid to Families with Dependent Children (AFDC) constituted discrimination on the basis of familial status in violation of the Fair Housing Act. 108 F.3d 246 (9th Cir. 1997).

¹¹³ Such arguments are especially strong in jurisdictions like New Orleans, where 99 percent of Section 8 voucher recipients are African-American. GREATER NEW ORLEANS FAIR HOUSING ACTION CENTER, *supra* note 101, at 6.

¹¹⁴ Daniel, *supra* note 105, at 783.

¹¹⁵ HUD's proposed disparate impact interpretation of the Fair Housing Act's antidiscrimination provision could expand recognition to disparate impact challenges to source-of-income discrimination, but as eleven courts of appeals already recognize disparate impact causes of action under the Fair Housing Act, the regulation is unlikely to prompt much change on this front. Implementation of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

anywhere in the United States, in the jurisdiction of a PHA with tenant-based program.”¹¹⁶ While allowed under HUD guidelines since 1989,¹¹⁷ voucher portability remains relatively rare:¹¹⁸ as of 2005, only 44,000 portable vouchers were in use outside the issuing jurisdiction, a meager 2.4 percent of the 1.86 million vouchers nationwide.¹¹⁹ Advocates suggest that voucher portability take-up rates could be improved by: removing informational and administrative barriers (e.g. nondisclosure,¹²⁰ waiting periods before porting,¹²¹ duplicative paperwork, conflicting requirements, delays in units approval¹²²);¹²³ moving towards regional administration of the voucher program;¹²⁴ and revoking 2005 HUD guidance allowing PHAs to deny a portability request if the recipient seeks to move to a higher cost jurisdiction, the PHA lacks sufficient funding, and the new PHA will not absorb the cost.¹²⁵ Even were these changes to be implemented and take-up rates increase, however, it remains unclear to what extent the

¹¹⁶United States Housing Act of 1937, 42 U.S.C. 1437f(r) (2006); Section 8 Tenant Based Assistance: Housing Choice Voucher Program, 24 CFR § 982.353 (2011).

¹¹⁷ HUD Notice PIH 2004-12; HUD Notice PIH 2005-1.

¹¹⁸ Quality Housing & Work Responsibility Act, Pub. L. No. 105-276 112 Stat. 2461 (1998); Tegeler, Hanley & Liben, *supra* note 68, at 497.

¹¹⁹NATIONAL LOW INCOME HOUSING COALITION (NLIHC), A PRIMER ON VOUCHER PORTABILITY2 (2005), available at <http://www.prrac.org/pdf/NLIHC-VoucherPortability2005.pdf>.

¹²⁰ Many housing authorities breach their regulatory duty to inform Section 8 recipients that they can use their vouchers outside the jurisdiction. Tegeler, Hanley & Liben, *supra* note 68, at 467.

¹²¹ HUD allows housing authorities to impose a twelve-month waiting period on new voucher holders who wish to port their subsidies. Section 8 Tenant Based Assistance; Statutory Merger of Section 8 Certificate and Voucher Programs, 64 Fed. Reg. 26632, 26646 (May 14, 1999) (codified at 24 C.F.R. 982.353 (c)(2)(iii)).

¹²² NLIHC, *supra* note 119, at 3. HUD rules governing voucher portability administratively and financially burden participating PHAs and thus create incentives for the housing authority to erect informational and logistical barriers to recipients’ moves. Barbara Sard, Director of Housing Policy, Center on Budget and Policy Priorities, Testimony before the National Commission on Fair Housing and Equal Opportunity 4 (Oct. 6, 2008), available at <http://www.cbpp.org/files/10-6-08hous-testimony.pdf>. Current procedures allow the “receiving” PHA to bill the “initial” PHA for both the cost of the voucher and 80 percent of the Section 8 Administrative Fee. This process is cumbersome, and PHAs report problems, including but not limited to, the initial agency’s delay in notifying a receiving agency of an incoming family, the initial agency’s slow payment and resulting cash flow problems for a receiving agency, and the burden posed by the initial agency’s loss of 80 percent of the administrative fee. NLIHC, *supra* note 119, at 3.

¹²³ Sard, *supra* note 122, at 4.

¹²⁴ Tegeler, Hanley & Liben, *supra* note 68, at 481.

¹²⁵ As opportunity neighborhoods are often higher-cost, cash-strapped PHAs may deny porting requests. NLIHC, *supra* note 119, at 3. HUD Notice PIH 2005-1 provides that “a PHA has the authority to deny a family’s request to move under the portability procedures to a unit in another jurisdiction that would require the PHA to pay a higher subsidy cost for the same family’s assistance if the PHA determines it does not have sufficient funding available under their calendar year 2005 budget...and the receiving PHA will not absorb the family into its own program.”

portability program could actually improve locational outcomes. Between 1998 and 2005, portability movers relocated to only slightly more integrated and well-to-do census tracts, moving on average from census tracts with 45.9 percent minority rates and 18.3 percent poverty rates to census tracts with 43.8 percent minority rates and 16.3 percent minority rates.¹²⁶

While the first set of supply-side solutions focus on ensuring existing units are available to voucher holders, the second set of these solutions takes a different approach – increasing the supply of affordable units in integrated, low-poverty neighborhoods by removing barriers to construction. Two primary policy recommendations have emerged: (1) challenge exclusionary zoning laws; and (2) improve siting of low-income housing tax credit (LIHTC) properties.

Land use scholar Anthony Downs observed almost forty years ago suburbs' propensity to adopt exclusionary zoning policies, including but not limited to minimum lot size, set back, and floor area requirements, underzoning, and refusal to zone for multi-family housing.¹²⁷ Exclusionary zoning policies prohibit the construction of low-income multi-family housing, mandate minimum housing and land purchases, and/or raise the cost of housing generally; in so doing, these policies prevent voucher recipients and other low-income individuals from living in suburban areas and perpetuate class-based and racial segregation.¹²⁸

Fair housing advocates thus recommend aggressively challenging exclusionary zoning ordinances under various state laws and the Fair Housing Act. A handful of state courts have

¹²⁶ Carissa G. Climaco, Christopher N. Rodger, Judith D. Feins & Ken Lam, *Portability Moves in HCV Program, 1998 to 2005*, 10 CITYSCAPE 5, 24 (2008).

¹²⁷ ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973).

¹²⁸ Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 9 (2001). Downs therefore maintained that zoning law, rather than market forces, was the primary cause of class-based residential segregation. DOWNS, *supra* note 127, at 11, 49-53. Law professor Henry Span subsequently argued that, while exclusionary zoning caused class-based segregation as Downs maintained, its impact on racial segregation was small: the discriminatory impact of exclusionary zoning falls primarily on moderate and low-to-moderate income families, not poor families who would have been unable to afford suburban locales regardless, and these impacted classes are not primarily African-American. Span, *supra* note 128, at 21. With the Section 8 program, however, poor and/or minority households might be able to afford suburban locales were adequate affordable units available. Thus, exclusionary zoning does contribute to residential segregation in the Section 8 program.

struck down exclusionary zoning ordinances as conflicting with requirements contained in state constitutions or state zoning enabling acts that governments, including municipalities, further the *regional* general welfare.¹²⁹ Absent such conducive state law, advocates could challenge exclusionary zoning ordinances under the Fair Housing Act's antidiscrimination provision, which under HUD's recently promulgated disparate impact regulation, prohibits any practice or policy that perpetuates segregation. Eleven courts of appeals have previously adopted a disparate impact reading of the FHA's antidiscrimination provisions,¹³⁰ and in many cases, have struck down exclusionary zoning ordinances on this basis.¹³¹ On the flip side, fair housing advocates could pressure state legislatures to adopt inclusionary zoning laws requiring municipalities to provide adequate opportunity and/or positive inducement for low-income housing.¹³²

Increased production of low-income housing tax credit (LIHTC) properties in integrated, opportunity neighborhoods could also help improve Section 8 families' locational outcomes. The Low-Income Housing Tax Credit (LIHTC) program is the most prolific producer of housing for low-income families,¹³³ subsidizing over 2 million affordable housing units in its 26-year tenure.¹³⁴ Voucher recipients often use their subsidies to occupy LIHTC units that they would otherwise have been unable to afford.¹³⁵ Program rules forbidding LIHTC properties from discriminating against voucher holders makes LIHTC units an especially appealing housing

¹²⁹ Span, *supra* note 128, at 26-28.

¹³⁰ Implementation of Fair Housing Act's Discriminatory Effects Standard, 76 Fed. Reg. 70921, 70923 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

¹³¹ *See, e.g.*, Metro Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290-91 (7th Cir. 1977); United States v. City of Jack Black, Missouri, 508 F.2d 1179, 1184-86 (8th Cir. 1974); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988).

¹³² Span, *supra* note 128, at 33-35.

¹³³ Elizabeth K. Julian & Demetria McCain, *Housing Mobility: A Civil Right*, in THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES 85, 94 (Chester Hartman & Gregory D. Squires eds., 2010).

¹³⁴ Buzz Roberts, *Strengthening the Low-Income Housing Tax Credit Investment Market*, 21.3 COMMUNITY INVESTMENTS 11, 11 (2011).

¹³⁵ Anne R. Williamson, Marc. T. Smith & Marta Strambi-Kramber, *Housing Choice Vouchers, the Low-Income Housing Tax Credit, and the Federal Poverty Deconcentration Goal*, 45 URB. AFF. REV. 1191, 121 (2009).

option for recipient households.¹³⁶ An analysis of Florida's Section 8 program found that 16 percent of all housing vouchers are used in LIHTC projects.¹³⁷

Unfortunately for Section 8 recipients, LIHTC properties are disproportionately located in segregated, low-income areas.¹³⁸ As of 2004, the typical LIHTC unit was located in a census tract with a 20 percent poverty rate, and 10 percent of all LIHTC units were in extreme poverty census tracts, where poverty rates are above 40 percent.¹³⁹ Elizabeth Julian suggests two policy proposals to remedy this imbalance. The Internal Revenue Service (IRS), the agency responsible for administering the LIHTC program, could promulgate regulations requiring both the state housing finance agencies (HFAs) that award the credits and recipient projects to affirmatively further fair housing in their allocation and siting decisions.¹⁴⁰ Additionally, state HFAs could revise their application review procedures to reward projects located in integrated, opportunity neighborhoods. Such revisions have the potential to drastically alter LIHTC locations and therefore expand the integrated, affordable housing opportunities available to Section 8 recipients. But these are just two of many possible policy approaches. Additional research is needed on the types of rules and incentives likely to change developer behavior in order to increase the supply of affordable units available in healthy neighborhoods.¹⁴¹

¹³⁶ Julian & McCain, *supra* note 133, at 94.

¹³⁷ Williamson, Smith & Strambi-Kramber, *supra* note 136, at 127. On the flip side, the 10,481 voucher holders living in LIHTC properties comprise 9 percent of LIHTC occupants. Sixty-three percent of Florida's over 800 LIHTC properties host at least one voucher holder. *Id.* at 123-127.

¹³⁸ William M. Rohe & Lance Freeman, *Assisted housing and residential segregation: The role of race and ethnicity in siting of assisted housing developments*, 67 *APA J.* 279, 290 (2001) (finding that LIHTC developments were more likely to be sited in census tracts with high proportions of poor households and African-Americans). *Cf.* Kirk McClure, *The Low-Income Housing Tax Credit program goes mainstream and moves to suburbs*, 17 *HOUSING POL'Y DEBATE* 419, 419 (2006) (finding tax credit developments are becoming more prevalent in suburban locales).

¹³⁹ GALVEZ, *supra* note 26, at 8.

¹⁴⁰ Julian & McCain, *supra* note 133, at 94.

¹⁴¹ BRIGGS, POPKIN & GOERING, *supra* note 1, at 227.

3. Maintain Status Quo

Academics do not gain tenure by endorsing the status quo, thus there are few articles justifying it. Within Washington, DC, however, there are policy advocates inclined to accept the current geographic distribution of Section 8 vouchers rather than risk rocking the boat by highlighting the program's shortcomings.¹⁴² With 2.5 million vouchers, Section 8 remains the single largest branch of federal housing.¹⁴³ Since 1990, however, the main increments in federal housing aid have been project-based, with the majority of new funding going to low-income housing tax credit projects.¹⁴⁴ Moreover, the Section 8 program has been subject to criticisms for its exploding costs, the result of rent increases during the late 1990s and early 2000s combined with the growing gap between recipients' income and housing costs as a result of the recession.¹⁴⁵ HUD suffered a significant budget reduction under the debt ceiling compromise of summer 2011, and President Obama's 2012 budget targets the Section 8 program for additional cuts.¹⁴⁶ Both exit-only and supply-side policy proposals come with significant price tags and thus may not be politically feasible – and hence worth the political capital – in this era of austerity.

¹⁴² See, e.g., Douglas Rice & Barbara Sard, "Unbalanced Approach to Deficit Reduction Could Cripple Housing and Community Development Programs," Center on Budget and Policy Priorities, June 23, 2011, *available at* <http://www.cbpp.org/cms/index.cfm?fa=view&id=3519> (discussing the potential impact of deficit reduction measures on housing and community development programs).

¹⁴³ SCHWARTZ, *supra* note 3, at 153.

¹⁴⁴ Edgar O. Olsen, *Housing Programs for Low-Income Households*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 365, 424-427 (Robert A. Moffitt ed., 2003); Robert C. Ellickson, *The False Promise of Mixed-Income Housing*, 57 UCLA L. REV. 983, 992 (2010).

¹⁴⁵ DOUGLAS RICE, SECTION 8 RENTAL ASSISTANCE PROGRAMS ARE NOT GROWING AS SHARE OF HUD BUDGET 1-2 (Center on Budget and Policy Priorities, July 20, 2011), *available at* <http://www.cbpp.org/files/7-20-11hous.pdf>. On the flip side, the recession and subsequent bursting of the housing bubble could help control Section 8 program costs and assist low-income renters by decreasing rental housing prices.

¹⁴⁶ DOUGLAS RICE & BARBARA SARD, PRESIDENT'S BUDGET NOT SUFFICIENT TO RENEW RENTAL ASSISTANCE FULLY FOR LOW-INCOME HOUSEHOLDS 1 (Center on Budget and Policy Priorities, March 14, 2012), *available at* <http://www.cbpp.org/files/3-14-12hous.pdf> (finding that the proposed renewal funding for the Section 8 voucher program could be as much as \$440 million below the amount needed to renew all voucher in use in 2012 and therefore jeopardize the housing subsidies of up to 55,000 low-income households).

II. RECENT RESEARCH FINDINGS NECESSITATE RETHINKING SECTION 8 POLICIES

Recent research findings cast doubt on the wisdom of these familiar policy proposals. Empirical evidence from Section 8 mobility experiments – *Gautreaux*, MTO, and other court-ordered assisted mobility programs – call into question the ability of exit-only voucher programs to improve recipient outcomes. These experiments’ findings also tested demand-side versus supply-side explanations for Section 8 clustering and suggest more expedient policy solutions for producing deconcentration. Finally, new insights from behavioral economics underlie individuals’ bounded rationality, highlight the mutability of preference and its role in decision-making, and offer strategies for steering people’s decisions in welfare-promoting directions while respecting freedom of choice.

A. *Empirical Evidence from Section 8 Experiments*

1. Assisted Mobility Programs’ Limited Success in Improving Recipient Outcomes

As discussed, the *Gautreaux* housing mobility program’s success in improving participant outcomes motivated the MTO experiment and a host of other exit-only voucher policy proposals. But *Gautreaux* was not designed as a research experiment and hence suffered from several design flaws that limited the salience of its findings.¹⁴⁷ Chief among these was selection bias. *Gautreaux* did not employ random assignment but instead screened and selected participants likely to thrive in suburban locations. Additionally, *Gautreaux* studies compared families who had moved to suburban areas and were still living there years later with families who had remained in central cities; researchers did not survey families who moved to the suburbs but later returned to the city, thus the research likely exaggerated the program’s average

¹⁴⁷BRIGGS, POPKIN & GOERING, *supra* note 1, at 49.

effects by focusing on a select group.¹⁴⁸ These design flaws may help explain why subsequent court-ordered deconcentration programs and MTO did not replicate *Gautreaux*'s promising results.¹⁴⁹ Indeed, even staunch proponents of exit-only voucher programs refer to MTO as a “generally fruitless initiative.”¹⁵⁰

Unlike *Gautreaux*, MTO was explicitly designed to test the efficacy of exit-only vouchers. Its administrators consistently adhered to the strict methodological requirements of a social experiment – random assignment, baseline surveys, long-term tracking of participants, etc.¹⁵¹ MTO's scientific accuracy made its disappointing long-term results all the more discouraging for exit-only voucher proponents. Among MTO adult participants, experts agree that there is “little difference between experimental and control groups in employment, earnings, or welfare receipt.”¹⁵² Nor did MTO produce uniformly better outcomes for child participants. While girls demonstrated improved mental health, less risky behavior, and better educational outcomes,¹⁵³ teenage males who moved to suburban locales were in fact less likely to succeed in school and more likely to engage in risky behavior than their counterparts who did not.¹⁵⁴ Participants did report lower levels of depression and anxiety, as well as improved quality of life, likely a result of reduced exposure to gang violence and drug trafficking.¹⁵⁵

¹⁴⁸*Id.* at 255.

¹⁴⁹ Solow, *supra* note 37, at 512-13. Evaluating the effects of the consent decree in *United States v. Yonkers Board of Education*, 624 F. Supp. 1276 (S.D.N.Y. 1985), for instance, scholars found that, while adults achieved economic gains, adolescents who relocated to the suburbs showed more behavioral problems and truancy than did peers who remained in inner-city neighborhoods. Rebecca C. Fauth, *The Impacts of Neighborhood Poverty Deconcentration Efforts on Low-Income Children's and Adolescents' Well-Being*, 14 CHILD., YOUTH & ENV'TS 1, 12 (2004).

¹⁵⁰ Solow, *supra* note 37, at 508.

¹⁵¹ BRIGGS, POPKIN & GOERING, *supra* note 1, at 66.

¹⁵² Stephanie DeLuca, *The Continuing Relevance of the Gautreaux Program for Housing Mobility: Recent Evidence*, in KEEPING THE PROMISE, *supra* note 20, at 25, 29. Briggs, Popkin and Goering assert that participants' low job readiness, reduced access to public transportation, and lack of childcare support may explain programs' failure to affect employment or earnings of participants on average. BRIGGS, POPKIN & GOERING, *supra* note 1, at 220-222.

¹⁵³ BRIGGS, POPKIN & GOERING, *supra* note 1, at 107.

¹⁵⁴*Id.* at 17.

¹⁵⁵*Id.*

Exit-only voucher proponents blame elements of MTO's design and implementation for its lackluster results,¹⁵⁶ calling the social experiment a "strong-idea-weakly-implemented."¹⁵⁷ Some of these criticisms are valid. Rather than directing families to integrated neighborhoods with available jobs, good schools, low crime, etc., MTO required only that experimental group families relocate to neighborhoods with poverty rates below 10 percent.¹⁵⁸ As a result, many MTO adults relocated to areas with few employment opportunities, while MTO children remained stuck in their original, poor-performing school districts.¹⁵⁹ Additionally, MTO did not provide the same extensive relocation assistance as did *Gautreaux*: premove housing mobility counseling was optional and of inconsistent quality, and MTO families were not provided with postmove counseling intended to help families remain in the suburbs.¹⁶⁰

2. Testing Supply-Side vs. Demand-Side Explanations for Section 8 Clustering

Initial MTO studies lent credence to demand-side explanations for Section 8 clustering.¹⁶¹ The early results suggested that minority Section 8 recipients from racially concentrated neighborhoods prefer to remain in those, or similar neighborhoods, even when given the choices and resources to enable them to move elsewhere. While MTO participants in the experimental were required to live in census tracts that were less than 10 percent poor, the vast majority relocated to areas with racial concentrations similar to those of their old neighborhoods.¹⁶² Additionally, many of those families that relocated to more integrated, suburban neighborhoods

¹⁵⁶ Solow, *supra* note 37, at 510-511.

¹⁵⁷ BRIGGS, POPKIN & GOERING, *supra* note 1, at 223.

¹⁵⁸ Solow, *supra* note 37, at 512-513.

¹⁵⁹ Philip Tegeler, *Connecting Families to Opportunity: The Next Generation of Housing Mobility Policy*, in ALL THINGS BEING EQUAL: INSTIGATING OPPORTUNITY IN AN INEQUITABLE TIME 79, 91 (Brian D. Smedley & Alan Jenkins eds., 2007).

¹⁶⁰ John Goering, Judith D. Feins & Todd M. Richardson, *A Cross-Site Analysis of Initial Moving to Opportunity Demonstration Results*, 13 J. HOUSING RES. 1, 8, 15 (2002).

¹⁶¹ Solow, *supra* note 37, at 510-511.

¹⁶² LARRY ORR ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., *MOVING TO OPPORTUNITY: INTERIM IMPACTS EVALUATION*, at viii (2003), available at <http://www.huduser.org/Publications/pdf/MTOFullReport.pdf>.

returned to the inner city within a year or two.¹⁶³ As a result, the average neighborhood poverty rates of the three MTO treatment groups (public housing residents, Section 8 recipients, and “opportunity voucher” recipients) converged over time – an outcome that demand-side proponents suggests indicates recipients’ desire to live in mostly poor, minority neighborhoods alongside people with similar racial and economic characteristics.¹⁶⁴

A subsequent longitudinal study of MTO households, however, led Xavier de Souza Briggs, Susan Popkin, and John Goering to conclude that demand-siders misconstrued the role of preferences in producing MTO households’ locational outcomes.¹⁶⁵ Those MTO participants who returned to high-poverty neighborhoods after serving their required two-year stint in opportunity neighborhoods were seldom motivated by dislike of their new neighborhood or a desire for access to family support or social institutions of their old neighborhoods.¹⁶⁶ Their moves were instead triggered by involuntary factors, such as illness and divorce, problems with their apartments or landlord, rent increases, landlord refusal to continue renting to a voucher holder, the pending sale of the units, and other symptoms of a hot housing market.¹⁶⁷ Once forced to leave their units, families encountered difficulties in finding affordable apartments in opportunity neighborhoods and were no longer privy to the relocation counseling that helped them find their first apartment. Their options were severely constrained by scarcity (limited availability of affordable housing in tight markets) and discrimination (landlord unwillingness to

¹⁶³*Id.* at 33 (finding that 66% of “experimental group” families made one or more additional moves, and a majority returned to areas similar to their pre-MTO neighborhoods).

¹⁶⁴*Id.* The desire to segregate by social class and race appears to hold across status groups. Patrick Bayer, Hanming Fang & Robert McMillan, *Separate When Equal?: Racial Inequality and Residential Segregation 2-4* (Nat’l Bureau of Econ. Research, Working Paper No. 11507, 2005) (finding that segregation increases as racial inequality decreases as growing population of middle-class blacks form their own neighborhoods).

¹⁶⁵BRIGGS, POPKIN & GOERING, *supra* note 1, at 231.

¹⁶⁶*Id.* at 167.

¹⁶⁷*Id.*

accept vouchers), and recipients lacked capacity and information to undertake broader searches.¹⁶⁸ In other words, recipients faced a limited choice set.¹⁶⁹

Briggs et al.'s conclusions are supported by evidence from court-ordered assisted mobility programs conducted in more affordable, less tight housing markets. After finding HUD liable for its failure to take affirmative action to address Baltimore's segregated housing situation in *Thompson v. HUD*, the lower court entered a consent decree creating the Special Mobility Housing Choice Voucher Program.¹⁷⁰ Since 2003, 1,522 families have received vouchers, worth between 110% and 130% of FMR, for use in "high opportunity areas," defined as neighborhoods with poverty rates lower than 10%, where African-Americans comprise no more than 30% of the population, and where fewer than 5% of units are federally assisted housing.¹⁷¹ Unlike MTO, *Thompson* families have largely remained in high opportunity neighborhoods – only one in five families returned to lower opportunity neighborhoods in the city after their required residency period.¹⁷² Among those families who opted not to remain in their new neighborhoods, most cited affordability constraints and the desire for a larger apartment.¹⁷³ Few cited dislike of their new neighborhoods and neighbors or a desire to be closer to family and social institutions as motivating their move.¹⁷⁴ *Thompson* families likely faced a larger choice set compared to MTO families in New York or Boston during the 1990s. Baltimore's population fell by 12 percent in

¹⁶⁸*Id.* at 231-233.

¹⁶⁹*Id.* at 232.

¹⁷⁰*Thompson v. HUD*, 220 F.3d 241, 244 (4th Cir. 2000).

¹⁷¹LORA ENGDahl, POVERTY & RACE RESEARCH ACTION COUNCIL, NEW HOMES, NEW NEIGHBORHOODS, NEW SCHOOLS: A PROGRESS REPORT ON THE BALTIMORE HOUSING MOBILITY PROGRAM 2-3 (2009), available at http://www.aclu-md.org/uploaded_files/0000/0154/housing_mobility_program_report.pdf[hereinafter PRRAC PROGRESS REPORT].

¹⁷²*Id.* at 34.

¹⁷³ As was reported in MTO's interim report, the limited availability of three and four bedroom units in suburban areas may prompt recipients' return to lower priced urban areas. *Id.*

¹⁷⁴PRRAC PROGRESS REPORT, *supra* note 172, at 34.

the 1990s and another 4.6 percent in the first decade of the 21st century; this population decline led to vacancy rates of 14.1 and 15.8 percent in 2000 and 2010, respectively.¹⁷⁵

The assisted mobility program contained in *Comer v. Cisneros* produced similar results in an analogous market: Buffalo, New York.¹⁷⁶ Two thousand minority residents of Buffalo received Section 8 vouchers (with no geographic restrictions), mandatory premove mobility counseling, and access to childcare and transportation to facilitate the housing search process.¹⁷⁷ Despite the lack of geographic restrictions, seven out of ten recipients chose to relocate to high-opportunity neighborhoods with lower rates of poverty than their prior residences.¹⁷⁸ Housing market conditions were key to this outcome: though the consent decree only provided for vouchers worth 100% of FMR, habitable apartments at that price were available in both suburban and urban areas due to Buffalo's poor housing market.¹⁷⁹

While low-income households in circa-2000 Baltimore and Buffalo enjoyed a wider range of options than recipient families in 1990s New York or Boston, in all cases, the choices facing families were far from ideal. Briggs framed Section 8 recipients' options as follows:

Live in a lousy apartment in a decent neighborhood or a better unit in a risky neighborhood. Deal with substandard housing – heaters that do not work, leaks that do not get fixed, pests that run rampant no matter how good a housekeeper one may be – or the well-documented hazards of unsafe neighborhoods.¹⁸⁰

¹⁷⁵ William Selway, *Census Shows Baltimore's Population Decline Slowing*, BOSTON GLOBE, Feb. 20, 2011, http://www.boston.com/news/nation/articles/2011/02/20/census_shows_baltimores_population_decline_slowing/.

¹⁷⁶ *Comer v. Cisneros*, 37 F. 3d 775 (2d Cir. 1994).

¹⁷⁷ Daniel Trudeau, *The Persistence of Segregation in Buffalo, New York: Comer v. Cisneros and Geographies of Relocation Decisions Among Low-Income Black Households*, 27 URB. GEOGRAPHY 20, 26 (2007).

¹⁷⁸ LISA ROBINSON & ANDREW GRANT-THOMAS, RACE, PLACE, AND HOME: A CIVIL RIGHTS AND METROPOLITAN OPPORTUNITY AGENDA 80 (2004).

¹⁷⁹ Trudeau, *supra* note 178, at 36. Interestingly, participants did not relocate to more integrated neighborhoods. *Academic Perspectives on the Future of Public Housing: Hearing Before the Subcomm. on Hous. and Community Opportunity of the H. Comm. on Fin. Services*, 111th Cong. (2009) (statement of Prof. Edward G. Goetz), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/goetz.pdf. Families moved an average of 1.5 miles from their former apartments into neighborhoods with similar minority populations. Trudeau, *supra* note 178, at 31. But the desire for racial homogeneity did not prompt this decision: only seven percent of those surveyed said they preferred to live in a neighborhood where their racial group constituted a majority of the population. *Id.* at 36.

¹⁸⁰ BRIGGS, POPKIN & GOERING, *supra* note 1, at 230-231.

These findings convinced Briggs and his coauthors of the necessity of expanding the choice set by increasing the supply of available units – one of the policy proposals outlined in Part IC and a strategy endorsed by the author.¹⁸¹

In addition to familiar suggestions to increase supply like challenging exclusionary zoning, improving the siting of low-income housing tax credit (LIHTC) properties, and strengthening protections against landlord source-of-income discrimination (refusal to accept tenants because they receive a government voucher), Briggs et al.’s MTO study findings also led them to recommend changing the choice set and default options that housing authorities present to voucher holders. Behavioral economics research indicates preference is not immutable; options, defaults, and accompanying framing affect decision-making.¹⁸² The existing Section 8 program defaults channel voucher recipients to poor, minority neighborhoods because, among other reasons, poor renters have limited capacity to search and landlords in ghetto neighborhoods are the most likely to accept vouchers and are therefore the easiest placements to find.¹⁸³ Gleaning applicable insights from new behavioral economics to apply to Section 8 policy design is the focus of the next section.

B. Insights from Behavioral Economics

The familiar policy proposals outlined in Part IC present a stark choice: accept segregated patterns of Section 8 use or require recipients to leave their ghetto neighborhoods as a condition of receiving housing aid. (While some policymakers emphasize expanding the supply of available units in order to improve locational outcomes, these policy solutions’ political feasibility and likely efficacy in changing the geography of Section 8 vouchers are questionable.)

¹⁸¹ *Id.*

¹⁸² Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003).

¹⁸³ BRIGGS, POPKIN & GOERING, *supra* note 1, at 233.

Recent research findings illustrate that policymakers are not faced with such an either-or option.

Rather, as Briggs highlighted in 2008 testimony:

Major developments in behavioral economics underline the wisdom of generating better choices for families, making those better choices the defaults or starting points, and then letting families opt out and make different choices if they so desire.¹⁸⁴

Indeed, today's behavioral law and economics, and its related offshoot of libertarian paternalism, aims to develop legal strategies that take into account people's bounded rationality and attempt to improve their outcomes without imposing strict limits on people's choices.¹⁸⁵

Leading this movement are professors Richard Thaler and Cass Sunstein. Sunstein and Thaler's central empirical claims have been two-fold: (1) people's choices are not always aligned with their long-term welfare; and (2) as preferences are typically pliable and ill-formed, starting points and default rules are likely to shape their behavior; in other words, the decision-making process constructs, not merely unveils, people's preferences.¹⁸⁶

The idea that recipients' choices are not always aligned with their long-term welfare is familiar; it serves to justify exit-only vouchers and other paternalistic anti-poverty policies.¹⁸⁷ As the story goes, the "culture of poverty" in which disadvantaged persons are enmeshed produces an array of "psychological and attitudinal short-fallings that render their views often misguided and their choices fallible, leaving them in need of paternalistic guidance."¹⁸⁸ This position stands diametrically opposed to the other standard theory of poverty, a view embraced by strong

¹⁸⁴Briggs, *supra* note 65, at 8.

¹⁸⁵Christine Jolls, Gordon Bradford Tweedy Professor of Law and Organization, Yale Law School, *Governing America: The Emergence of Behavioral Law and Economics*, Address at Max Weber Lecture Series, European University Institute (Jan. 28, 2009).

¹⁸⁶Sunstein & Thaler, *supra* note 183, at 1161-62.

¹⁸⁷Of course, whether an individual Section 8 household would see improvement in their long-term welfare if relocated to an opportunity neighborhood is a matter of empirical debate. See Part IIA.

¹⁸⁸Marianne Bertrand, Sendhil Mullainathan & Eldar Shafir, *A Behavioral Economics View of Poverty*, 94 AM. ECON. REV. 419, 419 (2004).

supply-side and status quo proponents. In this narrative, poor individuals are highly rational, wisely pursue their goals, and make calculated decisions adaptive to their life circumstances.¹⁸⁹

A behavioral economics view of poverty takes a third tack. The poor exhibit behaviors that are neither perfectly calculated nor especially wrongheaded. “Rather, the poor may exhibit the same basic weaknesses and biases as do people from other walks of life, except that in poverty, with its narrow margins for error, the same behaviors often manifest themselves in more pronounced ways and lead to worse outcomes.”¹⁹⁰ This position seems akin to common sense. But behavioral economics can usefully guide policy decisions by undertaking more realistic evaluations of recipients’ behavior, gaining insights as to their decision-making processes, and then applying these insights to develop alternative policies for improving outcomes without constraining choice. While standard economic thinking assumes big causes lead to big effects, and thus major interventions are in order, behavioral economics research demonstrates that minor causes may prompt highly consequential behaviors.¹⁹¹

Sunstein and Thaler chronicle the weaknesses and biases common to human decision-making. The poor, like everyone else, do not pay full attention, enjoy limited cognitive abilities, and fail to always maintain complete self-control; therefore, they sometimes make inferior decisions in terms of their own welfare.¹⁹² The decision-making processes of economically disadvantaged persons are further handicapped by their *information poverty*: ghetto residents’ isolation and limited resources constrain access to reliable information for making effective decisions.¹⁹³ These limitations cause individuals to rely instead on certain heuristics and biases

¹⁸⁹*Id.* at 419.

¹⁹⁰*Id.*

¹⁹¹*Id.* at 422-23.

¹⁹² Sunstein & Thaler, *supra* note 183, at 1162.

¹⁹³ BRIGGS, POPKIN & GOERING, *supra* note 1, at 226.

when making decisions: anchoring (employ starting point for thought process then adjust),¹⁹⁴ availability heuristic (determine likelihood of risk or probability of event materializing based on how readily examples come to mind),¹⁹⁵ representativeness (find similarities, rely on stereotypes),¹⁹⁶ unrealistic optimism,¹⁹⁷ status quo bias,¹⁹⁸ loss aversion (desire to stick with current holdings even when change would be in our interest),¹⁹⁹ and undue reliance on social influences.²⁰⁰ On average, the poor are especially sensitive to social influences because of their comparative information poverty and time constraints.²⁰¹ Social influences affect decisions both by conveying information (“if many people do or think something, their actions and their thoughts convey information about what might be best for you to do or think”) and exerting pressure to conform.²⁰² These heuristics and biases can lead individuals to make systematic blunders.²⁰³

In addition to their own internal biases and peripheral cues, individuals’ preferences and decisions are highly sensitive to the default rules, framing effects (i.e. wording of possible options), and starting points that policymakers provide.²⁰⁴ Default rules, frames, and starting points inevitably influence choices because of the human heuristics and biases explored above.²⁰⁵ Default rules, frames, and starting points serve as *suggestions*, and faced with uncertainty, people opt to do what most people do, or do what informed people do.²⁰⁶ Individuals

¹⁹⁴RICHARD H. THALER&CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 23-24 (2008).

¹⁹⁵*Id.* at 24-26.

¹⁹⁶*Id.* at 26-31.

¹⁹⁷*Id.* at 31-33.

¹⁹⁸*Id.* at 34-35.

¹⁹⁹*Id.* at 33-34.

²⁰⁰*Id.* at 53-71.

²⁰¹BRIGGS, POPKIN & GOERING, *supra* note 1, at 226.

²⁰²THALER&SUNSTEIN, *supra* note 195, at 54.

²⁰³ Sunstein & Thaler, *supra* note 183, at 1168.

²⁰⁴*Id.* at 1161.

²⁰⁵*Id.* at 1181.

²⁰⁶*Id.*

are also prone to *inertia* and unlikely to undertake the action required for change from the default or starting value. Default rules might also create *endowment effects*, by which people tend to value goods more highly if those goods were initially allocated to them than if they were assigned elsewhere. These effects are compounded when people’s preferences are ill-formed and murky.²⁰⁷

The degree to which peripheral considerations and situational cues, both those specific to the individual and characteristic of the policy, dictate decision-making depends on the choice and the chooser. When in unfamiliar and challenging situations, an individual will have less focused attention available for processing relevant information, leading him to fall back on heuristics and biases and often resulting in faulty decision-making.²⁰⁸ These factors are especially pronounced for those whom Michael Barr terms “low-literate individuals.”

[“Low-literate” individuals] tend to experience even greater difficulties with the trade-offs between effort and accuracy, show overdependence on peripheral cues, and tend toward a systematic withdrawal from many market interactions...People often do not fully process data that is imminently available because of limitations in attention, understanding, or perceived relevance, misremembering, or misforecasting one’s own behavior.²⁰⁹

Perhaps for the reasons Barr identifies, default rules generate the largest behavioral effect for women and African-Americans, two historically disadvantaged groups.²¹⁰

The demographic characteristics of voucher recipients and the challenges of navigating metropolitan housing markets indicate that biased decision-making may characterize the Section 8 search process. Women, minorities, and “low-literate” individuals comprise the majority of

²⁰⁷*Id.* at 1181-82.

²⁰⁸Michael S. Barr, Sendhil Mullainathan & Eldar Shafir, *Behaviorally Informed Regulation*, in NO SLACK: THE FINANCIAL LIVES OF LOW-INCOME AMERICANS 246, 249 (Michael S. Barr ed., 2012).

²⁰⁹*Id.*

²¹⁰Sunstein & Thaler, *supra* note 183, at 1181.

Section 8 recipients.²¹¹ Choosing an apartment and a neighborhood in a short time frame, while navigating the administrative hassles imposed by housing authorities, is a tense and challenging situation likely to divert focused attention from reasoned decision-making. Section 8 recipients choosing units are faced with numerous and complex locational choices,²¹² do not get prompt feedback on the long-term impacts of their neighborhood decisions,²¹³ and have limited knowledge of and/or opportunity to experience alternatives.²¹⁴ All of these conditions – decisions are difficult and rare, prompt feedback is not available, choosers are only able to make limited comparisons on their own, and recipients have trouble translating the choices into likely experiences – make the Section 8 lease-up prone to faulty decision-making processes and ripe for a nudge.²¹⁵

Sunstein and Thaler define a “nudge” as “any aspect of choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”²¹⁶ In short, it is a way of structuring choice that helps people learn and process information so they can make better decisions on their own.²¹⁷ Sunstein and Thaler claim there are six principles of good choice architecture common to well-designed systems:²¹⁸

iNcentives
Understand mappings
Defaults

²¹¹While White non-Hispanic and Black non-Hispanic households comprise roughly similar portions of the Section 8 voucher recipient population, 39.6 versus 40.9 percent, the percentage of Black recipients in central cities is twice that of Whites, 51.8 versus 26 percent. DEVINE ET AL., *supra* note 27, at 91. Eighty percent of Section 8 households have a female head of household; forty-eight percent of recipients are female heads of household with dependent children. U.S. DEP’T OF HOUS. & URBAN DEV., A PICTURE OF SUBSIDIZED HOUSING (2008).

²¹²THALER&SUNSTEIN, *supra* note 195, at 72.

²¹³*Id.* at 75.

²¹⁴*Id.* at 72-76. (“It is particularly hard for people to make good decisions when they have trouble translating the choices they face into the experiences they will have...When people have a hard time predicting how their choices will end up affecting their lives, they have less to gain by numerous options and perhaps even by choosing for themselves. A nudge might be welcome.”)

²¹⁵BRIGGS, POPKIN & GOERING, *supra* note 1, at 232.

²¹⁶THALER&SUNSTEIN, *supra* note 195, at 6.

²¹⁷*Id.* at 97.

²¹⁸*Id.* at 100.

Give feedback
Expect error
Structure complex choices

Each component is relatively self-explanatory. Good choice architecture requires understanding the processes by which individuals map information in order to present relevant information in a more comprehensible way.²¹⁹ Choice architects should also carefully consider how to structure complex and numerous choices to prevent people from resorting to erroneous simplifying strategies.²²⁰ Inertia, status quo bias, and the power of suggestion ensure that a large number of people will end up with the default, i.e. the option that goes into effect should the chooser do nothing, thus policymakers should wisely choose their defaults.²²¹ Well-designed systems provide feedback, letting people know when they are doing well and when they are making mistakes, in order to help individuals improve their performance.²²² A well-designed system anticipates that its users will make mistakes and should be forgiving of these errors when possible.²²³ Finally, a well-designed system pays attention to incentives. While incentives are more commonly the domain of traditional economic theory, behavioral economists emphasize the salience of incentives; incentives' success hinges on attracting people's attention so they might respond accordingly.²²⁴

To summarize, new behavioral economics research highlights individuals' bounded rationality, demonstrates the susceptibility of decisions to peripheral and systemic cues, and suggests "nudges" by which to improve individuals' welfare without constraining their freedom

²¹⁹*Id.* at 91-94.

²²⁰*Id.* at 94-97.

²²¹*Id.* at 83.

²²²*Id.* at 90.

²²³*Id.* at 87.

²²⁴*Id.* at 97-99.

of choice. Part III addresses whether these “nudge” principles should inform Section 8 voucher reform or whether other policy proposals should prevail.

III. A “NUDGE” FRAMEWORK FOR SECTION 8 REFORM

This Section defines and differentiates the normative frameworks underlying proposed Section 8 reforms: exit-only voucher proposals are justified by reference to an antighettoization paradigm, while an emphasis on recipient choice undergirds proposals to expand the supply of units available to Section 8 vouchers or maintain the locational status quo. While sympathetic to antighettoization’s emphasis on improving outcomes and choice-based theories’ respect for recipient autonomy, this Section ultimately rejects both of these normative approaches. I propose instead a “nudge” framework, whereby government planners attempt to improve Section 8 recipients’ locational outcomes without constraining freedom of choice. The last subsection explains why, from both a normative and legal perspective, a “nudge” framework is the correct paradigm for Section 8 reforms.

A. Defining and Differentiating Potential Frameworks for Section 8 Reform

1. Antighettoization Paradigm Underlies Exit-Only Voucher Proposals

Exit-only voucher proponents defend their proposals as compelled by justice. In their view, justice necessitates affirmative policies designed to eradicate racially concentrated ghettos, structures of subordination that compound the destructive forces of poverty, unemployment, crime, and poorly functioning social institutions, leaving its occupants with poor quality of life and bleak odds of success.²²⁵ Polikoff, Fiss, and Solow offer two primary justifications for this “antighettoization” framework of justice for housing law. One, ghettos perpetuate the racial caste

²²⁵ Solow, *supra* note 37, at 483; Fiss, *supra* note 86, at 36-43.

system by producing an “identifiable and persistent black underclass in America’s cities;”²²⁶ only through widescale economic integration programs can we improve ghetto residents’ life prospects and begin to remedy racial isolation.²²⁷ Two, governments’ complicity in creating and maintaining racial ghettos makes “antighettoization” through exit-only voucher programs and other deconcentration initiatives all the more morally necessary; government has a responsibility to remedy the subordination it perpetuated.²²⁸ Solow further asserts that not only does government have a responsibility to remedy ghetto residents’ subordination, it also has a responsibility to address the broader societal harms inflicted by racially concentrated ghettos.²²⁹ Having neighborhoods stratified by racial class serves to decrease a city’s overall economic activity, lower the employment rate, and raise aggregate crime levels.²³⁰

These justifications rest on admittedly paternalistic assumptions. The antighettoization framework posits both that living in integrated, high opportunity neighborhoods will improve current ghetto residents’ welfare, and that government planners know better than Section 8 recipients what neighborhoods will optimize their long-term outcomes. Indeed, exit-only voucher proponents concede that an antighettoization framework would paternalistically prevent African-American households from choosing to live in racially concentrated ghettos but counter that: “The choice to live and raise one’s children in a ghetto is not an informed preference that society should deem morally compelling.”²³¹

Antighettoization theorists offer several reasons why the choice to reside in a racially concentrated ghetto should not be considered morally acceptable in a liberal society. In liberal

²²⁶ Solow, *supra* note 37, at 495.

²²⁷ Polikoff, *supra* note 20, at 145.

²²⁸ *Id.* at 149.

²²⁹ Solow, *supra* note 37, at 495.

²³⁰ WILSON, *supra* note 53, at 14-54 (detailing the low levels of economic activity and decreased employment rates associated with racially and economically segregated cities).

²³¹ Solow, *supra* note 37, at 496.

democracies, rights are understood as conferring the ability to access societal resources, not to certain life outcomes willed by the individual.²³² A move to an integrated, high opportunity neighborhood would expand ghetto residents' access to resources and hence is consistent with the liberal conception of rights.²³³ Additionally, material deprivation may prevent ghetto residents from being fully autonomous persons able to make decisions reflective of their true preferences.²³⁴ poverty hinders autonomy by limiting exposure to crucial information and the range of experience necessary for critical competence,²³⁵ reducing the capacity for self-reflection,²³⁶ causing emotional difficulties,²³⁷ and decreasing self-efficacy.²³⁸ In other words, Section 8 recipients' choices proceed from unjust background conditions that lead to distorted preference development.

Even assuming, however, that Section 8 recipients are fully autonomous individuals with a right to choose their residential outcomes, three factors counsel against complete deference to their geographic preferences. First, Section 8 recipients receive housing subsidies, and, in bestowing this gift, the government may attach such reasonable conditions as necessary to achieve program goals.²³⁹ Second, while adults may choose to live in racially concentrated ghettos, society should not condone or subsidize their decision to deny their children the advantages of better neighborhoods, as these opportunities are necessary for children to develop

²³²*Id.* at 501.

²³³*Id.*

²³⁴ John Christman, *Autonomy, Independence, and Poverty-Related Welfare Policies*, 12 PUBLIC AFFAIRS QUARTERLY 383, 394 (1998).

²³⁵*Id.* at 387.

²³⁶*Id.* at 389.

²³⁷*Id.* at 392.

²³⁸*Id.* at 393.

²³⁹ Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965). See *infra* notes 248-251 and accompanying text for further discussion.

into fully autonomous individuals themselves.²⁴⁰ In short, where the parent's autonomy and child's equality of opportunity conflict, the child's access to basic material resources should be prioritized.²⁴¹ Finally, just as government should protect children from their parents' poor locational decisions, so too is government justified in protecting the 50 year-old from those actions to which his 25 year-old self is prone that will prove injurious to his welfare.²⁴² Exit-only vouchers operationalize the preferences of the 50 year-old Section 8 recipient while constraining the choices of his 25 year-old self.

2. Choice-Based Theory Underlies Status Quo and Supply-Side Proposals

The "choice-based" theory of justice undergirding proposals to expand the supply of units available to Section 8 voucher recipients and/or maintain the locational status quo stands diametrically opposed to the "antighettoization" theory of justice justifying exit-only voucher proposals. The choice-based theory of justice purports that ghetto residents should be able to choose their own fates and remain in their neighborhoods, if they so desire.²⁴³ Ghetto residents enjoy a "right to the city," as Henri Lefebvre posits; that right includes both the "right to appropriate urban space" and the "right to participate centrally in the production of urban space."²⁴⁴ John Calmore similarly argues for a nonsegregation paradigm that both recognizes

²⁴⁰ Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 41 (2008).

²⁴¹ *Id.*

²⁴² FRANK, *supra* note 64, at 243.

²⁴³ Brian Patrick Larkin, Note, *The Forty-Year "First Step": The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1653 (2007); Michael R. Tein, Comment, *The Devaluation of Nonwhite Community in Remedies for Subsidized Housing Discrimination*, 140 U. PA. L. REV. 1463, 1496 (1992) (arguing for "the right of people to remain indefinitely where they are"); J. Phillip Thompson, *Beyond Moralizing*, in *IN A WAY OUT*, *supra* note 86, at 66. ("I hope that instead of telling poor blacks that they cannot afford to live with one another...some kind of democratic and empowering process can be envisioned in which African-Americans might be able to utilize their churches, clubs, community organizations, and other social networks to promote their own vision of how they want to live...").

²⁴⁴ Mark Purcell, *Citizenship and the Right to the Global City: Reimagining the Capitalist World Order*, 27 INT'L J. URB. & REGIONAL RES. 564, 577 (2003).

people's right to remain where they are and calls for the elimination of restrictions on moving into other areas.²⁴⁵

Choice-based theorists further assert that limited supply prevents low-income minorities from making meaningful residential choices. As John Christman writes, autonomy demands that:

In any particular situation, the person must also be faced with a minimally adequate range of palatable options and must be able to choose outcomes from which he or she will not be deeply alienated.²⁴⁶

Thus, in addition to eliminating restrictions on moving into other areas, many choice-based proponents argue for expanding the residential choices for low-income minorities principally by increasing the supply of available units. Others go even farther and assert that minorities have a right to a revitalized ghetto; in other words, government should transform their home neighborhoods into opportunity neighborhoods and thereby allow individuals to choose between communities of opportunity, rather than choosing between living among their friends and neighbors in substandard housing and living in integrated, opportunity neighborhoods.²⁴⁷

Choice-based theorists reject the suggestion that, since Section 8 vouchers are a subsidy and not an entitlement, locational constraints are reasonable conditions on their use. As law professor Charles Reich argues, given government's hesitance to attach conditions to business subsidies, why should it be more willing to do so with welfare recipients?²⁴⁸ Reich further disputes the idea that subsidies should be seen as gifts given on condition.²⁴⁹ Such a position is a relic of the days when we believed the poor were to blame for their poverty; we now recognize that the poor have a right to a "minimal share in the commonwealth" and should not unilaterally

²⁴⁵ John O. Calmore, *Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7, 12 (1980).

²⁴⁶ Christman, *supra* note 234, at 389.

²⁴⁷ Tein, *supra* note 243, at 1494.

²⁴⁸ Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 736 (1964).

²⁴⁹ *Id.* at 749.

have their “independence of action” constrained through receipt of benefits.²⁵⁰ Rather, each constraint should be carefully tested to assure it reasonably relates to a proper legislative goal.²⁵¹ Tein adds that recipients’ poverty further counsels against constraints: since tenants’ diminished bargaining power leads them to participate in the Section 8 program, it is especially important that the program be administered so as to avoid infringing on the right to choose rather than compound inequities.²⁵²

B. The Case Against Exit-Only Vouchers

Exit-only voucher proposals aim to achieve several commendable goals: improve the welfare of Section 8 recipients, promote integration, and thereby redress government-perpetuated injustices. But while the goals are irreproachable, the means are not. There exist significant problems with exit-only voucher policies, including but not limited to their disregard for recipients’ preference to remain in ghetto neighborhoods, the limited empirical evidence supporting such constraints on choice, and the signaled devaluation of African-American communities implicit in deconcentration policies. This subsection outlines the disadvantages of exit-only vouchers and, in so doing, starts to make the case for “nudge” reforms to Section 8.

1. Liberal Emphasis on Choice and Autonomy

Solow and Fiss assert that liberal society’s accepted conception of rights as equal access to opportunities supports exit-only voucher policies. But an equally fundamental tenant of liberal societies – a person is best positioned to know his or her interests – cuts against their stance.²⁵³

Ever since Mill’s classic exposition of the liberal position,²⁵⁴ it has been widely accepted in western democracies that the individual is in general the best judge of his own welfare, thus

²⁵⁰Reich, *supra* note 239, at 1255-56.

²⁵¹*Id.* at 1255.

²⁵²Tein, *supra* note 243, at 1497.

²⁵³Bill New, *Paternalism and Public Policy*, 15 *ECON. & PHIL.* 63, 63 (1999).

any interference with individual autonomy must be rigorously justified.²⁵⁵ The position hinges on a two-prong argument. One, the utilitarian or consequentialist approach emphasizes that the individual knows best his preferences, their relative importance, and what choices will fulfill his preferences.²⁵⁶ In other words, individual autonomy maximizes utility. Two, the deontological approach emphasizes that the freedom to make choices has intrinsic as well as consequentialist value;²⁵⁷ exercising choice is important in itself, not merely as a means to maximize welfare.²⁵⁸

Whether Section 8 voucher recipients make locational decisions that reflect their preferences and maximize their welfare is a matter of debate. However, most market and liberal philosophy presumes not that individuals will necessarily maximize their welfare, but rather that the state is equally bad and perhaps worse at so doing.²⁵⁹ Indeed, the mixed results from Moving to Opportunity and other deconcentration initiatives evidence that government is no more adept than Section 8 recipients at choosing locations that improve outcomes.²⁶⁰ Additionally, exit-only voucher programs deny Section 8 recipients the intrinsic benefits of exercising choice. These restrictions compound inequities, insofar as Section 8 recipients' diminished economic bargaining power and hence limited choice set leads them to apply for housing subsidies.²⁶¹

Exit-only voucher proponents would counter that the proposed exit-only voucher remedy does not constrain choice or infringe on autonomy because families can opt to not participate in the program and instead remain in their current residences. This is a false choice. Only twenty-

²⁵⁴ JOHN STUART MILL, ON LIBERTY 151 (1974) (“The strongest of all arguments against the interference of the public with the purely personal conduct is that when it does interfere, the odds are that it interferes wrongly and in the wrong place”).

²⁵⁵ New, *supra* note 253, at 75.

²⁵⁶ *Id.*

²⁵⁷ Amartya Sen, *Freedom of Choice: Concept and Content*, 32 EUR. ECON. REV. 269 (1988).

²⁵⁸ New, *supra* note 253, at 76.

²⁵⁹ *Id.* at 64.

²⁶⁰ See, e.g., DEVINE ET AL., *supra* note 27, at 84 (“first-time movers do not appear to get much benefit, either in terms of avoiding poverty or in terms of moving toward economic independence”).

²⁶¹ Tein, *supra* note 243, at 1497.

five percent of eligible families receive housing aid,²⁶² and 16 percent of all families are severely rent-burdened, meaning they spend more than 50 percent of their income on housing.²⁶³ The recent recession pushed the homeless rolls to 1.6 million over the course of a year, in concert with rising unemployment.²⁶⁴ A poor family's likely choice between substandard housing and/or homelessness vs. forced integration is no choice at all.²⁶⁵ In the First Amendment context, the Supreme Court has held that to condition receipt of a government benefit on compliance with law inimical to a person's religious beliefs infringes on their free exercise.²⁶⁶ Likewise, to condition receipt of a housing voucher on acceptance of locational conditions constrains choice, in opposition to the program's goals and the liberal emphasis on autonomy. Moreover, a large scale deconcentration initiatives would serve to limit the choices available to those ghetto residents choosing to stay behind; the diversion of resources from inner-city communities and the likely migration of these communities' most advantaged members would produce a "super-under class," to borrow Richard Ford's phrase, even more isolated, concentrated, and desperate than before.²⁶⁷

2. The Mixed Empirical Evidence Does Not Justify Government Paternalism

Given that the individual is typically the best judge of his own welfare, and freedom of choice has intrinsic importance, government bears a heavy burden of proof to justify its

²⁶² G. THOMAS KINGSLEY & CHRISTOPHER HAYES, URB. INST., HOUSING ASSISTANCE IN MAKING CONNECTIONS NEIGHBORHOODS 1 (2008), available at <http://www.urban.org/uploadedpdf/412202-housing-assistance.pdf>.

²⁶³ MARY CUNNINGHAM, PREVENTING AND ENDING HOMELESSNESS 2 (2009). Housing is considered affordable when a household spends no more than 30 percent of its income on rent. *Id.*

²⁶⁴ CUNNINGHAM, *supra* note 263, at 2.

²⁶⁵ Tein, *supra* note 243, at 1494.

²⁶⁶ See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (a "substantial burden" is imposed, at a minimum, where the law forces a person or group "to choose between following the precepts of [their] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion in order to accept [government benefits], on the other hand").

²⁶⁷ Richard Thompson Ford, *Down by Law, in A WAY OUT*, *supra* note 86, at 48.

restrictions on individual autonomy.²⁶⁸ Government infringements on choice are best justified when (1) the state knows better than the individual how to maximize his welfare; and (2) the improvement is sufficiently significant to justify infringement on autonomy.²⁶⁹ Individuals may fail to make welfare-maximizing decisions due to technical inability (i.e. inability to make choices that achieve preferences because the quantity of necessary data is overwhelming and/or the causal connections between choice and outcomes are unclear), weak will that preferences current happiness over long-term wellbeing, emotional decision-making, a lack of experience, or weak preferences.²⁷⁰ Thus, the state might be a better judge of an individual's interests where the individual faces significant temptation to satisfy immediate wants rather than think of long-term benefits; when the individual lacks firsthand experience of the consequences of a decision; and/or where technical ability is required.²⁷¹

As discussed earlier, Section 8 recipients' geographic attachments, information poverty, and the difficulty of conceptualizing a neighborhood's direct impacts on long-term outcomes, among other factors, theoretically indicate that the government may outperform recipients as a judge of what residential locations would maximize welfare and that the increase in welfare would be significant enough to justify infringement on choice. This hypothesis is not empirically borne out. The mediocre track record of opportunity voucher programs does not evidence that government knows better than recipient families what residential location will optimize their well-being and counsels in favor of maintaining recipient choice. Rather, the growing evidence that poor families experience at most modest benefits from living in economically and racially

²⁶⁸*Id.*

²⁶⁹New, *supra* note 253, at 76.

²⁷⁰*Id.* at 71-72.

²⁷¹*Id.* at 79.

integrated neighborhoods accords with the voucher recipients' tendency to rent in mostly poor, minority neighborhoods.²⁷²

There are significant reasons why remaining in his home neighborhood might be more conducive to an individual recipient's welfare than relocation to an opportunity area. Despite the problems of ghetto neighborhoods, they still contain valuable family and social ties for some recipients.²⁷³ Current neighborhoods may afford proximity to family and friends, who provide needed childcare services to low-income mothers otherwise unable to afford it as well as more general day-to-day support.²⁷⁴ Some ghettos are also home to crucial institutions like black churches and community organizations that help create social capital and facilitate the formation and circulation of community norms.²⁷⁵ Inner-city areas may be more walkable and have a greater concentration of public transportation, an imperative for recipients without cars.²⁷⁶ And despite spatial mismatch theories, some residents may have more job opportunities and/or higher paying employment options in the inner city.²⁷⁷ Residential concentration can promote the formation of group-specific networks that provide enable access to jobs.²⁷⁸ Ethnic density may also be necessary to achieve the critical mass sufficient to support group-specific community institutions or commercial enterprises.²⁷⁹

In addition to its tangible benefits, living in a community of one's own may provide psychic advantages as well.²⁸⁰ Residents of black professional enclaves report that their

²⁷² Ellickson, *supra* note 144, at 1015.

²⁷³ Tracey L. Meares, *Communities, Capital, and Conflicts*, in *A WAY OUT*, *supra* note 86, at 52.

²⁷⁴ BRIGGS, POPKIN & GOERING, *supra* note 1, at 192-93.

²⁷⁵ Meares, *supra* note 273, at 53.

²⁷⁶ BRIGGS, POPKIN & GOERING, *supra* note 1, at 232-33.

²⁷⁷ *Id.* at 193.

²⁷⁸ Cutler, Glaeser & Vigdor, *supra* note 38, at 761.

²⁷⁹ *Id.*

²⁸⁰ Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan Areas*, CORNELL L. REV. 729, 731(2001) (detailing the phenomenon of African-American suburban

neighborhoods provide healing acceptance that counterbalances the stark rejection experienced in broader society.²⁸¹ Moreover, as law professor Sheryll Cashin found in her study of middle-class black enclaves, residents take an “affirmative delight in simply being among people like themselves in a community where they feel completely welcome.”²⁸² It is also well-documented that relative economic standing strongly affects happiness and performance.²⁸³

3. The Signaled Devaluation of African-American Culture and Identity

Noted civil rights leaders John Calmore, among others, argue that exit-only voucher programs and other mandatory integration policies devalue and further subordinate African-American culture and identity.²⁸⁴ In their view, such programs rest on white ethnocentric assumptions that nonwhites prefer to live dispersed among whites and will benefit from even minimal doses of integration.²⁸⁵ Such beliefs ignore minority voices and their right not to integrate.²⁸⁶ The position also denies legitimacy to nonwhite communities by implying that racially concentrated ghettos have no redeeming societal value,²⁸⁷ and that only majority white neighborhoods are valid communities:²⁸⁸ “the idea that properly ‘balanced’ communities must have racial proportions reflective of society as a whole robs nonwhite institutions of any claim to equal footing and relegates them to the margins.”²⁸⁹

enclaves and ultimately concludes that even middle-class blacks are harmed by segregation because of the biases of larger society).

²⁸¹ *Id.* at 747-48.

²⁸² *Id.* at 749.

²⁸³ FRANK, *supra* note 64, at 28-35.

²⁸⁴ Calmore, *supra* note 245, at 12 (arguing for a nonsegregation framework that recognizes people’s right to remain where they are and calls for eliminating restrictions on moving into other areas); Tein, *supra* note 243, at 1495-96.

²⁸⁵ Tein, *supra* note 243, at 1481. Tein counters that small infusions of nonwhite persons into predominantly white areas only serve to isolate and further marginalize them. *Id.*

²⁸⁶ *Id.* at 1470.

²⁸⁷ Solow, *supra* note 37, at 495 (“racial ghettos, however, perpetuate racial castes while producing no other collective good”).

²⁸⁸ Tein, *supra* note 243, at 1470.

²⁸⁹ *Id.* at 1491.

By deconcentrating ghetto neighborhoods, exit-only voucher reforms may also impede formation of minority cultural capital and political power. Racial enclaves create the opportunity for an enlivened sense of spirit and culture.²⁹⁰ Predominantly minority neighborhoods can enable residents to consolidate their political power; indeed, voting rights jurisprudence hinges on the assumption that dispersion serves to decrease minorities' political strength.²⁹¹ These benefits illustrate that nonwhite individuals' choice to remain in ethnic enclaves may reflect valid cultural preferences and utility-maximizing rationales, rather than simply a reactive sentiment.²⁹²

C. The Case Against the Status Quo

Whether Section 8 recipients are more adept than government planners at choosing neighborhoods conducive to their long-term welfare has been a matter of significant debate. But whereas recipients' competence relative to government is the crux of utilitarian defenses of the locational status quo, choice-based theorists' critique of exit-only vouchers and support of the status quo rests on the notion that Section 8 recipients' locational preferences and choices should be respected rather than constrained. This Article sympathizes with this premise. There exists, however, significant evidence that locational outcomes do not necessarily reflect recipients' true preferences. In other words, recipients' preferences and decisions might look quite different if they had a broader range of experiences, complete information, and no cognitive biases. Moreover, defaults matter, and the current Section 8 defaults shape recipients' choices to their detriment. That the present administration of the Section 8 program perpetuates recipients' locational biases only reinforces the conclusion that the existing geographic distribution of Section 8 vouchers does not capture recipients' preferences and necessitates policy reforms.

²⁹⁰Cashin, *supra* note 280, at 730.

²⁹¹ Tein, *supra* note 243, at 1492.

²⁹²*Id.* at 1494.

1. Recipients' Information Poverty and Cognitive Biases

The normative case for the locational status quo – the distribution of Section 8 vouchers reflects people's preferences and therefore cannot be unjust – rests on a faulty premise. The argument hinges on the assumption that residents' choice accurately reflects self-ownership and ideals formed under fair conditions, rather than proceeding from unjust background conditions resulting in distorted preference development. It is unrealistic to assume that an individual confined to his segregated, high-poverty neighborhood will form the same preferences and employ the same decision-making processes as he would have if afforded and aware of a broader range of opportunities.²⁹³ At the very least, ghetto residents' isolation and limited resources constrain access to reliable information for making effective decisions (*information poverty*). Even sociologist Xavier de Souza Briggs, who emphasizes locational choice and argues that mobility programs should be paired with reinvestment in inner-city neighborhoods in order to honor the choices of both those who leave and those who stay behind, rejects the assumption that distribution of Section 8 vouchers perfectly reflects recipients' enlightened preferences:

For poor people who have lived segregated lives in dangerous, high-poverty neighborhoods, conventional choice programs offer little room to maneuver, thanks to a limited choice set, what we have called information poverty, the limited comparisons the “choosers” are in a position to make on their own, and, sometimes, a logic of choice focused on avoiding violence and other risks – not necessarily on garnering opportunity.²⁹⁴

To summarize, voucher recipients may not know what they are missing because they have never had it nor has anyone they know ever had it.²⁹⁵

In addition to distorted background conditions, voucher recipients' locational choices may be hindered by the same pitfalls common to most human decision-making. For all

²⁹³ Prior to receiving Section 8 vouchers, recipient households typically live in predominantly minority, high poverty neighborhoods, as these are the only locations in which they can afford housing. DEVINE ET AL., *supra* note 27, at 29.

²⁹⁴ BRIGGS, POPKIN & GOERING, *supra* note 1, at 226.

²⁹⁵ *Id.* at 226.

individuals, poor and rich alike, meaningful choice requires often difficult to acquire information and careful judgments about that information.²⁹⁶ Recipients' information poverty and cognitive biases may prevent them from making neighborhood decisions in line with their true preferences and that maximize their welfare.

In fact, surveyed voucher recipients consistently express a preference for quiet, safe neighborhoods that offer amenities and high-quality services,²⁹⁷ but confess their lack of familiarity with suburban or low-poverty neighborhoods and their confusion about program rules.²⁹⁸ Researchers have also found that recipients often possess misinformation about suburban and/or low-poverty neighborhoods. Some participants in a 2000 study of HOPE VI relocatees, believed, for instance, that suburbs were prone to natural disasters, that the voucher program was part of a conspiracy to push blacks out of the city and into undesirable areas, and that the voucher program would terminate.²⁹⁹

Recipients' search tactics do not remedy these information gaps. Extensive information gathering and neighborhood canvassing require time, transportation, childcare and other scarce resources, which recipients frequently do not possess.³⁰⁰ Section 8 households instead employ social networks, newspapers, and the PHA-provided list of housing leads as search strategies.³⁰¹ Section 8 recipients' reliance on their social networks for information aligns with research findings that less-educated individuals more heavily utilize social networks in making decisions; as recipients' networks are often rooted in their particular neighborhoods or other low-income areas, this reliance serves to limit the locations that voucher holders consider and

²⁹⁶*Id.* at 233.

²⁹⁷SUSAN POPKIN & MARY CUNNINGHAM, *SEARCHING FOR RENTAL HOUSING WITH SECTION 8 IN CHICAGO* 30 (2000).

²⁹⁸*Id.* at 28-33.

²⁹⁹*Id.* at 26-27.

³⁰⁰BRIGGS, POPKIN & GOERING, *supra* note 1, at 233; Malaspina, *supra* note 94, at 309.

³⁰¹GALVEZ, *supra* note 26, at 12.

ultimately decide between.³⁰² Nor do public housing authorities (PHAs) help address Section 8 recipients' information poverty. As a general rule, housing authorities provide new recipients only with a list of housing leads.³⁰³ These listings are commonly located in the same subset of impoverished neighborhoods and are often comprised primarily of landlords who have previously rented to Section 8 tenants.³⁰⁴

Not only do Section 8 recipients lack adequate information about their residential options, the difficulties and stresses of navigating metropolitan housing markets and leasing a unit leave Section 8 recipients with less focused attention to process the information that is available. Voucher recipients describe the search process as daunting and often have trouble finding housing within the 60 to 120 day time limit imposed by the housing authority.³⁰⁵ Faced with an overwhelming decision, Section 8 recipients are likely to fall back on heuristics and cognitive biases that often result in faulty decision-making. The demographic characteristics of Section 8 recipients compound this likelihood: women, minorities, and "low-literate" individuals comprise the majority of Section 8 recipients and are particularly sensitive to peripheral cues and biases.³⁰⁶ Survey research of Section 8 recipients supports these theoretical predictions. Recipients commonly possess and rely on negative stereotypes about white neighborhoods and fear discrimination from landlords, realtors, or neighbors. Voucher holders also display status quo biases, including place attachment and dependence, that militate in favor of staying in their current neighborhoods. Significant search costs compound inertia effects.³⁰⁷ Finally, in addition

³⁰² Galvez, *supra* note 27, at 27; Malaspina, *supra* note 94, at 309 (recipients often lack social networks outside of their neighborhoods).

³⁰³ Malaspina, *supra* note 94, at 317.

³⁰⁴ Most successful households approached and rented from landlords who had previously hosted Section 8 tenants. STEPHEN D. KENNEDY & MERYL FINKEL, SECTION 8 RENTAL VOUCHER AND RENTAL CERTIFICATE UTILIZATION STUDY: FINAL REPORT (1994).

³⁰⁵ GALVEZ, *supra* note 26, at 12.

³⁰⁶ See *supra* notes 210-14 and accompanying text.

³⁰⁷ Malaspina, *supra* note 94, at 317-18.

to the information received from neighbors and friends, voucher recipients experience peer pressure to stay in their home communities.³⁰⁸

2. Section 8 Administration Compounds Recipients' Locational Biases

Rather than remedying recipients' information poverty and accounting for cognitive biases, most housing authorities' administration of the Section 8 program compounds voucher holders' locational inclinations. As Sunstein and Thaler detail, starting points and defaults convey information, impact the formation of preferences, and influence choices. For the reasons discussed earlier, starting points and defaults generate especially large behavioral effects for women, minorities, and low-literate individuals faced with unfamiliar and challenging situations – the Section 8 population and search process in a nutshell.³⁰⁹

Housing authorities have significant power to shape recipients' locational outcomes, and their current administration of the Section 8 program misuses this discretion. Most housing authorities do not provide mobility counseling, transportation access, neighborhood tours, or other services that would inform recipients about a wider range of housing options in advantaged neighborhoods. Instead, PHAs simply provide a list of available rental units that accept Section 8 vouchers that serve as starting points or defaults for the search process. These lists typically consist of landlord-notified openings and are often concentrated in poorer, less integrated neighborhoods.³¹⁰ Thus, in many jurisdictions, the existing default for Section 8 recipients is a list of ghetto housing offered by slumlords. For instance, a report by the Greater New Orleans Fair Housing Action Center found that approximately two-thirds of HANO's Section 8 voucher

³⁰⁸ Galvez, *supra* note 27, at 26.

³⁰⁹ See Section IIB.

³¹⁰ See *supra* notes 303-04 and accompanying text.

listings were located in low or very-low opportunity areas.³¹¹ By passively providing these listings, most PHAs steer recipients to poor, segregated neighborhoods.³¹² In contrast, when PHAs provide viable listings of available apartments in suburban neighborhoods, take-up rates in low-poverty rates improved.³¹³ PHA's provision of intensive one-on-one counseling and housing search assistance further increases recipients' relocation to opportunity neighborhood.³¹⁴ seventy percent of *Comervoucher* recipients chose to relocate to low-poverty neighborhoods throughout Buffalo after receiving mobility counseling.³¹⁵

D. The Normative Case for a "Nudge" Framework

The above sections detailed why neither the antighettoization framework underlying exit-only voucher proposals nor the choice-based defense of the status quo are the correct paradigms for Section 8 reform. To recap, the antighettoization framework errs in dismissing an individual's decision to live in a ghetto neighborhood as not morally compelling, while the choice-based approach overlooks how distorted background conditions, information poverty, cognitive biases, and existing Section 8 program defaults may prevent recipients from forming and realizing their true locational preferences.

Section 8 reforms should instead be oriented around a "nudge" framework: government should steer recipients toward opportunity areas that are on average likely to improve outcomes while allowing recipients to opt out and choose their own neighborhoods. This approach combines antighettoization's focus on improving individual outcomes, choice-based theorists'

³¹¹ Cameron Eaton, 2009 Housing Choice Voucher Program (HCVP) Opportunity Maps (Dec. 7, 2009) <http://www.gnofairhousing.org/2009/12/07/opportunity-maps/>.

³¹² Tegeler, Hanley & Liben, *supra* note 68, at 483.

³¹³ *Id.* at 482.

³¹⁴ *Id.*

³¹⁵ ROBINSON & GRANT-THOMAS, *supra* note 179, at 80.

emphasis on individual autonomy, and the pragmatic understanding that “paternalism, at least in a weak sense, is impossible to avoid.”³¹⁶

Choice-based theorists are correct that Section 8 recipients’ choices should be respected, both because individuals may know better than government planners how to maximize their welfare and because of the intrinsic importance of autonomy, especially for the already marginalized. But preferences do not exist in a vacuum; they are socially produced. To the extent that recipients’ choices reflect inadequate information, limited experience, and cognitive biases, government should seek to remedy these problems so as to enable recipients to make choices in line with their true preferences. Even more critically, housing authorities should reconfigure the default rules, frames, and starting points they do provide to encourage utility-maximizing residential choices rather than compounding recipients’ locational biases by unintentionally nudging households to segregated, high-poverty neighborhoods. The present arrangement constitutes government-perpetuated segregation and produces no benefit for the majority of recipients. And since the current defaults already constitute coercion, reconfiguring defaults in order to move recipients in welfare-promoting directions should be unobjectionable to even the most fervent libertarian, especially since these defaults will still allow freedom of choice.³¹⁷

Opportunity neighborhoods should be the default sites for use of Section 8 vouchers. While MTO and other exit-only voucher programs have produced insufficient evidence to justify exit-only voucher proposals,³¹⁸ there exists sufficient evidence that opportunity neighborhoods benefit a majority of residents to justify making them the default. MTO participants experienced significant improvements in mental health and well-being; the only population to experience

³¹⁶ Sunstein & Thaler, *supra* note 183, at 1166.

³¹⁷ *Id.* at 1164.

³¹⁸ See *supra* Section III.B(2).

worse outcomes were adolescent boys.³¹⁹ Thus, relocation to opportunity neighborhoods would probably be most recipients' ex post preference, e.g. the default most likely to operationalize the preference of the future 50 year-old recipient rather than his current 25 year-old self.³²⁰ Planners should, however, have the humility to recognize that while opportunity neighborhood residence may benefit the majority of Section 8 recipients, exit-only vouchers would not maximize the welfare of all participants. When armed with full information, Section 8 households are perhaps better positioned than government planners to make decisions that will maximize their welfare. As discussed, there are a number of reasons why continued residence in their home neighborhoods may be utility-maximizing: family and social ties, community institutions, childcare services, availability of public transportation, employment options, and the happiness and improved performance associated with community acceptance and camaraderie.³²¹ Opt-out strategies, by which recipients can choose to remain in the ghetto or relocate outside opportunity neighborhoods, are therefore essential. How burdensome it should be for the recipient to opt-out of the proposed default ("stickiness") depends on how likely opportunity neighborhoods are to promote recipient welfare and hence the degree of paternalism deemed appropriate.

To summarize, the Section 8 program should be administered so as to "nudge" recipients into opportunity areas, while giving individuals who would benefit from a different locational arrangement the freedom to opt out and choose their own neighborhoods. The next section details why this "nudge" framework is the legally, as well as normatively, correct paradigm for Section 8 reform.

³¹⁹ See *supra* Section II.A(1).

³²⁰ Sunstein and Thaler assert that default should be chosen based on (1) cost-benefit analysis indicating which option will improve the welfare of the most choosers; or (2) the ex post preferences of most choosers. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism*, 93 AM. ECON. REV. 176, 178-79 (2003).

³²¹ See *supra* Section III.B(2).

E. The Legal Case for a “Nudge” Framework

For some civil rights advocates, among them Philip Tegeler and Florence Roisman, exit-only vouchers and other deconcentration initiatives are not only morally necessary, they are also legally compelled.³²² In their view, the Fair Housing Act and the Housing and Community Development Act require administering federal housing programs so as to promote integration;³²³ a race-conscious federal policy that provides minority ghetto residents with rental subsidies for use in economically and racially integrated “opportunity neighborhoods” would most effectively foster integration and fulfill these statutory mandates.³²⁴

In their laudable focus on promoting integration, deconcentration proponents ignore the other primary goal embodied in the Fair Housing Act and in the Section 8 program: choice. Both the Fair Housing Act and the Section 8 program were explicitly intended to expand choice and thereby promote integration.³²⁵ Requiring recipients to use their housing vouchers in racially and economically integrated areas constrains residential choices and ignores the acts’ key directive. Moreover, race-conscious policies intended to promote residential integration are likely to encounter Equal Protection Clause challenges, especially where these policies have the incidental effect of limiting minorities’ housing choices.³²⁶ Exit-only voucher policies have only been upheld where necessary to remedy past discrimination, not as an affirmative policy.³²⁷

This Article’s suggested “nudge” framework would promote integrated living patterns without constraining choice or adopting race-conscious policies. In so doing, this proposal would

³²² Florence Wagman Roisman & Philip Tegeler, *Improving and Expanding Housing Opportunities for Poor People of Color: Recent Developments in Federal and State Courts*, 24 CLEARINGHOUSE REV. 312, 325 (1990).

³²³ *Id.* (arguing the express language of Title VIII at §3608(e)(5) imposes an obligation to act affirmatively to promote integration).

³²⁴ Solow, *supra* note 37, at 523.

³²⁵ *See infra* Section III.E(1).

³²⁶ *See infra* Section III.E(3).

³²⁷ John P. Relman, Glenn Schlactus & Shalini Goel, *Creating and Protecting Prointegration Programs under the Fair Housing Act*, in *THE INTEGRATION DEBATE*, *supra* note 133, at 42-45.

comply with the Fair Housing Act's and Housing and Community Development Act's primary dictates while avoiding potential Equal Protection Clause problems. By nudging Section 8 recipients towards integrated neighborhoods, this Article's proposal would also avoid the legal pitfalls facing the current voucher program, which arguably perpetuates segregation in violation of the Fair Housing Act's antidiscrimination provisions.

1. The Fair Housing Act's Prioritization of Choice Over Integration

Exit-only voucher proponents rely primarily on the Fair Housing Act as the legal impetus for their policy proposals.³²⁸ According to Florence Roisman, among others, the express language of Title VII imposes on government agencies an obligation to act affirmatively to promote integration; exit-only voucher programs are a natural outgrowth of that obligation.³²⁹

The express language to which Roisman refers is the FHA's "affirmatively further" mandate, codified at §3608(e)(5), which directs HUD to "administer [housing] programs . . . in a manner affirmatively to further the policies of this subchapter."³³⁰ "The policies of this subchapter" include the dictate "to provide, within constitutional limits, for fair housing throughout the United States."³³¹ Section 3608(e)(5) is therefore understood to require HUD to

³²⁸ See, e.g., Solow, *supra* note 37, at 498 (citing §3608 as the statutory hook for opportunity-housing vouchers); Michelle Ghaznavi Collins, Note, *Opening Doors to Fair Housing: Enforcing the Affirmatively Further Provision of the Fair Housing Act Through 42 U.S.C. § 1983*, 110 COLUM. L. REV. 2135, 2135 (arguing §3608 requires HUD to promote integration and should be enforceable against local governments and housing authorities under §1983).

³²⁹ Roisman & Tegeler, *supra* note 322, at 325.

³³⁰ 42 U.S.C. § 3608(e)(5) (2006). The subsequently enacted §3608(d) imposes analogous obligations on other federal departments and agencies. Specifically, 42 U.S.C. § 3608(d) directs that "[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including an Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary [of HUD] to further such purposes."

³³¹ 42 U.S.C. § 3601 (2006). Collins, *supra* note 328, at 2176 ("The reference in § 3608(e)(5) to § 3601 supports using the policy provision in § 3601 to clarify § 3608(e)(5)").

“affirmatively further fair housing.”³³²The text does not define “affirmatively to further” or “fair housing,” nor does it provide further hints as to the “policies of this subchapter.”³³³

These undefined terms, combined with HUD’s failure to promulgate regulations interpreting them,³³⁴ created a vacuum filled by conflicting judicial and academic interpretations of the §3608(e)(5) mandate. Roisman’s favored interpretation equates “further fair housing” with “promote integration,” based on the Act’s legislative history and judicial opinions.³³⁵ “Promote integration” is, however, only one of the two overarching goals evident in the FHA’s legislative history:(1) equal opportunity in housing choice; and (2) integrated living patterns.³³⁶ Senator Edward Brooke, a Kerner Commission member and one of the FHA’s two cosponsors, testified that the FHA was intended to “protect the freedom of individuals to choose where they want to live.”³³⁷ Rep. Celler echoed his Senate colleague: the Fair Housing Act would “remove the walls of discrimination which enclose minority groups”³³⁸ and thereby eliminate barriers to choice.³³⁹ In contrast, Senator Mondale is widely quoted as saying that the Act was intended to replace the

³³²See, e.g., Craig Gurian & Michael Allen, *Making Real the Desegregation Promise of the Fair Housing Act: “Affirmatively Furthering Fair Housing” Comes of Age*, 43 CLEARINGHOUSE REV. 560, 560 (2010).

³³³Collins, *supra* note 328, at 2142.

³³⁴HUD’s current regulation on affirmatively further fair housing, contained at 24 CFR § 570.601(a)(2), provides only that HUD’s statutory duty to further fair housing also applies to state and local governments, as well as some rental housing providers, and grantees must conduct an analysis of impediments (AI) to fair housing choice within the jurisdiction, take “appropriate actions to overcome the effects of any impediments identified through that analysis,” and maintain records of their analysis and actions regarding fair housing. The accompanying guidance contained in HUD’s Fair Housing Planning Guide somewhat elaborates on these requirements: “HUD interprets these broad objectives to mean: analyze and eliminate housing discrimination in the jurisdiction; promote fair housing choice for all persons; provide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin; promote housing that is structurally accessible to, and usable by, all persons, particularly persons with disabilities; and foster compliance with the nondiscrimination provisions of the Fair Housing Act.”U.S. DEP’T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE, 1-3 (1996), available at <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

³³⁵Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 364 (2007).

³³⁶Larkin, *supra* note 243, at 1625.

³³⁷114 Cong. Rec. 2525 (statement of Sen. Brooke).

³³⁸114 Cong. Rec. 9563 (statement of Rep. Celler).

³³⁹Larkin, *supra* note 243, at 1622.

ghetto with “truly integrated and balanced living patterns.”³⁴⁰ Fair housing advocates seize on this statement to argue that §3608(e)(5) requires HUD to actively promote integration but neglect Mondale’s accompanying observation that economics and choice would determine population dispersal once the FHA removed barriers to integration.³⁴¹ In other words, as Brian Patrick Larkin argues, “protecting private housing choice was the direct result of the Act, but the promotion of integrated living was to be an indirect result.”³⁴²

That is not to say Senators Mondale and Brooke did not perceive integrated living patterns as the ultimate goal.³⁴³ Rather, both men believed the FHA was only a first step “on the true road to integration” and was neither the solution nor even the driving force for achieving integrated living patterns.³⁴⁴ A “foot in the door,”³⁴⁵ it was not a “cure [for] all the wrongs and ills in this country.”³⁴⁶ Additional legislative action would be needed to fulfill the Kerner Commission’s second and third objectives of empowering the powerless and achieving

³⁴⁰ 114 Cong. Rec. 3422 (statement of Sen. Mondale).

³⁴¹ See, e.g., Florence Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 IND. L. REV. 507, 509 (2008). 114 Cong. Rec. 3422 (statement of Sen. Mondale) (“Fair Housing by itself will not move a single Negro into the suburbs – the law of economics will determine that.”)

³⁴² Larkin, *supra* note 243, at 1627. See also Richard H. Sander, Comment, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 919-21 (1988) (arguing that Act’s drafters believed removing discrimination would allow for the creation of the economic and political environment necessary for integration to occur); Leonard S. Rubinowitz & Elizabeth Trosman, *Affirmative Action and the American Dream: Implementing Fair Housing Policies as Federal Homeownership Programs*, 74 NW. U. L. REV. 491, 538 n. 178 (1979) (arguing Senator Mondale saw integration as an expected result but not a direct goal of the Act).

³⁴³ Excepting Senators Brooke’s and Mondale’s statements, the Fair Housing Act produced a very limited legislative record thanks to the circumstances of its passage. Larkin, *supra* note 243, at 1628. See *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 210 (1972) (“The legislative history of the Act is not too helpful”); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 n. 29 (3d. Cir. 1977) (commenting on the Fair Housing Act’s lack of committee reports); *Otero v. New York City Housing Authority*, 484 F.2d 1122 n. 14 (2d. Cir. 1973) (remarking that there was virtually no legislative debate concerning HUD’s affirmative duties under § 3608). The Act quickly cleared the Senate following the Kerner Report’s release and secured equally speedy passage through the House of Representatives after Dr. Martin Luther King’s assassination and the ensuing riots. MASSEY & DENTON, *supra* note 54, at 194.

³⁴⁴ 114 Cong. Rec. 3422 (statement of Sen. Mondale).

³⁴⁵ 114 Cong. Rec. 6000 (statement of Sen. Mondale).

³⁴⁶ 114 Cong. Rec. 6001 (statement of Sen. Brooke).

integration, once the Fair Housing Act achieved the Kerner Commission's first objective of combating discrimination.³⁴⁷

While the FHA's drafters saw the Act as a preliminary step towards integration, judges have adopted a more aggressive view of the FHA's role in achieving this aim. By some courts' interpretation, the Act was intended not merely to break down the walls of discrimination that confined minorities to the ghetto but also to provide an affirmative tool for achieving integration. These subsequent judicial interpretations ensconced the promotion of integration as a direct goal of the Fair Housing Act, on par with equal housing opportunity.³⁴⁸

The judicial understanding of integration as a primary goal of the Fair Housing Act, alongside equal opportunity, appears in interpretations of HUD's §3608(e)(5) obligation to affirmatively further fair housing. Courts uniformly interpret HUD's "affirmatively further" obligation to require HUD, through its operation of its grant programs, to do more than avoid discriminating itself or aiding the discrimination of others, or even removing barriers to equal access to housing by combating discrimination.³⁴⁹ HUD must at least consider the fair housing impacts of its decisions,³⁵⁰ and evaluate alternative courses of action based on their ability to affirmatively further fair housing.³⁵¹ Despite these similarities, two somewhat conflicting interpretations of the provision have emerged:(1) §3608(e)(5) obligates HUD to administer its grant programs so as to *increase the "supply of genuinely open housing,"* expand minorities'

³⁴⁷ The Kerner Report suggested three objectives: "a) eliminating barriers to choice (antidiscrimination); b) removing the frustration of powerlessness (empowerment); and c) increasing contact across racial lines to destroy stereotypes and hostility (integration)." Larkin, *supra* note 243, at 1622. NAT'L ADVISORY COMM'N ON CIVIL DISORDER, REPORT OF THE COMMISSION ON CIVIL DISORDERS (1968) [hereinafter KERNER REPORT].

³⁴⁸ Larkin, *supra* note 243, at 1629.

³⁴⁹ NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d 149, 156-157 (1st Cir. 1987) ("every court that has considered the question has held or stated that Title VIII imposes upon HUD an obligation to do more than simply refrain from discriminating (and from purposely aiding discrimination by others)").

³⁵⁰ Jaimes v. Toledo Metropolitan Housing Authority, 758 F.2d 1086, 1104 (6th Cir. 1985) (HUD officials must consider fair housing impacts in their "decision-making calculus").

³⁵¹ NAACP v. Sec'y of Hous. & Urban Dev., 817 F.2d at 157 ("minimal Title VIII obligation to evaluate alternative courses of action in light of their effect upon open housing").

housing choice, and thereby enable integration;³⁵² and (2) §3608(e)(5) requires HUD to administer its programs so as to *foster “integrated residential housing patterns.”*³⁵³

Academic commentary has largely ignored the distinction between the two definitions, citing “genuinely open supply of housing” and “integrated residential housing patterns” interchangeably for the proposition that §3608(e)(5) requires HUD, and by extension housing authorities, to promote integration.³⁵⁴ Conflating the two phrases ignores key value and operational differences. Whereas the “genuinely open supply of housing” interpretation mandates that HUD to the extent possible administer its funds so as to expand integrated housing opportunities and therefore fair housing choice, the “integrated residential housing patterns” view requires HUD to sometimes constrain housing choice to achieve integration. For instance, a housing authority’s decision to impose racial quotas on public housing occupancy would foster integration but constrain the choices of those occupants denied housing. Similarly, an exit-only voucher program, whereby recipient minority families could only use their housing vouchers outside minority neighborhoods, would produce more balanced living patterns but could prevent recipient families from living in their neighborhood of choice.

Whereas Roisman and other deconcentration advocates would sacrifice equal choice to achieve integrated living patterns, courts have generally prioritized equal choice above integrated living patterns when faced with a conflict between the Act’s two goals.³⁵⁵ This position is consistent with the intentions of the FHA drafters, who did not envision integration occurring outside the framework of equal choice.³⁵⁶ *Otero* provides the notable exception. There, the

³⁵² *Id.* at 154-155. *See also* *Jaimés*, 715 F. Supp. at 842 (“[i]f HUD is properly fulfilling its duties, over time one would expect to find HUD’s activity increasing the supply of open, integrated housing”).

³⁵³ *Otero*, 484 F.2d at 1134.

³⁵⁴ *See, e.g.,* *Collins*, *supra* note 328, at 2142.

³⁵⁵ *Relman et al.*, *supra* note 327, at 40.

³⁵⁶ *Larkin*, *supra* note 243, at 1628.

Second Circuit found that the FHA imposed on HUD and housing authorities an affirmative duty to integrate, which trumped the residents' rights to equal choice, provided the housing authority could demonstrate "such action is essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community."³⁵⁷ The *Otero* court therefore upheld a housing authority's decision to apply racial quotas to public housing occupancy and prevent minority residents from returning.³⁵⁸

But when faced with the *Otero* conflict between equal choice and nondiscrimination versus integration, most courts have concluded that the non-discrimination duty takes priority over the integration imperative.³⁵⁹ Only one subsequently overruled district court decision echoed the *Otero* holding that the government's duty to integrate should be given effect even where it would deprive minorities of available and desirable housing choices.³⁶⁰ Otherwise, post-*Otero* courts have consistently struck down affirmative housing plans that violated the goal of nondiscrimination and limited the housing choices available to minorities, even if the proposed course of action would promote integration.³⁶¹ For instance, in *United States v. Starrett City Associates*, the Second Circuit struck down a Brooklyn apartment's racial quota system, even though the system was aimed at avoiding "tipping" and promoting integration; it distinguished *Otero* as involving a one-time preference rather than an ongoing practice.³⁶²

HUD's soon-to-be released regulation regarding its obligation to affirmatively further fair housing also appears likely to prioritize choice over integration. As discussed, HUD has not promulgated a regulatory definition of affirmatively further fair housing in the 44 years since the

³⁵⁷ *Otero*, 484 F.2d at 1134, 1140.

³⁵⁸ *Id.* at 1140.

³⁵⁹ Relman et al., *supra* note 327, at 40.

³⁶⁰ *King v. Harris*, 464 F. Supp. 827, 830 (E.D.N.Y. 1979).

³⁶¹ Relman et al., *supra* note 327, at 40.

³⁶² *United States v. Starrett City Associates*, 840 F.2d 1096, 1102 (2d Cir. 1988). *See also* *Burney v. Housing Authority of Beaver County*, 735 F.2d 113 (3rd Cir. 1984); *United States v. Charlottesville*, 718 F.Supp 461 (W.D. Va. 1989).

FHA's passage. But according to its Fall 2011 Unified Agenda, HUD will release a notice of proposed rulemaking (NPRM) entitled "Affirmatively Furthering Fair Housing" later this year.

Details are not yet available, but the Unified Agenda contained the below abstract.

This rule would provide fair housing performance standards for the requirement to affirmatively further fair housing. The Department seeks to foster effective fair housing strategies and to provide clear guidance to local communities, public housing agencies, and assisted housing providers to help them in their efforts to responsibly identify and solve fair housing problems, as these recipients strive to achieve *equal opportunity in housing for all*. To that end, the rule is intended to provide specific standards and the bases upon which these requirements would be measured--both for purposes of receiving HUD funds and to aid the Department in determining that recipients are in compliance with applicable requirements.³⁶³

The NPRM's emphasis on "equal opportunity in housing for all" likely forecasts HUD's stance. This definition accords with the FHA framers' stated intention of promoting equal housing choice and thus enabling, rather than compelling, residential integration.

In sum, the FHA's legislative history, subsequent judicial interpretations, and HUD's pending regulations evidence that the Act prioritized equal choice over integration. The Fair Housing Act therefore does not provide the legal impetus for, or even condone, exit-only voucher programs that constrain Section 8 recipients' geographic choices.

2. The Housing and Community Development Act's Goals for Section 8

Created by the Housing and Community Development Act of 1974,³⁶⁴ the Section 8 program was primarily intended to provide decent housing opportunities for low-income individuals by reducing their rent burdens.³⁶⁵ But as deconcentration proponents emphasize, the program's objectives also included the "reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality

³⁶³U.S. Dep't. of Hous. & Urban Dev., Notice of Proposed Rulemaking, *Affirmatively Furthering Fair Housing* [FR-5173] (2012).

³⁶⁴Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(c)(6), 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301(c)(6) (2006)).

³⁶⁵Briggs, *supra* note 65, at 1.

of neighborhoods.”³⁶⁶ This selective reading ignores the second half of the clause. Section 8’s framers hoped the program would reduce racial and income-based isolation “through the spatial deconcentration of housing *opportunities* for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods.”³⁶⁷

Similar to the Fair Housing Act, the Housing and Community Development Act prioritized the expansion of decent housing choice for low-income individuals. Spatial integration was a secondary goal; it ranked six on a list of nine programmatic objectives.³⁶⁸ Indeed, not until the late 1980s did the Section 8 program become focused on improving locational outcomes. This policy shift was a result of Wilson’s influential research on the perils of concentrated poverty and encouraging results from the *Gautreaux* experiment, not adherence to a statutory command.³⁶⁹ The focus on locational outcomes, while in keeping with the congressional objectives of providing economic opportunity, lacks explicit statutory grounding.

In sum, the Housing and Community Development Act of 1974 intended for the Section 8 program to expand the range of decent housing opportunities available to low-income individuals, and, perhaps as a result, reduce recipients’ geographic isolation and improve their economic situation. Constraining recipient choice in order to improve locational outcomes, through an exit-only voucher program, is inconsistent with the Section 8 program’s primary objective. A “nudge” framework would appropriately balance the competing statutory goals of expanded recipient choice, reduced geographic isolation, and greater economic opportunity.

³⁶⁶ See, e.g., Solow, *supra* note 37, at 481; Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(c)(6), 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301(c)(6) (2006)).

³⁶⁷ Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 101(c)(6), 88 Stat. 633 (codified as amended at 42 U.S.C. § 5301(c)(6) (2006)).

³⁶⁸ *Id.*

³⁶⁹ Briggs, *supra* note 65, at 1.

3. Equal Protection Clause Limits on Section 8 Reforms

The strongest exit-only voucher proposals would provide minority residents of inner-city ghettos with Section 8 vouchers for use exclusively in racially integrated, low-poverty neighborhoods. Courts have grown hesitant, however, to allow race-conscious action to promote residential integration and frequently sustain Equal Protection Clause challenges to race-conscious laws.³⁷⁰

Race-conscious plans that limit minorities' housing choices have been upheld only where necessary to remedy past discrimination.³⁷¹ In *Hills v. Gautreaux*, the Supreme Court approved the creation of race-conscious opportunity vouchers as a remedy for HUD's violation of the Civil Rights Act of 1964 and the Fifth Amendment in its siting of public housing complexes.³⁷² Similarly, in *Thompson v. HUD*, the district court approved a partial consent decree setting aside housing choice vouchers for minority recipients' use in low-poverty, integrated neighborhoods; the court deemed the program necessary to remedy the legacy of intentional discrimination and segregation in Baltimore's public housing.³⁷³

Even where race-conscious policies are intended to address past discrimination and do not constrain minority housing choices, courts are hesitant to uphold such remedies if race-neutral strategies could successfully produce integration. In *Walker v. City of Mesquite*, the Fifth Circuit reversed a district court's remedial order directing that new public housing units be built in predominantly white areas of Dallas.³⁷⁴ Writing for the panel, Judge Jones cited the Section 8

³⁷⁰ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Johnson v. California*, 545 U.S. 162 (2005); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

³⁷¹ *Relman et al., supra* note 327, at 46. See, e.g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 930 (2d Cir. 1968) (upholding an Equal Protection Challenge to an urban renewal plan that resulted in the disproportionate removal of minority residents from their communities).

³⁷² *Hills v. Gautreaux*, 425 U.S. 284 (1976).

³⁷³ *Thompson v. HUD*, 220 F.3d 241, 244 (4th Cir. 2000).

³⁷⁴ *Walker v. City of Mesquite*, 169 F.3d 973, 986 (5th Cir. 1999).

program's success in producing integration as evidence both that the district court's race-conscious site selection was no longer necessary to remedy the effects of past discrimination and that more narrowly tailored race-neutral remedies existed.³⁷⁵ Judge Jones held: "A race-conscious remedy is justified, after race-neutral remedies have been considered and found wanting, if it is the only effective means by which to remedy the effects of past discrimination."³⁷⁶ As Section 8 provided an alternative means to remedy the effects of the past discrimination, the district court's remedial order violated the Equal Protection Clause.

The Fifth Circuit's interpretation of the Equal Protection Clause may be anomalous.³⁷⁷ Most courts have accepted the race-conscious siting of government affordable housing projects required by HUD regulations. But the decision illustrates courts' general distaste for race-conscious remedies, a dislike heightened where the proposed policy would infringe on equal protection rights of protected class members, rather than the white homeowners who brought suit in *Walker v. Mesquite*. It is also significant that the Fifth Circuit rejected a race-conscious policy intended to remedy past discrimination rather than affirmatively further fair housing, since the integration imperative enjoys the most weight where employed to redress past discrimination.³⁷⁸

Proposed race-conscious opportunity voucher programs would encounter special judicial scrutiny because such programs (1) would constrain the residential choices available to voucher recipients; (2) would not be intended to remedy past discrimination but rather justified based on the §3608(e)(5) duty to affirmatively further fair housing; and (3) race-neutral strategies, like the proposed "nudge" reforms, could successfully produce integration.³⁷⁹ Indeed, fears of judicial

³⁷⁵ *Id.* at 984-85.

³⁷⁶ *Id.* at 986.

³⁷⁷ Florence Wagman Roisman, *Constitutional and Statutory Mandates for Residential Racial Integration and the Validity of Race-Conscious Affirmative Action to Achieve It*, in *THE INTEGRATION DEBATE*, *supra* note 133, at 70.

³⁷⁸ Relman et al., *supra* note 327, at 50.

³⁷⁹ Establishing legacy of intentional discrimination in every municipality administering the proposal is infeasible.

overrule influenced Moving to Opportunity’s design. Though modeled on the *Gautreaux* housing mobility program, which gave minority families housing vouchers to relocate to racially integrated neighborhoods, MTO was race-neutral in its voucher dispersal and required recipient families to move to low-poverty, rather than racially integrated neighborhoods.³⁸⁰

Unlike exit-only voucher reforms, this Article’s proposed “nudge” framework for Section 8 reforms would be race-neutral; it would steer, but not require the relocation of, all recipient families to opportunity neighborhoods. “Nudge” policies would thus avoid the Equal Protection Clause challenges likely to plague exit-only voucher programs.

4. Status Quo Violates Fair Housing Act by Perpetuating Segregation

Just as the Equal Protection Clause presents a legal obstacle to exit-only voucher proposals, so too may ramped up enforcement of the FHA’s antidiscrimination provisions jeopardize the program’s status quo.

Eleven courts of appeals have held that the FHA’s antidiscrimination provision, contained at § 3604, does not merely prohibit intentional discrimination in the sale or rental of housing but also outlaws practices that disparately impact protected classes.³⁸¹ Every appellate court that has addressed the issue has also embraced the Seventh Circuit’s position in *Arlington Heights II*, that Title VII may be violated by facially neutral actions that perpetuate segregation.³⁸² For instance, in *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, the Second Circuit struck down a town’s zoning ordinance, which confined multifamily housing to a large minority neighborhood, on the grounds that the ordinance perpetuated segregation “by

³⁸⁰BRIGGS, POPKIN & GOERING, *supra* note 1, at 54.

³⁸¹ Nat’l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 58 (D.D.C. 2002) (“Every Circuit Court except the District of Columbia Circuit has held that disparate impact claims are cognizable under the FHA.”)

³⁸² Implementation of Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70921, 70923 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100); *Metro Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290-91 (7th Cir. 1977).

restricting low-income housing needed by minorities to an area already 52% minority” and therefore violated §3604’s anti-discrimination requirements.³⁸³ State and local governments have also been held liable for perpetuating segregation in violation of §3604 for adopting large lot zoning,³⁸⁴ prohibiting the construction of multi-family housing,³⁸⁵ and disproportionately denying tax credits intended for construction of affordable housing in predominantly white neighborhoods.³⁸⁶

HUD’s recently promulgated regulation interpreting FHA’s anti-discrimination provision, contained at § 3604, seeks to codify these judicial holdings.³⁸⁷ The November 16, 2011, Notice of Proposed Rule, prohibits all persons and entities from engaging in even racially neutral courses of action that have the incidental effect of perpetuating segregation: a person or entity may be liable under § 3604 for a practice that has a discriminatory effect where “the practice has the effect of creating, perpetuating, or increasing housing patterns that segregate by race, color, religion, sex, familial status, national origin, or disability.”³⁸⁸ Though courts have recognized disparate impact liability under §3604 for several decades, enforcement has been spotty. HUD’s codification of these interpretations and accompanying rollout should lead to increased prosecutions and potentially expose existing Section 8 policies to challenge.³⁸⁹

³⁸³ *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 934-37 (2d Cir. 1988).

³⁸⁴ *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 567 (N.D. Tex. 2000).

³⁸⁵ *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1186 (8th Cir. 1994).

³⁸⁶ *Inclusive Communities Project, Inc. v. Texas Dep’t of Housing & Community Affairs*, 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010).

³⁸⁷ *Implementation of Fair Housing Act’s Discriminatory Effects Standard*, 76 Fed. Reg. 70921 (proposed Nov. 16, 2011) (to be codified at 24 C.F.R. pt. 100).

³⁸⁸ Where a plaintiff suing under §3604 can establish a *prima facie* case that a “decision ... ‘makes housing options significantly more restrictive for members of a protected group than for persons outside that group,’ the defendant bears the burden of establishing that his decision furthered a legitimate interest and no less discriminatory alternative was available. *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006) (quoting *Hous. Investors, Inc. v. City of Clanton*, 68 F. Supp. 2d 1287, 1298 (M.D. Ala. 1999)).

³⁸⁹ Commentators have suggested that disparate impact liability under §3604 could be used to challenge landlord’s source of income discrimination and refusal to rent to Section 8 recipients. *See, e.g., Adam Culbreath & James E. Wilkinson, “No Section 8” Policies: Combating Landlords’ Resistance to Renting to Section 8 Recipients* 33 CLEARINGHOUSE REV. 607, 612 (2000).

As discussed, current HUD policies – low FMRs, geographically restrictive property listings, etc. – contribute to the clustering of Section 8 vouchers in racially segregated neighborhoods. Since African-Americans are disproportionately represented among Section 8 recipients, these policies have the incidental effect of perpetuating segregation and therefore arguably violate §3604. By comparison, “nudge” reforms to Section 8 would steer recipients toward opportunity neighborhoods and thus actively avoid perpetuating segregation.

To summarize, the Fair Housing Act’s antidiscrimination and affirmatively further provisions outline the bare minimum a government entity must do to comply with its statutory obligations, while the Equal Protection Clause limits how far a government entity may go in affirmatively furthering fair housing and promoting integration. This Article’s proposal sits comfortably between these two poles. A “nudge” framework for Section 8 would promote integrated living patterns without constraining choice or adopting race-conscious policies. Finally, a “nudge” framework would entail affirmative steps to avoid perpetuating segregation through the administration of the Section 8 program and thus shield against §3604 challenges. Applying this “nudge” framework and generating concrete policy recommendations for the Section 8 program is the focus of Section IV.

IV. APPLYING THE “NUDGE” FRAMEWORK TO REFORM THE SECTION 8 PROGRAM

As discussed, the use of choice architecture, i.e. the presentation of choices, defaults, and other incentives geared toward helping people make choices in their self-interest, can improve Section 8 recipients’ locational outcomes without depriving them of freedom of choice. This section makes policy recommendations for “nudging” Section 8 recipients into integrated, low poverty neighborhoods.

Part A draws upon behavioral economics. It suggests ways to remedy recipients' information poverty and change the starting points that currently push low-income and minority individuals toward residence in poor, segregated neighborhoods. It then explores possible new defaults, evaluating, for instance, a recent proposal that capable public and private agencies provide recipient families with an available unit in an opportunity neighborhood but allow the family to reject this default option and move to a neighborhood of its choosing if it desires.

Should such nudges be insufficient to improve locational outcomes, or should a multi-prong strategy be preferred, Part B recommends a more conventional economic approach: monetary incentives. HUD's Small Area FMR pilot program determines the fair market rent (FMR) of a Section 8 voucher based on the ZIP code where the recipient chooses to live, rather than the metropolitan statistical area (MSA) average currently in use.³⁹⁰ Section 8 vouchers are therefore worth more money to recipients who choose to reside in opportunity neighborhoods, incentivizing this choice.

A. Nudge Recipients with New Defaults and Starting Points

At present, PHAs provide minimal information and no default options to Section 8 recipients seeking units. Housing authorities simply give new voucher holders a list of available rental units that accept Section 8 vouchers. The listed units are typically clustered in poorer, less integrated neighborhoods, as few housing authorities conduct their own search processes but instead rely on landlords, often slumlords, to report availabilities. As the list provides the starting point for many recipients' search process, it steers recipients into ghetto neighborhoods.³⁹¹

³⁹⁰ Section 8 Housing Choice Voucher Program – Demonstration Project of Small Area Fair Market Rents in Certain Metropolitan Areas, Discussion of Comments, and Request for Participants, 76 Fed. Reg. 22122, 22124 (Apr. 20, 2011).

³⁹¹ See *supra* Section III.C(2).

Housing authorities should not continue with this detrimental status quo but should instead create starting point or default options that promote recipients' welfare. At the very least, housing authorities should help address recipients' information poverty by including in their listings available, affordable units in opportunity neighborhoods. (This would require housing authorities to recruit and perhaps monetarily incentivize landlords in opportunity neighborhoods, rather than relying on those landlords who come to them or who have previously rented to Section 8 recipients.) Without much effort, housing authorities could also include relevant neighborhood information, like crime rates, school performance, and employment opportunities, for each unit.³⁹² More burdensome and more efficacious would be providing mobility counseling to help Section 8 recipients sift through their options and decide on the unit most likely to improve welfare. Numerous deconcentration initiatives, among them Buffalo's experience post-*Comer*, illustrate mobility counseling's significant impact on locational outcomes.³⁹³ Finally, depending on resource constraints, PHAs might also provide prearranged tours of available units in opportunity neighborhoods and/or offer childcare services and transportation to enable recipients to conduct broader searches themselves.³⁹⁴ Should housing authorities be unwilling or unable to undertake these responsibilities, nonprofits and fair housing organizations could step in. For example, as part of the *Walker* Settlement Voucher program in Dallas, a local nonprofit, the Inclusive Communities Project, provided Section 8 recipients with information and mobility

³⁹² The Housing Authority of New Orleans has transitioned to an online system that allows residents to look at a map and see what units are available in each neighborhood. Overlaying "opportunity indicators," like the shading used by the Kirwan Institute at Ohio University, would be a simple addition. Reckdahl, *supra* note 101.

³⁹³ Tegeler, Hanley & Liben, *supra* note 68, at 475 (finding that, especially where a substantial number of units are available at FMR, mobility programs have been very effective in moving families from high-poverty areas to low-poverty neighborhoods).

³⁹⁴ Julian & McCain, *supra* note 133, at 90-92.

counseling, recruited and educated landlords, and identified financial and social services to ease the post-move transition.³⁹⁵

Rather than simply addressing information gaps and reconfiguring starting points, HUD and/or PHAs could go one step farther and make residence in an opportunity neighborhood recipients' default choice. In their definitive analysis of MTO, Briggs, Popkin, and Goering proposed that capable public and private agencies contract with landlords (perhaps offering an incentive payment if necessary) and provide recipient families with an available unit (or set of units) in an opportunity neighborhood.³⁹⁶ The family could still reject the default option(s) and move to a neighborhood of its choosing, but the availability of this default would affect preference formation and encourage residence in an opportunity neighborhood. The housing authority would do the heavy lifting by addressing two of the primary obstacles to recipients' suburban relocation: search costs and suburban landlords' unwillingness to accept vouchers.

Briggs, Popkin, and Goering do not address how burdensome it should be for the recipient to depart from the proposed default, a factor key to its stickiness. The minimally paternalistic approach would make it costless for the recipient to depart from the default, e.g. the housing authority would provide the recipient with alternate available units in their neighborhood of choice. Slightly more burdensome, and hence increasing the default's stickiness, would be requiring the opting-out recipient to conduct his own search process with minimal or no assistance; recipients' limited resources and time could prompt high default take-up rates, though in a decision as personal as residence, this might or might not be the case. Lastly, the PHA could adopt more coercive tactics and impose significant procedural constraints on those seeking to reject the default of residence in opportunity neighborhoods: an abbreviated search period and

³⁹⁵*Id.*

³⁹⁶BRIGGS, POPKIN & GOERING, *supra* note 1, at 233.

multiple layers of approval are classic bureaucratic obstacles that come to mind. The choice of tactic would hinge on how likely opportunity neighborhoods are to promote recipient welfare and what degree of “nudging” is deemed morally appropriate – two questions open to debate.

B. Determine Voucher Amount Based on Small-Area Fair Market Rent

Rather than determining FMR based on MSA averages, HUD should peg the subsidy amount to the average rent in the ZIP code where the recipient chooses to locate. This approach would monetarily incentivize recipients to move to opportunity neighborhoods³⁹⁷ and thereby improve outcomes.³⁹⁸ Fortunately, a current HUD pilot offers a policy prototype and a means of testing the efficacy of this tactic.

As discussed, the current too low FMRs effectively limit Section 8 recipients to poorer, often predominantly minority neighborhoods and thus perpetuate segregation.³⁹⁹ This reality was the basis of the Dallas non-profit Inclusive Communities Project’s 2008 suit against HUD. ICP alleged that HUD’s calculation of Section 8 amounts based on MSA averages confined voucher holders to poor, minority neighborhoods and constituted a violation of HUD’s duty to affirmatively further fair housing.⁴⁰⁰ As part of the settlement, HUD created the Small Area FMR program, with Dallas as the first pilot site.⁴⁰¹ Under the Small Area FMR program, Section 8 voucher amounts are calculated based on the cost of rent and utilities for 40% of recently rented

³⁹⁷ While monetary incentives are a conventional economics approach, behavioral economics highlights the importance of ensuring incentives are both salient and attention-grabbing. See *supra* note 224 and accompanying text. The salience of increased voucher payment standards is unquestionable, but HUD and PHAs should take steps to make sure that recipients both know of the differential payments and apply this knowledge to their search process.

³⁹⁸ For example, a 1990 Government Accountability Office (GAO) study found that FMRs based on smaller geographic areas increased recipient employment options, at least where the newly accessible areas boasted adequate public transportation. U.S. GEN. ACCT. OFF., GAO/RCED-94-112, RENTAL HOUSING: USE OF SMALLER MARKET AREAS TO SET RENT SUBSIDY LEVELS 62-70 (1994).

³⁹⁹ Tegeler, Hanley & Liben, *supra* note 68, at 478.

⁴⁰⁰ *Inclusive Communities Project v. HUD*, 3-07 0945-L (N.D. Tex. Complaint filed May 29, 2007).

⁴⁰¹ Proposed Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2012, 76 Fed. Reg. 52058, 52067 (Aug. 19, 2011).

units *in each ZIP code*.⁴⁰² The goal is to encourage Section 8 recipients to relocate to integrated, opportunity neighborhoods, where rents are likely higher, while ensuring higher Section 8 voucher amounts do not artificially inflate housing prices in ghetto neighborhoods.⁴⁰³ The Small Area FMR program also provides voucher holders with mobility counseling, tours of opportunity neighborhoods, and transportation and childcare subsidies.

The Dallas Housing Authority concluded its first year of the Small Area FMR program on December 31, 2011. No data has yet been publicly released, though the author has a FOIA request pending. Dallas is presently the only jurisdiction participating in the Small Area FMR program. HUD's request for proposals for the Small Area FMR program generated applications from only four housing authorities, thus the expansion of the pilot has been indefinitely postponed.⁴⁰⁴ Once released, the pilot results will provide an important window into the strength of recipients' preferences for ghetto neighborhoods and the efficacy of monetary incentives in improving locational outcomes.⁴⁰⁵

Critics maintain ZIP codes are still too large an area to incentivize Section 8 recipients to relocate to opportunity neighborhoods. Following a 2010 assessment and adjustment of its Section 8 voucher amounts, the New Orleans housing authority began pegging voucher amounts to housing submarkets, each smaller than a ZIP code.⁴⁰⁶ New Orleans' experience will therefore provide another interesting counterexample to the Small Area FMR program being piloted in

⁴⁰² Section 8 Housing Choice Voucher Program – Demonstration Project of Small Area Fair Market Rents in Certain Metropolitan Areas, Discussion of Comments, and Request for Participants, 76 Fed. Reg. 22122, 22124 (Apr. 20, 2011).

⁴⁰³ *Id.* at 22123. In order to control costs, Small Area FMRs will be capped at 150 percent of metropolitan FMR. This cap excludes the wealthiest neighborhoods from recipients' option base, but according to HUD's calculations, it would only eliminate 170 of 17,000 metropolitan ZIP codes. The floor for Small Area FMR rents will be the state metropolitan minimum FMR. To ensure the decrease in FMR is not too drastic from some high-poverty ZIP codes, the decrease in FMR will be limited to 10 percent per year. *Id.*

⁴⁰⁴ Proposed Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program Fiscal Year 2012, 76 Fed. Reg. 52058, 52058 (Aug. 19, 2011).

⁴⁰⁵ Jeff Cohen, *Dallas Tests Where Section 8 Recipients May Live*, NPR, July 5, 2011, <http://www.npr.org/2011/07/05/137617828/dallas-experiments-where-section-8-recipients-may-live>.

⁴⁰⁶ Reckdahl, *supra* note 101.

Dallas: Are ZIP codes still too large an area to incentivize moves to opportunity neighborhoods? How should FMR be calculated— by MSA, ZIP code, census tract, neighborhood, etc. – in order to improve locational outcomes? These answers should help inform the design of Section 8 reforms pegging FMR to smaller geographic areas in order to incentivize recipients’ relocation to opportunity neighborhoods. Regardless, moving away from a metropolitan-level calculation of FMR should help improve recipients’ locational outcomes.

C. Implementing Choice-Enabling Reforms to Section 8

Enacting choice-enabling reforms to the Section 8 program would be a significant step towards improving recipients’ locational outcomes and well-being, while respecting their autonomy. Moreover, the outlined reforms are reasonable, workable, and not particularly costly. This section discusses what role the key institutional actors (Congress, HUD, PHAs, and nonprofits) can and/or should play in these reforms’ adoption and implementation.

1. Recommendations to Congress

Congressional authorization is not required for HUD to either nudge recipients with new defaults and starting points or expand the Small Area FMR pilot program. Congress could amend Section 8’s authorization legislation to define the currently undefined “market area” as a ZIP code, and thereby require payment standards to be calculated based on 90 to 110 percent of ZIP code FMR.⁴⁰⁷ This legislative change would prompt the nationwide enactment of the Small Area FMR scheme. Additionally, Congress could amend the legislation to require HUD and/or PHAs to provide listings of suburban properties, default options, mobility counseling, or other of the suggested nudge reforms. But Congress is not well-situated to enact these reforms: partisan gridlock has stalled most legislation, and legislators lack HUD’s expertise and ability to shift

⁴⁰⁷ United States Housing Act of 1937, 42 U.S.C. § 1437f(o) (2006).

course as new evidence comes to light. Congress should, however, allocate additional funds to cover voucher payment increases as a result of the Small Area FMR program and to pay for the costs of providing comprehensive information, mobility counseling, default options, and other “nudge” reforms. While perhaps politically infeasible given the current budget crisis, additional allocations are essential to the reforms’ success and necessary to ensure that improving some recipients’ locational outcomes does not produce a corresponding decline in the number of households receiving Section 8 vouchers.

2. Recommendations to HUD Federal Administrators

The present language gives the Secretary of HUD almost total discretion to make exceptions to FMR-based payment standards and/or impose administrative requirements on housing authorities. As such, HUD could promulgate regulations implementing any of these reforms without legislative action. HUD federal administrators are the institutional actors best suited to enact these reforms. Agency officials possess the necessary expertise, can promulgate regulations without regard to legislative gridlock, and can act flexibly to respond to new information and results. Most importantly, HUD’s actions would be binding on PHAs across the country and therefore prompt nationwide adoption of these reforms.

Assuming the results from the Dallas Small Area FMR experiment are promising, HUD should consider expanding the pilot program to include more PHAs and/or replacing MSA-based FMRs with ZIP code-based FMRs for all jurisdictions. HUD should also tweak the program to address problem areas apparent from the pilot’s administration and results. Finally, HUD should promulgate regulations or issue guidance requiring housing authorities to provide voucher recipients with listings of suburban properties, default options, mobility counseling, or other of the suggested nudge reforms. HUD could set minimum information, counseling, and default

requirements,⁴⁰⁸ and/or require PHAs to amend their Section 8 Administrative Plans to include a HUD-approved “Housing Mobility Plan,” that details how the housing authority has been and will be successful in helping recipient households move to integrated, low-poverty areas.⁴⁰⁹

3. Recommendation to Housing Authorities

Should neither Congress nor HUD take action, housing authorities still have significant authority to implement these reforms. Housing authorities could of their own volition provide additional information to recipients, liaise with suburban landlords, offer default options in opportunity neighborhoods, require mobility counseling, make transportation and/or childcare subsidies available, etc. Given budgetary and personnel constraints, PHAs may wish to partner with local fair housing organizations and nonprofits to provide this information and services.

PHAs could also determine payment standards based on FMRs in ZIP codes or census tracts, rather than MSAs, provided they were accepted into the Small Area FMR pilot program or could secure HUD approval of exception payment standard amounts.⁴¹⁰ Given the miniscule number of PHAs who applied to the Small Area FMR program in the prior round, a PHA’s odds of acceptance appear high. In order to receive HUD approval to implement a Small Area FMR program, outside the formal pilot project, the PHA would have to demonstrate that higher payment standards are needed either to help families find housing outside high-poverty areas and/or because voucher holders encounter problems finding units under the current payment

⁴⁰⁸Phil Tegeler, Michael Hanley, and Judith Liben suggest that minimum requirements for PHAs should include: “(1) multiple written and oral notifications to tenants of their portability rights; (2) collection and dissemination to Section 8 participants of suburban rental listings and listings in non-poverty concentrated areas; (3) outreach to suburban landlords to develop additional resources; (4) dissemination of information on transportation and services in suburban communities; (5) routine approval of exception rents where necessary for units in low-poverty neighborhoods; and (6) designation of staff to assist tenants in moving,” as well as the availability of more intensive assistance and counseling for tenants who request it. Tegeler, Hanley & Liben, *supra* note 68, at 482.

⁴⁰⁹*Id.* at 484.

⁴¹⁰ Voucher Tenancy, Payment Standard Amount and Schedule, 24 C.F.R. § 982.503 (2011).

standards.⁴¹¹ New Orleans' recent move to determine FMR based on housing submarkets demonstrates HUD approval for exception payment standards is not an insurmountable obstacle.

4. Recommendations to Fair Housing Organizations

Fair housing organizations should continue lobbying Congress, HUD, and PHAs to adopt Section 8 reforms designed to improve locational outcomes, though as this Article argues, their support would be better directed toward “nudge” policies that enable choice, rather than the exit-only vouchers proposals currently popular in the fair housing community. Fair housing organizations should also consider filing suits challenging current FMRs and existing defaults as violations of HUD's duty to affirmatively further fair housing. As in Dallas, such suits might prompt the local PHA to join the Small Area FMR pilot and/or implement their own submarket-based payment standard, complete with mobility assistance.

In addition to advocacy, fair housing organizations should provide concrete assistance to PHAs and voucher recipients. The Inclusive Communities Project's willingness to gather information, provide mobility counseling, conduct landlord outreach, offer supportive services, and otherwise useful amenities the PHA was unwilling or unable to provide accounts for much of the *Walker* mobility's program success in improving recipients' locational and life.⁴¹² Indeed, ICP's success relative to other housing authorities' mobility programs suggests nonprofits and fair housing organizations may actually be better situated than housing authorities to provide effective mobility counseling and supportive services.⁴¹³

⁴¹¹*Id.* While the HUD field office can approve exception payment standard amounts from above 110 percent of the published FMR to 120 percent of the published FMR, approval of the Assistant Secretary for Public and Indian Housing or his delegates is required for requested exception payment standards above 120 percent of FMR. *Id.*

⁴¹²Julian & McCain, *supra* note 133, at 91.

⁴¹³George E. Peterson & Kale Williams, *Housing Mobility: What Has It Accomplished and What Is Its Promise?*, in HOUSING MOBILITY: PROMISE OR ILLUSION? (Alexander Polikoff ed., 1995) (detailing the efficacy of housing mobility programs).

CONCLUSION

Nearly forty years after its inception, the Section 8 program has yet to realize its founding goal of providing low-income families with adequate housing in integrated, mixed-income neighborhoods. Voucher recipients remain isolated in “ghettos” – a status quo that exacerbates the cycle of poverty, damages recipients’ well-being, and arguably violates the Fair Housing Act insofar as the Section 8 program’s existing administration compounds this segregation. The geographic concentration of Section 8 vouchers demands redress. But constraining recipient choice and requiring program participants to leave behind families, churches, and community is not the answer; the policy solution best for one recipient may not be well-suited for another. This Article’s proposed “nudge” framework would instead employ conventional and behavioral economic approaches – comprehensive information, opportunity neighborhood defaults, and monetary incentives – to steer recipients to welfare-maximizing neighborhoods, while allowing them freedom of choice. In so doing, these proposed policy reforms offer a 21st century solution to the 20th century’s problematic legacies.

APPENDIX A
Housing Authority of New Orleans Housing Choice Voucher Distribution by Zip Code (Nov. 2010)

