

FAIR OPPORTUNITY IN
AFFORDABLE HOUSING:

HOW THE JUDICIAL REMEDY IN *GAUTREAUX*
INFORMED ANTIPOVERTY POLICY

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I. What is Fair Opportunity in Affordable Housing?

[A] decent place for a family to live becomes a platform for dignity and self-respect and base for hope and improvement. A decent home allows people to take advantage of opportunities in education, health and employment—the means to get ahead in our society. A decent home is the important beginning point for growth into the mainstream of American life.

—The National Housing Task Force, “A Decent Place to Live,” 1988¹

The phrases “decent home” and “a decent place to live” get tossed around a good deal, making it too easy to lose sight of what they really mean. President Franklin Delano Roosevelt first mentioned the right to a decent home in his “Second Bill of Rights” to ensure economic security in a democratic society.² The term was codified in the Housing Act of 1949, which espoused the national goal of “a decent home and a suitable living environment for every American family.”³ In this context, then, housing is much more than a universal necessity, a mere dwelling for shelter from the elements. The quality of housing carries a physical and spatial importance. A dilapidated, overcrowded physical environment leads to hazardous conditions and increased risk of disease and infection, threatening human health and well-being. In fact, the links between stunted childhood development and lead poisoning, and mold and respiratory disease are well documented. The spatial environment or location of housing, on the other hand, is integrally related to job markets, the quality of education, local tax-bases, the distribution of public services, and the prevalence of crime. In terms of physical and spatial environments, the differences between “good” and “bad” neighborhoods are both real and apparent. Look, for example, at the juxtaposition between Camden, New Jersey and Cherry Hill, New Jersey—affluent privilege contrasted against staggering poverty despite being separated by a distance of five miles. Compare the graduation rates in the

¹ Qtd. in Rachel G. Bratt, Michael E. Stone, and Chester Hartman, “Why a Right to Housing Is Needed and Makes Sense: Editors’ Introduction,” *The Affordable Housing Reader*, edited by J. Rosie Tighe and Elizabeth J. Mueller (New York: Routledge, 2013), 56.

² See Franklin D. Roosevelt, “State of the Union Message to Congress, January 11, 1944,” *Franklin D. Roosevelt Presidential Library and Museum*, http://www.fdrlibrary.marist.edu/archives/address_text.html.

³ Qtd. in Rachel G. Bratt, Michael E. Stone, and Chester Hartman, “Why a Right to Housing Is Needed and Makes Sense: Editors’ Introduction,” *The Affordable Housing Reader*, edited by J. Rosie Tighe and Elizabeth J. Mueller (New York: Routledge, 2013), 53.

public high schools, the crime rates, the employments rates, and we begin to see why *place* matters in poverty.

The *placement* of housing, in turn, carries a cultural and emotional importance. If a house (or a rental) is a home, then it is a place of family life, where human connections of love and nurturance are expressed. The home also connotes a sense of belonging and permanence; the home in the prosperous suburbs symbolizes community and citizenship, whereas the blighted unit in public housing symbolizes exclusion and the stigmatization of a spiritual homelessness, in which inhabitants have no contribution to make to society, no sense of fulfillment or self-realization. These emotional deficits, in tandem with the adverse effects of physical and spatial environments, affect psychological stress and well-being. In the journal *Science*, researchers at the University of Chicago found that happiness levels, despite being subjectively determined, soared after 4,600 households—part of the experimental Moving to Opportunity (MTO) program—moved to better neighborhoods. Although their average income was approximately \$20,000, the participants exhibited levels of happiness that correspond with people living on \$33,000.⁴ Consequently, we begin to see why housing, unlike all other socioeconomic arrangements, perhaps with the exception of employment, defines life in America. Housing is the fundamental aspect of the American national ethos—the American dream—because it is a physical manifestation of who we are, our self-worth and self-respect in the larger context of contemporary society, and our well-being in terms of human happiness and freedom.

Housing is obviously important, so do we do enough to provide a “decent home” for underprivileged, low-income Americans? If “decent” entails affordability, then the answer is no. By affordability, I mean housing that does not exceed more than 30 percent of a household’s income as

⁴ See Jens Ludwig, Greg J. Duncan, Lisa A. Gennetian, Lawrence F. Katz, Ronald C. Kessler, Jeffrey R. Kling, and Lisa Sanbonmatsu, “Neighborhood Effects on the Long-Term Well-Being of Low-Income Adults,” *Science* 337.6101 (September 2012): 1505-1510.

defined by the U.S. Department of Housing and Urban Development (HUD). Affordable housing is traditionally provided for through public housing (which is in a state of decline and demolition), government subsidized housing, or the Section 8 voucher program. But, HUD estimates that 4.8 million receive assistance out of the 8.5 million American households that pay more than 50 percent of their income for housing, thus leaving behind roughly 3.7 million households that are severely “cost burdened” in other “necessities such as food, clothing, transportation, and medical care.”⁵ The vast majority of those that receive housing assistance earn less than \$20,000 a year and, of note, more than half of public housing and Section 8 project-based inhabitants are elderly or have a disability.⁶

If “decent” entails fairness, conversely, then the answer is still no. By fairness, I mean the fair equality of opportunity to pursue housing in a “suitable living environment,” free from economic (and racial) segregation and discrimination. Fairness entails mobility in housing to avoid places of concentrated poverty and inhibited opportunity. The housing literature is rife with evidence of inequality in urban, segregated ghettos. William Julius Wilson’s *The Truly Disadvantaged* (1987) concluded that the concentration and immobility of urban poverty stems from the structural transformation of the American economy during globalization and the loss of industry.⁷ Therefore, the placement of subsidized housing in areas with distressed labor markets only worsens the problematic nature of poverty. Douglas Massey and Nancy Denton’s groundbreaking work in *American Apartheid* (1993), moreover, shows how the black ghettos of America were created by whites and how continued segregation and the concentration of poverty—a legacy of our racist, Jim

⁵ U.S. Department of Housing and Urban Development, “Affordable Housing,” http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/.

⁶ National Low Income Housing Coalition, “Who Lives in Federally Assisted Housing?” *Housing Spotlight* 2.2 (November 2012): 1, <http://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf>.

⁷ See William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Illinois: U of Chicago P, 1987).

Crow heritage—can be lessened through fair housing enforcement.⁸ Fair housing, embodied by Title VIII of the Civil Rights Act of 1968, has succeeded in virtually eliminating *de jure* segregation, but it has been woefully inadequate in challenging the economic forces that lead to *de facto* segregation in today's cities. All too often, moreover, affordable housing only perpetuates the economic segregation that fair housing seeks to rectify. During the 1990s, 83.2 percent of low-income blacks and 77.0 percent of low-income Hispanics lived in urban neighborhoods where more than 20 percent of all residents were considered poor; the disparity was even worse for blacks because their neighborhoods often had a poverty rate in excess of 40 percent.⁹ Notably, 36.5 percent of public housing developments are in census tracts with poverty rates above 40 percent.¹⁰ Unfortunately, there has never been a coherent antipoverty framework for housing policy in America, especially one that reconciles fairness with affordability, integration with segregation, and market economics with opportunity. Housing, as I argue, must be both affordable and fair to substantively alleviate poverty. How can we reconcile these dichotomies in a way that reduces poverty?

In response, I posit that fair opportunity must be cognizable in affordable housing. To do so requires a fair process that can help low-income Americans achieve mixed-income integration through the distribution of federal housing assistance. I extend Norman Daniels's theorization of Rawlsian "justice as fairness" in public health to housing. Housing, like health, "is of special moral importance because it contributes to the range of opportunities open to us," which, in turn, affects our well-being and the level of our participation in a liberal democracy that necessitates equal citizenship.¹¹ In order to ensure this normal range of opportunities and functionings, we must regulate variances in the social determinants of housing in a way that benefits the social welfare of

⁸ See Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge: Harvard UP, 1993).

⁹ John Yinger, "Housing Discrimination and Residential Segregation," *Understanding Poverty*, edited by Sheldon H. Danziger and Robert H. Haveman (New York: Russell Sage Foundation, 2001), 378.

¹⁰ *Ibid.*, 386.

¹¹ Norman Daniels, *Just Health: Meeting Health Needs Fairly* (New York: Cambridge UP, 2008), 21.

all—promoting the fair equality of opportunity to mitigate “the moral arbitrariness of social contingencies.”¹² The social determinants of housing that affect the *effective* range of opportunities include the labor market (i.e. jobs and training), safety (i.e. crime and law enforcement), public health (i.e. sanitation and food access), public services (i.e. transportation and infrastructure), education (i.e. spending and attainment levels), recreation (i.e. public spaces and community life), amongst others. We should be particularly concerned with relative deprivation in fair housing—the differences between the ghetto and the suburbs—because relativity shows us how inequalities prevent full participation in society.¹³ According to Daniels, “Failing to promote health in a population, that is, failing to promote normal functioning in it, fails to protect the opportunity or capability of people to function as free and equal citizens.”¹⁴ Replace health, as broadly defined, with housing, as broadly defined, and we reach the same determination that unhealthy, unfair housing creates arbitrary inequality, adversely affecting the *positive* liberty and dignity of equal citizens. Assuming, of course, that this failure is an injustice, it is logical to turn to the intersection of the law and the housing market, where the abstractions of justice and fairness are applied in the real-world.¹⁵

II. The Theory and Practice of Judicial Remedies

According to Peter Schuck of Yale Law School, the housing market constantly intersects with the law because it is “probably regulated more heavily than any comparably diverse,

¹² Ibid., 53.

¹³ Ibid., 87.

¹⁴ Ibid., 14.

¹⁵ Daniels himself raises qualifications about fair equality of opportunity in health because regulating all the factors that affect health becomes infeasible. In this sense, his theory may be overly ambitious and idealistic since it would be incredibly expensive to regulate all the social determinants of health (and, by extension, housing), let alone ensure that the regulation is fair in accordance with the accountability for reasonable resource allocation. Without a universal, enforceable right to fair housing it becomes hard to regulate the social determinants, but, as a matter of justice, we are obligated to approximate that right. I argue that this is not as difficult in housing policy because a simple change in location or placement can achieve positive social determinants, which is not necessarily the case for health.

fragmented, and competitive market.”¹⁶ With local government involved in land-use zoning, building codes, and rent control, and the federal government involved in tax policy, financial regulation, and community development, there are a variety of different policy goals that inevitably end up conflicting. For example, the government has a history “of subsidizing homeownership but not tenancy, which probably exacerbates the racial segregation that civil rights programs seek to combat”; the mortgage interest tax deduction, in particular, costs \$67.5 billion with “the benefits concentrated among high-income owners in a few, large metropolitan areas.”¹⁷ Given these tensions, we focus on legislatures and the policymaking apparatus, but we tend to overlook the role of the judiciary. Legal conflicts are, after all, adjudicated in the courts on a daily basis.

Judicial remedies, especially, can achieve justice for victims of discrimination and segregation in housing policy, mandating *positive* enforcement of equal protection and due process. The problem, of course, is that judicial remedies in housing have been inconsistent and dubious without a universal, enforceable right to fair housing. The Fair Housing Act (Title VIII of the 1968 Civil Rights Act) was intended to eradicate racial, religious, and ethnic discrimination in housing, but, in order to secure its passage, the act “was stripped of its enforcement provisions.”¹⁸ The Fair Housing Act was amended in 1988 to increase the limit on punitive damages, award attorney’s fees to winning plaintiffs, and empower HUD and the U.S. Department of Justice to enforce compliance and prosecute violators.¹⁹ But, the government’s resources are limited and it relies heavily on private groups, such as the National Fair Housing Alliance, to file suits and bring cases into the courts. Fair housing, as previously mentioned, can do little to challenge the economic forces that lead to *de facto*

¹⁶ Peter H. Schuck, “Judging Remedies: Judicial Approaches to Housing Segregation,” *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 292.

¹⁷ *Ibid.*, 293.

¹⁸ Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge: Harvard UP, 1993), 14.

¹⁹ Veronica M. Reed, “Fair Housing Enforcement: Is the Current System Adequate?” *Residential Apartheid: The American Legacy*, edited by Robert D. Bullard, J. Eugene Grigsby III, and Charles Lee (Los Angeles: U of California P, 1994), 224-5.

segregation and concentrated poverty for the simple reason that if you cannot afford housing in a certain area, then you should probably look somewhere else. Therefore, judicial remedies are inherently limited in their scope and magnitude. If, however, we are serious about fair opportunity in affordable housing and regulating adverse social determinants, then we need a unified legal framework, now more than ever, for rectifying segregation and deconcentrating poverty. It is in the courtroom that fair housing will be litigated and, as public housing becomes a policy of the past and legislatures show no sign of advocacy for housing issues in a time of divisive polarization, judicial remedies must evolve to balance fairness with affordability for victims of discrimination. Significant questions, however, remain: What exactly can judicial remedies do? Are the justifications for these remedies legally or constitutionally permissible? Which remedies are the most efficacious in practice?

Judicial remedies are, in theory, unlimited as long as they remain within constitutional bounds and they are tailored to remedy the actual injury that took place. In effect, however, we can conceptually summarize the two main judicial remedies used in the latter half of the 20th century. The first judicial remedy used to enforce fair housing utilizes inclusionary zoning and project-based assistance to compel mixed-income integration. The well-known *Mt. Laurel* decision in the New Jersey State Supreme Court validated this type of remedy and lower judicial officers were allowed to order affirmative governmental actions for inclusionary zoning and project-based subsidies.²⁰ The inclusionary zoning remedy required that 20 percent of units in rental developments be set aside for

²⁰ The *Mt. Laurel* litigation began in 1971 when a group of low-income families sued the township of Mt. Laurel for exclusionary zoning practices that kept them out of the community. Exclusionary zoning in terms of minimum lot sizes and housing types are not particularly controversial to many Americans who do not perceive of classist exclusions as socially problematic. In 1975, the New Jersey Supreme Court agreed with the plaintiffs that the town's actions violated the State Constitution's general welfare provision, not because exclusionary zoning was unlawful, but because the town was engaged in a scheme to minimize the tax burdens associated with a larger and poorer population needing more public assistance. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713. This created a watershed of litigation and, in an attempt to clear up confusion, the decision known as *Mt. Laurel II* was ordered in 1983 and it was this decision that allowed remedies to institute fair housing through mandatory inclusionary zoning and project-based subsidies. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390. The New Jersey State Legislature subsequently passed a Fair Housing Act to make judicial solutions more universally applicable. See Peter H. Schuck, "Judging Remedies: Judicial Approaches to Housing Segregation," *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 309-13.

low-income citizens and the subsidies, averaging around \$25,000 per low-income unit, were given to builders to develop new units.²¹ *Mt. Laurel*, however, had a mixed legacy of success in providing fair housing and deconcentrating poverty. The remedy ensured a degree of affordability because most *Mt. Laurel* low-income units required an income ranging from \$14,500 to \$29,000, although the poorest of the poor were not helped.²² One of the problems, however, with inclusionary zoning and project-based assistance is that there is no guarantee that new developments will be placed in mixed-income communities, only a guarantee that these new developments will provide affordable housing. In a study of a *Mt. Laurel* suburban development called Village Green Condominiums, 60 to 70 percent of inhabitants were blue-collar or pink-collar workers.²³ We cannot be sure if these individuals were working poor, living on the margins, or if they would have been just as well-off living in working class neighborhoods compared to higher-income suburbia. On a positive note, 25 percent of the inhabitants in the Village Green Condominiums were single mothers with dependent children, perhaps signaling improved opportunities for these children who may have otherwise been worse off.²⁴

Another study found that of those that moved to *Mt. Laurel* developments in the suburbs, over two-thirds were white and only 47 percent had previously lived in cities, and of those that moved to developments in urban areas, over 90 percent were black.²⁵ As Peter Schuck astutely points out, “Indeed, by helping low-income people, mainly whites, move from the cities to the suburbs, *Mount Laurel* may even have exacerbated residential segregation by race, although this

²¹ John M. Payne, “Is Affordable Housing Fair Housing,” *Yale Law and Policy Review* 6.2 (1988): 363.

²² The 30 percent on income definition for affordability was translated to 45 to 65 percent of the median income for a family of four in New Jersey at the time. See *Ibid.*, 367.

²³ *Qtd. in* John M. Payne, “Is Affordable Housing Fair Housing,” *Yale Law and Policy Review* 6.2 (1988): 368.

²⁴ *Ibid.*

²⁵ *Qtd. in* Peter H. Schuck, “Judging Remedies: Judicial Approaches to Housing Segregation,” *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 315-6.

segregation effect would be small, given the low migration totals.”²⁶ If we are concerned about rectifying the adverse social determinants found in highly concentrated and segregated levels of urban poverty, however, then judicial remedies would have to be racially and spatially conscious, not just based on income-levels. This, of course, is legally controversial because racial classification under the law is subject to strict scrutiny pursuant to the Equal Protection Clause. Inclusionary zoning and project-based assistance, moreover, lie on theoretically shaky grounds and they evidence a mixed efficacy in the actual practice of alleviating poverty.²⁷ In fact, inclusionary zoning and project-based assistance do not accord with housing market principles of location, competition, and supply and demand. In places where demand is lower, land is cheaper, and zoning is more generous, developer subsidies are not always needed and, when they are, they are probably needed in urban ghettos where investment is sparse. Mixed-income suburbs, however, have greater demand and higher prices. As a result, the development costs of low-income housing are much greater. In a judicial remedy similar to that of *Mt. Laurel* (see footnote 27), the *Yonkers* litigation created project-based developments in the form of new public housing in mixed-income areas, but the cost of \$110,000 per unit forced HUD to object to the new constructions.²⁸ Inclusionary zoning can also increase the price of housing in the market because developers must raise the going market-rate to

²⁶ The *Mt. Laurel* remedy in total produced about 28,932 low-income units by 2001 with another 13,056 approved for construction and another 11,245 built through rehabilitation efforts. For comparison, at the time of implementation, 243,736 units were needed to reach all households spending more than 30 percent of their income on housing. See *Ibid.*, 314-5 and for the quotation see *Ibid.*, 316.

²⁷ The arduous and protracted litigation in the *Yonkers* case adds to the case-law in substantiation of this claim. The litigation took more than 20 years to reach a resolution, suggesting that judicial remedies utilizing inclusionary zoning and project-based assistance are controversial. In *United States v. Yonkers Board of Education*, 518 F. Supp. 191 (D.C.N.Y. 1981), a Judge ruled that the city had racially segregated its public housing and ordered a “bricks and mortar” construction of public housing and low-income housing, through inclusionary zoning and project-based subsidies, in mixed-income areas of Yonkers. To enforce compliance after continued defiance, the Judge issued a moratorium on private development that devastated the city. In the end, only 200 public housing units and additional 200 out of 600 low-income housing units mandated by the court-order were ever built and, as the empirical evidence showed, they did a relatively poor job of integrating mixed-income communities. For a discussion of *Yonkers*, see Peter H. Schuck, “Judging Remedies: Judicial Approaches to Housing Segregation,” *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 324-64.

²⁸ Peter H. Schuck, “Judging Remedies: Judicial Approaches to Housing Segregation,” *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 359.

compensate for the cost (or loss) incurred by building the low-income units, which, in turn, may decrease the supply of housing.²⁹ Inclusionary zoning and project-based assistance may be able to desegregate and deconcentrate poverty at a superficial level, but they cannot truly integrate low-income inhabitants into mixed-income areas without the empowerment of counseling and support services. Ultimately, judicial remedies that utilize inclusionary zoning and project-based assistance must be very cautious in their implementation—something courts are not well-equipped to do—if they are even to do it at all.

A second more affirmative and promising remedy is found in the *Gautreaux* case. *Gautreaux* differed from *Mt. Laurel* and *Yonkers* insofar that it did not focus on forced integration through inclusionary zoning and project-based assistance. Instead it fashioned a remedial approach that established a tenant-based mobility program, coupled with support services, based on Section 8 housing vouchers. As a form of tenant-based assistance, *Gautreaux* was possible because it avoided the zoning problems of constructing new low-income housing in metropolitan neighborhoods and the political problems associated with a forcible change in community composition. *Gautreaux* allowed low-income tenants to choose from a variety of different neighborhoods in the Chicago metropolitan area, where the social determinants of housing were better developed. Although by no means perfect, the *Gautreaux* remedy exhibited positive results and, as I argue, is the best judicial remedy because it makes fair opportunity more realizable by allowing affordable housing to align with market principles. A brief history of the litigation will elucidate the remedy's theoretical underpinnings and practical implementation.

²⁹ The economic effects of inclusionary zoning are not all bad and they vary widely depending on different markets and contexts. See Antonio Bento, Scott Lowe, and Arnab Chakraborty, "Housing Market Effects of Inclusionary Zoning" *The Affordable Housing Reader*, edited by J. Rosie Tighe and Elizabeth J. Mueller (New York: Routledge, 2013), 438-51.

III. The History of *Gautreaux*

Dorothy Gautreaux, along with her husband and four children, lived in a one-bedroom apartment in Chicago. They were desperate for more room, but they could not afford a bigger apartment, so, in 1953, they applied for public housing. Out of desperation, she listed Dearborn Homes as her first preference because she knew there was availability.³⁰ What she really desired, however, was to escape to a better area with her family. She knew that the Chicago Housing Authority (CHA) would relegate her to the same neighborhood she currently lived in, blighted by deteriorating conditions. In time, Gautreaux became active in the Civil Rights movement and it opened her eyes to the segregating practices of the CHA. The CHA began building high-rise public housing “projects” in predominately African-American neighborhoods that entrapped residents in the already slum-like conditions.³¹ Gautreaux, along with four other neighborhood activists, enlisted the help of the American Civil Liberties Union (ACLU) in filing a discrimination suit against the CHA and the U.S. Department of Housing and Urban Development (HUD), alleging that both the CHA and HUD racially discriminated in their distribution of public housing—a violation of the Civil Rights Act, passed in 1964, 11 years after Dorothy Gautreaux moved into public housing. Alexander Polikoff, a young private sector attorney, took the case *pro bono* for the ACLU in 1966. Polikoff knew, of course, the case would be controversial, entangling the litigants in Chicago politics and Richard J. Daley’s political machine. Polikoff, however, did not know that the litigation would forever change antipoverty housing policy. A brief account of how the *Gautreaux* litigation developed will inform an assessment of the efficacy and impact of the judicial remedy.

³⁰ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 50.

³¹ These “projects,” now demolished, included Henry Horner Homes, a development of 920 apartments completed in 1957, and the Robert Taylor Homes, the world’s largest public housing development completed in the early 1960s that was comprised of 4,400 apartments in 28 adjacent sixteen-story buildings. For a compelling story of these projects, see Alex Kotlowitz, *There Are No Children Here: The Story of Two Brothers Growing Up in the Other America* (New York: Doubleday, 1991). The account traces the story of the Rivers brothers and their family subsisting in stressful and unhealthy conditions in the Henry Horner Homes.

The history of *Gautreaux* can be summarized in three important steps: (1) the District Court's scattered-site remedy, (2) the U.S. Supreme Court's *Hills v. Gautreaux* decision, and (3) the housing choice voucher remedy known as the Gautreaux Assisted Housing Program (GAHP). The first step came in 1969 when United States District Court Judge Richard Austin ruled in the plaintiff's favor, finding that the CHA intentionally discriminated in its building of public housing, thus violating the Equal Protection Clause and the Civil Rights Act of 1964. Judge Austin, however, dismissed HUD as a party to the suit. Sadly, Dorothy Gautreaux died of kidney failure in 1968 before she could see the litigation of her namesake reach a resolution.³² She was remembered for her activism which kept housing, not just schooling, at the forefront of the Civil Rights movement in Chicago and it was her heroic character that humanized *Gautreaux*, lending a sense of reality to the litigation, sociological study, and policy debate that would stem from one woman's insistence on fair housing. Nevertheless, Judge Austin issued a remedial court order, demanding that public housing be desegregated. He exempted 1,458 housing units, many of which were high-rise tenements in the ghetto, but he mandated that the next 700 units be built in predominately white, well-off neighborhoods to ensure integration.³³ This became known as the *scattered-site remedy*, a project-based remedy that would increase the supply of public housing in mixed-income communities. The scattered-site program had dubious results in integrating low-income tenants and continued political resistance completely stalled the court order's implementation until Judge Austin appointed a receiver to administer it in 1987.

The litigation, however, dragged on. The second step of *Gautreaux*, arguably the most important step for its validating effect, came in 1971 when the Court of Appeals for the Seventh Circuit ruled that HUD was liable and should not have been dismissed from the original suit. This

³² Ibid., 65.

³³ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 74.

time, the Court issued remedial order requiring HUD to “fund a program enabling low-income, black families to relocate beyond the city limits and throughout the Chicago metropolitan area, largely into rental housing.”³⁴ The case caught the attention of the Nixon administration and the Secretary of HUD, Carla Anderson Hills, who appealed the ruling. The U.S. Supreme Court granted certiorari in *Hills v. Gautreaux* and, in January of 1976, Polikoff faced off against U.S. Solicitor General Robert Bork, a former classmate of his at the University of Chicago Law School, in oral arguments. The arguments advanced by Bork and Polikoff reflect the ideological division that makes judicial remedies in fair housing so controversial. Bork posited that the affirming the Circuit Court’s judgment would create an “extraordinary legal principle” that would “actually destroy the autonomy and some of the political processes of the cities and housing authorities who have no connection with the violation in Chicago.”³⁵ Keeping with conservative jurisprudence, “a metropolitan-wide land use” and “social planning” on this scale would be a severe usurpation of the judiciary’s powers.³⁶ Bork’s point was legitimate; the judicial remedy prescribed by the Seventh Circuit trumped the power—well within a local government’s prerogative—to regulate land-use and housing construction. The people of metropolitan Chicago, in other words, had no say in the desegregation and dispersion of inner-city residents that carried the potential to affect the composition of their own communities.

If the desegregation of housing and the deconcentration of poverty was to be given a chance in urban ghettos, a way around local community autonomy would have to be crafted. In response, Polikoff gave the Justices an eminently practical counterargument that justified an activist intervention in the desegregation of housing. He argued that Section 8 housing vouchers, recently

³⁴ Peter H. Schuck, “Judging Remedies: Judicial Approaches to Housing Segregation,” *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 320.

³⁵ Qtd. in Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 145.

³⁶ Qtd. in *Ibid.*

enacted by Congress in the Housing and Community Development Act of 1974, could be used by HUD to satisfy the Circuit Court's order and, in doing so, avoid any large-scale interference with or coercion of local government.³⁷ Because Section 8 was tenant-based, HUD did not have to interfere with local zoning laws nor did it have to physically construct developments when it gave households a voucher. Under normal circumstances, suburban zoning could effectively reject low-income tenants through *exclusionary* zoning restrictions. When these restrictions were openly subverted through *inclusionary* requirements, however, suburban communities perceived it as a threat to local homogeneity, leading to political resistance and outright defiance. Polikoff argued that *Gautreaux* could avoid these problems all together, at least from a legal point of view, because Section 8 vouchers had no compulsory requirements for landlords, thus preserving local autonomy. The *Gautreaux* remedy, in effect, aligned with the new Section 8 legislation and the prevailing politics of the day because it allowed the integration of low-income housing to be decided in the rental market, rather than through the forced construction of affordable housing in communities that did not desire it. In short, Polikoff's justification for *Gautreaux* was hardly a judicial overreach because government subsidized vouchers empowered tenants to choose housing through the market, which could not be construed as an infringement on the authority of local government.

Polikoff's argument won the day. In a unanimous opinion issued in April of 1976, the Court held that racially discriminatory public housing programs violated the Civil Rights Act and Fifth Amendment due process. The remedial action was allowed to extend beyond the city limits—where the violation actually occurred. Justice Potter Stewart, writing the opinion, opined that the judicial remedy was appropriate because it allowed for flexibility and discretion so HUD could substantively amend for the constitutional infringement:

³⁷ Ibid, 140.

HUD's position, we think, underestimates the ability of a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without overstepping the limits of judicial power established in the *Milliken* case.³⁸ HUD's discretion regarding the selection of housing proposals to assist with funding as well as its authority under a recent statute to contract for low-income housing directly with private owners and developers can clearly be directed toward providing relief to the respondents in the greater Chicago metropolitan area without preempting the power of local governments by undercutting the role of those governments in the federal housing assistance scheme.³⁹

This marked the first time the Court “had ever authorized a school or housing desegregation plan to extend beyond the community where the legal violation took place” and it acknowledged, as a matter of legal precedent, that inferior conditions in public housing were unfair and could be compensated for.⁴⁰ This acknowledgement carried profound implications, but, interestingly enough, there has been little follow-up from the Courts on the issue of fairness in project-based housing. According to housing advocate David Bryson, *Gautreaux* did inspire “a second wave of cases attacking the segregated and discriminatory fashion in which federal and local governments have operated public and assisted housing programs.”⁴¹ In *Closed Doors, Opportunities Lost* (1995), John

³⁸ See *Milliken v. Bradley*, 418 U.S. 717 (1974), a controversial 5-4 decision that held school systems were not responsible for desegregation busing across district lines unless it could be shown that they had deliberately engaged in a policy of segregation. In *Gautreaux*, Justice Stewart preserved *Milliken* by stating that a metropolitan-wide remedy was justified because there was an actual constitutional violation committed by HUD. Justices Brennan, Marshall, and White wrote separately in *Gautreaux* to say that they would have overruled *Milliken*.

³⁹ *Hills v. Gautreaux et al.*, 425 U.S. 284 (1976), 301.

⁴⁰ Peter H. Schuck, “Judging Remedies: Judicial Approaches to Housing Segregation,” *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 320.

⁴¹ David B. Bryson, “The Role of the Courts and a Right to Housing,” *A Right to Housing: Foundation for a New Social Agenda*, edited by Rachel G. Bratt, Michael E. Stone, and Chester Hartman (Philadelphia: Temple UP, 2006), 203-4. See *Young v. Pierce*, 685 F. Supp. 975 (E.D. Tex. 1988); *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999); *Comer v. Cisneros*, 37 F.3d 775 (2nd Cir. 1994); *Hollman v. Martinez*, U.S. Dist. Lexis 16106 (D. Minn. 2002); *Thompson v. HUD*, 220 F.3d 241 (4th Cir. 2000); *Sanders v. HUD*, 872 F. Supp. 216 (W.D. Penn. 1994); *Davis v. New York City Housing Authority*, 278 F.3d 64 (2nd Cir. 2002); *Langlois v. Abington Housing Authority*, 207 F.3d 43 (1st Cir. 2000). The

Yinger documents how *Gautreaux*-like programs arose out of litigation in Cincinnati, Dallas, Hartford, Memphis, and Omaha.⁴² In particular, the Cincinnati judicial remedy, called the Special Mobility Program, showed promise. During its operation, it helped approximately 40 families every year move into mixed-income communities with Section 8 housing vouchers and, by 1994, 723 households had participated in the program.⁴³ The cost to the taxpayer was only \$1,080 per household and participating households, on average, saw their wages increase from \$4.93 to \$5.86 per hour after moving.⁴⁴ The mobility aspect of the program apparently helped to enhance labor market prospects as a social determinant of opportunity. Furthermore, a small increase in state litigation occurred after *Gautreaux*, contending that landlords could not discriminate against tenants with housing vouchers. This litigation has been relatively successful in compelling landlords to accept Section 8 vouchers.⁴⁵

The overall lack of follow-up on *Gautreaux*, however, can be attributed, albeit speculatively, to two reasons. First, compensation for the injustice was triggered not through economic discrimination, but through racial discrimination—a phenomenon that became much harder to prove in the wake of the Civil Rights movement that eradicated *de jure* segregation. In fact, without the CHA’s blatantly unconstitutional behavior, there would have been no legal recourse for the segregation of low-income housing in Chicago. The inability of the judiciary to remedy discrimination has also been exacerbated by the Supreme Court’s rulings that confine constitutional challenges to cases of explicit, intentional discrimination. Second, the Court has made a palpable

remedies in these cases ranged from court-ordered tenant-based assistance for integration into mixed-income neighborhoods to the demolition of racially segregated public housing.

⁴² John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* (New York: Russell Sage Foundation, 1995), 153.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ See *Commission on Human Rights and Opportunities v. Sullivan Association*, 250 Conn. 763, 739 A.2d 238 (1999); *Franklin Tower One v. N.M.*, 157 N.J. 602, 725 A.2d 1104 (1999); *Attorney General v. Brown*, 400 Mass. 826, 511 N.E.2d 1103 (1987) in David B. Bryson, “The Role of the Courts and a Right to Housing,” *A Right to Housing: Foundation for a New Social Agenda*, edited by Rachel G. Bratt, Michael E. Stone, and Chester Hartman (Philadelphia: Temple UP, 2006), 204.

ideological shift to the right since 1976. Although a justifiable and an efficacious remedy, *Gautreaux* entailed a degree of judicial policymaking in its tenant-based remedy that would not have garnered nine votes if it were decided today.⁴⁶

The third step in the history of *Gautreaux*, the housing choice voucher remedy that Polikoff had argued for before the Supreme Court, was crafted in a consent decree between HUD and the plaintiffs in 1981. Formally known as the Gautreaux Assisted-Housing Program (GAHP), the remedy mandated that 7,100 households living in segregated public housing receive Section 8 housing vouchers and that they use these vouchers to move into mixed-income communities with populations that were less than 30 percent African-American.⁴⁷ The CHA distributed these vouchers, equal to the difference between 30 percent of a household's income and the fair market rate for rental units determined by a housing agency, to qualified applicants participating in GAHP. The subsidized vouchers were tenant-based, meaning that families would enter the housing market on their own, with support and counseling from nonprofit agencies, and could move where they pleased as long as a landlord accepted the vouchers. Pre-move counseling primarily aided families in

⁴⁶ The conservative shift is perhaps a causal factor for the lack of follow-up, explaining why the U.S. Supreme Court has been hostile to cases claiming a right to fair housing. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), the Court used a disparate impact test to determine if a zoning ordinance barred families of various socioeconomic and racial backgrounds from residing in a neighborhood and held that the ordinance was constitutional. In *Warth v. Seldin*, 422 U.S. 309 (1971), the Court ruled that the plaintiffs, who alleged that a town's zoning ordinances excluded low-income people, could not demonstrate an injury and thus lacked standing. The decision effectively ruled that economic discrimination in the housing market was not constitutionally problematic. Once again, these rulings indicate that it is exceedingly difficult to argue against land-use regulation as it relates to the housing market. *Gautreaux* circumvented this difficulty because its remedy was tenant-based rather than project-based and, on the whole, remedies fashioned in this way seem to pass constitutional muster.

⁴⁷ HUD's obligation to provide vouchers for 7,100 households was an "arbitrary number," according to Alexander Polikoff, reaching approximately one-fifth of the 40,000 families mentioned in the original class action suit against the CHA and HUD. Negotiations involving the scope of the program would have continued if it was not for the election of Regan in 1980 and a less amenable administration in HUD. See Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 240. Beyond the threat of Regan's conservative revolution, however, was the continued growth of the ghetto during the course of the *Gautreaux* litigation. By the time the consent decree was entered in 1981, the ghettos of Chicago had a population of roughly 1.2 million people, making 7,100 Section 8 participants look insignificant, even trivial. See Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge: Harvard UP, 1993), 191.

searching for housing and post-move counseling helped households adjust, over time, to the new social environment. The support services ranged from identifying accommodation units, accompanying families to inspect units, and assisting with lease applications and negotiations with landlords.⁴⁸

By 1998, HUD's court-ordered obligation to fund GAHP ended when 7,100 low-income black families, with the support of various nonprofits, had moved out of inner-city public housing.⁴⁹ More than half the participants moved into over 100 suburban Chicago communities.⁵⁰ The program was also incredibly popular; between 10,000 and 15,000 applicants applied for only 325 annual spots each year of GAHP's existence.⁵¹ Consequently, a low-income housing mobility program, crafted as a judicial remedy and validated by the nation's highest court, succeeded in dispersing a significant number of impoverished African-Americans to middle-income neighborhoods. Did it, then, achieve justice? Did mobility accord with the principles of fairness?

IV. The Efficacy of *Gautreaux*

The first part of the judicial remedy in *Gautreaux*—the scattered-site housing ordered by the District Court Judge—was, unsurprisingly, not at all effective until almost 20 years after the original decision in 1969. Due to political resistance and continued noncompliance on the parts of HUD and especially the CHA, a development organization called the Habitat Company was placed in receivership of the court order in 1987.⁵² The scattered-site remedy developed 1,813 public housing units in multiple neighborhoods (in addition to the 900 CHA had already built beforehand) at a cost

⁴⁸ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 246.

⁴⁹ Peter H. Schuck, "Judging Remedies: Judicial Approaches to Housing Segregation," *Harvard Civil Rights-Civil Liberties Law Review* 37 (2002): 321.

⁵⁰ John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* (New York: Russell Sage Foundation, 1995), 153.

⁵¹ *Ibid.*

⁵² Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 197.

of \$187 million—a “minor miracle” as Alexander Polikoff puts it.⁵³ Unfortunately, however, the Habitat Company had extreme difficulty finding affordable property, within HUD funding limitations, to build new public housing. Their task proved to be nearly impossible given the booming market conditions in metropolitan Chicago during the 1990s; developable lots in mixed-income areas that were less than 30 percent African-American were scarce and, when sites were found, they suffered from various forms of environmental pollution.⁵⁴

Consequently, the Habitat Company effectively circumvented the order and decided to build in predominately Latino neighborhoods within the city. This decision still corresponded with the stipulations of the court order, but, without integration into the suburbs, the deconcentration of poverty never fully occurred. Unfortunately, data is not readily available on the efficacy of the scattered-site remedy in *Gautreaux*, but, if the previously mentioned *Mt. Laurel* and *Yonkers* remedies are any indication, scattered-site housing does little to integrate low-income people into homogenous suburban neighborhoods. Residents remain concentrated in public housing units and therefore they cannot escape the stigmatization that goes along with it. In short, the scattered-site program confirms why the integration of project-based assistance will always be politically and economically problematic. With limited funds, HUD cannot afford to purchase housing sites in suburban communities where land is more valuable. Continued political resistance in the scattered-site remedy shows how contentious project-based assistance can be, making the convincing of suburban communities to approve zoning for low-income housing all the more dubious. Fortunately, there is a more affirmative and attainable answer for fair and affordable housing.

The second judicial remedy—the housing choice voucher remedy formally known as the Gautreaux Assisted Housing Program—showed great efficacy. Before delving into the results, there are three qualifications worth mentioning. First, *Gautreaux* had little cumulative impact on housing

⁵³ Ibid., 204.

⁵⁴ Ibid., 200.

segregation and the concentration of poverty in Chicago. Second, the African-Americans that participated in the GAHP were presumably motivated to do so. Many participants were not representative of traditional public housing inhabitants because those with serious behavioral or credit problems were screened out of the program. Therefore, a self-selection bias exists in the *Gautreaux* outcomes. Third, the studies on the results of the GAHP suffer from a number of statistical deficiencies.⁵⁵ The sample sizes were very small and there were no true experimental and control groups. Social scientist James Rosenbaum attempted to overcome the latter dilemma by assigning those that moved to the suburbs, more than half the participants, as the experimental group and those that remained in the city as the control group. Fortunately, both groups started with similar income, employment, educational, and family characteristics.

The results of the studies were incredibly encouraging and, at the very least, substantiate the claim that housing mobility programs can ameliorate the social determinants that affect poverty. In “Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs,” Rosenbaum and Susan Popkin, using a multivariate analysis, found evidence to substantiate both a structural and cultural hypothesis as to why African-Americans in the ghetto found better opportunities once they moved to the mixed-income areas. The multivariate factors—including work history, education, family circumstances, and long-term welfare dependency—reveal some support for the cultural hypothesis that better role-models and stable community institutions lead to better outcomes in the suburbs. But, Rosenbaum and Popkin found stronger evidence for the structural hypothesis that better economic opportunities in the suburbs were strongly correlated to

⁵⁵ The empirical work analyzing the *Gautreaux* program is not a truly randomized experiment and therefore it cannot “literally” evaluate the impact of the program. The studies can only measure the impact of moving to the suburb as compared to remaining within the city. These methodological limitations may call into question the impact of the program, but, needless to say, they cannot take away the positive outcomes *Gautreaux* participants experienced. See footnote 99 in John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* (New York: Russell Sage Foundation, 1995), 336.

better labor market participation.⁵⁶ Their findings confirm that enhanced social determinants in mixed-income communities can provide the fair opportunity to improve socioeconomic outcomes. By the same token, the adverse determinants in the ghetto have a powerful inhibiting effect on an individual's capability to achieve well-being. In blighted public housing developments, high crime rates, education deficits, poor health, and a lack of public investment not only lead to stagnated poverty, but also to the detriment of self-worth and dignity in the larger community—what Norman Daniels and John Rawls would call insufficient “social bases of self-respect.”⁵⁷ The healthy functioning of a democratic society relies on the contribution of self-respecting citizens, but the determinants in the ghetto are anathema to that contribution.

Moreover, in “Closing the Gap: Does Racial Integration Improve the Employment and Education of Low-Income Blacks?”, Rosenbaum found that children of *Gautreaux* households that moved to the suburbs were four times more likely to finish high school than those households that stayed in the city; they were twice as likely to attend college; 75 percent found employment compared to 41 percent who stayed in the city; even those who moved to the suburbs were 16 percent more likely to hold jobs among those who never had a job before.⁵⁸ The increases in employment were attributed to a better labor market with higher wages and a physically safer working environment. The increases in educational attainment were attributed to better quality schools, smaller classroom sizes, and qualified teachers. Educational achievement was ostensibly comparable to the *Gautreaux* participants that stayed in the city, but given the higher educational standards in suburban schools, this suggests that their suburban movers actually performed better.⁵⁹

⁵⁶ James E. Rosenbaum and Susan J. Popkin, “Employment and Earnings of Low-Income Blacks Who Move to Middle-Class Suburbs,” *The Urban Underclass* edited by Christopher Jencks and Paul E. Peterson (Washington: Brookings Institution, 1991), 353-54.

⁵⁷ Norman Daniels, *Just Health: Meeting Health Needs Fairly* (New York: Cambridge UP, 2008), 54-5.

⁵⁸ See James E. Rosenbaum, “Closing the Gap: Does Racial Integration Improve the Employment and Education of Low-Income Blacks,” *Affordable Housing and Public Policy: Strategies for Metropolitan Chicago* edited by Lawrence B. Joseph (Chicago, U of Chicago P, 1993), 223-53.

⁵⁹ *Ibid.*, 246.

Perhaps most importantly, the gains made by low-income blacks in the suburbs show that deficient education and sustained unemployment in the ghetto are not irreparable and can be overcome. The evidence indicates that the socioeconomic disparities between blacks and whites, to a large extent, can be attributed to the placement of housing—thus bolstering the need for further desegregation and the deconcentration of poverty to eliminate arbitrarily imposed inequality.

In terms of social effects, the results of the *Gautreaux* mobility program are also promising. Exposure to crime and violence dropped significantly and both the suburban and city groups exhibited roughly the same levels of social integration in terms of neighborhood interactions, friends made, and feelings of acceptance.⁶⁰ Given the history of racial animosity in Chicago, the fact that low-income blacks felt welcomed in the suburbs on a similar level to those that stayed in the city is an understated success. Suburban movers did, however, encounter more hostility and racial harassment than city movers at first, but these experiences were infrequent and nonviolent with no perceived signs of emotional distress.⁶¹ Anecdotal evidence confirms these findings in interviews conducted by Rosenbaum. Referring to the positive externality of simply having a new address, one respondent poignantly remarked, “Because they don’t give you credit when you live in public housing.”⁶² According to another respondent, the white neighbors were more than welcoming: “They welcomed me in, gave me things, showed me where the school was. They showed you where the grocery stores are, how to take the paths to them without walking on the streets. They babysat.”⁶³ Social integration not only helped to ensure a healthy, less stressful living environment, but the integration reported by the respondents perhaps had a positive effect on socioeconomic

⁶⁰ Ibid., 235

⁶¹ Ibid., 234 and 237.

⁶² Qtd. in Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 254.

⁶³ Qtd. in James E. Rosenbaum, “Closing the Gap: Does Racial Integration Improve the Employment and Education of Low-Income Blacks,” *Affordable Housing and Public Policy: Strategies for Metropolitan Chicago* edited by Lawrence B. Joseph (Chicago, U of Chicago P, 1993), 236.

outcomes. Improved access to credit and even the simple act of babysitting can improve capabilities, especially for mothers and children, which they would not have otherwise had in the hostile, uncooperative environment of the ghetto. Ultimately, the housing mobility program in *Gautreaux* significantly improved social and economic outcomes through the successful desegregation of housing and the deconcentration of poverty. The remedy improved capabilities like credit-access and childcare by ameliorating the social determinants—such as the lack of financial investment and social cooperation—that existed in the Chicago ghetto. *Gautreaux* also improved socioeconomic outcomes for its participants by the correcting the determinants—such as poor educational attainment and deficient job markets—that lead to failures in the fair equality of opportunity. Ultimately, *Gautreaux* achieved fair opportunity in affordable housing. But, *how* exactly was it successful?

V. How Did *Gautreaux* Work?

The *Gautreaux* remedy worked because it made fair opportunity more realizable by allowing affordable housing to accord with the market principles of free choice, good information, and proper incentives. Specifically, *Gautreaux* achieved this balance through three key advantages: (1) the remedy provided affordable housing through a cost-effective, tenant-based voucher that avoided the incentive problems of project-based assistance; (2) the metropolitan-wide mobility aspect of the remedy gave participants the free choice to find fair housing in communities with better schools, labor markets, and physical environments, thus deconcentrating poverty; and (3) the counseling and support services provided to participants helped to mitigate the adverse effects of compulsory social and racial integration by rectifying poor information in the marketplace. By combining liberal ideals of affordability and fairness with conservative ideals of market choice and competition, moreover, *Gautreaux* represented a political compromise of sorts. After all, housing mobility vouchers were first implemented by the Nixon administration as an alternative to beleaguered public housing. If we are

serious about approximating a right to fair and affordable housing, then the *Gautreaux* remedy leaves adequate room for an ideological consensus in which the abstractions of fairness can be made a reality.

From the perspective of affordable housing, *Gautreaux* succeeded for the same reasons that Section 8 housing vouchers succeed, that is, by subsidizing the cost of housing through a simple means-tested transfer. Comparatively, in fact, tenant-based vouchers surpass project-based assistance in terms of affordability for both the common taxpayer and the low-income renter. The problem with project-based assistance is that it is extremely expensive for the government to act as a supplier, either directly building housing or stimulating supply through incentives, renting the newly constructed units at reduced rates. Project-based assistance includes traditional public housing, the Low Income Housing Tax Credit (LIHTC) for housing developers, and the Section 8 subsidy for new construction.⁶⁴ According to economist Ed Olsen, for every ten families that are switched from project-based assistance to tenant-based assistance, we could reach two more families. In total, this would mean 900,000 more families served, in addition to the 4.5 million families currently served by project-based assistance, without increasing the current appropriation levels.⁶⁵ Project-based assistance also shields supply from market forces, dis-incentivizing competition which, in turn, keeps prices artificially high for the low-income renter. In fact, many households with incomes less than 30 percent of the area median cannot afford to live in LIHTC developments.⁶⁶ New construction in project-based assistance also can run into problems of gentrification, especially if a subsidized development makes a neighborhood a nicer place to live, thus driving up surrounding property

⁶⁴ Public housing serves approximately 1.3 million households. The Low Income Tax Credit, which credits builders for reserving at least 20 percent of newly constructed units for low-income households, has created 1.1 million low-income units since 1987. For comparison, Section 8 housing mobility vouchers serve 2 million households at a much lower cost. See Janet M. Currie, *The Invisible Safety Net*, (Princeton: Princeton UP, 2006), 92-3.

⁶⁵ Hearing before the Committee on Financial Services, U.S. House of Representatives, 108th Congress, First Session, on H.R. 1841, Housing Assistance for Needy Families Act of 2003. June 17, 2003, (statement of Ed Olsen, Professor of Economics at the University of Virginia), <http://economics.virginia.edu/sites/economics.virginia.edu/files/House030617Written.pdf>.

⁶⁶ Janet M. Currie, *The Invisible Safety Net*, (Princeton: Princeton UP, 2006), 95.

values. In this scenario, the poor benefit “only to the extent that they own the property surrounding the project” and are thus not guaranteed to benefit from “neighborhood upgrading.”⁶⁷

The Section 8 voucher, on the other hand, is much more cost-effective even though it caps rental payments at 30 percent of the renter’s income. Economist Janet Currie engages in a hypothetical scenario of how the voucher works, explaining how it can save the typical low-income family a substantial amount of money, while keeping the actual transfer payment relatively low:

Specifically, suppose that a poor family of four in Los Angeles earned \$18,800 a year and was able to find a modest two-bedroom apartment for \$750 per month: Their annual rental payments of \$9,000 would eat up 48 percent of their earnings. If they got into the Section 8 program, their rent would be capped at 30 percent of their income. This family would save \$4,360 per year, which is greater than the maximum EITC credit of \$4,204.⁶⁸

The \$4,360 cost incurred by the taxpayer is comparatively lower than project-based assistance. But, the savings for the poor family—approximately 23 percent of its annual income—is an even more considerable sum for a family living on the margins. Unlike project-based assistance, there is no need for the government to increase the supply of housing with vouchers. The subsidy can induce an increase in demand in participating markets that will encourage private development.

Accordingly, the tenant-based strategy endorsed by the *Gautreaux* remedy helps to reduce the financial burden of housing on low-income families and, in doing so, it improves on project-based assistance by reaching more needy households through a more cost-effective methodology. In this vein, *Gautreaux* reflects a fair process for delivering affordable housing.

⁶⁷ Hearing before the Committee on Financial Services, U.S. House of Representatives, 108th Congress, First Session, on H.R. 1841, Housing Assistance for Needy Families Act of 2003. June 17, 2003, (statement of Ed Olsen, Professor of Economics at the University of Virginia), <http://economics.virginia.edu/sites/economics.virginia.edu/files/House030617Written.pdf>.

⁶⁸ *Ibid.*, 94-5.

The *Gautreaux* remedy, however, does not just ensure a fair process in delivering affordability. What makes *Gautreaux* unique was that the court ordered dispersion of public housing residents to mixed-income areas actually enhanced the social determinants that affect housing, thus ensuring fair opportunity in socioeconomic outcomes. Not only does the remedy signify a momentous civil rights victory in desegregating housing as a matter of racial justice, the remedy also conceives of economic and social justice. Dorothy Gautreaux's dream was to exercise free choice in selecting a place to live with better schools, labor markets, and healthy living environments, rather than let the bureaucrats in the Chicago Housing Authority (CHA) decide where to place her. The tenant-based assistance model empowers individuals with a money-equivalent and sustained support to improve their own situation and take advantage of the fair equality of opportunity in a mixed-income neighborhood. Project-based assistance, on the other hand, empowers the very institutions, like the CHA, that have contributed to the segregation of housing and the concentration of poverty. As the efficacy of the *Gautreaux* remedy suggests, it is precisely this mobility that can engineer better social and economic outcomes, ending the intergenerational transfer and high concentration of poverty.

The primary objection to this theory of mobility, known more pejoratively as "liberal social engineering," states that the "culture of poverty" in the ghetto cannot be removed and, if ghetto inhabitants are moved to mixed-income areas, they will bring violent crime, drug-use, unemployment, and family instability with them. Paradoxically, the dramatic change in location and scenery can alleviate many of these pervasive social problems. *Gautreaux* confirms that the ghetto subculture is a misnomer because, in reality, the "culture of poverty" disintegrates through structural factors, including better employment and education, and a number of cultural factors, including positive social interaction and conduct. The fear that this dispersion of the ghetto will threateningly encroach on suburbia is misguided because *Gautreaux* only moved a limited number of families into

several neighborhoods during the course of each year. If this gradual assimilation is what it takes to avert the fear of urban poverty, then we should do it slowly—just as long as we are doing it.

As a final point, the counseling and support services for *Gautreaux* participants also contributed to the remedy's efficacy. Unfortunately, no empirical data exists to measure the effect of these services, but we do know just how extensive and proactive these services were. The primary organization tasked with support was the Leadership Council for Metropolitan Open Communities, which contracted with the CHA to screen eligible families for the Section 8 voucher program and, if accepted, provide them with pre-move and post-move counseling. When a family signed up for the *Gautreaux* program or got off the waiting-list, representatives from the council would make an initial home visit, verifying income and credit reports. At this point, the family would either be recommended by the council, failed by the council, or the family itself would decline to proceed after hearing about the program. Regrettably, about half the families signed up for the program either failed or declined to proceed. Consequently, the council did engage in creaming to a certain extent—but the extent of the creaming was not out of line with the standard eligibility criteria for many assistance programs.⁶⁹

After the selection stage, families attended mandatory informational sessions on basic housekeeping, financial credit, consumer protection, and suburban services including healthcare and transportation. For the vast majority of *Gautreaux* families, interestingly enough, the biggest obstacle in moving was not having public transportation in the suburbs.⁷⁰ According to Alexander Polikoff, counselors also “added pep talks on self-esteem and more detailed information on housing search strategies and how families could present themselves favorable to landlords.”⁷¹ The latter provided families with good information in the marketplace and, as time went on, successful participants

⁶⁹ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 235.

⁷⁰ Ibid., 238

⁷¹ Ibid., 246.

came back to speak to moving families to speak about their experiences. The council also kept records of all the available units in the Chicago metropolitan area and provided them to families who received their vouchers. By the 1990s, *Gautreaux* families, perhaps empowered by these services, began finding apartments and convincing landlords to rent to them on their own. In November of 1992, for example, 68 out of 70 families located apartments on their own.⁷² Counseling and support, as a result, *facilitated* integration into mixed-income communities. The experience of the regular Section 8 voucher program, without the sustained assistance of highly motivated counselors, suggests that families end up clustering in low-income areas not far from the ghetto. If mobility programs are to deconcentrate poverty in a meaningful way, then they must include the necessary support and empowerment.

VI. Antipoverty Housing Policy: *Gautreaux* and Moving to Opportunity

Given the *Gautreaux* remedy's success, it comes to no surprise that the housing choice voucher program inspired antipoverty housing policy on the federal level. In fact, the judicial remedy in *Gautreaux* served as the impetus behind the Moving to Opportunity (MTO) program. By the late 1980's and into the early 1990's, HUD Secretaries Jack Kemp, under President Bush, and Henry Cisneros, under President Clinton, were open to the ideal of housing mobility and free choice. Alexander Polikoff saw an opportunity to promote the *Gautreaux* remedy on a national level and he lobbied Kemp's office and worked with the legislative staff of Senator Barbara Mikulski of Maryland, chair of the Senate committee that handled HUD appropriations at the time, to create a bill that resembled *Gautreaux*.⁷³ The result was MTO, which was authorized by Congress in 1992 and implemented in 5 cities—Baltimore, Boston, Chicago, Los Angeles, and New York—in 1994. MTO was experimental, meaning that the program was designed to evaluate the efficacy of housing mobility before a national, large-scale program was initiated. Of the total participants in MTO, one

⁷² Ibid.

⁷³ Ibid., 262-3.

group received 6,000 Section 8 vouchers, in addition to counseling, to move from a high-poverty area, defined as a census tract with a poverty rate of at least 40 percent, to an area with a poverty rate of 10 percent or less; a second group received Section 8 vouchers and could use it to rent in any neighborhood and a third group, serving as a control group, did not receive any vouchers and continued to live in public housing.⁷⁴ Although an admirable effort to deconcentrate poverty in inner-city ghettos, the program contained a number of flaws that left a mixed efficacy in terms of substantively enhancing the social determinants of housing. According to John Yinger, MTO was also relatively troubled from the start because the program “ran into severe opposition in the suburbs of Baltimore, the second year of funding was cut off, and the Clinton administration’s proposal to extend the program beyond the original five sites was killed in Congress.”⁷⁵

Nevertheless, early evidence from MTO was promising insofar that some social determinants, including health and safety, were drastically improved for households who moved to low-poverty areas. A 2001 study found that the experimental group, which moved to low-poverty areas, experienced significant improvements in social outcomes, including neighborhood safety, and the children of these households had fewer behavioral and health problems; the experimental group, in fact, had a 65 percent decline in the chance of asthma attack.⁷⁶ Girls in the experimental group, moreover, “were more likely to graduate high school and were much less likely to suffer from anxiety,” but the effect of the move into a low-poverty had little impact on boys, signaling that moving children to more affluent neighborhoods may not be a “panacea.”⁷⁷ After the end of ten years—the allotted study time for MTO participants—the long-term results were more ambiguous. Importantly, the improved social outcomes persisted and participants reported that they lived in

⁷⁴ John Yinger, *Closed Doors, Opportunities Lost: The Continuing Cost of Housing Discrimination* (New York: Russell Sage Foundation, 1995), 235.

⁷⁵ Ibid.

⁷⁶ See John Yinger, “Housing Discrimination and Residential Segregation,” *Understanding Poverty*, edited by Sheldon H. Danziger and Robert H. Haveman (New York: Russell Sage Foundation, 2001), 381.

⁷⁷ Janet M. Currie, *The Invisible Safety Net*, (Princeton: Princeton UP, 2006), 104-5.

safer and healthier housing which had consequent effects on well-being and health. But, MTO largely failed to improve economic and educational outcomes; the experimental group did not exhibit much progress over the control group in terms of employment, income, welfare dependency, and educational achievement.⁷⁸ These mixed results may be discouraging and may call into question the ability of voucher mobility programs to ameliorate the social determinants of housing, but MTO had a number of design flaws that made it less effective than *Gautreaux*.

First, the long-term studies of MTO only measured results between 10 and 15 years after households enrolled in the program. These studies have since ended and are not ongoing. In comparison, James Rosenbaum's *Gautreaux* studies were more longitudinal, covering participants for over two decades. The effects of integration, moreover, may not be readily accessible after a short period of time and may take many years to accumulate. During the MTO's short lifespan, there were also a number of confounding factors including welfare reform and the economic boom of the 1990s which may have "wiped out employment benefits from moving" since all MTO groups probably did better in the labor market during that time period.⁷⁹

Second, and most importantly, eligibility for MTO was based on an income threshold, unlike *Gautreaux* which was racially conscious in its selection of participants. As previously mentioned in the discussion of the *Mt. Laurel* judicial remedy, an income-based criterion does not, paradoxically, do a very good job of desegregating inner-city housing and deconcentrating poverty. In MTO, *only* 60 percent of the experimental group moved to census tracts with poverty rates of 20 percent or less and many of these areas were still in urban areas predominately populated by racial minorities; the

⁷⁸ See Sanbonmatsu et al., "Moving to Opportunity for Fair Housing Demonstration Program - Final Impacts Evaluation," U.S. Department of Housing and Urban Development (October 2011), http://www.huduser.org/publications/pdf/HUD_MTOExecSummary_v4.pdf.

⁷⁹ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 275.

other groups remained in urban areas with poverty rates hovering between 20 and 30 percent.⁸⁰ In fact, by 2000, only 13.3 percent of the experimental households moved to areas with poverty rates of 10 percent or less—whereas the vast majority of *Gautreaux* participants moved to white, suburban neighborhoods that had low poverty rates and were less than 30 percent African-American in composition.⁸¹ *Gautreaux* may have been the impetus behind MTO, but the programs substantively differed in the way they approached the concentration of poverty. The comparison between *Gautreaux* and MTO suggests that race and the relative concentration of poverty matter in regulating the social determinants of housing. The social determinants seem to be greatly improved in suburban areas with low poverty rates compared to urban areas with poverty rates well above 10 percent. The relative impact of moving from a 30 percent poverty rate (highly concentrated poverty) to a 20 percent poverty rate, without leaving an urban environment, appears to be rather small as it was in MTO. *Gautreaux*, on the other hand, shows us that the most significant gains are made when moving to a neighborhood with a very small poverty rate, suggesting that the breakdown of structural inequalities in the social determinants occurs only when tenants escape the impoverishment and isolation of urban environments. Consequently, if mobility programs are to achieve fair opportunity in affordable housing, voucher recipients must be required to move to metropolitan, mixed-income communities. Only then can detrimental social determinants be avoided in real, not just apparent ways.

VII. The Legacy of *Gautreaux*: Successes, Shortcomings, and the Future of Housing Policy in the United States

Thirty-eight years since the Supreme Court issued its landmark decision in *Hills v. Gautreaux*, the judicial remedy in *Gautreaux* proves that fair opportunity is possible in affordable housing. The housing choice voucher remedy successfully moved over 7,000 low-income, minority families out of

⁸⁰ Janet M. Currie, *The Invisible Safety Net*, (Princeton: Princeton UP, 2006), 104.

⁸¹ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 276.

distressed public housing and into suitable living environments. The households that moved to suburban communities showed improved outcomes in labor market participation, educational attainment, and social integration. These positive outcomes suggest that the social determinants of housing were substantially ameliorated through a simple change in geographic location, thus eroding seemingly “irreducible” structural and cultural inequalities in the ghetto environment. With resulting fair opportunities and capabilities, participants saw increased levels of health and quality of life, presumably signaling a realization of self-sufficiency and self-respect—pivotal functionings in a democratic society. *Gautreaux* inspired similar judicial remedies in court-ordered desegregation schemes and informed federal antipoverty housing policy through Moving to Opportunity. The shortcomings of Moving to Opportunity, moreover, prove why *Gautreaux* succeeded where other housing mobility programs fell short. Tenant-based assistance, coupled with support and counseling, must focus on desegregating urban ghettos by inducing renters to move to mixed-income, suburban communities. *Gautreaux* demonstrates that a desegregation effort can align with market principles, can be cost-effective, and, in doing so, substantively alleviate concentrated poverty.

Granted, housing choice vouchers and mobility programs are not always sufficient and they do not guarantee fair opportunity in the regulation of social determinants. Without concerted integration efforts and support services, voucher recipients end up clustering in low-income areas. Many landlords choose not to accept vouchers because the subsidy is not large enough to ensure a fair-market rate in more affluent communities or they just fear bureaucratic entanglements. Strong market conditions also undermine mobility because the demand and price for rental housing goes up, and landlords no longer need the business of Section 8 voucher recipients. Even the supply of rental housing that meets minimum standards varies from location to location. Fortunately, suburban communities generally have excess capacity and, as Ed Olsen points out, the Experimental Housing Allowance Program offers “powerful evidence on the ability of tenant-based vouchers to

increase the supply of apartments meeting minimum housing standards even in tight housing markets.”⁸² If there is a demand for fair housing, even if the government subsidizes tenancy, then it will be built according to the laws of the free market. Ultimately, the problems of housing choice vouchers are not insurmountable. They can be easily overcome through legislative fixes, changes in policy implementation at the administrative level, and increased lobbying of reluctant landlords through coordinated nonprofit and governmental efforts.

When it comes to mobility and fair opportunity, moreover, housing choice vouchers greatly outweigh project-based assistance in a cost-benefit analysis. First, project-based assistance is much more expensive; market pricing limits the ability of the government to construct new low-income rental units in suburban communities. Second, the forced integration of project-based developments encounters political resistance and classism that can be avoided in a *Gautreaux*-like dispersion program, in which individual households are moved in small numbers via the marketplace to new neighborhoods without unwanted attention. Finally, from a legal perspective, *Gautreaux*-like judicial remedies are not likely to be subject to review or scrutiny because they avoid issues of local autonomy by empowering the tenants themselves to purchase housing in the marketplace.

Gautreaux consequently provides a unified legal framework for future judicial decisions tasked with remedying segregation in America’s urban ghettos. The housing choice voucher remedy also informs the future of antipoverty housing policy. As public housing becomes a policy of the past as more and more units are either demolished or sold off to the lowest bidder, vouchers are a promising alternative and we need to ensure that they provide fair opportunity, an area in which

⁸² The Experimental Housing Allowance Program was commissioned in South Bend, Indiana and in Green Bay, Wisconsin, where tenant-based vouchers increased the supply of housing that met minimum standards by 9 percent. The percentage increase in supply over the 5 years of the experiment did more than the previous 65 years of subsidized production of low-income housing. See Hearing before the Committee on Financial Services, U.S. House of Representatives, 108th Congress, First Session, on H.R. 1841, Housing Assistance for Needy Families Act of 2003. June 17, 2003, (statement of Ed Olsen, Professor of Economics at the University of Virginia), <http://economics.virginia.edu/sites/economics.virginia.edu/files/House030617Written.pdf>.

traditional project-based assistance has failed in the past. The federal government should phase out low-income constructions subsidy programs and the public housing operating fund, continuing to sell blighted projects and developments; the savings should be fully reinvested into housing choice voucher programs in which we can reach a greater number people at a lower cost. Additional funds should be appropriated for the assessment and evaluation of housing choice voucher programs. These assessments should be longitudinal and comprehensive, monitoring the effectiveness of housing choice programs for purposes of improvement and, hopefully, justifying continued expansion. Furthermore, tenant-based assistance would ideally be an entitlement below a certain income level, which would come at a lesser cost than one might think.⁸³ Congress could and should increase HUD appropriation levels. In 1978, the annual appropriation for HUD was \$75 billion (in 2002 dollars), but that spending fell to \$16 billion during the first Regan administration, and, currently, appropriations for the fiscal year 2014 stand at \$32.8 billion.⁸⁴ We could be doing a lot more for an insignificant increase in the overall federal budget.

A national-level *Gautreaux* program that focuses on deconcentrating poverty and improves on the flaws of Moving to Opportunity is also not out of reach. A hypothetical policy scenario from Alexander Polikoff puts the problem in perspective and is worth quoting at-length:

Suppose that by congressional enactment 50,000 housing vouchers were made available annually, were earmarked for use by black families in urban ghettos, and could be used only in nonghetto communities, distant from high poverty areas—say census tracts with less than 10 percent poverty and not minority-impacted. Suppose that the vouchers were allocated to the 127 metropolitan areas with more than

⁸³ Admittedly, this is unrealistic given the current political environment. But, Ed Olsen describes the benefit of a housing assistance entitlement program and he analyzes the pros and cons of an in-depth proposal. See *Ibid.*, 19-22.

⁸⁴ See Janet M. Currie, *The Invisible Safety Net*, (Princeton: Princeton UP, 2006), 112, and The National Council of State Housing Agencies, “Congress Passes FY 2014 Omnibus Appropriations Bill, January 14, 2014,” <http://www.ncsha.org/blog/congress-passes-fy-2014-omnibus-appropriations-bill>.

400,000 residents—say 125 to make the arithmetic easier. Suppose also that to avoid threatening any receiving community, no more than a specified number of families (an arbitrary number, say, ten, or a small fraction of occupied dwellings) could move—in a dispersed, not clustered, fashion—into any city, town, or village. If an average of forty municipalities in each metropolitan area served as receiving communities, the result would be—using ten as the hypothetical move-in ceiling—that 50,000 families each year, or 500,000 in a decade, would move in ‘Gautreaux fashion.’ Notably, the 500,000 moves in a decade would equal *almost half the million black families living in metropolitan ghetto census tracts*.⁸⁵

From this perspective, at least, the problem of inner-city poverty may not be as unmanageable as we once thought. Out of fairness, eligible white and Hispanic families from concentrated urban poverty should be free to move as well; a proposed program can be racially conscious, but it cannot classify eligibility by race alone. Securing 50,000 vouchers per year and adopting a *Gautreaux* model to ensure integration into mixed-income communities are feasible policy recommendations—costing approximately \$200 million a year. The hardest ask is to find 40 receiving municipalities within 125 metropolitan cities, but, considering that *Gautreaux* placed its participants in over 100 towns in the Chicago metropolitan area, it is certainly not implausible.⁸⁶ Significant questions, however, remain: How many families would be willing to move? Is there a fair process for recruitment? Could this proposal garner political support? The experience of *Gautreaux* suggests an affirmative answer to these questions and many more. If fairness means providing a fair equality of opportunity and a normal range of functionings in society, then justice requires us to try *Gautreaux* on a much larger scale. For in fact, the enhancements in the social determinants of housing cultivated health and well-

⁸⁵ Alexander Polikoff, *Waiting For Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (Evanston: Northwestern UP, 2006), 382-3. (author’s emphasis)

⁸⁶ *Ibid.*, 386.

being for those concentrated in urban poverty, ultimately proving that justice is possible in affordable housing.

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