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SEARCHING FOR FAIR HOUSING

Lee Anne Fennell

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SEARCHING FOR FAIR HOUSING

*Lee Anne Fennell**

There is a blind spot in the scholarly and legal treatment of housing discrimination: the racial biases of homeseekers. Search strategies routinely incorporate information about neighborhood racial composition, either as a proxy or as a direct preference. Although search heuristics can powerfully entrench and perpetuate (or, alternatively, disrupt) segregation, it is widely assumed that the way that families search for homes is none of the law's business. This paper questions that assumption and, more broadly, examines how homeseeking fits into a societal conception of fair housing that assigns positive value to integration.

INTRODUCTION

Private discrimination against homeseekers based on race has been illegal in the United States since 1968.¹ But discrimination *on the part of* homeseekers has received no parallel regulatory or legislative attention.² Rather, it is generally assumed that a househunter has every legal right to enter or avoid a community for any reason she likes, including its racial or ethnic composition.³ On the surface, this asymmetry fits neatly with antidiscrimination law's focus on unblocking access to housing

* Max Pam Professor of Law and Ronald H. Coase Research Scholar, University of Chicago Law School. I thank Vicki Been, Christopher Fennell, Eduardo Peñalver, Daria Roithmayr, Nicholas Stephanopoulos, Lior Strahilevitz, and Noah Zatz for helpful comments and conversation. Research support from the Stuart C. and JoAnn Nathan and Harold J. Green Faculty Funds is also gratefully acknowledged.

¹ The Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, was enacted in 1968. A 1968 Supreme Court decision also recognized that Section 1982 of the Civil Rights Act of 1866 bans private racial discrimination in property transactions. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Antidiscrimination laws also reach discrimination based on a number of protected statuses other than race—for example, the Fair Housing Act also reaches color, religion, national origin, sex, familial status, and disability—but race will be my focus in this piece.

² I argue that certain forms of discriminatory homeseeking could in fact be reached through existing law. *See infra* Part III. But the prevailing view of the law's coverage is very much to the contrary.

³ *See, e.g.*, Stacy Seicshnaydre, *The Fair Housing Choice Myth*, 33 CARDOZO L. REV. 967, 987 (2012) (describing as “perfectly legal” the diminution in housing choice that comes “in the form of a majority-group member’s consumer choice to opt out of inclusion”); John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1579 (1993) (explaining that efforts at integration would be thwarted, even if illegal conduct were addressed, by whites’ “perfectly legal housing choices that, cumulatively, would lead to segregated neighborhoods”); Xavier de Souza Briggs, *Politics and Policy: Changing the Geography of Opportunity*, in THE GEOGRAPHY OF OPPORTUNITY 310, 314-15 (Xavier de Souza Briggs & William Julius Wilson, eds., 2005) (“[S]egregation stems not only from illegal acts of discrimination, but also from perfectly legal, if segregative, choices” including “‘self-steering’ by whites and minorities”).

opportunities.⁴ Yet as Thomas Schelling's work made clear decades ago, individual location choices can have a profound, cumulative impact on overall housing patterns and hence on available housing choices.⁵ And the role that neighborhood racial composition continues to play in the home selection decisions of white households, whether as a proxy or as a direct preference,⁶ remains a chief driver of segregation.⁷

It is, therefore, something of a puzzle why antidiscrimination law, and legal scholarship devoted to the topic, have largely ignored homeseeking.⁸ The puzzle deepens when we consider the Fair Housing Act's goal of promoting integration—a goal that would seem to require either addressing segregative household choices or counteracting them in some way. In this paper, I take on this understudied and undertheorized issue. I critically examine presumed normative and doctrinal impediments to addressing homeseeker discrimination, and consider how the law's treatment of this form of bias connects conceptually to the project of delivering fair housing.

My analysis challenges two claims on which there appears to be overwhelming legal and scholarly consensus: that the law *does not* and *should not* reach discriminatory housing search. Contrary to all prior analyses of which I am aware, I argue that at least some manifestations of homeseeker bias can be a normatively appropriate target of fair housing law.⁹ I also argue, contrary to the prevailing wisdom, that existing law can be fairly read to offer tools for addressing certain forms of homeseeker bias.¹⁰ There are indeed significant normative and doctrinal limits on the scope of liability that can attach to housing search. But giving homeseekers a free pass to discriminate is not the benign, overdetermined move that it is

⁴ See Seicshnaydre, *supra* note 3, at 981 (“The [Fair Housing Act] protects the choices of the housing consumer in a marketplace in which the housing provider stands as gatekeeper.”).

⁵ See, e.g., THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 147-66 (1978); see also DARIA ROITHMAYR, REPRODUCING RACISM 93-120 (2014)

⁶ See, e.g., INGRID GOULD ELLEN, SHARING AMERICA'S NEIGHBORHOODS 49 (2000) (discussing whites' use of “race as a proxy”); see also *infra* Part I.A.2

⁷ See, e.g., Lance Freeman & Tiancheng Cai, *White Entry Into Black Neighborhoods: Advent of a New Era?* 660 ANNALS AM. ACAD. POL. & SOC. SCI. 302, 302 (2015) (“While there is considerable debate about the causes of the spatial isolation of blacks, on one reason there is near unanimity—whites' avoidance of black neighborhoods.”).

⁸ Seicshnaydre, *supra* note 3, has the most detailed legal analysis of the issue of which I am aware. See *id.* at 999-1004. Most analysts ignore the issue as both a doctrinal and theoretical matter. See, e.g., TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 200 (2015) (noting antidiscrimination law's asymmetrical application to some actors and not others and expressing surprise “that most discrimination law theorists ignore this ostensibly bizarre set-up”). Scholars in other disciplines have explored the dynamics of housing search and choice in considerable detail but have not focused on regulating homeseeking. See *infra* Part I.A. A small but growing literature addresses other discriminatory consumer choices. See, e.g., Katharine T. Bartlett and G. Mitu Gulati, *Discrimination by Customers* (2015) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2540334; Kimani Paul-Emile, *Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462 (2012); Michael Blake, *The Discriminating Shopper*, 43 SAN DIEGO L. REV. 1017 (2006). Cf. Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1400-01 (2009).

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.

generally thought to be.

Recognizing the correlative relationship between rights and duties identified by Wesley Hohfeld¹¹ helps to illuminate what is at stake. Safeguarding the rights of households to receive fair housing opportunities requires distributing corresponding fair housing duties (in some manner) throughout society. The fewer the agents who are considered appropriate bearers of those duties, the greater the duties must be on some or all of the remaining agents—or the more constrained must be the fair housing rights. Thus, keeping homeseekers off the roster of parties who are held to account for intentional racial discrimination requires shifting the costs of that discrimination somewhere else—either back onto members of minority groups who see their rights to fair housing accordingly curtailed, or onto other parties who are in a position to overcome or compensate for the effects of biased home search.¹²

The paper proceeds in four parts. Parts I and II challenge the dominant view that housing search should be deemed normatively off-limits as a domain for legal intervention. These Parts address, respectively, two primary rationales for ignoring search practices—that homeseekers cannot materially influence fair housing opportunities, and that any effort to address search would be an impermissible intrusion into autonomy and related values.¹³ Part I examines the empirical effects of housing search bias on segregation and concludes that this bias significantly interferes with fair housing opportunities. Unaddressed discrimination by homeseekers thus produces a disconnect—which I term “the search gap”—between the rights that families have to fair housing opportunities and the duties that the law imposes on parties not to discriminate in the housing domain.

Part II turns to questions of autonomy and associational privacy. Although these normative considerations place important constraints on legal interventions into search, I resist the blanket conclusion that every form of intentional homeseeker discrimination must be immunized. Following a pattern that can already be found in certain provisions of fair housing law (most notably, in the incomplete exception from liability for so-called “Mrs. Murphy” landlords),¹⁴ I sketch a conceptual approach that would preserve a realm for ultimate decisional autonomy for homeseekers while prohibiting the use of exclusionary search tactics that operate in a

¹¹ WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 36-42 (Walter Wheeler Cook ed., 1923).

¹² See *infra* Part I.B; see also *infra* Part IV (describing some ways in which costs might be shifted).

¹³ These rationales track the factors of “efficacy” and “negative liberty” that Tarunabh Khaitan recently elaborated in discussing the law’s choice to extend nondiscrimination duties only to certain actors and not others. See KHAITAN, *supra* note 8, at 195-213 (using the different treatment of landlord and tenants as an example). In the case of discrimination by tenants, Khaitan suggests, the intrusion associated with imposing a duty would be high and the efficacy would be low. See *id.* at 200, 212-13.

¹⁴ See *infra* Part II.B.1 (discussing 42 U.S.C. § 3603(b)(2)).

categorical manner to preclude the possibility of learning through search. This same approach also offers a novel way to address fair housing issues in the roommate context—an arena in which housing provision and homeseeking often blur together.

I then move from the normative question of what the law *should do* to the doctrinal question of what the law *does* (or can properly be read to do). Part III shows how categorical discrimination by homeseekers might be reached through existing legal limits on advertising and statements, as well as through constraints on real estate agents, without infringing ultimate decisional autonomy. Part IV considers the potential and limits of other doctrinal hooks for addressing biased search or countering its effects. Disparate impact analysis can reach third party conduct that interacts with and exacerbates the biases of homeseekers. In addition, the Fair Housing Act’s statutory mandate “affirmatively to further” fair housing¹⁵ supports experimentation with information strategies directed at debiasing search, such as pattern-disrupting homeseeking tools.

This is an especially propitious moment for addressing these issues. Last term, the Supreme Court held in *Inclusive Communities* that the Fair Housing Act includes a disparate impact cause of action.¹⁶ That decision also explicitly recognized integration as a continuing goal of the Act.¹⁷ In addition, HUD has recently breathed new life into the Fair Housing Act’s “affirmatively further” mandate, with a final rule issued in July 2015 that directs localities and other entities receiving HUD funding to take a data-driven approach to meeting their obligations.¹⁸ At the same time, homebuyers are increasingly involved in orchestrating their own searches, while technological developments offer new threats and novel opportunities in the search domain. In sum, it is becoming both increasingly feasible and increasingly important to treat homeseeking as a fair housing issue.

Before beginning, some notes about scope and emphasis are in order. Gaining traction on the neglected topic of housing search requires analytically isolating racially biased homeseeking from many other issues with which it is plainly entwined as an empirical matter: continuing discrimination by housing providers; steering by realtors; public and private land use controls that produce economic stratification, including restrictions on the quantity and location of housing stock; affordable housing policy decisions at all governmental levels; inequities in education and other local goods and services; and many others. Biased search is by no means the only

¹⁵ 42 U.S.C. § 3608(e)(5); see also 42 U.S.C. § 3608(d).

¹⁶ 135 S.Ct. 2507 (2015).

¹⁷ *Inclusive Communities*, 135 S.Ct. at 2525-26 (“The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”).

¹⁸ U.S. Department of Housing and Urban Development (HUD), Affirmatively Furthering Fair Housing, Final Rule, 80 FED. REG. 42272 (July 16, 2015).

obstacle to achieving fair housing. But it is an important and neglected obstacle that can benefit from close conceptual and doctrinal analysis. Unlike other impediments to fair housing, biased housing choice involves conduct that is both overtly discriminatory and widely believed to lie beyond the reach of law—a combination that warrants attention.

Because housing search represents an almost entirely unexplored policy front, I will focus here on moving-in decisions rather than on moving-out decisions.¹⁹ There are two reasons to view biased homeseeking as the more foundational housing choice problems. First, research shows that the moving-in decision is more sensitive to neighborhood racial composition than the decision to move out.²⁰ Second, racially motivated out-moves are implicitly premised on racially motivated in-moves. A family would have no reason to leave an existing neighborhood based on its racial composition unless it had identified another neighborhood to move *into* that had a different composition. Even when out-moves are motivated by fears of declining property values rather than racial composition as such, the dynamic is driven by the anticipated racial biases of potential in-movers.²¹

Finally, my analysis is driven by the phenomenon that Ingrid Gould Ellen has termed “white avoidance”—the unwillingness of white households to move into neighborhoods that are already populated by a substantial fraction of African-American households.²² I will therefore concentrate primarily on racial discrimination by whites against blacks.²³ This limited focus is not meant to suggest that other forms of discrimination are nonexistent or unimportant, nor to deny that they interact with white avoidance in important ways—some of which I will discuss. Rather, I wish to direct attention to the type of homeseeker conduct that continues to be most strongly implicated in the perpetuation of segregation.²⁴

¹⁹ The two sets of decisions obviously interact. See, e.g., ELLEN, *supra* note 6, at 46.

²⁰ See *id.* at 133 (citing survey data showing that “when confronted with a neighborhood that is one-third black, 59 percent of white respondents in 1992 said they would be unwilling to move in, while only 29 percent said they would try to move out”); see also *id.* at 50-51. Aside from inertia and switching costs, existing residents have more information about their communities and thus a diminished need to rely on crude proxies like race. See *id.* at 106; cf. Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination* 75 U. CHI. L. REV. 363 (2008) (explaining how more information about individuals can reduce decisionmakers’ reliance on racial and gender proxies).

²¹ Put differently, white flight would not be sufficient to sustain segregation in the absence of white avoidance. See Freeman & Cai, *supra* note 7, at 303 (“[W]hite avoidance, in addition to the oft-written-about mechanisms of discrimination and white flight, would seem to also be a necessity for whites to maintain their spatial distance from blacks.”).

²² ELLEN, *supra* note 6, at 2-3.

²³ The persistence and prevalence of black-white residential segregation in the United States explains my primary focus on those two groups in this piece, despite the obvious simplification that such a dichotomous focus involves. See, e.g., CAMILLE ZUBRINSKY CHARLES, *WON’T YOU BE MY NEIGHBOR? RACE, CLASS, AND RESIDENCE IN LOS ANGELES* 3 (2006) (noting the need to move beyond a black-white dichotomy).

²⁴ See, e.g., Freeman & Cai, *supra* note 7, at 305 (“While discrimination and white flight, the other instruments of segregation, fell out of favor or at least declined, white avoidance appears to have been a durable mechanism through which segregation has persisted in urban America.”); see also *infra* Part I.A.3.

I. IS HOMESEEEKING HARMLESS?

Two broad rationales, singly or in combination, appear to explain most of the academic and legal disinterest in addressing biased homeseeker choices.²⁵ The first, which I take up in this Part, is the idea that homeseekers can do little harm through their discriminatory conduct because they lack the power to materially influence fair housing opportunities.²⁶ This is simply untrue as an empirical matter, at least if one takes a view of fair housing that recognizes entrenched segregation as harmful and assigns positive value to advancing integration.²⁷ Unaddressed discriminatory homeseeking generates a gap between meaningful fair housing rights and the duties that the law is thought to impose on parties in the housing domain. Although there is more than one way to close this “search gap,” it should not be ignored.

A. *The Harms of Biased Search*

Although discrimination against homeseekers based on race has been illegal in the United States since 1968,²⁸ residential segregation remains high in many American cities.²⁹ Standard explanations include wealth differentials that correlate with racial and ethnic groups; continuing supply-side discrimination (*e.g.*, by landlords and realtors); and the preferences of those selecting housing.³⁰ Although the first two factors plainly contribute to segregation, homeseeker preferences for neighborhood racial composition appear to play an independent role.³¹ Moreover, because

²⁵ See, *e.g.*, KHAITAN, *supra* note 8 at 195-213.

²⁶ I will take up the second claim, which is grounded in autonomy concerns, in Part II, *infra*.

²⁷ Such an understanding is consistent with recent pronouncements of the Supreme Court and HUD, see *supra* notes 17-18 and accompanying text, and it is the one I adopt for purposes of this paper. The harms of segregation have been well documented. See, *e.g.*, David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. PUB. ECON. 2158 (2007); David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad?* 112 Q.J. ECON. 827 (1997); Justin Steil et al., *Desvinculado y Desigual: Is Segregation Harmful to Latinos?* 660 ANNALS AM. ACAD. POL. & SOC. SCI. 57 (July 2015); see generally PATRICK SHARKEY, *STUCK IN PLACE* (2013); ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010).

²⁸ See *supra* note 1.

²⁹ There have been important declines in racial segregation over recent decades nationwide, but these declines have been uneven across cities and regions, leaving segregation high in many cities such as Chicago. See Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. (forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673026 (surveying the social science literature on trends in desegregation).

³⁰ See, *e.g.*, Maria Krysan et al., *Pathways to Residential Segregation*, in *CHOOSING HOMES, CHOOSING SCHOOLS* 27, 36 (Annette Lareau & Kimberly Goyette, eds., 2014).

³¹ See, *e.g.*, Seicshnaydre, *supra* note 3 and sources cited therein. Economic differences are insufficient to explain existing levels of racial segregation. See, *e.g.*, Margery Austin Turner, *Limits on Housing and Neighborhood Choice: Discrimination and Segregation in U.S. Housing Markets*, 41 INDIANA L. REV. 797, 813 (2008) (“[I]f households were distributed across neighborhoods entirely on the basis of income rather than race or ethnicity, levels of segregation would be dramatically lower.”); see also SHARKEY, *supra* note 27, at 28 (noting that economic differences do not explain the far higher percentages of black children—including those in middle- and upper-income families—who grow up in high-poverty neighborhoods, compared with white children). Non-homeseeking forms of discrimination are not enough to explain existing patterns either. See, *e.g.*, Freeman & Cai,

housing choices are iterative and interdependent, wealth differentials and discrimination in housing access can be magnified and replicated through home selection choices that take racial composition into account.³²

In the sections below, I will explain how racial bias enters into housing search protocols, clarify that it does more than merely proxy for race-neutral variables, and discuss the impediments that it presents to the pursuit of fair housing.

1. Search Heuristics and Racial Bias

White homeseekers, especially homebuyers, tend to avoid neighborhoods with substantial African-American populations.³³ Neighborhood racial composition factors into the preferences of black homeseekers as well, although to a much lesser extent and for reasons that are often endogenous to perceived white racial preferences.³⁴ Although little research has addressed the question,³⁵ it is not hard to imagine how information about race might enter into the search process. Racial composition is one of the easiest pieces of information to learn about neighborhoods from publically available data, and it may be explicitly used to pre-screen search areas—either an overt desideratum or as a proxy for neighborhood quality.³⁶

Racial composition may also enter into search heuristics in more subtle ways. The cognitive and time demands of the home search process make some preliminary winnowing of neighborhoods inevitable.³⁷ Consider the role of word-of-mouth neighborhood recommendations (and warnings) that house hunters receive from people in their familial, social, or employment

supra note 7, at 302-03 (“Neither the discrimination faced by blacks attempting to move into white neighborhoods nor white flight from neighborhoods into which blacks move will necessarily result in the apartheid-like landscape that characterizes much of urban America without whites concomitantly avoiding black neighborhoods”); Maria Krysan et al., *In the Eye of the Beholder*, 5 DU BOIS REV.: SOC. SCI RES. ON RACE 5 (2008) (concluding that an independent role is played by white preferences in homeseeking).

³² See *infra* Part I.B.3 (examining these interactions); see also Krysan et al., *supra* note 30, at 39-47 (discussing how dynamic processes perpetuate segregation in ways not captured by examining individual explanations in isolation)

³³ Observed moving behavior and studies on preferences both support this conclusion. See, e.g., ELLEN, *supra* note 6, at 131-51 (reviewing literature); CHARLES, *supra* note 23, at 125-30 (finding in an LA survey using the “showcard” method to elicit neighborhood racial composition preferences that “fewer than one-fifth of whites ha[d] an ideal neighborhood that was over 20 percent black”); Robert J. Sampson and Patrick Sharkey, *Neighborhood Selection and the Social Reproduction of Concentrated Racial Inequality*, 45 *Demography* 1, 25 (2008) (finding, in a study tracing the flow of moves made by Chicago families, that “80% of whites transition into (or remain in) neighborhoods that are predominantly white and nonpoor, whether inside or outside the city”). In addition, a number of recent research designs move beyond stated preferences to attempt to isolate the role of race in hypothetical decisionmaking. See, e.g., Michael Bader & Maria Krysan, *Community Attraction and Avoidance in Chicago: What’s Race Got to Do With It?* 660 *ANNALS ACAD. POL. & SOC. SCI.* 261, 275 (2015).

³⁴ See *infra* Part I.B.2.

³⁵ See Bader & Krysan, *supra* note 33, at 277 (observing that existing studies on revealed preferences “fail to reveal how inequality seeps into the [search] process”).

³⁶ See *infra* Part I.A.2

³⁷ See Bader & Krysan, *supra* note 33, at 264.

circles—i.e., from nonrandom demographic samples of the local population. Also suggestive are findings that people tend to be more familiar with neighborhoods that are close to them and in which their own race is overrepresented.³⁸ If knowledge of a neighborhood is a prerequisite to search within it, then the way in which familiarity is established becomes important.³⁹

Home search advice is likely to get boiled down to simple formulas, such as invisible boundary lines that should not be crossed. As a rental housing advisor in Oak Park recently observed, “[p]eople walk in with mental maps and memories of stories they saw on a blog and rumors they’ve once been told. *Don’t live on the east side of Oak Park.*”⁴⁰ Homebuyers in particular cannot ignore the prevalence of these bright-line prescriptions, even if they personally take them with a grain of salt, given the likelihood that others—including the future homebuyers to whom they will later wish to sell—will hear and heed the same rules. More broadly, these and similar heuristics can fuel predictions about the future racial composition of the neighborhood and trigger concerns about property values and local services.⁴¹ The result can be an entrenched neighborhood reputation that becomes a self-fulfilling prophecy.⁴²

Of course, some househunters may simply visit prospective neighborhoods and form impressions based on what they observe. Even this alternative is deeply infused with racial overtones, however. Recent studies have shown that when white participants evaluate neighborhoods shown in video vignettes, an objectively identical neighborhood scene (people walking down the street, working on cars, and so on) will be rated lower when African-American people are visible in the scene than when only white people are observed.⁴³ Whether this discounting operates at a

³⁸ See Maria Krysan & Michael D.M. Bader, *Racial Blind Spots: Black-White-Latino Differences in Community Knowledge*, 56 SOC. PROBLEMS 677 (2009).

³⁹ Friends and family may play a large role in establishing familiarity, as does the influence of past segregation. See Bader & Krysan, *supra* note 33, at 278.

⁴⁰ Emily Badger, *How Race Still Influences Where We Choose to Live*, Wash. Post, Wonkblog, July 17, 2015 (quoting Kate Lindberg Vazquez, Oak Park Regional Housing Center).

⁴¹ See, e.g., ELLEN, *supra* note 6, at 135 (observing that “in the case of many whites, much of their reluctance [to enter neighborhoods with substantial minority populations] stems from fears about the future quality of services delivered in the neighborhood, rather than a simple dislike of non-whites”). Property values are widely cited as a reason for race-based decisionmaking. See, e.g. *id.* at 109 (reporting on survey responses in which “falling property values and rising crime” were the most common reasons provided by white respondents for why they would leave a racially mixed area); see also *infra* Part IV.C.2 (discussing significance of homeownership and prospects for stake-lowering).

⁴² See, e.g., ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 36 (2012) (explaining the role of “[n]eighborhood reputations” for disorder which can produce a “reinforcing cycle” and observing that “[s]ocial perceptions of disorder actually had a larger effect on later poverty levels than the inertial path dependence for which prior poverty serves as a direct proxy”); Boger, *supra* note 3, at 1578 (explaining that beliefs about lower property values in integrated neighborhoods “tend to become self-fulfilling prophesies”).

⁴³ Maria Krysan et al., *Does Race Matter in Neighborhood Preferences? Results from a Video Experiment*, 115 AM. J. SOC. 527 (2009); Krysan et al., *supra* note 31.

conscious level or not, it suggests that even those househunters who are open to visiting unknown neighborhoods as part of their housing search may end up making racially biased housing choices.

Technological changes in the mechanics of search impact could bear on the role that racial composition plays in location decisions. Online reviews of neighborhoods are becoming more common⁴⁴ and may increasingly supplement or supplant other information sources. If those who post online come from a broader mix of demographic backgrounds than the families, friends, and business associates of homebuyers, the results could help to break down existing path dependencies in housing choice. However, people may resort to online guidance only after having made a first cut based on information derived from word-of-mouth recommendations, personal familiarity, or explicit screening based on racial composition. Moreover, race-based stereotypes about particular areas may become reinforced and amplified through repetition online.

The widespread availability of internet access through mobile devices makes information easier to access and parse on the fly. New smartphone apps can marshal data and recommend communities to users.⁴⁵ Dwellr, developed by the U.S. Census Bureau, uses Census Bureau data to match users with their preferred communities based on their preferences—including whether they prefer a community mostly made up of families with children.⁴⁶ Homefacts, a subsidiary of RealtyTrac, provides data on conditions up to 5 miles from a given address on dimensions that include registered sex offenders, school quality, crime rates, unemployment, median home values, and tornado and earthquake risks.⁴⁷

Although these existing apps and interfaces do not allow users to filter neighborhoods based on racial composition, such a possibility hardly seems far-fetched. Racial bias might also work its way into other information tools used by homeseekers. For example, concerns about racial bias plagued the now-withdrawn crowdsourcing app SketchFactor, which aggregated user reports about safety and “sketchiness” in DC neighborhoods.⁴⁸ Studies

⁴⁴ See, e.g., Melanie Pinola, *How Can I Quickly Find the Best Neighborhood(s) in Any City and the Best Hangouts Therein?* Lifehacker, May 10, 2012, http://lifehacker.com/5909195/how-can-i-quickly-find-the-best-neighborhoods-in-any-city-and-the-best-hangouts-therein?utm_expid=66866090-67.e9PWweE2DSnKObFD7vNEoqg.0 (describing a variety of tools for assessing neighborhoods and accessing reviews about them); Streetadvisor.com <http://www.streetadvisor.com/> (site devoted to user reviews and ratings of neighborhoods and streets); see also BlockAvenue, www.blockavenue.com (compiling information about areas based on a number of measures and attributes and assigning a composite letter grade “BlockScore”).

⁴⁵ See Michele Lerner, *To Make It Home Sweet Home, There’s an App for That*, WASH. POST, June 4, 2015, at http://www.washingtonpost.com/real-estate/theres-an-app-for-that/2015/06/03/62ebdb54-edc4-11e4-8abc-d6aa3bad79dd_story.html.

⁴⁶ Dwellr, U.S. Census Bureau, <https://www.census.gov/mobile/dwellr/>. This is surprising indeed, given that (with limited exceptions) the Fair Housing Act expressly prohibits discrimination based on familial status (defined as having, or preparing to have, children in the home).

⁴⁷ See HomeFacts by RealtyTrac, <http://www.homefacts.com/>.

⁴⁸ See, e.g., Andrew Marantz, *When an App Is Called Racist*, NEW YORKER, July 29, 2015, <http://www.newyorker.com/business/currency/what-to-do-when-your-app-is-racist>. A recent episode of the TV

showing how racial bias can infect impressions about disorder and neighborhood quality raise serious concerns about such reports.⁴⁹ Even objective information about safety can produce path dependence, as systematic avoidance of an area renders it increasingly less safe.⁵⁰

More complex predictive algorithms can be readily imagined that would either explicitly or implicitly build in racial criteria. Consider, for example, a fictitious app designed for households relocating to a new metropolitan area—call it Tiebout2Go.⁵¹ Families type in the address of their current home, input a commuting range and a price bracket in the new area, and receive a list of suitable homes within neighborhoods and local jurisdictions that most closely resemble their current environment in terms of demographics, incomes, occupations, aesthetics, political leanings, local services, school quality, and proximity to local amenities.⁵² The software is highly predictive of which homes and neighborhoods the user will like, greatly expediting the matching process.⁵³ Search costs fall, but so too do the prospects for disrupting entrenched housing patterns, including those involving racial composition.⁵⁴

series *The Good Wife* featured a similar algorithm-driven app that prompted claims of racial bias. CBS, *The Good Wife*, Season 7, Episode 9 (aired Nov., 29, 2015).

⁴⁹ See Krysan et al., *supra* note 43; Robert J. Sampson & Stephen W. Raudenbusch, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows,"* 67 *SOC. PSYCH. Q.* 319 (2004).

⁵⁰ See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 35-42 (1961) (noting the importance of “eyes upon the street”). Such concerns were raised in connection with Microsoft’s “Pedestrian Route Production” app, which (according to its patent application) contemplated a function capable of mapping walking routes that would avoid “high crime” areas. U.S. Patent No. 20,090,157,302 [0035] (filed Dec. 14, 2007), available at <http://appft.uspto.gov/netah/html/PTO/srchnum.html> (search “20090157302”); see also Allison Keyes, *This App was Made for Walking—But Is it Racist?*, NPR.org (Jan. 25, 2012), <http://m.npr.org/story/145337346?url=/2012/01/25/145337346/this-app-was-made-for-walking-but-is-it-racist>.

Another recently introduced walking app incorporates crime statistics. See Liz Camuti, *Walkonomics: What Makes the Best Route?* *The Dirt*, July 23, 2015 <https://dirt.asla.org/2015/07/23/walkonomics-what-makes-the-best-route/> (describing app that rates “walkability” based on several factors, including “fear of crime”).

⁵¹ Charles Tiebout is best known for his theory that (under certain strong assumptions) households will sort into communities that provide their preferred mix of services, amenities, and taxes, making the choice among locations similar to an ordinary shopping experience. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 422 (1956).

⁵² For discussion of past or existing tools making use of very similar approaches, see generally John T. Metzger, *Clustered Spaces: Racial Profiling in Real Estate Investment* (2001), available at http://www.lincolnst.edu/pubs/606_Clustered-Spaces. For example, the “Community Calculator Neighborhood Locator” asked users to input the zip code from which they were moving along with the city or community to which they were moving, and generated recommendations of demographically similar communities. *Id.* at 17-18, 36 fig. 2. This tool was the subject of legal challenges. *Id.* at 17; see also *Isaac v. Norwest Mortgage*, 2002 WL 1119854 (N.D.Tex.).

⁵³ The related idea of using data to generate personalized default rules in various domains has received recent scholarly attention. See Cass R. Sunstein, *Deciding by Default*, 162 *U. PA. L. REV.* 1, 48-56 (2013); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 *MICH. L. REV.* 1417 (2014). If racial or other protected class data about the housing consumer herself were used as part of the algorithm that determined which homes she was likely to prefer, legal prohibitions on steering would plainly kick in—just as it does if a real estate agent makes such predictions herself based on her client’s race. For discussion of some normative issues surrounding use of demographic data in formulating personalized default rules, see Porat & Strahilevitz, *supra*, at 1461-67.

⁵⁴ Cf. Sunstein, *supra* note 53, at 49-50 (noting that basing defaults on past choices may eliminate opportunities for the kind of learning that occurs “as people encounter, entirely serendipitously, activities and products that do not in any way reflect their past choices”).

Such an app would operate like an especially powerful but less transparent word-of-mouth recommendation. Here, instead of the consumer receiving recommendations from those in her own circle of acquaintances, she is effectively receiving the recommendation from herself, based on past choices—even though those choices may have been made in constrained choice settings or produced through similarly biased processes. The capacity of such technologies to replicate and thereby entrench past choices is worrisome.⁵⁵ Similar concerns attached to earlier forms of “cluster profiling” that were used to classify neighborhoods for homeseekers based on demographic data.⁵⁶

2. Proxies and Preferences

Race clearly matters when it comes to housing search. But how much of the observed bias in homeseeking can be explained by the idea that racial composition serves as a proxy for neutral variables relating to neighborhood quality, such as safety, schools, and services? The question connects to two potential lines of reasoning.⁵⁷ First, if neighborhood racial composition were a close proxy for neighborhood quality, then it might seem that eradicating the role of race in home selection decisions and replacing it with race-neutral factors would do little or nothing to address segregated patterns. Second, if neighborhood racial composition were a poor proxy for neighborhood quality, then it might seem that the provision of better information and more useful proxies would solve the problem.

There is reason for skepticism about both propositions. Empirical work suggests that that racial composition plays an independent role in home selection decisions, producing different results than would be generated based on objective neighborhood quality factors alone.⁵⁸ Yet the capacity of better information and tighter proxies to squeeze out the influence of race is greatly limited by the interdependent nature of housing search.

Instructive on the first point are studies that use a factorial analysis to isolate the effect of racial composition on hypothetical home purchase

⁵⁵ Of course, predictive algorithms also endeavor to learn from their users, and could update preferences over time. Cf. Sunstein, *supra* note 53, at 53 (making this point in the context of personalized default rules). There is also the potential for such algorithms to consciously build in a certain amount of random variation. See *infra* notes 262-263 and accompanying text.

⁵⁶ See Metzger, *supra* note 52.

⁵⁷ It might also affect the normative assessment of the conduct. See, e.g., ELLEN, *supra* note 6, at 155; ANDERSON, *supra* note 27, at 71.

⁵⁸ The question is a complex one to get at, however, and not all researchers have reached the same conclusions. See Valerie A. Lewis, *Who We'll Live With: Neighborhood Racial Composition Preferences of Whites, Blacks, and Latinos*, 89 SOCIAL FORCES 1385, 1386 (2011) (“The debate over whether racial composition has an independent influence on neighborhood preferences remains unsettled due to inherent limitations of data and methodology.”). Neither revealed location preferences nor preference surveys offer an empirically crisp view of motivations, neighborhood quality is difficult to measure, see *id.*, and correlations between race and socioeconomic status complicate the picture. See, e.g., ELLEN, *supra* note 6, at 6.

decisions.⁵⁹ One study published in 2001 asked white respondents in a nationwide telephone survey to imagine they had two school-aged children and were in the market for a new house.⁶⁰ They were then asked to indicate the likelihood they would buy a hypothetical house that otherwise met their requirements, after receiving (randomly generated) neighborhood information along five dimensions: school quality, racial composition, property value trends, the home's value relative to those of others in the neighborhood, and crime rate.⁶¹ The study found that “[b]lack neighborhood composition . . . matters significantly, even after controlling for proxy variables.”⁶² A more recent study using similar methodology in the Houston metropolitan area likewise found that “white respondents were less likely to say they would buy the house as the percentage of black residents in the neighborhood increased, even after controlling for the proxy variables.”⁶³

Another recent study in the Chicago area examined which, out of a set of 41 real communities, respondents said they would “seriously consider” or “never consider.” There, “[w]hites’ willingness to seriously consider neighborhoods declined rapidly as the percent black and Latino increased,” an effect that “existed even in the presence of controls that are thought to explain differences in racial preferences” including “home values, school scores, and crime rates.”⁶⁴ Similarly, “[w]hites were more likely to avoid communities as both the percentage of African Americans and Latinos increased” and “[a]gain, these racial differences persisted after controlling for neighborhood characteristics.”⁶⁵

Although outright racial animus is one explanation for these results, it is also possible that respondents are actually applying an implicit discount to some of the other quality variables once they know the racial composition, based on their prior beliefs about correlations between neighborhood quality and race.⁶⁶ The fact that these beliefs are empirically faulty does not keep

⁵⁹ An initial nationwide survey focusing on white preferences using this approach was Michael O. Emerson et al., *Does Race Matter in Explaining Residential Segregation? Exploring the Preferences of White Americans*, 66 AM. SOC. REV. 922, 924-25 (2001). A later study employing the same approach focused on the Houston metropolitan area and expanded the focus to include preferences of blacks and Latinos as well as whites. Lewis, *supra* note 58.

⁶⁰ Emerson et al., *supra* note 59, at 924-27.

⁶¹ *Id.* at 925-26.

⁶² *Id.* at 931. Whites became unlikely to purchase the home when the black percentage was above 15% and became increasingly unlikely as it rose beyond that threshold. *Id.* at 932. The authors concluded “Our findings suggest a low probability of whites moving to neighborhoods with anything but a token black population, even after controlling for the reasons they typically give for avoiding residing with African Americans.” *Id.* The effects were especially strong among respondents who had children under 18 in the home. *Id.* at 930.

⁶³ Lewis et al., *supra* note 58, at 1398.

⁶⁴ Bader & Krysan, *supra* note 33, at 275.

⁶⁵ *Id.* at 275-76. Interestingly, “neither violent nor property crime rates had independent effects on whether a community would be avoided.” *Id.* at 276.

⁶⁶ Emerson et al., *supra* note 59, at 932-33 (discussing “the possibility that whites cannot or will not divorce race from variables for which race serves as a proxy” and that they might, for example, “still think ‘higher crime’ even if told lower crime”). Such a possibility is buttressed by work showing that perceptions of crime in an area are influenced by race, after controlling for actual crime levels. See Lincoln Quillian & Devah Pager, *Black*

them from exerting strong pressure on even hypothetical housing purchase decisions. And the more frequently they do so, the more reinforced and entrenched those faulty beliefs become. Finding ways to shift reliance to underlying neighborhood quality measures rather than racial stereotypes could break this destructive feedback loop.⁶⁷

This brings us to the second line of reasoning cited above. Could the increasing richness and multidimensionality of data about places to live reduce reliance on the crude proxy of race and thereby render homeseeking less biased?⁶⁸ The salutary effect of increased information in squeezing out bad proxies has been suggested in other contexts, such as employment.⁶⁹ Home selection decisions, however, differ in their deep interdependence. Homebuyers in particular may feel they cannot switch to new proxies in the absence of assurance that abandonment of racial proxies will be sufficiently widespread. Unlike an employer who can achieve gains on her own by selecting a tighter-fitting proxy for employee quality, a homeseeker benefits from a better proxy for neighborhood quality (at least in the sense of safeguarding property values) only if many others will also use similar proxies in constructing their bids for homes.⁷⁰

Consider in this connection recent work by economists Jungsuk Han and Francesco Sangiorgi modeling information acquisition in “beauty contest” situations: ones in which each player’s payoff depends not on whether he chooses the most objectively “beautiful” candidate, but rather whether he chooses the candidate that most others will deem to be the most beautiful.⁷¹ Where the need to coordinate expectations with those of others is greater than the desire to choose the best alternative on the merits, a flawed but widely shared information source can become a focal point.⁷² As

Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime, 107 AM. J. SOC. 717, 718-19 (2001) (finding “that the percentage of a neighborhood’s black population, particularly the percentage young black men, is significantly associated with perceptions of the severity of the neighborhood’s crime problem” even after controlling for crime rates and other neighborhood characteristics).

⁶⁷ See, e.g., ROITHMAYR, *supra* note 5, at 57-68 (discussing the “snowballing” dynamic of positive feedback loops, which operates to magnify initial advantages and disadvantages).

⁶⁸ Cf. Strahilevitz, *supra* note 20 (examining the possibility that increased availability of information about individuals could reduce statistical discrimination in hiring and other contexts).

⁶⁹ For example, an employer who wishes to avoid hiring an ex-convict might make use of criminal records rather than demographic statistical correlations in deciding who to hire. See *id.* at 365-66.

⁷⁰ See ANDERSON, *supra* note 27, at 71 (“Although the self-fulfilling prophecy could be avoided if whites collectively refused to racially profile neighborhoods, any individual white who ignores the racial profile risks a large personal loss in access to advantage for a negligible positive impact on the neighborhood’s access.”).

⁷¹ Jungsuk Han & Francesco Sangiorgi, *Searching for Information*, Sveriges Riksbank Research Paper No. 124 (May 2015), available at <http://ssrn.com/abstract=2635392>. The beauty contest metaphor is from JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 158 (1936) (analogizing investment to a contest for choosing the prettiest faces, but one in which the winner is “the competitor whose choice most nearly corresponds to the average preferences of the competitors as a whole”).

⁷² See Han & Sangiorgi, *supra* note 71, at 37 (finding “that agents may prefer an inferior information source with less searchable information due to coordination motives”). Cf. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 444, 454-57 (2006) (discussing use of amenities correlated with demographic characteristics as focal points in newly developed communities, where demographic composition cannot yet be directly observed). On the use of focal points to solve coordination problems more

Han and Sangiorgi explain, “[w]hen the coordination motive is sufficiently strong, there exists an equilibrium in which all agents choose to focus on the inferior information source.”⁷³ Because home values have as their inputs the proxies employed by numerous current and future homeseekers, racial composition may be a focal and thus difficult-to-shake information source.

3. Search as an Impediment to Fair Housing

Biased homeseeking is not a benign phenomenon. Race-conscious search procedures impede fair housing opportunities in at least three interlocking ways. First, by entrenching segregated patterns and preferences, race-conscious househunting makes stable integrated choices difficult to initiate, foster, and maintain.⁷⁴ At a most basic level, existing patterns define the choice sets that confront homeseekers; one cannot choose an integrated neighborhood that does not exist.⁷⁵ Recent scholarship models how race-based homeseeking creates a self-perpetuating segregative cycle that amplifies preexisting income inequalities:⁷⁶ whites choose more wealthy neighborhoods than they otherwise would in order to have more same-race neighbors, and blacks accept slightly less wealthy neighborhoods in order to have more same-race neighbors.⁷⁷ The resulting dynamic fuels continuing racial inequality, visiting significant harm on African Americans while producing few gains for whites.⁷⁸

Second, biased homeseeking, asymmetrically engaged in by white households, produces price premiums in white neighborhoods relative to homes in African-American neighborhoods.⁷⁹ Homes in white

generally, *see, e.g.*, RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* 22-56 (2015); THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 53-80, 89-118 (1963).

⁷³ Han & Sangiorgi, *supra* note 71, at 37.

⁷⁴ SCHELLING, *supra* note 5, at 146 (“People who have to choose between polarized extremes—a white neighborhood or a black . . . will often choose in the way that reproduces the polarization.”).

⁷⁵ See Lincoln Quillian, *A Comparison of Traditional and Discrete Choice Approaches to the Analysis of Residential Mobility and Locational Attainment*, 660 *ANNALS AM. ACAD. POL. & SOC. SCI.* 240, 243-44 (2015) (observing that “[a] household cannot move to a neighborhood that does not exist” and explaining how the choice set is fixed in advance of the individual household’s choice).

⁷⁶ Alejandro Badel, *A Racial Inequality Trap*, Federal Reserve Bank of St. Louis Res. Div. Working Paper No. 2015-034A (2015), available at <http://research.stlouisfed.org/wp/2015/2015-034.pdf>.

⁷⁷ *Id.* at 3; *see also* Quillian, *supra* note 75, at 255-56 (finding based on conditional logit analysis “that the huge gap in the odds of moving into a poor neighborhood between whites and blacks mostly reflects the fact that whites move into white neighborhoods and blacks move into black neighborhoods, and there is a large average difference in poverty rates and income between white and black neighborhoods”).

⁷⁸ Badel, *supra* note 76, at 27 (“[E]ven though racial preferences are the engine of this inequality trap, racial integration implies large welfare gains for black households and relatively small losses for white households.”).

⁷⁹ See David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 *J. POLIT. ECON.* 455, 486 (1999) (“By 1990 . . . whites pay more for equivalent housing than blacks in more segregated metropolitan areas, suggesting that decentralized racism has replaced centralized racism as the factor influencing residential location.”); John Yinger, *Hedonic Estimates of Neighborhood Preferences*, 44 *PUB. FIN. REV.* 22, 44 (2016) (presenting findings based on hedonic regression models that, among other results, “indicate that houses in all-white neighborhoods may have housing prices up to one-third higher than houses in integrated neighborhoods, all else equal”); Casey J. Dawkins, *Recent Evidence on the Continuing Causes of Black-White Residential Segregation*, 26 *J. URB. AFF.* 379, 389-90 (2004) (summarizing hedonic regression

neighborhoods also appreciate at higher rates for a given level of housing stock and local amenities.⁸⁰ As the housing wealth that African Americans and whites accumulate over time diverges as a result of this dynamic, African Americans are less able to compete for homes in more affluent neighborhoods.⁸¹ Housing search decisions that tighten the connection between race and housing wealth have the effect of withdrawing housing opportunities based on race.⁸²

Third, race-conscious search procedures both motivate and facilitate housing discrimination by those providing access to housing. Thus, landlords, realtors, or developers may be incentivized to discriminate in order to produce housing patterns that are pleasing to their target audiences.⁸³ Race-conscious search can also make it easier for providers of housing access to achieve segregated results without resort to overt discrimination. For example, housing providers may embed housing amenities that enable parties to more easily self-select into segregation.⁸⁴ The prevalence of race-conscious housing consumers can thus alter the mix of housing that is provided in the marketplace and the degree of segregation that it exhibits.

B. Are There Countervailing Considerations?

One might concede that racially biased search can alter housing opportunity sets and even generate certain kinds of disadvantage but deny

studies, which suggest there is a premium associated with segregated white areas, although its magnitude may be changing in certain areas); see also Patrick Bayer et al., *A Dynamic Model of Demand for Houses and Neighborhoods*, NBER Working Paper No. 17250 (2011) (finding a dynamic model produces lower estimates for willingness to pay for same-race neighbors).

⁸⁰ See, e.g., Chenoa Flippen, *Unequal Returns to Housing Investments? A Study of Real Housing Appreciation among Black, White, and Hispanic Households*, 82 SOCIAL FORCES 1523, 1540 (2004) (reporting results finding that “the negative effect on home appreciation of having a very large initial black population (i.e., greater than 65%) at the time of purchase remains statistically significant even after accounting for all other factors that influence housing appreciation.”); Jacob S. Rugh et al., *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse*, 62 SOCIAL PROBLEMS 186, 195 (2015) (finding confirmation of “the well-documented disparity in home appreciation rates by race and neighborhood racial composition” in data showing that black borrowers saw smaller local home price gains between 2000 and the peak in 2006-07 than white borrowers (139 percent versus 168 percent), yet the local home price losses that followed were deeper for black borrowers than for white borrowers).

⁸¹ See ROITHMAYR, *supra* note 5, at 109. Segregation produces harms through other mechanisms as well, many of which feed back into the ability to compete effectively for the housing of one’s choice. For example, segregation in housing translates into shortfalls in educational and employment opportunities. See, e.g., ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 23-43 (2010). Housing segregation also constrains who people are likely to meet, date, and marry. See Emens, *supra* note 8, at 1396-1400.

⁸² See, e.g., ROITHMAYR, *supra* note 5, at 63-64, 108-16 (discussing ways that racial disparities in housing wealth become self-reinforcing).

⁸³ For example, discrimination by landlords that is designed to cater to the preferences of other tenants may be a significant concern. See Pierre-Phillippe Combes et al., *The Neighbor Is King: Customer Discrimination in the Housing Market*, (2012), available at <https://halshs.archives-ouvertes.fr/halshs-00793403> (modeling the influence of customer-based discrimination based on whether a landlord owns one or many units in the same building, and finding evidence of this phenomenon in the French rental market).

⁸⁴ See Strahilevitz, *supra* note 72 (discussing the use of exclusionary amenities in private communities).

that it represents a phenomenon that, on balance, justifies intervention. On the contrary, the argument might run, any effort to reduce race-conscious homeseeking will primarily work to the disadvantage of African-American households by fueling gentrification and compromising their efforts to form and maintain identifiably black neighborhoods. Do these countervailing concerns undermine the claims above?

1. Gentrification and Displacement

To this point, the discussion of biased search heuristics has used as its prototype the white homeseeker who shuns neighborhoods that include more than a small percentage of minority households. This model of biased search may seem anachronistic or at least incomplete. Indeed, given the dynamics of gentrification, one might wonder whether the real threat to minority communities today is not the risk that white households will stay *out*, but rather that they will move *in* – not “white avoidance,” but “white invasion.”⁸⁵ On this account, it might seem that biased homeseeking could at least diminish the chance that minority households will be displaced through rising home prices or that communities of color will be torn apart by rapid changes.

On further analysis, however, invasive or disruptive gentrification itself can be understood as a phenomenon that is crucially fueled by race-conscious homeseeker choices.⁸⁶ An analogy can be drawn to the cascading dynamics of “white flight.”⁸⁷ In a standard gentrification scenario, there is an initial entry into a largely minority neighborhood by a few white households. Their entrance might be precipitated by some new development catering to a different income group than prevails in the neighborhood, or they might simply be drawn by low housing prices that offer attractive opportunities for rehabbing. Regardless, their presence changes the composition of the neighborhood in ways likely to attract more whites, and eventually the area becomes known as a gentrifying one. Once some

⁸⁵ On white avoidance and white invasion, see generally Freeman & Cai, *supra* note 7.

⁸⁶ There are other important factors that drive gentrification as well, primarily supply constraints on housing, that might be separately addressed. See, e.g., John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91 (2014).

⁸⁷ See Freeman & Cai, *supra* note 7, at 315 (noting that “just as the integration created by blacks moving into white neighborhoods often proved temporary, there is the risk that these black neighborhoods [experiencing white entry] will soon become predominantly white”). For discussion of neighborhood “tipping” models, see generally Thomas C. Schelling, *A Process of Residential Segregation: Neighborhood Tipping*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 157 (Anthony H. Pascal ed., 1972). Recent empirical work using data from the 1970-2000 time period has come to inconsistent conclusions as to whether a tipping model like the one Schelling developed matches with the way in which neighborhoods changed. Compare William Easterly, *Empirics of Strategic Interdependence: The Case of the Racial Tipping Point*, NBER Working Paper 15069 (June 2009) (finding that Schelling’s model of strategic interaction is largely not supported by the data) with David Card, Mas, Alexandre Mas, and Jesse Rothstein, *Tipping and the Dynamics of Segregation*, 123 Q.J. ECON. 177–218 (2008) (finding evidence of tipping in most cities, and calculating city-specific tipping points).

demographic threshold is passed, in-moving households may be able to project the future trend of the area and make decisions accordingly. As in the white flight model, racial composition (current and projected) plays a key role.⁸⁸

Plausibly, the changing racial composition acts as an accelerant that causes more abrupt and disruptive changes than would occur in the absence of race-based decisionmaking. Seen through this lens, gentrification does not offer a counterpoint to integrative efforts, but rather another reason why integrative efforts are crucial to pursue. Here it is important to see that people moving into gentrifying neighborhoods do so against a backdrop of pervasive segregation—one in which neighborhoods may be viewed by large segments of the future resale market in binary terms based on the predominant race of the residents. In such a world, homeseekers may be willing to take a chance on a gentrifying neighborhood only once it appears a sure bet to become predominantly white. A kind of herding response thus produces intensive gentrification within certain neighborhoods, while other neighborhoods receive no economic boost at all.

Although there has been a notable increase in “white invasion” of black neighborhoods in recent years, it remains a relatively limited phenomenon that has affected no more than eleven percent of predominantly black neighborhoods.⁸⁹ This is not to deny the significance of concerns about displacement and neighborhood change. But if more neighborhoods were stably integrated, price increases and demographic change would likely occur more evenly and organically across a larger set of neighborhoods.⁹⁰

2. Minority Preferences for Segregated Neighborhoods

Discussions about integration, when they do not run entirely aground on the issue of gentrification, are often stopped dead in their tracks by the assertion that segregated minority communities prefer to stay that way.⁹¹

⁸⁸ Gentrification involves in-movers who are wealthier than existing residents, so in-movers could be making decisions based only on the changing economic profile of the area rather than its changing racial composition. Yet if the fact that an in-mover at Time 1 was white makes the entry of a white household at Time 2 more likely, holding the earlier in-mover’s economic status constant, then race-conscious decisionmaking is helping to fuel neighborhood change.

⁸⁹ See Freeman & Cai, *supra* note 7, at 309 (observing that despite a marked recent increase in white entry into black neighborhoods “most (89 percent or 95 percent depending on how black neighborhoods are defined) black neighborhoods did not experience white invasion.”).

⁹⁰ Indeed, there is some empirical evidence countering the standard gentrification account that suggests neighborhood gains can benefit both in-movers and stayers without producing elevated levels of displacement. See, e.g., Ingrid Gould Ellen & Katherine M. O’Regan, *How Low Income Neighborhoods Change: Entry, Exit, and Enhancement*, 41 REG. SCI. & URB. ECON. 89 (2011) (examining gains experienced by low-income neighborhoods in the 1990s). Examining the conditions under which such neighborhood upgrading can occur, and the potential for it to be combined with sustainable increases in integration, represent important lines for future research.

⁹¹ See, e.g., CHARLES, *supra* note 23, at 3 (“[A]ccording to this argument, racial residential segregation persists because that is the way everyone wants it: actual residential patterns reflect our unconstrained choices.”).

This claim might seem to offer a powerful critique to the line of reasoning pursued here. So what if white homeseekers are using biased heuristics to skirt African-American neighborhoods? To suggest that this is a problem might seem to offensively imply that the minority neighborhoods somehow “need” white households in their midst.⁹²

Yet the available evidence does not suggest that African-American households generally desire high levels of racial separation. Far from an entrenched desire for absolute segregation, most preference surveys show black respondents respond favorably to a wide range of potential demographic mixes—a much wider mix than are preferred by white respondents.⁹³ Summing up a large number of studies, Casey Dawkins concludes that “evidence suggests that while both whites and blacks may have preferences for living in neighborhoods where their own race is in the majority, such preferences are still much stronger among whites, on average, than among blacks.”⁹⁴ A recent Chicago-area study finds the same pattern, with black respondents reporting a much greater willingness than whites to consider a wide mix of communities ranging “from nearly all-white to nearly all-black and almost everything between.”⁹⁵

The factors that shape minority preferences for predominantly minority neighborhoods also deserve attention. Here, research offers stronger support for explanations rooted in fear of discrimination by white neighbors than “in-group favoritism.”⁹⁶ As Maria Krysan and her coauthors explain, “you cannot disentangle a preference from the historical and contemporary

⁹² See, e.g., ELLEN, *supra* note 6, at 160 (“Policies to promote neighborhood racial mixing have also been attacked for being demeaning to minorities, that is, for presuming that there is something inherently wrong with all-black communities.”).

⁹³ There is strong and consistent evidence of this asymmetry, which has persisted over time in stated preference surveys. See, e.g., ELLEN, *supra* note 6, at 46 (observing “that survey data consistently show that black households are far more open [than whites] to a variety of racial mixes”); Maria Krysan & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Persistent Segregation?* 80 *SOCIAL FORCES* 937, 960 (2002) 960 (“There is no mistaking the pattern [shown by preference survey data]. Blacks are much more willing to live with white neighbors than whites are willing to live with African Americans. And African Americans, in great numbers, are willing to live in a neighborhood where they are one of a handful of black residents.”); Krysan and Faison, *Racial Attitudes: An Update* (online at <http://igpa.uillinois.edu/programs/racial-attitudes/detailed8> (“A question in which blacks were asked if they would oppose living in a neighborhood that was half white shows . . . just 7 percent either somewhat or strongly opposed to this in 2006” compared with 24 percent of whites who said they “would be opposed to living in a half-black neighborhood”) (citation omitted).

⁹⁴ Dawkins, *supra* note 80, at 393; see also CHARLES, *supra* note 23, at 125 (“Blacks, Latinos, and Asians . . . all prefer substantially more racial integration and are more comfortable than whites as numerical minorities” although “each group’s preference for same-race neighbors exceeds whites’ preferences for integration”).

⁹⁵ Bader & Krysan, *supra* note 33, at 277. As Bader and Krysan explain, these findings “undermine the idea that black self-segregation is responsible for metropolitan patterns of segregation.” *Id.*

⁹⁶ Krysan & Farley, *supra* note 93, at 965 (“[B]oth the qualitative and quantitative assessments of unwillingness to move into an all-white neighborhood point to the important role of African Americans’ perceptions of whites’ hostility and discrimination: African Americans who thought whites to be discriminatory were less willing to pioneer and when directly asked why they would not move into such a neighborhood, the majority gave reasons associated with hostility and discrimination.”); CHARLES, *supra* note 23, at 98 (“[A]reas that are overwhelmingly white, or at least largely devoid of coethnics, are often perceived by nonwhites as hostile and unwelcoming”). By contrast, “[t]he preferences of whites appear to be more directly shaped by active racial prejudice . . . than by fears of out-group hostility or neutral ethnocentrism.” *Id.*

experiences that African Americans have had with respect to discriminatory actions of whites and institutional biases firmly imbedded in the housing market.”⁹⁷ Similarly, Sheryll Cashin speaks of “integration exhaustion” experienced by blacks, who would rather avoid facing potential discrimination or hostility in a mostly-white neighborhood.⁹⁸ To the extent that preferences are inferred from observed patterns of residential choice by African-American households, it also becomes important to recognize the severe constraints that often accompany home searches.⁹⁹ One of the most important constraints may well be existing segregated patterns that typically limit blacks to “one of two choices: an almost all-black neighborhood or one where blacks are few.”¹⁰⁰

Nonetheless, black preferences are obviously heterogeneous and include some affirmative preferences for predominantly black neighborhoods.¹⁰¹ And there is at least anecdotal evidence of African-American communities seeking to maintain an area’s racial composition against in-movers.¹⁰² Yet even these reactions may be understood not as a response to integration as such, but rather to a societal pattern in which segregated minority neighborhoods are shunned by whites unless and until there is evidence that the area is going to be transformed into a wealthier and predominantly white area. Preferences formed in the shadow of entrenched segregation and dichotomous white responses—complete avoidance or outright takeover—are unlikely to be reflective of preferences that might hold under different conditions. Disrupting the search dynamics that contribute to segregation and resegregation could make integration both more stable and more attractive.

⁹⁷ Krysan et al, *supra* note 30, at 40.

⁹⁸ SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 9, 17-32 (2004).

⁹⁹ See Krysan et al., *supra* note 30, at 47-52 (citing research on the often time-pressured and involuntary moves undertaken by low-income African-American households, and other economic limitations that “call[] into question the very relevance of the idea of choices and preferences”); Stefanie DeLuca, *What Is the Role of Housing Policy? Considering Choice and Social Science Evidence*, 34 J. URB. AFF. 21, 25-26 (2012) (urging attention to the processes of preference formation and the constraints under which preferences are formed).

¹⁰⁰ CASHIN, *supra* note 98, at 17 (citing Krysan & Farley, *supra* note 93, at 969); see also Jacob J. Vigdor, *Residential Segregation and Preference Misalignment*, 54 J. URB. ECON. 587, 589 (2003) (“The indices reveal that the nationwide proportion of Black households living in overwhelmingly Black neighborhoods vastly exceeds the proportion of Black survey respondents stating a preference for such neighborhoods. The indices also reveal, however, that the nationwide proportion of Black households with few or no Black neighbors exceeds the proportion stating a preference for such neighborhoods.”).

¹⁰¹ See CASHIN, *supra* note 98, at 17-32 (discussing the range of attitudes blacks hold with respect to racial composition); Vigdor, *supra* note 100 (estimating based on data from the Multi-City Urban Study of Urban Inequality that elicits preferences about “ideal” neighborhood composition that “[r]oughly 3% of the Black population in each metropolitan area would live on a block where more than 14 out of 15 residents (or 96.7%) were Black”).

¹⁰² Ginia Bellafante, *In Bed-Stuy Housing Market, Profit and Preservation Battle*, N.Y. TIMES, June 19, 2015, <http://www.nytimes.com/2015/06/21/nyregion/in-bed-stuy-housing-market-profit-and-preservation-battle.html>.

C. The Search Gap

The discussion above establishes that discriminatory search perpetuates segregation and constrains housing choices for many households. Leaving it unaddressed produces what I term here “the search gap”—the distance that discriminatory search patterns interpose between meaningful fair housing opportunities and the antidiscrimination duties that the law is understood to impose.¹⁰³ The search gap is one component of a larger disconnect between rights and duties that plays an underappreciated role in conflicts over antidiscrimination law. In Hohfeld’s famous schema, rights and duties are “jural correlatives”: if one party holds a right, another party (or parties) must hold the corresponding duty.¹⁰⁴ Conceptually, there can be no gap between rights and duties; they must match up as a matter of logic. Nonetheless, it is possible to hold inconsistent ideas about the respective reach of rights and duties, as I suggest antidiscrimination law often does.

Civil rights flow from a proposition about the moral irrelevance of protected status, and seek to ensure that people’s lives will be not arbitrarily constrained in certain important realms (employment, public accommodations, housing) because of that status.¹⁰⁵ Like property rights, antidiscrimination rights are “multital” in character—corresponding not to a duty held by a single party but rather to a set of duties held by many parties.¹⁰⁶ Unlike a property right, however, antidiscrimination law does not impose duties universally on the rest of the world with the functional equivalent of a “keep out” sign.¹⁰⁷ The law focuses instead on eliminating particular discriminatory acts committed by a limited slate of identifiable actors whose conduct is both reachable and deemed to be the proper business of law.¹⁰⁸

As a result, the law does not reach the full universe of discriminatory acts that reduce housing opportunities based on protected status. There is

¹⁰³ Biased search is not the only source of a gap between rights and duties in the fair housing arena, nor is it the only factor contributing to the persistence of segregation. See, e.g., Seicshnaydre, *supra* note 3, at 980-81. But it is an important contributor to segregation that might be reached more effectively than it is presently. See *id.* at 972 (observing that, by focusing only on the interactions between minority homeseekers and housing access providers, “[t]he law reaches only two parties in a three-party tango”).

¹⁰⁴ HOHFELD, *supra* note 11, at 36.

¹⁰⁵ Cf. Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, UCLA School of Law Research Paper No. 16-06 (2016), available at <http://www.ssrn.com/abstract=2730845> (identifying the goal of employment discrimination law as the elimination or redress of “status causation”—workplace harms caused by one’s protected status).

¹⁰⁶ The term “multital” is Hohfeld’s; it corresponds to in rem (as opposed to in personam) rights. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 781-82 (2001) (discussing Hohfeld’s idea of multital rights, for which he offered the example of land ownership).

¹⁰⁷ See KHAITAN, *supra* note 13, at 62 (“Unlike typical duties in criminal law or the law of torts, the duties of discrimination are not borne by everyone. Instead of a universal approach, the law identifies specific types of persons to impose its burdens.”).

¹⁰⁸ This view corresponds to what Alan Freeman has called “the perpetrator perspective.” See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978) see also Zatz, *supra* note 105, at 6-7, 31-37.

some discriminatory conduct that we cannot reach, and some discriminatory conduct that we seem unwilling to reach. For example, we cannot reach discriminatory conduct that occurred long in the past or that is too subtle or diffuse to pin on particular actors. Conduct that society is presently unwilling to reach can be found, for example, in various exceptions to antidiscrimination law.¹⁰⁹ Discriminatory homeseeker conduct spans the “can’t reach” and “won’t reach” categories. Some of it might be impossible to prove, but there is also a widespread view that it would be normatively unacceptable to reach it even if it were possible.¹¹⁰ In short, the most normatively attractive account of duties may not correspond to the most normatively attractive account of rights.

There is more than one way to reconcile this inconsistency. Most obviously, society can focus on distributing enumerated duties based on its preferred normative criteria for imposing liability, and then simply tailor rights to match. At first this might seem not only correct, but inevitable. All the law can ever do is grant the rights that match up to the liabilities that it imposes. But there is no reason to assume that the analysis should start with duties, and then reverse engineer rights. It might seem more in keeping with the spirit of antidiscrimination law to do the opposite: shape liability in ways that are designed to make race irrelevant to housing opportunities. Thus, we might begin with the premise that every household has the right to a set of housing options that is not materially constricted by race and then set about distributing duties throughout society in a manner calculated to achieve this result. If the slate of duty-holders cannot be broadened to capture all discriminatory conduct, then heavier burdens must be placed on other actors.

Of course, the relevant statutory scheme will determine which of these approaches, or what combination of them, can be carried out under existing law—a point I will come to later. My point at this stage is purely conceptual. If the law cannot or will not impose nondiscrimination duties on homeseekers, the costs associated with their discriminatory choices must fall somewhere else—whether on the members of protected groups who are disadvantaged by their search conduct, on parties who are in a position to influence or channel homeseeker choices, or somewhere else. Significantly, then, the parties potentially harmed by unaddressed bias in homeseeking include not only those directly disadvantaged, but also third parties who may be required by the law to help take up the slack. It thus becomes

¹⁰⁹ See, e.g., the exception for “Mrs. Murphy” landlords, 42 U.S.C. § 3603(b)(2).

¹¹⁰ See, e.g., KHAITAN, *supra* note 13, at 195-213; Seicshnaydre, *supra* note 3, at 1001; see also ELLEN, *supra* note 6, at 169 (“[F]or obvious reasons, policies that restrict people’s freedom to live where they want should be avoided”); ANDERSON, *supra* note 27, at 175 (defining an “informal realm” that includes “people’s choices of friends, acquaintances, associates, and neighbors” and stating that “antidiscrimination laws should not cover such informal discrimination”).

important to parse the conventional assumption that homeseeker discrimination is normatively unreachable. The next Part takes up that task.

II. THE AUTONOMY OBJECTION

The second principal rationale for exempting biased homeseeking, apart from its alleged harmlessness, is that attempting to address it would represent too serious an intrusion on normative values like decisional autonomy, privacy, and intimate association, which I will refer to collectively here as autonomy. It might seem that nothing is more central to the identity of a family than choosing where to live. The idea that the process of selecting a home could be anyone else's business may seem intuitively repugnant. But this assumption requires investigation. After all, it was at one time common to understand property rights as granting owners an unlimited right to refuse a transfer.¹¹¹ Section A probes the basis for shielding search that is, by hypothesis, socially harmful. Section B develops an account of the duties that might appropriately be placed on homeseekers, drawing on an approach that can already be seen in fair housing law.

A. Why Shield Search?

The idea that considerations of autonomy or “negative liberty” render homeseeking unreachable can be broken down into several possible claims. One claim might be that actors who make choices in certain capacities, such as “tenant,” simply act in too private a role for the state's coercive power to reach. Thus, Tarunabh Khaitan observes that “duty-bearers” in antidiscrimination law “tend to gravitate towards the public end of the public-private spectrum,” where a party's claim to negative liberty is attenuated by the public nature of the capacity in which she acts.¹¹² Extended broadly to the homeseeking context, the claim might be that deciding who one will live among is a deeply private and personal matter, implicating questions of privacy and association.

Yet antidiscrimination law, as well as the U.S. Constitution, plainly withdraws from households the right to choose their neighbors.¹¹³

¹¹¹ See, e.g., Wendell E. Pritchett, *Where Shall We Live? Class and Limitations of Fair Housing Law*, 35 URBAN LAWYER 399, 403 (2003) (observing that the claims of fair housing advocates in the period prior to the enactment of the Fair Housing Act “contradicted the widely accepted principle that property ownership included the full right of disposal”); see also Bartlett & Gulati, *supra* note 3, at 20-21 (arguing that autonomy interests must be balanced against other competing interests, such as nondiscrimination, and observing that there has been evolution over time in how that balance is struck).

¹¹² KHAITAN, *supra* note 13, at 207.

¹¹³ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that racially restrictive covenants cannot be constitutionally enforced); *Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009) (en banc) (observing that if a condo association were to post “a sign saying, ‘No Observant Jews Allowed’” it “would undoubtedly violate [42 U.S.C.] § 3604(a).” Restrictive covenants and discriminatory signs would also violate 42 U.S.C. § 3604(c), which

Providers of housing are legally constrained from delivering on consumer preferences for racially homogeneous residential environments.¹¹⁴ It is also unlawful for current residents to keep out would-be arrivals based on race through restrictive covenants, threats, violence, or other forms of interference.¹¹⁵ Nor can current residents band together and use the instrument of public or private government to restrict who may move in.¹¹⁶ Once one recognizes that the law (uncontroversially and appropriately) withdraws the right to control the racial composition of one's neighbors, it becomes difficult to understand how there could be an autonomy right to attempt to do exactly that. And as this analysis makes plain, current antidiscrimination law already imposes certain duties on private households, negating any notion of a blanket free pass for people acting in the capacity of resident.

A different form of the argument might treat the act of *choosing a home* as a very special sphere of autonomy into which the law should not intrude.¹¹⁷ The home bundles together countless attributes, including surrounding amenities and neighbor characteristics;¹¹⁸ all contribute to an overall vibe or feel of the place. As a site that will be crucial to the occupants' identity, the home might seem too personal and important a decision to subject to *any* second-guessing by government agents. And unlike stand-alone acts such as trying to enforce a restrictive covenant against one's neighbor or harassing her based on her race, choosing a home is a complex decision that is opaque to outsiders.¹¹⁹

A focus on opacity might seem to suggest the concern boils down to proof problems and the difficulty in disentangling malign from benign motivations. But there is another point here as well: the government's attempt to disentangle motivations may *itself* constitute an autonomy intrusion.¹²⁰ People searching for homes may wish to respond to subjective impressions that would later be difficult to articulate if called to account. Of course, landlords have made similar points as well—that they may wish to respond subjectively to tenants based on difficult-to-pinpoint aspects of

prohibits discriminatory ads, statements, and notices.

¹¹⁴ See notes 206-208 and accompanying text.

¹¹⁵ See 42 U.S.C. §§ 3604(a), 3617, and 3631.

¹¹⁶ See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917); *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009).

¹¹⁷ See, e.g., Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009) (discussing and critiquing the ways in which law privileges the home).

¹¹⁸ See, e.g., Quillian, *supra* note 75, at 242 (“[P]laces are actually bundles of multiple attributes, which matter simultaneously in how households choose destinations.”); Barton A. Smith, *Racial Composition as a Neighborhood Amenity*, in *THE ECONOMICS OF URBAN AMENITIES* 165 (Douglas B. Diamond, Jr., & George S. Tolley, eds., 1982) (discussing the role of neighborhood racial composition).

¹¹⁹ Henry Smith has explored the related idea that property holdings are opaque by design, serving as “information hiding” modules, each of which operates like a “black box” as to outsiders. See, e.g., Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2111-16 (2012).

¹²⁰ Cf. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (applying the constitutional prohibition on “excessive entanglement between government and religion”).

their personalities. And just as we worry in the landlord context that those hard-to-pin-down gut feelings about a prospective tenant are simply prejudice,¹²¹ we might justifiably worry that overall subjective impressions about neighborhoods will be infected by racial bias.¹²²

Nonetheless, the burden of requiring a nondiscriminatory explanation for a housing choice decision seems too high. Should a family have to divulge details of its personal habits, sleeping arrangements, work hours, transit requirements, and so on to a government official to explain why they chose the home on Mulberry Avenue and not the one on Pecan Drive? Aside from the prohibitive administrative costs of such an approach, such inquiries would be unacceptably intrusive. This does not mean, however, that homeseeker heuristics must be ignored entirely. Law can address search processes without controlling anyone's ultimate decision. Consider, for example, "ban the box" legislation that forbids initial employment screening based on past convictions, while still allowing that factor to be considered in ultimate decisionmaking.¹²³ As I will suggest below, we already have a version of this approach within the FHA itself: the incomplete exception for Mrs. Murphy landlords.¹²⁴

B. *Chance Encounters and Categorical Exclusion*

For the reasons discussed above, directly policing the ultimate housing decisions of homeseekers is neither workable nor normatively attractive. But this does not mean that the homeseeker's *decision structure* is unreachable. That structure might be modified to do two things: first, raise the costs of homeseeker discrimination (relative to making less biased decisions); and second, create environments in which learning—and

¹²¹ See, e.g., *Marable v. H. Walker & Assoc.*, 644 F.2d 390, 396 (5th Cir. 1981) (finding that the district court "failed to consider whether defendant's rejection of [plaintiff's] application for tenancy was a pretext for racial discrimination" where the cited reasons included refuted factual assertions and the claim that the plaintiff "got 'a little smart' during one phone call").

¹²² See *supra* notes 43, 49 and accompanying text.

¹²³ See, e.g., JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* 231-35 (2014) (discussing approaches that limit categorical exclusion through application questions or advertising but preserve ultimate decisionmaking authority); see also Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 991 (2015); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 936-39 (2014). Some of these approaches could be criticized on the ground that they might push employers to rely more heavily on racial proxies. See LIOR JACOB STRAHILEVITZ, *INFORMATION AND EXCLUSION* 142-46 (2011); Strahilevitz, *supra* note 20; see also Elmore, *supra*, at 1035-39. But such criticisms do not apply where the racial proxy *itself* is the subject of search limits, as contemplated here.

¹²⁴ 42 U.S.C. § 3603(b)(2) (exempting from certain provisions of the Fair Housing Act "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence."); see *infra* Part II.B.2 (analyzing this exception's failure to exempt qualifying units from prohibitions on discrimination advertisements and statements). A parallel exception for single family homeowners who meet certain criteria follows the same pattern and can be analyzed in the same way. See 42 U.S.C. § 3603(b)(1); *infra* note 129.

associated disruptions to existing assumptions and patterns—might take place.¹²⁵ Regulating aspects of the search environment without directly regulating the ultimate decisions that homeseekers reach can be understood as a form of “choice architecture” or “nudge”¹²⁶ that is designed to limit resort to categorical exclusion based on racial criteria.¹²⁷

Although it long predates the term “choice architecture,” the structure of the so-called Mrs. Murphy exception to the FHA can be viewed in just such terms, as I explain below. A similar combination of decisional autonomy and structured choice might be employed to address the tension between intimate association rights and the public interest in nondiscrimination in the roommate context, where housing provision and homeseeking often blur together. Here, I offer a novel alternative to the approach the Ninth Circuit took in *Roommate.com*.¹²⁸ Finally, I outline how the same conceptual approach could be applied to the homeseeking context more generally.

1. Nudging Mrs. Murphy

The FHA contains a number of limited exceptions, but none is more interesting and perplexing than the so-called “Mrs. Murphy exception,” which exempts from certain prohibitions “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually owns and occupies one of such living quarters as his residence.”¹²⁹ The exception’s popular name comes from the politicized specter of an elderly widow who must take in boarders to meet expenses.¹³⁰ The arguments for exempting such landlords seem to track the two raised above: Mrs. Murphy plausibly has a greater interest in negative freedom surrounding rentals than do her commercial landlord counterparts, and landlords of this type might be thought to represent such a small share of the rental market as to pose little real threat to housing access.¹³¹

¹²⁵ Cf. FISHKIN, *supra* note 123, at 232 (describing how certain employment statutes “do not actually bar discrimination in the final decision on the basis of the protected variable” but rather “giv[e] the applicant a chance to convince the employer that perhaps, despite a past criminal conviction or a bout of unemployment, she is the best applicant for the job”).

¹²⁶ See generally, RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

¹²⁷ Cf. Emens, *supra* note 8, at 1311 (arguing that even though intimate discrimination should not itself be actionable, “law should take account of its role in intimate discrimination at a structural level”); *id.* at 1366-73 (examining law’s structural role in intimate discrimination).

¹²⁸ Fair Housing Council of San Fernando Valley v. Roommate.com, 666 F.3d. 1216 (9th Cir. 2012).

¹²⁹ 42 U.S.C. § 3603(b)(2). A similarly-structured exception exempts owners of single-family residences who meet certain criteria in selling or renting out their homes. 42 U.S.C. § 3603(b)(1). Although I will focus in the text on the Mrs. Murphy exception, the same analysis applies to the single family homeowner exception, which likewise shields actors from liability for their decisions but not for their ads or statements.

¹³⁰ For more on the history of the Mrs. Murphy exception and its roots in debates over public accommodations law, see Rigel Oliveri, *Discriminatory Housing Advertisements On-line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1135-38 (2010).

¹³¹ When the FHA was enacted in 1968, Senator Walter Mondale estimated that the fraction of housing units

Section 3603(b)(2) of the FHA makes § 3604's antidiscrimination provisions inapplicable to a Mrs. Murphy landlord, but it does so with an important exception: Section 3604(c)'s prohibition on biased advertisements, notices, and statements remains in force, even for Mrs. Murphy.¹³² This combination of exemption and exception generates seemingly anomalous results. Mrs. Murphy can discriminate without fearing liability under the FHA as long as she doesn't tell the rejected tenant why she is rejecting her (but she can be liable if she is honest).¹³³ Moreover, because Mrs. Murphy cannot use advertising to screen out tenants to whom she will not rent, she and the would-be tenants alike must bear higher search costs.¹³⁴ These anomalies also present a potential constitutional issue: regulating advertising and statements beyond the scope of underlying illegality could raise First Amendment concerns.¹³⁵

A variety of explanations have been floated for the differential treatment of advertisement and act, statement and sentiment.¹³⁶ Of particular relevance here is the idea that holding Mrs. Murphy to the standard of unbiased advertising will alter the information environment in which she makes decisions, and, in the process, potentially render those decisions less biased. If she cannot keep away entire categories of people through her advertisements, she will be forced to encounter homeseekers one-on-one, on

qualifying for the exception was and would remain at approximately three percent. See James D. Walsh, Note, *Reaching Mrs. Murphy: A Call for the Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 Harv. C.R.-C.L. L. Rev. 605, 606 n.6 (1999) (citing 114 CONG. REC. 2495, 3424 (1968) (statements of Sen. Mondale)). It is unclear what percentage of the rental housing stock currently falls under the Mrs. Murphy exemption. See *id.*

¹³² That provision makes it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c).

¹³³ If her discrimination is based on race or on classifications that would have counted as racial in 1866, however, she would still face potential liability under § 1982. See 42 U.S.C. § 1982; *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987).

¹³⁴ See, e.g., Oliveri, *supra* note 130, at 1165.

¹³⁵ The application of § 3604(c) to Mrs. Murphy landlords has been upheld against constitutional challenge. *United States v. Hunter*, 459 F.2d 205, 213-14 & n.10 (4th Cir. 1972). However, evolution in the commercial speech doctrine raises doubts about the continuing validity of such precedents. See, e.g., STRAHILEVITZ, *supra* note 123, at 97 (2011) (questioning whether decisions upholding advertising bans in Mrs. Murphy situations remain good law, given changes in the Supreme Court's commercial speech doctrine); see also *Chicago Lawyers Committee for Civil Rights Under Law v. Craigslist*, 519 F.3d 666 (7th Cir. 2008) (Easterbrook, C.J.) (observing in dicta, after noting that § 3603(b)(1)'s exemption for single-family homes permits liability for advertising, that "any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment."). It should be noted, however, that the gap between the scope of § 3604(c)'s prohibitions and the unlawfulness of the underlying conduct is much smaller than commonly assumed, due in large part to § 1982 (which bans racial discrimination in housing transactions, without exception) and more restrictive state laws. See Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 293-94 (2001) (making these points and concluding that, "[a]s a result, the modern 'commercial speech' doctrine, though generous in its protection of legal and non-misleading messages, continues to provide a safe haven for § 3604(c) in all but the narrowest of circumstances.").

¹³⁶ See, e.g., STRAHILEVITZ, *supra* note 123, at 96-97 (discussing circuit court decisions that focused on the potential spillovers of Mrs. Murphy advertisements in deterring nonwhites from searching in a given area of the city or creating misimpressions about antidiscrimination law); Schwemm, *supra* note 135, at 223, n.162 (citing legislative history focusing on the damaging effects of the speech itself).

the phone, online, or in person. Confronting people as individuals may produce a learning effect that causes her to reconsider the stereotypes that she harbors.¹³⁷ Even if the encounter is an awkward or uncomfortable one, it may carry some of the generative insulation-breaking power that Jerry Frug has associated with chance encounters in public spaces within cities.¹³⁸

Thus, the FHA will not second-guess the choices that Mrs. Murphy ultimately makes about to whom she will rent, but it will not allow her to screen people out categorically based on their group status. Nor will the FHA allow her to turn them away with an overt statement about that status; she need not be particularly polite, but she must find a way to interact with them without mentioning their group status as a reason for her refusal to deal. The FHA thus mandates that she make any discriminatory choices on a retail rather than wholesale basis, within a facially neutral search process.

To be sure, there are unanswered empirical questions about how well this setup works to change behavior, as well as normative questions about any system that raises search costs—often quite asymmetrically—for homeseekers as well as for Mrs. Murphy landlords.¹³⁹ My aim here is not to take a position on the qualified Mrs. Murphy exception but rather to point out how it works to structure the search environment while at the same time recognizing a realm of decisional freedom. As I will show, a similar approach could be extended to homeseeking, an arena where heightened search costs would largely be borne by the discriminator.

2. Reining in Roommates

One of the most interesting recent questions in fair housing law surrounds whether and how the prohibitions on discriminatory housing choice apply to roommates who are sharing a residence. This issue reads on questions of housing search both by analogy and in the following more direct sense: roommate matching is often undertaken reciprocally in ways that blur traditional lines between housing providers and housing demanders.

In *Roommate.com*, the Ninth Circuit held that shared living situations lie entirely outside of the purview of the FHA, based on its reading of the word

¹³⁷ Cf. EDUARDO PEÑALVER & SONIA KATYAL, PROPERTY OUTLAWS 67-70 (2010) (explaining how civil rights sit-ins changed attitudes).

¹³⁸ See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1050 (1996) (“Big cities are a prime location in America for the experience of otherness: They put people in contact, whether they like it or not, with men and women who have values, opinions, or desires that they find unfamiliar, strange, even offensive.”) See also Dawkins, *supra* note 80, at 389 (describing “the contact hypothesis, which states that interracial prejudices decline as groups gain familiarity with each other and come into contact with each other more often in social situations”).

¹³⁹ Mrs. Murphy can turn away a prospective tenant after a single glance, whereas that would-be tenant may have invested considerable time and money to come view the apartment.

“dwelling.”¹⁴⁰ The court’s interpretation drew heavily on what it took to be the assumptions of Congress at the time of the FHA’s enactment, as well as on the canon of constitutional avoidance—triggered in this case by concerns about the intimate association rights implicated in roommate choices.¹⁴¹ Throughout the lively majority opinion, Judge Kozinski recounted myriad ways in which roommates might find themselves incompatible or just uncomfortable with roommates of a different sex or religion, from the fear being seen in a towel while in transit from the shower¹⁴² to discovering foods in the refrigerator that violate one’s religious restrictions.¹⁴³

Significantly, the court’s approach read shared living situations out of the FHA entirely—a result that not only keeps people from being forced into housing relationships that offend their beliefs or their modesty, but that also legalizes facially discriminatory roommate ads, such as for “whites only” group houses.¹⁴⁴ There is another way of interpreting the statutory text in the roommate context, however—one that would address the court’s concerns about intimate association while remaining truer to the textual definition of “dwelling.”¹⁴⁵ It begins with the same general principle discussed in the Mrs. Murphy context: preserving a sphere of decisional autonomy while structuring the search environment to permit the learning that can come from chance encounters with individual people.¹⁴⁶

Textually, this alternative would read the prohibitions in § 3604 to extend a conclusive presumption that individual roommate selections are not “because of” protected status if they are made in accordance with required search protocols.¹⁴⁷ These search protocols would incorporate the bans on statements and advertisements in § 3604(c), potentially modified to fit the roommate context. For example, roommate ads for residents of the same sex or for co-religionists might be justified on the grounds that there are valid, nondiscriminatory reasons (modesty or religious observance) for *categorically* limiting one’s search along these dimensions.¹⁴⁸ But with

¹⁴⁰ Fair Housing Council of San Fernando Valley v. Roommate.com, 666 F.3d. 1216 (9th Cir. 2012).

¹⁴¹ *Id.* at 1220, 1222-23.

¹⁴² *Id.* at 1221 (“a girl may not want to walk around in her towel in front of a boy”).

¹⁴³ *Id.* (“An orthodox Jew may want a roommate with similar beliefs and dietary restrictions, so he won’t have to worry about finding honey-baked ham in the refrigerator next to the potato latkes.”).

¹⁴⁴ I thank Eduardo Peñalver and Michael Schill for discussions on this point and on other aspects of the Roommate.com decision.

¹⁴⁵ The FHA defines “dwelling” as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.” 42 U.S.C. § 3602(b) (emphasis added). For a critique of the 9th Circuit’s failure in *Roommate.com* to distinguish among different kinds of shared living arrangements based on structural features and capacity to achieve privacy (e.g., through locks on doors and separate bedrooms), see Tim Iglesias, *Does the Fair Housing Act Apply to “Shared Living Situations”?* Or *The Trouble With Roommates*, 22 AFFORDABLE HOUSING & COMMUNITY DEV. L. 111, 124-25 (2014).

¹⁴⁶ See Oliveri, *supra* note 130 (attributing this point to Eduardo Peñalver).

¹⁴⁷ For a different proposed alternative, see Iglesias, *supra* note 145, at 144-46 (arguing for varying treatment of roommate advertising depending on where and how the advertising occurred).

¹⁴⁸ An analogy might be drawn to Title VII’s “bona fide occupational qualification” defense, which allows

respect to protected characteristics for which no plausible *categorical* intimate association interest for roommates exists, such as race,¹⁴⁹ the ban on discriminatory ads would remain in force. This approach would push roommates to select or reject each other as individuals rather than categorically based on group status alone—even as it protected their ultimate selections from scrutiny.¹⁵⁰

3. The Homeseeker’s Search

In both of the situations above, suppressing discriminatory signals could hold value even if there were no effort to regulate bias in ultimate housing decisions. The value stems from two sources. First, restricting the discriminatory signal raises the cost of exclusion by requiring would-be discriminators to deal directly with individuals rather than categorically screening them out. Second, bringing such parties into direct contact with individuals possessing protected characteristics may produce a learning effect.

We come now to the question of homeseeker search heuristics. Here too, it would be feasible to harmonize an interest in decisional privacy and autonomy with principles of nondiscrimination by regulating the search environment while applying a conclusive presumption that decisions reached within that search environment are nondiscriminatory in nature. As in the prior examples, search protocols could be adjusted to raise the costs of discrimination, preserve the potential for learning through chance encounters, and prevent people from engaging in categorical exclusions based on group membership. In the next Part, I will consider some ways that such structuring might proceed.

As I will explain, existing law can potentially reach homeseekers who use discriminatory advertising or statements or employ others (including

employers to select employees based on religion, sex, or national origin (but not race) where doing so is “reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e)(1). Such an selectively categorical approach may be implicit in HUD’s longstanding recognition of an exception to § 3604(c) for sex, but not other protected statuses, when the advertising is for shared living arrangements. *See* Roberta Actenberg, Assistant Secretary for Fair Housing and Equal Opportunity, Memorandum, Guidance Regarding Advertisements Under §804(c) of the Fair Housing Act, Jan. 9, 1995, at 2 (“Intake staff should not accept a complaint against a newspaper for running an advertisement which includes the phrase **female roommate wanted** because the advertisement does not indicate whether the requirements for the shared living exception have been met.”) (emphasis in original). This exception was previously codified at 24 C.F.R. § 109.20 (b)(5). 24 C.F.R. Part 109 was subsequently withdrawn by HUD, but the withdrawal was accompanied by a statement that the Part contained “nonbinding guidance” that was “very helpful to HUD clients” but that would thenceforth be provided in handbook or other guidance formats rather than in the Code of Federal Regulations. 61 FED. REG. 14378 (Apr. 1, 1996).

¹⁴⁹ *Cf.* *Soules v. U.S. Dep’t of Housing and Urban Development* 967 F.2d 817, 824 (2d Cir. 1992) (finding landlord’s question about children in the household did not necessarily violate the FHA because there could be a valid purpose for asking, but suggesting there would never be a valid reason for asking about race).

¹⁵⁰ *But see* Oliveri, *supra* note 130, at 1170-71 (considering and rejecting an approach that would retain an advertising ban for roommates, in part because it would raise the costs to minority roommate-seekers in locating housemates of the same race, ethnicity, or nationality).

apps and websites) to carry out biased searches. Unlike in the situations above, the dampening of informational signals in the homeseeking context primarily places costs on the party who is seeking to discriminate—here, the homeseeker. Sellers and landlords may be inconvenienced to some degree by showing homes to homeseekers who have engaged in less comprehensive prescreening based on their own biases, if those biases prove intractable. Nonetheless, those housing providers will also gain the potential capacity to complete some transactions that would not otherwise occur. And, importantly, the homeseeker cannot impose costs on others without imposing equal or larger costs on herself by actually going to look at the places in question.

Before turning to specific doctrinal vehicles for achieving this result, it is important to emphasize a point that this paper's focus on white avoidance has muted: the normative analysis above and the doctrinal points below would apply regardless of the race of the homeseeker pursuing a racial composition preference. As a result, strategies designed to address white avoidance may run counter to deeply held preferences by some minority households. In assessing this concern, it is important to recognize the mild and contingent nature of many minority preferences for same-race neighbors,¹⁵¹ and the related possibility that lower levels of society-wide segregation would alter the nature of race-based preferences across all groups. Nonetheless, one cannot escape the possibility that altering search protocols could interfere with some minority homeseeking preferences.

Although this possibility does complicate the normative picture,¹⁵² the large and asymmetric harms that residential segregation visits on minority households must also be kept in mind. There is in fact no way to pursue the Fair Housing Act's goal of integration without making a value judgment against segregationist preferences, even those held by African-American households.¹⁵³ This does not mean anyone's ultimate choice about where to live will be withdrawn, only that the law is not neutral on the issue of housing patterns. Just as the law already limits what sellers, landlords, and realtors can do to maintain a neighborhood's current racial composition—

¹⁵¹ See *supra* notes 93-100 and accompanying text.

¹⁵² See, e.g., Seicshnaydre, *supra* note 3, at 1001 (explaining that “seeking to hold white people responsible for their own housing choices” would be “untenable for a variety of reasons, not the least of which is that . . . we would also have to hold blacks liable for their own housing choices to the extent that those choices perpetuated segregation”); cf. Oliveri *supra* note 130, at 1170-71 (arguing that the Fair Housing Act should not reach roommate advertisements, in part because it would burden minority group members who wished to live with members of the same race, ethnicity, or nationality).

¹⁵³ My assumption in the text is that symmetrical treatment would be constitutionally required. However, if certain kinds of segregative choices systematically do more societal harm than others in driving segregated patterns, that could supply a neutral reason for setting enforcement priorities. Moreover, certain kinds of symmetrical treatments would interfere substantially less with minority homeseeking preferences than with white homeseeking preferences. See *infra* note 230 and accompanying text (providing the example of prohibiting search tools that filter neighborhoods based on whether one's own race constitutes a majority or super-majority). I thank Noah Zatz for this point.

whatever it may be¹⁵⁴—the law can take measures to influence and regulate the search environment.

III. ADDRESSING HOMESEKING THROUGH LAW

Although the question is rarely analyzed in any depth, it is widely assumed that existing law does not reach discriminatory homeseeking. This Part challenges that assumption. Viable doctrinal avenues—albeit wholly unrecognized ones—already exist for reaching aspects of homeseeking in a manner consistent with the normative considerations and constraints developed in the previous two Parts.

I begin this Part by questioning the assumption that housing choices made for racially biased reasons are, as commentators are wont to put it, “perfectly legal.”¹⁵⁵ Although the Fair Housing Act probably does not make it unlawful for homeseekers to discriminate based on race in their selection of a home, Section 1982 of the Civil Rights Act of 1866 almost certainly does. However, for a number of reasons, § 1982 does not offer an especially useful or attractive stand-alone vehicle for reaching homeseeking. Nonetheless, § 1982 buttresses (and saves from a key criticism) the use of *other* provisions within the FHA, including the prohibition on discriminatory advertisements and statements, to reach certain collateral actions undertaken by homeseekers or by those assisting them in the course of conducting a housing search. As I show, this approach is fully consistent with both the text and purpose of the FHA.

A. *The Househunter’s (Legal) Prerogative?*

One can fairly conclude that the “housing refusal” prohibition in § 3604(a) of the FHA does not outlaw a homeseeker’s racially biased housing choice. That provision makes it illegal to “to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race [or another protected status].” Anyone who purchases or rents a home can in some sense be said to have made that dwelling unavailable to everyone else.¹⁵⁶ But in the typical case, a biased homeseeker does not make a particular dwelling unavailable to anyone because of race; rather,

¹⁵⁴ For example, existing interpretations of antidiscrimination law would prohibit a black homeseller from favoring a black buyer over a white one in an effort to maintain a neighborhood’s character—despite the deeply felt sense of neighborhood identity that might prompt such conduct. *See* Bellafante, *supra* note 102. Even if such a seller were exempt under § 3603(b)(1) of the Fair Housing Act, which would depend on a variety of factors, § 1982’s blanket ban on intentional racial discrimination in housing transactions would reach the conduct.

¹⁵⁵ *See supra* note 3.

¹⁵⁶ *See* Michigan Protection and Advocacy Service v. Babin, 18 F.3d 337, 345 (6th Cir. 1994).

she makes it unavailable to everyone regardless of race.¹⁵⁷

The cumulative effect of homeseeker choices may indeed be to make dwellings unavailable because of race, whether through price effects or otherwise. Similarly, by participating in biased housing choices that entrench segregation, a homeseeker might be said to have contributed to making a particular *sort* of dwelling—one situated in an integrated neighborhood—unavailable because of race.¹⁵⁸ Yet no home chooser produces such results alone.¹⁵⁹ If the prohibitions on discriminatory decisionmaking in the FHA were the only ones in play, the conclusion that homeseeking is doctrinally unreachable would be a sensible one.

But there is another path to homeseeker liability: Section 1982 of the Civil Rights Act of 1866. Although often upstaged by the FHA, § 1982 remains a powerful part of the antidiscrimination arsenal. Unlike the FHA, it does not contain any exceptions. It covers both private and governmental discrimination.¹⁶⁰ And it is squarely directed at racial discrimination.¹⁶¹ The provision reads in full as follows: “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”¹⁶²

What is most notable about this provision for present purposes is that the rights it grants run not only to the various means of *obtaining* property (inherit, purchase, lease) but also to means of *disposing* of property (sell, convey). Homeseekers are not just choosing where to live, they are also choosing from whom they will and will not buy. And § 1982 seems to make discriminatory purchase decisions just as actionable as discriminatory sales

¹⁵⁷ There have in fact been some cases involving purchases motivated by the desire to deprive protected group members of the opportunity to buy or occupy a dwelling. In *Babin*, the Sixth Circuit held that even a purchase motivated by a desire to keep out members of a protected group presents no cognizable FHA violation, *see id.*, though at least two subsequent federal district court opinions have declined to follow *Babin*'s lead. See *U.S. v. Hughes*, 849 F.Supp. 685 (D. Neb. 1994) (denying motion to dismiss where a bank financed a purchase allegedly undertaken for the purpose of preventing the property's purchase for a group home for mentally disabled adults); *Step-by-Step v. Lazarus*, 1997 WL 853508, 11 NDLR P 182 (M.D. Pa. 1997) (finding that the Fair Housing Act “does apply to a buyer who purchases a property with the intention of preventing the purchase by an entity planning to use the property as a Group Home for members protected under the Act”). But situations involving exclusionary motives for purchase are, one would hope, rare outliers.

¹⁵⁸ If a dwelling is understood not just as a structure but also as a bundle of attributes that incorporates effects from outside the property boundaries, then segregation effectively withdraws one dwelling type (a home in an integrated neighborhood) from the market and replaces it with a very different one (a home in a segregated neighborhood). *See generally* LEE ANNE FENNELL, *THE UNBOUNDED HOME* (2009) (examining the implications of a broad conceptualization of the home that encompasses off-parcel amenities and effects).

¹⁵⁹ *Cf. Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990) (“[The Fair Housing Act] does not impose liability . . . for failing to coordinate individual integrative acts that have an aggregate resegregative effect”).

¹⁶⁰ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)

¹⁶¹ Section 1982 has also been interpreted to reach classifications that would have been thought of as race-based at the time of its enactment, and hence extends to discrimination based on national origin, ethnicity, and religion. *See e.g., Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987).

¹⁶² 42 U.S.C. § 1982.

decisions.¹⁶³ It is hard to see how § 1982 would fail to apply, for example, to a buyer who rejects an otherwise acceptable home sales transaction solely because of the race of the seller.

It is not as obvious, however, that § 1982 provides a useful tool for addressing choices to rule out entire areas based on their racial composition. Choosing to buy in an all-white neighborhood greatly increases the odds of buying from a white seller, and is thus likely to deprive a seller of a different race of a sales transaction. But this outcome might seem to be merely an incidental by-product of the neighborhood choice.¹⁶⁴ Even a househunter who is using explicitly racial criteria to choose a neighborhood may be perfectly willing to purchase from a seller of a different race; one might imagine that she primarily cares about the race of her would-be neighbors, not the racial identity of her grantor.¹⁶⁵ There are a couple of responses to this point.

First, there is empirical evidence that the race of the seller or current occupant of a housing unit *does* matter to homeseekers, whether as part of the search heuristic or as an independent basis of discrimination.¹⁶⁶ Analysis of data from 1989-93 uncovered a surprising reluctance of white households to move into housing units that had been vacated by black households—a reluctance that appeared insensitive to numerous other factors about the dwelling unit and the neighborhood in which it is located.¹⁶⁷ Although now dated, these findings raise the possibility that African-American owner-occupants may be losing home sales based on their own racial identity, as distinct from the neighborhood’s overall racial trends.¹⁶⁸ More recent work corroborates this interpretation. In a 2010 Bay Area study, respondents who viewed images of the same home rated it less favorably if the sellers were depicted as a black family rather than a similarly configured and attired white family.¹⁶⁹ Also suggestive is a 2014 working paper finding that black

¹⁶³ I thank Noah Zatz for discussions on this point.

¹⁶⁴ If finding a white seller were instead the *reason* for seeking out the mostly white neighborhoods, then the fact that some sellers in the neighborhood are nonwhite would not defeat a § 1982 claim for intentional discrimination. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (targeting of class of laundries due to prevalence of Chinese owners).

¹⁶⁵ That § 1982 presumably reaches only intentional discrimination sharpens this point. The Supreme Court has limited the reach of parallel language in Section 1981 of the Civil Rights Act of 1866 to intentional discrimination, using reasoning that strongly suggests both provisions would be treated alike. *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 382-91 (1982).

¹⁶⁶ See ELLEN, *supra* note 6, at 140 (“To some extent, the race of the previous occupant may be viewed as a clear proxy for the racial composition of the neighborhood. . . . But it is possible that the race of the departing occupant signifies something in itself . . .”).

¹⁶⁷ ELLEN, *supra* note 6, at 150 (describing the findings and concluding that “[t]he key implication is that whites appear unwilling to enter black-vacated units, and few circumstances seem to change their minds”).

¹⁶⁸ Specifically, white in-moving rates into black-vacated units appeared unaffected by “the growth in the black population over the previous decade.” *Id.* at 150.

¹⁶⁹ Courtney Marie Bonham, *Devaluing Black Space: Black Locations as Targets of Housing and Environmental Discrimination* 34-46 & apps. C & D (unpublished dissertation, Stanford University, 2010) available at <https://searchworks.stanford.edu/view/8714877>; see also Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, in *IMPLICIT RACIAL BIAS ACROSS THE*

landlords offering spaces on Airbnb receive lower rents than nonblack landlords.¹⁷⁰

Second, even if the buyer's discrimination were directed solely at the neighbors of the seller, and not at the seller herself, the seller still loses a sale due to intentional racial discrimination. Where the seller is of the same race as the discriminated-against parties, it seems a bit artificial to absolve the buyer of liability on the ground that she only meant to discriminate against the neighbors.¹⁷¹ If African-American homesellers are losing sales because white homebuyers are avoiding their neighborhoods based on the race of the residents, one could fairly conclude that those sellers are being deprived of equal chances to transact over property based on their race. This conclusion seems especially compelling where past discrimination makes it very likely that African-American homesellers will be selling homes within predominantly African-American neighborhoods.

A 1973 Seventh Circuit decision, *Clark v. Universal Builders*,¹⁷² embraced an analogously broad reading of § 1982. There, the plaintiffs alleged that the defendants exploited a “dual housing market” by selling homes in African-American neighborhoods for higher prices and on less favorable terms than comparable homes in white areas. The defendants contended that they did not violate § 1982 because they did not offer different terms to buyers of different races for the *same* homes. But the Seventh Circuit found it an unrealistic dodge for defendants to assert “that they would have sold on the same terms to those whites who elected to enter the black market and to purchase housing in the ghetto and segregated inner-city neighborhoods at exorbitant prices, far in excess of prices for comparable homes in the white market.”¹⁷³ Similar skepticism might attach to a househunter's assertion that she would be perfectly willing to purchase from any black homeseller that she happened to encounter within an otherwise all-white neighborhood.

LAW (Justin D. Levinson & Robert J. Smith, eds., 2012) (discussing this study and other work by Bonham and her colleagues).

¹⁷⁰ Benjamin G. Edelman and Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (January 10, 2014), Harvard Business School NOM Unit Working Paper No. 14-054, available at <http://ssrn.com/abstract=2377353> (finding racial discrimination against Airbnb landlords, with equivalent rentals from a nonblack host commanding 12% higher rents on average).

¹⁷¹ A similar idea of “transferred intent” applies in tort law: a defendant cannot escape liability for the intentional tort of battery by asserting that he meant to batter a different person instead. See, e.g., *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958).

¹⁷² 501 F.2d 324 (7th Cir.), cert. denied 95 S. Ct. 657 (1974).

¹⁷³ *Id.* at 331. On appeal after remand (*Clark II*), the Seventh Circuit upheld a judgment for the defendant based on the district court's findings that homes in question (located, respectively, in suburban Deerfield, Illinois and on Chicago's South Side) were not in fact comparable and that plaintiffs had failed to explain how defendants could have charged excessive prices in a market that appeared to be a competitive one. *Clark v. Universal Builders*, 706 F.2d 204 (7th Cir. 1983) (*Clark II*). Nonetheless, *Clark I's* insistence on taking a realistic view of the ways in which discrimination has shaped the landscape that actors encounter, when coupled with § 1982's embrace of both sides of property transactions, could provide a potential doctrinal hook for reaching discriminatory homeseeking.

Many hurdles to employing this approach remain, however. If African-American sellers are avoided *en masse* through neighborhood choice rather than one at a time, there may be no identifiable victim of discrimination. Even if this obstacle can be surmounted through organizational standing or standing premised on the injuries of segregation,¹⁷⁴ pinpointing the behavior that caused these injuries remains problematic.¹⁷⁵ Data may establish that white buyers are failing to buy from black sellers at rates that are higher than can be explained through other factors, but there may be no way to determine which specific transactions featured discrimination.¹⁷⁶

Nonetheless, the discussion above suggests that § 1982 would be available in instances where proof of discriminatory intent is available—for example, where a homeseeker is found to have rejected a prospective seller or landlord based on race. Evidence of such discriminatory intent might be found in some of the same places that one might look for violations of the FHA: in advertising, statements, and interactions with realtors.¹⁷⁷

B. Reaching Collateral Search Conduct

The discussion above suggests that the FHA contains no clear way to reach the actual decisions of biased homeseekers as a conceptual matter, while § 1982 offers a conceptual path that may be largely unavailable for practical or proof reasons. But might the two be combined in some manner? One possibility has already been mentioned: that certain collateral acts that are regulated by the FHA—advertising, statements, and assisted search—could constitute *evidence* of a homeseeker's § 1982 violation. But the fact that § 1982 reaches biased homeseeking can also be used to buttress direct liability for collateral search behavior under the FHA itself.

As I explain below, the FHA can be fairly read to reach certain forms of collateral search conduct. To be sure, the law has not previously been read in this way;¹⁷⁸ indeed, HUD has made some contrary interpretative

¹⁷⁴ Organizational standing is permitted in Fair Housing Act cases but lower courts are divided on whether it is available in § 1982 cases. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 27:17 (Westlaw).

¹⁷⁵ This proof difficulty is distinguishable from the impediment to liability under the FHA identified above relating to the cumulative effect of many actors. Even though both routes to liability may be unavailable as a practical matter, § 1982 offers a clear conceptual path for holding particular actors liable if only the proof problems could be overcome, whereas the uncoordinated cumulative acts that produce housing unavailability under the FHA may not translate into any identifiable liability-producing acts by any particular parties.

¹⁷⁶ Disparate impact analysis is often capable of reaching practices that statistically cause status-related harm, even when it is impossible to identify the particular cases in which status produced the result. *See generally* Zatz, *supra* note 105. But this approach only works when there is some party producing aggregate results through a practice or policy, not when many individuals are separately making their own decisions, only some of which involve discrimination.

¹⁷⁷ *Cf.* Schwemm, *supra* note 135, at 251-55 (discussing evidentiary use of discriminatory statements in establishing violations of other sections of the FHA).

¹⁷⁸ I am not aware of any court interpreting the law in this way, nor have I seen any scholarly support for such an interpretation. *See, e.g.,* Seicshnaydre, *supra* note 3, at 1003-04 (quickly rejecting the possibility §

moves.¹⁷⁹ But those interpretations, I posit, were likely driven by constitutional or conceptual concerns with reading the FHA to reach collateral conduct relating to *legal* underlying acts.¹⁸⁰ They may also have been supported by an assumption that the biased decisions of buyers and tenants can have no real effect on fair housing. Both the practical effect of biased homeseeking behavior and the legal status of the underlying conduct must be rethought in light of the analysis above. There is no doctrinal impediment to reaching collateral or assistive acts that abet discrimination that is both illegal and harmful.

Homeseekers are typically viewed as outside the FHA's ambit because they are not thought to be erecting or policing any barriers to housing access; they are merely trying to navigate them like everyone else. Yet the "barriers" metaphor misleadingly treats the set of housing opportunities as exogenously given, as if we need only make actors step out of the way or remove race-based filters from their doorsteps. Where the housing choice set is constrained by discriminatory homeseeking heuristics, those heuristics become barriers that are no less real than those erected by housing providers. Achieving the integrative purpose of the FHA, recently reaffirmed by the Supreme Court, requires attention to both demand-side and supply-side impediments to that goal.

C. Advertising and Statements

Section 3604(c) of the FHA makes it illegal "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race [or other protected status], or an intention to make any such preference, limitation, or discrimination." The limiting language "with respect to the sale or rental of a dwelling" has been interpreted to rule out "stray remarks" or social commentary about living patterns.¹⁸¹ But nothing in the advertising and statement prohibition specifies which side of a transaction the speaker or advertiser must stand on. Thus, homeseekers who state preferences based on race in connection with buying or renting a dwelling seem to fall under the literal language of § 3604(c), just as sellers and landlords plainly do.

It does not appear, however, that HUD or the courts have read § 3604(c) to reach homeseeker communications. HUD's regulation on advertising and

3604(c) could apply to homeseeking, asserting that it, like § 3604(d), "do[es] not contemplate third parties").

¹⁷⁹ See *infra* Parts III.C and D.

¹⁸⁰ As noted above, there might be First Amendment concerns with regulating speech beyond the ambit of substantive prohibitions—but these concerns would not apply when the underlying conduct is illegal. See Schwemm, *supra* note 135, at 293.

¹⁸¹ See *id.* at 215.

statements repeats the statutory prohibitions and then adds the following proviso: “The prohibitions in this section shall apply to all written or oral notices or statements *by a person engaged in the sale or rental of a dwelling.*”¹⁸² Purchasers and tenants are arguably “engaged” in a sale or rental of a dwelling when they negotiate or sign a contract or lease, but the language fits them less well than supply-side housing providers. Moreover, the next section of the regulation, although expressly nonexhaustive, provides examples that seem to focus on supply-side discrimination.¹⁸³

HUD also produced a letter and memorandum in the mid-1990s indicating that ads in which homeseekers describe their own characteristics would not be reachable by the FHA.¹⁸⁴ Notably, such self-describing ads, when engaged in by housing providers, have been held to violate § 3604(c). For example, a landlord’s advertisement of a unit for rent in a “white home” produced liability for both the landlord and the newspaper that published the ad.¹⁸⁵ Just as a self-describing landlord indicates a preference for a tenant who shares the stated characteristic, tenants and buyers who describe their own characteristics are plausibly signaling preferences for those characteristics in landlords, sellers, or neighbors.

Alternatively, a tenant or buyer might express a “limitation” based on protected status within the meaning of the statute simply by representing to sellers or landlords that the proposed transaction will be with a person whose characteristics match the specified ones—thereby facilitating discrimination by housing providers. Interestingly, HUD issued its guidance despite expressly recognizing this risk.¹⁸⁶ Such self-describing ads, if sufficiently prevalent, could allow landlords to fill their units with those who match their preferred profile without ever having to run a discriminatory ad or turn away people who show up to look at the unit.

These concerns have only been sharpened by the ways in which technology has altered the process for matching up homeseekers and homes. The one-to-many model of communication exemplified by the print newspaper ad has been supplanted by the many-to-many communications that widespread internet use facilitates—ones in which buyers and tenants as well as sellers and landlords can initiate housing matches. Those seeking housing can at trivial cost post information about their own characteristics

¹⁸² 24 C.F.R. 100.75(b) (emphasis added).

¹⁸³ 24 C.F.R. 100.75(c).

¹⁸⁴ See Nelson Diaz, U.S. Department of Housing and Urban Development, Office of General Counsel, undated letter (opining that ads in which homeseekers describe themselves along protected dimensions did not violate the Act); Sarah Pratt, Department of Housing and Urban Development, Memo dated July 25, 1996 (stating this conclusion and promising future guidance on the issue). The text of both the Diaz letter and the Pratt memo is available at National Fair Housing Advocate Online, http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_advmemo. The additional guidance promised in the Pratt memo does not appear to have materialized.

¹⁸⁵ United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972).

¹⁸⁶ See Diaz, *supra* note 184.

or the characteristics that they seek in landlords, neighbors, or housemates. Reaching these ads and statements is a move that is well supported by the FHA's text and purpose.

D. Assisted Search: Agents and Apps

Homeseekers often receive assistance from others in carrying out searches. I will consider here two forms of assistive technologies: the employment of real estate professionals; and the use of apps or interactive websites to structure search. In both cases, I will consider both the potential liability of the homeseeker making use of such assistance to carry out biased searches, and the possible liability of the provider of such assistance (the real estate agent, app creator, or website provider). As in the case of advertisements and statements, the prohibitions contained in § 1982 help to buttress causes of action that relate to these sorts of assisted search. Where the underlying conduct is illegal, it makes little sense to exempt actions directed at abetting it, if they otherwise fall within the coverage of the text and would undermine the FHA's purposes if left unchecked.

1. Real Estate Professionals

Consider first the possibility that homeseekers could incur liability based on biased statements or instructions given to real estate agents. Significantly, § 3604(c) applies to both oral and written statements “with respect to sale or rental of a dwelling.”¹⁸⁷ If that prohibition were read to reach homeseeker communications, it could reach statements made to real estate agents, including requests to exclude homes from consideration based on racial criteria. Such a statement would fall within the textual prohibition because it “indicates [a] preference, limitation, or discrimination based on race” if it is sufficiently targeted to constitute a statement made “with respect to sale or rental of a dwelling.”¹⁸⁸

Significantly, HUD's regulation on discriminatory ads and statements explicitly prohibits “[e]xpressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race [or other protected status].”¹⁸⁹ While

¹⁸⁷ See, e.g., 24 C.F.R. 100.75(b) (“The prohibitions in this section shall apply to all written or oral notices or statements by a person engaged in the sale or rental of a dwelling.”); *Jancik v. U.S. Dep't of Housing and Urban Development*, 44 F.3d 553 (7th Cir. 1995) (finding that a landlord's comments and questions over the phone to a prospective tenant violated § 3604(c)).

¹⁸⁸ Much of what homeseekers say about their prospective searches would likely fall beyond the narrow confines of “with respect to sale or rental of a dwelling.” See Schwemm, *supra* note 135, at 215 (citing cases in which § 3604(c) was found inapplicable because the statements in question were not tied to a specific transaction involving a dwelling). But some very targeted comments and instructions to realtors could be related tightly enough to the sale or rental of a dwelling to potentially generate liability.

¹⁸⁹ 24 C.F.R. 100.75(c)(2).

HUD limits that prohibition to statements made by those “engaged in sale or rental of a dwelling” and thus may contemplate its application only to those standing on the supply side of a housing transaction,¹⁹⁰ this interpretation shows that instructions to a realtor represent the kinds of statements that can, in HUD’s view, run afoul of the FHA. Under the analysis in the preceding section, however, there is no textual, constitutional, or purpose-based reason to treat homeseekers any differently under § 3604(c) than landlords and sellers are already treated.

Consider next the potential liability of real estate professionals who solicit or follow race-based househunting instructions. Real estate agents are covered by the general prohibitions on discrimination found in § 3604 of the Fair Housing Act, including 3604(a), and thus may not “otherwise make unavailable or deny . . . a dwelling.” This language plainly reaches racial steering, in which a real estate professional selectively chooses properties to show based on the race of her clients, even if her actions are based on her own assumptions (accurate or not) about their preferences for neighborhood racial composition. But what if the client actually expresses a preference and the agent merely carries it out, so that the agent cannot be said to have made any dwelling unavailable to that client? Here, it becomes relevant that § 3605(a) separately provides:

It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.¹⁹¹

Section 3605(b) defines “residential real estate-related transaction[s]” to include not only loans and other financial transactions related to real estate, but also “the selling, brokering, and appraising of residential real property.”¹⁹² Although § 3605 appears to be rarely invoked in cases involving the conduct of real estate agents,¹⁹³ the usual meaning of “selling” and “brokering” would readily encompass the work of real estate agents.¹⁹⁴

Significantly, § 3605’s statutory language contains no indication that

¹⁹⁰ See 24 C.F.R. 100.75(b); see text accompanying notes 182-183 *supra*.

¹⁹¹ 42 U.S.C. § 3605(a).

¹⁹² 42 U.S.C. § 3605(b).

¹⁹³ This omission may be due to the broadly applicable set of prohibitions in § 3604, which fit better with the usual steering case. But because § 3604 may not apply to homeseeker discrimination for the reasons already discussed, § 3605 could do independent work in addressing buyer-initiated discrimination.

¹⁹⁴ See 24 C.F.R. 100.20 (“*Broker or Agent* includes any person authorized to perform an action on behalf of another person regarding any matter related to the sale or rental of dwellings, including offers, solicitations or contracts and the administration of matters regarding such offers, solicitations or contracts or any residential real estate-related transactions.”).

only buyers and tenants, and not sellers and landlords, are capable of being deprived of transactions based on race. Textually, the issue boils down to whether the “any person” that a covered party may not discriminate against includes only the agent’s own actual and potential clients and those counterparties who happen to be consumers of housing,¹⁹⁵ or also potential counterparties to the transactions in which a realtor’s own clients will engage as purchasers or tenants. If *no one* is to be discriminated against in the availability of transactions (as the phrase “any person” would seem to suggest), then it is hard to see why the prohibition would not reach agents who assist clients in carrying out racially discriminatory home searches.

There is some contrary authority on this point, albeit not based on a reading of § 3605. A 1990 Seventh Circuit decision authored by Judge Posner, *Village of Bellwood v. Dwivedi*, indicated that a buyer’s broker who was merely satisfying her discriminatory customer’s preferences would not be liable under the Fair Housing Act, since housing customers were supposed to be the beneficiaries, and not the targets, of antidiscrimination law.¹⁹⁶ Although recognizing that the biased decisions of homebuyers could have a cumulative impact on housing patterns, Judge Posner opined that it was not up to brokers “to solve [this] collective-action problem.”¹⁹⁷

In 1996, HUD wrestled with the same issue.¹⁹⁸ Initially, HUD Assistant Secretary Elizabeth Julian responded in the negative when asked whether a buyer’s agent would violate the Fair Housing Act if she complied with a client’s race-based search instructions.¹⁹⁹ She followed up this response with a second letter suggesting such conduct would be unethical and imprudent, even though not illegal.²⁰⁰ After significant pushback,²⁰¹ Julian

¹⁹⁵ Judge Posner read § 3604’s statutory prohibitions in this manner in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530 (7th Cir. 1990) (“The statute prohibits real estate agents from refusing to show properties because of the race of the *customer*, or misleading the *customer* about the availability of properties because of his race, or cajoling or coercing the *customer* because of his race to buy this property or that or look in this community rather than that.”) (emphasis in original). Like most steering cases, *Bellwood* does not mention § 3605.

¹⁹⁶ *Bellwood*, 895 F.2d at 1531 (“[T]he broker who responds to the [buyer’s] desires . . . is not discriminating against the *customer*, or denying the *customer* a dwelling, or misrepresenting to the *customer* the unavailability of a dwelling”); see also *id.* at 1530 (“The statute prohibits real estate agents from refusing to show properties because of the race of the *customer*, or misleading the *customer* about the availability of properties because of his race, or cajoling or coercing the *customer* because of his race to buy this property or that or look in this community rather than that.”) (emphasis in original).

¹⁹⁷ *Id.* at 1530.

¹⁹⁸ It did so in a series of communications from then-HUD Assistant Secretary Elizabeth Julian, which have been collected online by the National Fair Housing Advocate Online. See NFHAO, The Buyer’s Agent Issue, http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent.

¹⁹⁹ Letter from HUD Assistant Secretary Elizabeth Julian to Jill Levine dated Oct. 2, 1996, available at http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent#Initial%20HUD%20Buyer%27s%20Agent%20Letter (stating that subject to some provisos, “a buyer’s agent would not violate the Act merely by dutifully accommodating the client’s request to limit, on a protected class basis, the search for dwellings”).

²⁰⁰ Letter from HUD Assistant Secretary Elizabeth Julian to Jill Levine (undated, responding to Levine’s letter dated Oct. 28, 1996) http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent#Second%20HUD%20Buyer%27s%20Agent%20Letter (“In short, from the standpoint of legally prudent, as well as ethical, considerations, I would strongly advise against any agent or broker . . . accommodating a request that a housing search be limited based on race, or other protected-class terms.

retracted the initial letter²⁰² and promised to follow up with “comprehensive guidance” on the point,²⁰³ a promise that seems to have gone unfulfilled.²⁰⁴

An assumption underlying these existing analyses is that homeseekers themselves could never be held liable for undertaking discriminatory searches or making discriminatory housing decisions. But that assumption is both inaccurate and irrelevant. It is inaccurate given the analysis above about the reach of § 1982. It is irrelevant because the law already uncontroversially extends greater duties in cases where real estate agents are employed than it does when parties to real estate transactions act alone. For example, the single-family homeowner exception does not apply if the owner uses an agent, and the agent himself could be liable in that scenario as well.²⁰⁵

Moreover, as the earlier discussion of autonomy suggested, homeseekers have no plausible normative claim to compel others to help them realize discriminatory preferences about their neighbors—at least no claim that would be consistent with existing understandings of fair housing law. Well-settled understandings of antidiscrimination already constrain parties to act in ways that may thwart the strongly held desires of housing consumers for racial homogeneity. Just as an employer cannot refuse to hire women simply because customers dislike working with women,²⁰⁶ a landlord cannot ban people of a particular race or religion simply because most of the landlord’s other current or prospective tenants do not like living near people of that race or religion. Likewise, a real estate agent cannot steer customers away from a given neighborhood in order to satisfy the racial preferences of current residents or the prospective biases of future

The fact that Section 804(a) of the Fair Housing Act may, under limited circumstances, not prohibit such accommodation does not make it right, does not make it ethical, and it is not the policy of the Department of Housing and Urban Development to endorse such conduct.”)

²⁰¹ See Letter from Aurie Pennick to HUD Assistant Secretary Elizabeth Julian, dated Nov. 8, 1996 http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent#Aurie%20Pennick%27s%20response%20to%20the%20HUD%20Buyer%20Agent%20letters (stating that Julian’s Oct 2, 1996 letter “was received with shock and dismay by fair housing advocates and many real estate professionals” and asserting that the guidance given in it was “unhelpful, illogical, and even dangerous”).

²⁰² Letter from HUD Assistant Secretary Elizabeth Julian to Aurie Pennick, dated Dec. 3, 1996 http://www.fairhousing.com/index.cfm?method=page.display&pagename=HUD_resources_buyers_agent#HUD%20final%20Buyer%27s%20Agent%20letter%20%28response%20to%20Aurie%20Pennick%29 (“In light of the obvious ‘slippery slope’ down which my letter has apparently invited some to slide, and my agreement with you that my letter sent the ‘wrong message,’ I have decided to rescind the October 2, 1996 letter, as you requested, and develop comprehensive guidance that will address the issue more broadly”).

²⁰³ *Id.*

²⁰⁴ See *Hannah v. Sibcy Cline Realtors*, 769 N.E.2d 876, 885 (Ohio, 2001) (noting that the promised guidance never materialized).

²⁰⁵ See 42 U.S.C. §§ 3603(b)(1), 3605. Similarly, the Mrs. Murphy exception only creates an exemption from § 3604 (with the exception of § 3604(c)). See 42 U.S.C. § 3603. Thus, if Mrs. Murphy hired a realtor, that person could presumably be held liable for discrimination under § 3605, even though Mrs. Murphy would not herself be liable for engaging in the same discrimination.

²⁰⁶ See, e.g., Alan Wertheimer, *Reflections on Discrimination*, 43 SAN DIEGO L. REV. 945, 962-63 (2006) (“Employers cannot make market rational decisions that reflect racist or sexist customer reactions”).

homeseekers in that area.²⁰⁷

These prohibitions thus already operate to effectively withdraw discriminatory prerogatives from both residents and prospective homeseekers.²⁰⁸ It seems odd to rule out what merely amounts to an additional way of withdrawing discriminatory prerogatives from homeseekers: forbidding agents from following categorical race-based instructions from current homeseekers. There are also practical difficulties in separating acts directed at catering to the racial preferences one expects current and future residents to have (clearly forbidden) from those that merely carry out the expressed racial preferences of current homeseekers. The fact that a broker's other potential clients have preferences about racial composition may influence the way that the broker responds to the race-based preferences that are stated by her current clients. Agents, as repeat players who work both sides of the fence, may have a financial interest in the content of buyer preferences. At the very least, there is the appearance of a conflict of interest when agents are involved in processing and carrying out racially biased search instructions.

Many real estate agents wisely refuse to embroil themselves in furthering the discriminatory preferences of their clients. They may instead suggest that the clients themselves identify neighborhoods of interest, without the broker providing information about the racial composition of the area. Agents might, however, increasingly recommend apps or data sources that will enable homeseekers to identify neighborhoods that meet their criteria.²⁰⁹ This trend raises the stakes for the treatment of those technologies, a topic I turn to now.

2. Apps and Interactive Online Tools

Could an app designed to simplify search, or a homeseeker's use of such an app, violate fair housing law? The Fair Housing Act predated, and thus does not speak directly to, the use of apps and interactive websites. But new ways of carrying out prohibited acts can plainly be reached by antidiscrimination law, provided there is no countervailing law on the

²⁰⁷ The *Bellwood* court acknowledged this point, 895 F.2d at 1530 (“A person who serves as a conduit for another person's discrimination can, it is true, be guilty of intentional discrimination, or, what is the same thing, of disparate treatment.”). However, the court distinguished cases in which a realtor steers her homebuying client away from a neighborhood based on the preferences of other potential customers in that neighborhood or follows the instructions of a *selling* client not to show the home (both of which are clearly impermissible) from a case in which the realtor facilitates the racial preferences of her own homebuying client. *Id.* at 1530-31.

²⁰⁸ *Cf.* Mark Kelman, *Defining the Antidiscrimination Norm to Defend It*, 43 SAN DIEGO L. REV. 735, 758-49 (2006) (arguing that prohibitions on employment discrimination extend to the customers of the business, who are in effect the “true employers,” and that therefore an employer cannot discriminate based on customer preferences).

²⁰⁹ *See, e.g.,* Lerner, *supra* note 45 (reporting on a broker's belief that providing demographic data directly to clients would violate fair housing laws, leading her to instead recommend apps that will provide the same data).

books. For example, it is uncontroversial that landlords and sellers who post discriminatory ads on the internet are liable under the Fair Housing Act, even though the Communications Decency Act limits the liability of internet service providers who do nothing more than serve as conduits for these discriminatory ads.²¹⁰

Interactive tools that elicit information about protected characteristics from homeseekers or facilitate the filtering of applicants for housing based those characteristics can also produce liability under § 3604(c). Thus, in an earlier branch of the *Roommate.com* litigation, the Ninth Circuit held that an interactive website that prompts users to specify preferences corresponding to protected status could run afoul of the Fair Housing Act's advertising provision, notwithstanding the immunity offered to internet service providers by the Communications Decency Act.²¹¹ Of course, that interface elicited preferences from those who were offering housing, not those who were seeking it. But if § 3604(c) were found to apply to homeseeking, as suggested above, the seeker/provider distinction would disappear. Both the person using the interface to restrict search based on racial criteria and the website provider enabling this functionality could be potentially liable.

Consider an online tool or mobile app that aggregated information about the races of sellers or landlords and permitted users to filter listings on this basis. § 3604(c) liability could be triggered by the statements or preferences communicated by the user to the application.²¹² Even if such an interface were deemed too attenuated from any particular sale or rental to generate liability under § 3604(c), a homeseeker's use of such a tool could provide proof of a § 1982 violation in withdrawing opportunities for sales and rental transactions from individuals based on race.²¹³ Such an app could be readily distinguished from tools that enable homeseekers (and others) to learn about neighborhood conditions, including racial composition. Data on neighborhood racial composition could be used in any number of valid, nondiscriminatory ways, from assessing changes in neighborhoods over time to reassuring homeseekers that they were making integrative rather than segregative moves, and there are compelling normative reasons to resist restricting access to such information.²¹⁴

²¹⁰ See *Chicago Lawyers Committee for Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 672 (7th Cir. 2008) (“Using the remarkably candid postings on craigslist, the Lawyers’ Committee can identify many targets to investigate. It can dispatch testers and collect damages from any landlord or owner who engages in discrimination.”).

²¹¹ *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008) (en banc). The specific ruling became moot when the Ninth Circuit later ruled that roommates are not making decisions about “dwellings” and hence fall outside the FHA entirely. But its holding remains relevant for situations that do not involve shared housing.

²¹² Cf. *Jancik v. U.S. Dep’t of Housing and Urban Development*, 44 F.3d 553, 557 (7th Cir. 1995) (holding that a landlord’s question about race can, in context, violate § 3604(c)).

²¹³ Cf. Schwemm, *supra* note 135, at 251-55 (discussing evidentiary use of discriminatory ads and statements).

²¹⁴ A more difficult intermediate case, which I will return to below, would be an app that not only informs

A particularly interesting set of questions is raised by the prospect of interactive tools that would allow households to coordinate their home selection decisions with each other, without involving a developer, landlord, or realtor. For example, groups of in-movers could coordinate in virtual space, privately, to enter a new or redeveloping community. If such tools are not already available it seems inevitable they soon will be. Indeed, a recent novel set in Detroit had what one character termed “a Groupon model of gentrification” as a primary plot element.²¹⁵ What should the role of law be with respect to such coordination?

On one hand, housing coordination of this sort is merely a scaled up and high tech version of the kinds of decisions that homeseekers already make—and which are widely viewed as immune from legal action. On the other, coordinated action might seem like a larger threat to housing access. Even if disconnected individual decisions lie beyond the law, efforts to coordinate those decisions might not. Such coordinated action could make dwellings unavailable under § 3604(a). Moreover, some interactive tools designed to coordinate behavior could violate § 3604(e), the FHA’s anti-blockbusting provision, which makes it unlawful “[f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race [or other protected status].”²¹⁶ An app that merely predicted future racial trends would not be attempting to induce anyone to sell or rent, but a for-profit coordination platform that prominently included racial data might seem to do exactly that.

Reaching coordination tools, however, would be a double-edged sword. As this paper’s analysis has suggested, the existing uncoordinated patterns of homeseeking decisions already pose a serious threat to fair housing, if a largely unrecognized one. If it is more difficult to achieve integrated outcomes through unguided and fragmented individual choices than it is to perpetuate segregated outcomes through those same dispersed choices, cracking down on mechanisms for coordinating and guiding choice could run counter to the project of advancing integration. This point bears on the doctrinal question to the extent that the integrative purpose of the FHA informs interpretation of its provisions.

Regardless of the state of current law, apps introduce another actor onto the scene (the app designer) who could be the subject of legal and policy directives. Certain kinds of functionality that would tend to produce a

about racial composition but also enables categorical screening of listings on that basis. *See* text accompanying notes 229-231, *infra*.

²¹⁵ BENJAMIN MARKOVITS, *YOU DON’T HAVE TO LIVE LIKE THIS* (2015). In the novel, a developer served as a coordinator and appeared to have the power to select which groups would actually receive blocks of houses, but it is easy to imagine models in which groups and individuals could go to a website to coordinate blocks of proposed purchases.

²¹⁶ 42 U.S.C. § 3604(e).

segregative effect might be analyzed under a disparate impact analysis, as I will discuss below, although a robust nondiscriminatory interest in the free availability and use of data would strictly limit this avenue. Nonetheless, there may be other ways in which these new data tools could be addressed to advance fair housing. Most notably, the affirmatively further mandate might include incentives for innovative apps that would help to debias search and advance integration.²¹⁷

IV. SHIFTING COSTS

Although the approach detailed in Part III would break new doctrinal ground and carry considerable expressive force,²¹⁸ it would likely make only limited inroads into closing the search gap.²¹⁹ Consistent with the normative constraints outlined in Part II, it would preserve a realm of decisional autonomy in which bias could operate unchecked. The associated costs must be borne by someone—whether those who find their housing opportunities diminished due to their protected status, or other parties who are in a position to bear or mitigate those costs. This Part explores some of the ways that these costs might be shifted among parties.

A. Theories and Limits

The Fair Housing Act contains two powerful doctrinal levers for shifting the costs of biased homeseeking: the disparate impact cause of action, and the mandate to “affirmatively further” fair housing. Each of these potential avenues for closing the search gap will be explored in more detail below. Notably, however, even legal prohibitions on disparate *treatment* shift some costs associated with biased search. For example, landlords, developers, and real estate agents are not permitted to discriminate based on protected status even when placed under great financial pressure to do so by other prospective tenants, buyers, or clients. Legal compliance in these situations can mean forfeiting income. Prohibitions on such customer-catering discrimination can be understood not only as a means of effectively overriding certain consumer preferences,

²¹⁷ See *infra* Part IV.C.3.

²¹⁸ See generally MCADAMS, *supra* note 72 (examining the power of the law to communicate norms and enable people to coordinate their behavior, even in the absence of enforcement); see also Bartlett & Gulati, *supra* note 3, at 41-42 (suggesting that even a difficult-to-enforce legal change addressing discrimination by customers could carry expressive force, change norms, and increase the visibility of the issue).

²¹⁹ The effect is difficult to predict because a change in search norms could yield more significant results than might be predicted based on enforcement actions alone. See Bartlett & Gulati, *supra* note 3, at 41 (“Insofar as the goal here [in the context of customer discrimination] is to change the customer attitudes that lead to discriminatory preferences, those expressive effects [of law] may be the most important thing.”). Whatever the size of the response, any decrease in discriminatory conduct on the part of homeseekers will reduce the costs that other parties must bear as a result of such conduct.

then, but also as a technology for shifting costs associated with certain forms of homeseeker discrimination onto housing providers and brokers.

Disparate impact and the affirmatively further mandate offer more overt means of reallocating bias-related costs. Biased search heuristics factor into these theories in two ways, supplying both a “why” and a “how.” First, the existence of discriminatory homeseeking and its effects in perpetuating segregation provides a rationale for compensatory efforts, as well as a basis for rebutting the notion that optimal integration levels have already been achieved. Second, a focus on search tactics provides substantive guidance about the shape that such corrective efforts might take.

Efforts to promote integration can come under fire for being too aggressive as well as for being too anemic.²²⁰ Race-conscious efforts to influence cumulative homeseeker decisions, as through integration maintenance programs directed at addressing tipping dynamics, confront legal barriers.²²¹ And in *Inclusive Communities*, the majority expressed wariness about (although it did not completely rule out) the possibility of race-conscious remedies for disparate impact violations.²²² Nonetheless, the affirmatively further mandate, along with the Court’s recognition of the Fair Housing Act’s goal of integration in connection with its disparate impact analysis, offer potential hooks for supporting (or at least not outlawing) a variety of cost-shifting approaches in the search space.

B. Disparate Impact

The disparate impact cause of action, recently recognized by the Supreme Court in *Inclusive Communities*, offers one avenue for shifting the costs of biased search onto parties who are in a good position to bear or mitigate them.²²³ Although disparate impact is a theory at least partly justified by its ability to smoke out intentional discrimination that is simply too difficult to prove,²²⁴ in prototypical form it reaches conduct that is both facially neutral and neutral in intent. Neutral policies can have a discriminatory effect if they reach factors that correlate with protected group status. Often those correlations are produced by intentional

²²⁰ Cf. Saul Levmore, *The Mortgage Crisis and Affirmative Action*, Sept. 3, 2007, <http://uchicagolaw.typepad.com/faculty/2007/09/mortgage-crisis.html> (discussing settings involving “regulation from two directions”).

²²¹ See, e.g., *United States v. Starrett City*, 840 F.2d 1096 (2d Cir. 1988) (striking down an integration maintenance plan as violative of the Fair Housing Act).

²²² See *Inclusive Communities*, 135 S.Ct. at 2524-25.

²²³ Because the disparate impact cause of action has been recognized for decades by courts of appeals, see, e.g., *Inclusive Communities*, 135 S. Ct. at 2525, there has already been considerable experience with some of these approaches.

²²⁴ See, e.g., *Inclusive Communities*, 135 S.Ct. at 2522 (“Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”).

discrimination by actors whose conduct is, for whatever reason, not readily reachable by law.²²⁵

Consider *Griggs v. Duke Power*,²²⁶ the case that held disparate impact claims to be cognizable under Title VII. There, the screening administered by the employer (tests and a high school graduation requirement) yielded disparate results that tracked racial lines. This disparity was due to some form of past racial discrimination, whether in the schools or elsewhere. Of course, many of the African-American job applicants who failed the screen did so for reasons unrelated to their race just as many white applicants failed the screen, but it is a statistical certainty that some of the black applicants were disadvantaged because of race.²²⁷ The disparate impact cause of action does not ask for these past causal chains to be untangled, but rather requires that a less discriminatory alternative be put in place if one is available.

In the housing context, certain choices of public and private actors interact with homeseeker biases to produce results that entrench segregation. Challenging those choices through disparate impact analysis offers a way of ameliorating the impacts of homeseeker choices. For example, changes in zoning classifications that catalyze rapid and concentrated gentrification while constraining the production of housing in other neighborhoods can be challenged based on the predicted interaction with homeseeker choices. Disparate impact analysis has already been used to challenge, with some success, decisions about the location of affordable housing or the permissibility of different categories of housing stock in a given municipality.²²⁸

There are other, less familiar ways in which disparate impact claims might be used to address or backfill the search gap. For example, disparate impact analysis might be used to evaluate search practices facilitated by particular data manipulation tools. Suppose an app were created that allowed users to filter real estate listings based on maximum percentages of households of a particular race residing within a certain radius of the property. Further, suppose it were shown that widespread use of this type of tool within a particular geographic area tended to perpetuate patterns of segregative housing choices—a type of discriminatory effect recognized by both HUD and the Supreme Court as supporting a disparate impact claim.

²²⁵ This is not to suggest that identifying such prior discrimination is a prerequisite to liability—plainly it is not. In the contexts of sex and disability, for example, liability can be imposed based on differences that were not due to anyone’s discrimination. See Zatz, *supra* note 105, at 34-35

²²⁶ 401 U.S. 424 (1971).

²²⁷ See Zatz, *supra* note 105, at 27-32.

²²⁸ See Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM U. L. REV. 357 (2013) (analyzing and collecting data on the use of disparate impact analysis in different categories of cases, including ones involving “housing barriers” such as exclusionary zoning).

Of course, showing a discriminatory effect is just the first step in making out such a claim: under the burden-shifting approach adapted from *Griggs*, the defendant has an opportunity to present a valid nondiscriminatory reason for the policy or practice, which the plaintiff then must show can be achieved through a less discriminatory alternative.²²⁹ The fact that data tools might be used to support integrative as well as segregative housing searches provides a nondiscriminatory reason for offering and employing such a tool. But a less discriminatory alternative than enabling users to place “ceilings” on particular groups might be an app that allowed users to specify minimum percentages of a particular race, perhaps capped at 50% or 60%. Such an approach would allow some in-group clustering as well as integrationist efforts without supporting searches for segregated areas.²³⁰ It would not keep people from using data to find more segregated neighborhoods if they wished to do so, but it would keep doing so from being a routinized and potentially focal practice.

An app like the fictitious Tiebout2Go, which would seek to replicate as closely as possible an individual’s current residential situation in a new metropolitan area,²³¹ could also be subject to disparate impact analysis if it tended to have a segregative effect. Here, however, the nondiscriminatory rationale would be that of facilitating relocation into areas that match one’s current location—a way of “not moving” (or not moving as much) when one moves. After all, continuing to live in a segregated neighborhood also entrenches segregation, but there are compelling nondiscriminatory reasons that people might wish to stay where they are. These interests are attenuated when one seeks to replicate one’s current environment elsewhere, however. A less discriminatory approach might permit matching only on factors other than racial composition, or adding some degree of randomization along that dimension and others that closely correlate with it.

Although debate continues over disparate impact analysis, the persistence of homeseeker discrimination removes one powerful argument against recognizing such claims: the idea that a disparate treatment approach is sufficient to provide fair housing opportunities. The influence of biased homeseekers on housing patterns debunks the idea that all of the residual segregation that remains after eliminating disparate treatment by governments, landlords, sellers, and brokers, can be chalked up to the

²²⁹ See *Inclusive Communities*, 135 S.Ct. at 2511, 2522-23; 24 C.F.R. 100.500. The precise formulation of the disparate impact test under the FHA remains open to question. See, e.g., Robert G. Schwemm, *Fair Housing Litigation After Inclusive Communities: What’s New and What’s Not*, 115 COLUMBIA L. REV. SIDEBAR 106, 121 (September 2015) (noting minor wording differences between HUD’s disparate impact rule and the Court’s statements about disparate impact in *Inclusive Communities*).

²³⁰ It is noteworthy that such an approach would appear to interfere relatively little with the broad run of African-American neighborhood composition preferences while having much more bite in addressing white racial composition preferences. See *supra* note 93 and accompanying text (discussing empirical evidence of asymmetric preferences for neighborhood composition).

²³¹ See *supra* note 51, and accompanying text.

choices of those who are disadvantaged. Rather, attending to search shows that at least some of that residual segregation is attributable to *intentional racial discrimination in the housing domain*.

I do not, of course, mean to suggest that the search gap is the sole justification for recognizing disparate impact. Even removing the search gap entirely would not align the right to race-irrelevant housing options with an intent-based understanding of duty. There is a great deal of other past and present behavior that could not be reached by such an understanding, including a history of de jure segregation that continues to shape housing options “because of race.” Nonetheless, the search gap is an especially interesting place to focus attention when considering the footing of disparate impact analysis. White avoidance represents an ongoing species of *intentional* discrimination that generally flies under the radar and is assumed to be untouchable by law, despite its large effects on housing patterns. It shows that some of the work that disparate impact analysis might do is not about fixing obscure problems far back in the causal chain, but rather about addressing here-and-now intentional racial discrimination that we refuse to tackle head-on.²³²

C. Affirmatively Furthering

The Fair Housing Act obligates HUD to “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the Act].”²³³ In a July 2015 final rule, HUD defined “affirmatively further” as “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.”²³⁴ Under this rule, grant recipients such as local governments and public housing authorities must submit, at five year intervals, an Assessment of Fair Housing that documents current housing patterns, sets goals to improve them, and details impediments and plans for overcoming them.

²³² Cf. Wertheimer, *supra* note 206, at 958 (“Precisely because society decides to allow racially biased mating choices, it may also acquire a responsibility to remedy or soften the harmful social consequences of such choices.”); *id.* at 959 (“Precisely because there are limits on our ability to realize fair equality of opportunity and precisely because we cannot or should not seek to eliminate arbitrary effects of the natural lottery, Rawls seeks a principle which recognizes these facts and which mitigates their effects.”).

²³³ 42 U.S.C. § 3608(e)(5). Another provision mandates cooperation by other executive departments and agencies in affirmatively furthering the purposes of the Act. 42 U.S.C. § 3608(d).

²³⁴ U.S. Department of Housing and Urban Development, *Affirmatively Furthering Fair Housing*, Final Rule, 80 FED. REG. 42271 (July 16, 2015). In the past, HUD required local governments, housing authorities, and other grant recipients to create an “Analysis of Impediments” to Fair Housing. This document “was generally not submitted to or reviewed by HUD,” however, and was found to be “not as effective as originally envisioned.” *Id.* at 42272. See also Rigel Oliveri, *Beyond Disparate Impact: How the Fair Housing Movement Can Move On*, 54 WASHBURN L.J. 625, 642-43 (2015) (discussing HUD’s history of neglecting the affirmatively further mandate and citing the 2006 Westchester County litigation as turning point).

HUD does not mandate any particular outcomes or set any benchmarks, however, much less specify sanctions for failing to do so.²³⁵ Nonetheless, HUD's new emphasis on the affirmatively further mandate offers support for efforts to overcome patterns associated with presumptively unreachable forms of conduct. Below, I consider some strategies that change the mix of information available to searchers, alter what is at stake, or innovate in other ways within the search space.

1. Information Strategies

Information-based strategies can focus on either adding or subtracting information.²³⁶ In the former category fall efforts to address homebuyer search heuristics through affirmative marketing efforts.

In *Steptoe v. Beverly Area Planning Association*, for example, a nonprofit community organization, the Beverly Area Planning Association (BAPA) provided information to househunters who were interested in making “nontraditional moves.”²³⁷ Beverly, a historically Irish neighborhood on the far southwest side of Chicago, had become integrated, and BAPA was concerned about maintaining that integration against resegregation.²³⁸ To that end, it provided bifurcated housing advice, informing white homeseekers about housing opportunities within the integrated Beverly neighborhood, but suggesting that black homeseekers seek housing *outside* the neighborhood, in the nearby white suburbs of Evergreen Park and Oak Lawn.²³⁹ The court upheld BAPA's selective provision of information against FHA and § 1982 challenges, finding that BAPA did not control access to housing, held no monopoly on housing information, and disclosed to homeseekers the selective nature of the information that it would provide.²⁴⁰ BAPA was thus deemed to be merely providing extra information about integrative moves to those who sought it out.²⁴¹

Efforts at affirmative marketing were upheld in another Chicago-area case, *South-Suburban Housing Center v. Board of Realtors*.²⁴² There, the

²³⁵ Rather, the rule requires that those whom it funds chart their own progress, set benchmarks, and identify obstacles and ways of overcoming them. See 80 FED. REG. 42272, 42286-87 (describing comments on this issue and providing a response).

²³⁶ In other words, as Lior Strahilevitz puts it, law can employ “search lights” or “curtains.” Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1711-13 (2008) (explaining how law can use search lights and curtains, in addition to carrots and sticks, and highlighting the way that the former two strategies might be used in the antidiscrimination context); see also STRAHILEVITZ, *supra* note 123, at 157-72.

²³⁷ 674 F.Supp 1313 (N.D. Ill. 1987).

²³⁸ See *Steptoe*, 674 F.Supp. at 1315.

²³⁹ *Id.* at 1316.

²⁴⁰ *Id.* at 1319-20.

²⁴¹ *Id.*

²⁴² 935 F.2d 868 (1991).

South-Suburban Housing Center (SSHC) made extra efforts to interest white homebuyers in homes that it had bought in an area of Park Forest that had become known as a “black block.”²⁴³ The court held that this did not violate the Fair Housing Act, because black homebuyers were not dissuaded or misinformed about the opportunities.²⁴⁴ Although the court noted that any steering based on a customer’s race would be impermissible, it held that “[i]n the absence of concrete evidence of this nature . . . we see nothing wrong with SSHC attempting to attract white persons to housing opportunities they might not ordinarily know about and thus choose to pursue.”²⁴⁵

As in *Steptoe*, the information provided by SSHC was deemed to be purely additive, and offered in support of one of the Fair Housing Act’s goals: integration.²⁴⁶ Neither group’s provision of extra information would be necessary or useful if home search decisions were already being made in a race-neutral way. In both cases, the need to counter existing race-based decision patterns provided the impetus and the justification. Nonetheless, selectively channeling information about neighborhood opportunities to white homeseekers is a less normatively attractive way to break up established search patterns than finding race-neutral mechanisms to disrupt established search heuristics. Below, I will consider some ways that emerging technologies might support such alternatives.

The opposite strategy—that of removing information—has also been attempted by communities, primarily in the context of attempting to arrest “white flight.” As Schelling’s analysis suggests, housing decisions can produce cascades; thus, shielding some moves from view could keep other moves from occurring at all. Starting in the 1970’s, a number of communities experimented with limits on “for sale” signs, in an effort to arrest a destructive dynamic in which knowledge of sales sets off more sales. There are important constitutional limits on this approach, however, and in *Linmark v. Township of Willingboro*, the Supreme Court struck down such a sign ban on First Amendment grounds.²⁴⁷ Yet the Court did not categorically rule out the possibility of signage limits, and some communities have continued to pursue such strategies.²⁴⁸

²⁴³ *Id.* at 873. The purchases of the homes by SSHC followed a wave of foreclosures and blight in the neighborhood. *Id.*

²⁴⁴ *Id.* at 884.

²⁴⁵ *Id.*

²⁴⁶ *See id.*

²⁴⁷ 431 U.S. 85 (1977). In his opinion for the Court, Justice Marshall observed that an alternative to prohibiting “for sale” signs would be for white homeowners to send a competing message with “not for sale” signs. *Id.* at 97. For a discussion of the use and effects of “not for sale” signs, including their potential to unwittingly telegraph that racial transition was underway, see RICHARD R. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD* 193-202 (2013).

²⁴⁸ Oak Park Village Code 13-2-3 (banning for sale and for rent signs) http://sterlingcodifiers.com/codebook/index.php?book_id=459&chapter_id=20381#s932047; *id.* 13-2-3.1 (allowing open house signs on Sundays only for periods of four hours or less)

Today's information-rich environment provides many more ways to access information about homes for sale, but there may still be something viscerally significant and especially salient about physical signs. For one thing, homeowners who have no thought of moving are unlikely to be actively monitoring online real estate listings, but they can hardly avoid noticing a fresh crop of "for sale" signs as they drive through the neighborhood. For the very same reason, banning signs represents an infringement on the ordinary workings of the market. As a seller, one might wish to capture the attention not only of potential buyers who are actively searching for listings, but also those who might be willing to consider a move to the right property. Nonetheless, the sign ban arguably solved a collective action problem for residents that may have left even the sellers better off on balance than if it did not exist.

Even if this sort of information suppression could keep existing integrated neighborhoods from resegregating, however, it would do little to address existing segregation. Other forms of information suppression, such as hiding demographic data, might be expected to do more harm than good. At the same time, there might be room to encourage data aggregation and use tools that shield some forms of information from view while highlighting others.²⁴⁹ Another alternative is to raise the (implicit or explicit) price of obtaining certain kinds of information, or to subsidize choices made in the absence of that information. Some possibilities along these lines are discussed below.²⁵⁰

2. Changing Stakes

If property value concerns are a significant driver of race-based homeseeeking, then one approach might be to lower the stakes associated with property value changes. Ingrid Gould Ellen observes that pro-homeownership policies may entrench segregation, since data shows that homeowners are more sensitive than renters to racial composition.²⁵¹ Thus, a very basic move to support integration would be to alter the law's relative treatment of different tenure forms. Significantly, § 3608(d) of the Fair Housing Act requires all federal agencies to cooperate with HUD in affirmatively furthering fair housing. One way to do so would be to cut back on tax subsidies for homeownership.²⁵²

http://sterlingcodifiers.com/codebook/index.php?book_id=459&chapter_id=20381#s932048.

²⁴⁹ See, e.g., Strahilevitz, *supra* note 236, at 1711-13.

²⁵⁰ See *infra* Part IV.C.3.

²⁵¹ ELLEN, *supra* note 6 at 176; see also Freeman & Cai, *supra* note 7, at 313 (finding a "negative relationship between the homeownership rate and white invasion [of black neighborhoods]" and suggesting that this "is consistent with Ellen's (2000) argument that white renters will be more comfortable taking the risk of moving into black neighborhoods because they have less at stake than owners.").

²⁵² There have been many calls to end the mortgage interest tax deduction, although such proposals are

Another stake-lowering approach might be to encourage rent-to-own alternatives. Not only does the available evidence indicate that homebuyers are more sensitive to neighborhood racial composition than renters, it also establishes that the moving-in decision is more sensitive to neighborhood racial composition than the moving-out decision.²⁵³ These two facts considered in tandem suggest that considerable leverage might be provided by a try-it-before-you-buy-it approach to location decisions.²⁵⁴ While rent-to-own is not a commonly available alternative presently, there is no reason why it could not be encouraged, through tax policy or otherwise, as part of the mission of affirmatively furthering fair housing.

Home equity insurance offers another possibility, one that has been written about extensively and attempted in at least a few communities.²⁵⁵ Here, the idea is to allow homeowners to offload some of the risk of property value decline to investors or insurers in the hope of reducing sensitivity to changes in the local area. Although typically raised in the context of stemming white flight or addressing NIMBYism, it could also support more integrative move-in decisions. White in-movers may avoid areas with relatively small minority populations if they fear that a dynamic process is underway that will transform the neighborhood into a largely minority one. Insuring against declines in home value that are not attributable to the homeowner's own decisions on her parcel could ease this fear.

Among the critiques of this approach is the idea that it is offensive to

usually spurred by housing consumption distortions or the regressive impact associated with the present tax treatment. For a recent review of the literature and discussion of some potentially offsetting effects on location choices, see David Albuoy & Andrew Hanson, *Are Houses Too Big or In the Wrong Place? Tax Benefits to Housing and Inefficiencies in Location and Consumption*, 28 TAX POLICY AND THE ECONOMY 63 (NBER 2014), available at <http://www.nber.org/chapters/c13054>. See also Boger, *supra* note 3, at 1606-10 (proposing phase-outs of the mortgage interest deduction and property tax deduction for residents of communities that have failed to meet certain "fair share" housing targets, but doing so to leverage support for reaching those targets rather than to change choices about tenure form).

²⁵³ See *supra* note 24.

²⁵⁴ The efficacy of this approach depends on the reason for the difference between moving in and moving out decisions. Ellen has posited that the difference can be attributed to the fact that residents have more knowledge about the neighborhood, and hence less need to rely on racial stereotypes. See ELLEN, *supra* note 6, at 106. But as discussed above, if the racial proxy is widely used by homeseekers, it will remain an important input into home values – something we might expect to capture the attention of homeowners. See generally WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (2001). An alternative or supplemental explanation would be that, having already invested in the home, homeowners do not wish to realize a loss and hence tend to stay the course—whether rationally or not. See, e.g., David Genesove & Christopher Mayer, *Loss Aversion and Seller Behavior: Evidence from the Housing Market*, 116 Q.J. ECON. 1233 (2001); Stephen Day Cauley & Andrey D. Pavlov, *Rational Delays: The Case of Real Estate*, 24 J. REAL ESTATE FIN. & ECON. 143 (2002). If this explanation is doing most of the work, then a rent-to-own approach might not be very helpful.

²⁵⁵ See, e.g., ELLEN *supra* note 6, at 163, 172-72; William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URBAN STUD. 317, 335 (2004); Adam Yarmolinsky, *Reassuring the Small Homeowner*, 22 PUB. INTEREST 106, 106 (Winter 1971); Maureen A. McNamara, *The Legality and Efficacy of Homeowner's Equity Assurance: A Study of Oak Park, Illinois*, 78 NW. U. L. REV. 1463, 1468-69 (1984); Matityahu Marcus and Michael K. Taussig, *A Proposal for Government Insurance of Home Values against Locational Risks*, 46 LAND ECON. 404, 408-12 (1970).

insure against racial change.²⁵⁶ But a broad-based realigning of homeownership risk could also protect homeowners against many potential sources of home value change unrelated to neighborhood composition.²⁵⁷ While I will not repeat here the arguments in favor of and against offering a reduced-risk version of homeownership, it should be noted that this represents one possible way of beginning to address the search gap—and one that would do so without limiting homeseeker choice. Here too, tax policy could play a primary role in encouraging more integration-friendly forms of tenure.

Some of the highest stakes may be nonfinancial in nature. White families with children appear more sensitive to neighborhood racial composition than do those without children.²⁵⁸ To the extent this pattern is driven by concerns about schools, one potential type of in-kind subsidy might be priority in school choice plans for those locating in integrated communities.²⁵⁹ More broadly, finding ways to encourage temporary entry into unfamiliar communities could spur valuable learning. Here, it is interesting to consider the ways in which new business models like Airbnb have enabled people to gain familiarity with neighborhoods in a low-stakes way.²⁶⁰ Well-designed adaptations could enable families to gain first-hand familiarity with different areas within a city.

Of course, any of these approaches would introduce difficult design issues. My point here is not to advocate for any particular policy but rather to suggest the need for, and potential traction of, creative thinking around the issue of housing search—an issue I turn to explicitly now.

3. Innovating in the Search Space

The affirmatively further mandate offers an opportunity for communities to pursue innovative new strategies in the search space—ones that might be capable of shaking up existing patterns and reducing reliance on racial proxies. At a meta-level, the best way to proceed may be to find

²⁵⁶ See ELLEN *supra* note 6, at 173.

²⁵⁷ See generally Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008) (discussing such a broad-based approach as well as other past and proposed risk-reduction models).

²⁵⁸ See, e.g., ELLEN *supra* note 6, at 127-28, 142, 154; Emerson et al., *supra* note 59, at 930.

²⁵⁹ For an interesting proposal along these lines, see A. Mechele Dickerson, Book Review, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273 (2005) (reviewing ELIZABETH WARREN AND AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* 2003).

²⁶⁰ See, e.g., David Roberts, *Our Year of Living Airbnb*, N.Y. TIMES, Nov. 25, 2015, <http://www.nytimes.com/2015/11/29/realestate/our-year-of-living-airbnb.html? r=0> (chronicling a year of living for one-month stretches in a series of Airbnb rentals throughout New York in an effort to gain more familiarity with various neighborhoods); See, e.g., Lee Chilcote, *How One Couple Turned A “Toxic Corner” of Cleveland Into a Development Hotbed*, Vanity Fair, Sept. 30, 2015, <http://www.vanityfair.com/culture/2015/09/hingetown-neighborhood-cleveland> (describing a couple’s redevelopment efforts in an area of Cleveland they dubbed “Hingetown,” “including a full-time Airbnb unit they use to show off the neighborhood”). This is not to suggest that Airbnb has been uncontroversial or free of normative critiques, only that it vividly illustrates the capacity of a new approach to alter ways of interacting with a city.

ways to incentivize integrative innovations in search technologies. Social impact bonds offer one tool for harnessing results-oriented policy ideas.²⁶¹ These bonds make payoffs contingent on a grantee's ability to deliver measurable results along a particular, verifiable metric—which here might mean reducing certain measures of segregation and achieving particular affirmative indicia of successful integration.

Because housing patterns depend on complex interdependent patterns of behavior, there is a primary role for fostering new search norms and for developing new focal strategies to guide search. Apps and interactive tools might do this in a variety of ways at a variety of scales. Consider, for example, the possibility that a community could develop and popularize a free pro-integration housing search tool that might become focal for guiding search. Such an interface could build on a variety of the strategies discussed above, whether by suppressing certain kinds of information, highlighting others, or simply introducing a certain amount of random perturbation into the results that it delivers.

Economists have used the notion of “simulated annealing” to capture the sorts of random mutations that may enable moves to higher valued equilibria.²⁶² By introducing noise into search, changes might be prompted that would ultimately catalyze larger shifts from self-reinforcing search patterns.²⁶³ For example, a user might be prompted to input neighborhoods that she knows she would like to search within, and the app might automatically blend the results with those from similar neighborhoods with which she might be less familiar.

Certain search tools might even enable a kind of “blind booking” model with respect to setting up appointments to see residential units.²⁶⁴ Such an

²⁶¹ See, e.g., J.B. Wogan, *Can Social Impact Bonds Help Reduce Homelessness?* GOVERNING, Sept. 8, 2015, <http://www.governing.com/topics/finance/gov-social-impact-bonds-help-santa-clara-county-reduce-homelessness.html>; Ronnie Horesh, *Injecting Incentives Into the Solution of Social Problems: Social Policy Bonds* 20(3) ECON. AFFAIRS (2000); Hanna Azemati et al., *Social Impact Bonds: Lessons Learned So Far*, COMMUNITY DEVELOPMENT INVESTMENT REV. (April 2013), <http://www.frbsf.org/community-development/publications/community-development-investment-review/2013/april/social-impact-bonds-lessons-learned/>

²⁶² See Ken Kollman, John Miller, & Scott Page, *Political Institutions and Sorting in a Tiebout Model*, 87 AM ECON REV. 977, 989 (1997) (“A minor mistake . . . can dislodge the system from a relatively bad local optimum, and induce agents to re-sort themselves into a better configuration.”).

²⁶³ See Richard R.W. Brooks, *The Banality of Racial Inequality* (reviewing ROITHMAYR, *supra* note 5), 124 YALE L.J. 2626, 2655-61 (2015) (discussing Roithmayr's use of the Polya urn model to illustrate path dependence and explaining how introducing random variation into the urn-filling operation could break the pattern). Cf. Jarno M. Koponen, *We Need Algorithmic Angels*, Crunch Network, April 18, 2015, <http://techcrunch.com/2015/04/18/we-need-algorithmic-angels/> (identifying a need for an “algorithmic aid” that, among other things, “exposes you to alternative choices and diverse worldviews”); Ellie Anzilotti, *This Mapping App Is Designed for Urban Wanderers*, Atlantic CityLab, Feb. 23, 2016 <http://www.citylab.com/navigator/2016/02/this-app-will-turn-you-into-an-urban-wanderer/470577/> (describing the Likeways wayfinding app that consciously builds in serendipity and takes users by less traveled paths).

²⁶⁴ Under these models, consumers commit to a particular expenditure, such as for a hotel or a flight, before learning exactly where they will be going or what they will be getting. See, e.g., Susan Stellin, *Taking Some Mystery Out of Blind Booking*, N.Y. TIMES, March 28, 2013, http://www.nytimes.com/2013/03/31/travel/taking-some-mystery-out-of-blind-booking.html?_r=0; Scott McCartney, *The Best Airline Bargains, If You Have a Taste*

approach could allow the user to set detailed parameters about commuting times from employment and school locations, the specifics of the housing unit itself, and the non-protected characteristics of neighbors. Apps and search tools might also make use of certain kinds of information and not others, or require a separate “unmasking” step to consciously gain certain pieces of data about racial composition or the racial identity of counterparties (such as might be derived from pictures). It could become an act of social consciousness to choose search tools and settings that mask information that could, even unconsciously, lead to biased actions.²⁶⁵

While this family of approaches wouldn’t be of interest to every homeseeker, tools for debiasing search could soften preconceived ideas about how one goes about finding a residence and change norms surrounding the search process. By incentivizing the use of search technologies that consciously embed surprising results, law and policy could take a more active role in disrupting segregated housing patterns.

CONCLUSION

Our fair housing laws express a normative commitment: that race will not influence the housing opportunities that one receives, and that one’s life chances will not be arbitrarily limited by residential racial segregation. Recent events have shown a renewed willingness to deliver on that promise. In *Inclusive Communities*, the Supreme Court not only recognized a disparate impact cause of action in the Fair Housing Act, but also reaffirmed that integration remains a continuing goal of the Act. With a new final rule, HUD has taken concerted action to pour more content into the Fair Housing Act’s affirmatively further mandate. The time is ripe to consider what the future of fair housing should look like. That future, I suggest, should include more careful attention to housing search.

Homeseeking bias currently interposes a gap between the rights that fair housing law aspires to extend to all households and the liability that it generates for actors who interfere with those rights. Because biased search represents a form of intentional discrimination that can powerfully entrench segregation, leaving it unredressed requires some justification. Ignoring search means shifting costs somewhere else—either to those who lose out

for Adventure, WALL ST. J., Sept. 2, 2015, <http://www.wsj.com/articles/the-best-airline-bargains-if-you-have-a-taste-for-adventure-1441214282>

²⁶⁵ See Edelman & Luca, *supra* note 170 (finding racial discrimination against Airbnb landlords based on profile photos); Jennifer L. Doleac & Luke C.D. Stein, *The Visible Hand: Race and Online Market Outcomes*, 123 ECON. J. F469 (2013) (finding racial discrimination in online sale of iPods based on hands visible in the image); see also Benjamin Edelman, Michael Luca, & Dan Svirsky, *Racial Discrimination in the Sharing Economy*, unpublished manuscript (2016), available at <http://www.benedelman.org/publications/airbnb-guest-discrimination-2015-12-09.pdf> (finding that Airbnb guests with distinctively African-American names had their requests rejected more often than guests with distinctively white names).

as a result of these cumulative search patterns, or to some other actors that the law will hold to account.

This paper presents a two-pronged approach to the search gap. First, we should not accept at face value the conventional view that the conduct of homeseekers is untouchable. While there are good normative reasons to avoid intruding into the ultimate decisions that homeseekers make, this does not mean that all facets of homeseeking should be exempted from scrutiny. Second, to the extent that we cannot or will not reach discriminatory homeseeking, the gap that it produces requires something more of other actors than the bare duty not to intentionally discriminate. Both the disparate impact cause of action and the affirmatively further mandate provide legal hooks for shifting the costs associated with biased search onto parties who are in a position to bear or mitigate those costs.

Discriminatory search is, of course, only one source of the overall right-duty gap found in fair housing. This paper's deep conceptual and doctrinal dive into search has necessarily left unaddressed many other contributors to segregation and, more broadly, to social inequities associated with residential patterns.²⁶⁶ The analysis here thus addresses only one piece of a large and difficult puzzle—but it is an important piece, and one that should no longer be neglected. Simply leaving the costs of biased homeseeking on those who are the subjects of discrimination is not consistent with the promise of fair housing. We must search for better alternatives.

²⁶⁶ See, e.g., Tama Leventhal et al., *Children in Neighborhoods*, in HANDBOOK OF CHILD PSYCHOLOGY AND DEVELOPMENTAL SCIENCE Ch. 13 (7th ed.) (Richard M. Lerner, ed., 2015) (reviewing the literature on links between children's neighborhood environments and life outcomes); Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, AM. ECON. REV. (forthcoming 2016), available at <http://scholar.harvard.edu/hendren/publications/effects-Exposure-Better-Neighborhoods-Children-New-Evidence-Moving-Opportunity>.