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SOME THOUGHTS AND REFLECTIONS ON THE FORTIETH ANNIVERSARY OF THE NEW YORK CITY HUMAN RIGHTS COMMISSION

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Professor Schill's paper on the New York City Human Rights Commission provides a great deal of valuable data, history, and insightful analysis into the New York City Commission on Human Rights' operations. Following Professor Schill's framework, this essay will comment on the three sections of his paper: (i) the statistical evidence of discrimination, (ii) its consequences for the minority community and the history and operation of the Commission, (iii) and its prospects for the future.¹

I. The Evidence of Discrimination

The charts and data that Professor Schill has cited reflect three basic issues in housing discrimination. First, he shows national patterns reflecting racial and ethnic discrimination in the housing market. Second, he extrapolates some of that data and applies it to the New York City market. Finally, he cites data and charts indicating the debilitating impact that housing discrimination has on minority communities.

The inescapable conclusion that must be drawn from this data is that the New York metropolitan area remains a highly segregated region where opportunities for integrated living and fair and equal treatment in housing lag behind other regions of the country.²

* Associate Professor of Law, City University of New York School of Law. I would like to thank my colleagues Professor Conrad Johnson and Professor Mary Zulack at the Columbia Law School Fair Housing Clinic. Through them I have learned a great deal about litigating housing discrimination cases. The views expressed here are my own and do not reflect those of the clinic. However, my colleagues have generously shared their experiences in practicing before the City Commission on Human Rights and these conversations have been particularly valuable in the preparation of this article. I am also indebted to Michelle Morales for her research assistance.

1. See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332-3 nn.3-4 (1988).

2. Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination In Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991 (1996).

Two pieces of data are particularly compelling in Professor Schill's analysis. The first is what whites and blacks perceive as integrated living arrangements are quite different. Whites generally prefer few if any blacks in their immediate neighborhood, despite the fact that some surveys show a general acceptance of the principles of equal housing opportunity in the white community. Even those whites who are willing to live in integrated communities perceive integration as a ratio of blacks to whites that substantially favors whites.³ Changes in this racial balance have been characterized by housing experts as the "tipping factor." As the ratio of blacks to whites in a building or neighborhood goes up, this "tipping" of the scales of perceived acceptable integration accounts for many white residents' willingness to abandon an entire community when black presence becomes too evident.⁴

Blacks, on the other hand, tend to prefer housing integration in roughly equal proportions. Although this ideal is rarely achieved, it nevertheless reflects the general commitment to integrated housing prevalent in most black communities and a grudging recognition that if they do not have numerical parity with their white neighbors, subordination rather than equality may ensue.⁵

Professor Schill also cited a 1991 national study which concluded that in 53% of renting inquiries for blacks, and in 46% of renting inquiries for Hispanics, they faced discriminatory experiences.⁶ When New York was isolated within the national survey, the low end estimates of the incidence of discrimination in New York was still as high as 40% for black renters and 53% for Hispanics.⁷ Some of the difference between the national and the New York figures for discrimination suffered by Hispanics may reflect that the Hispanic population of New York is largely drawn from the Caribbean and as a result many of them reflect their greater lineal mixture from persons of African decent even though they would not

3. *Id.* at 995. See also DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 92-93 (1993)(discussing various studies which show that whites have little tolerance for racial mixtures above 20% black).

4. MASSEY & DENTON, *supra* note 3, at 92. See also *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1099 (2d Cir. 1988), where an expert witness testified that tipping occurs as low as 1% and as high as 60%, but the consensus was that the typical range was between 10% and 20%. In this case, housing officials allegedly tried to prevent white flight by maintaining quotas on the number of black applicants that would be accepted in the housing complex.

5. MASSEY & DENTON, *supra* note 3, at 91.

6. Schill, *supra* note 2, at 998.

7. *Id.*

classify themselves as black.⁸ Unfortunately, people who are biased against blacks will act on their perceptions of who is black regardless of the nuances of ethnic, racial and national identification.

These figures certainly suggest a high incidence of housing discrimination in New York, and provide an interesting contrast to the figures put forward by the New York City Commission on Human Rights showing the number of complaints filed with those agencies alleging housing discrimination. In New York City, there were 266 complaints filed alleging housing discrimination during the two year period from January 1992 through December 1993. Approximately one third of these complaints alleged racial discrimination and one fifth alleged national origin discrimination.⁹ For the same period the State Division on Human Rights received 371 complaints statewide. Of these, 184 were racial discrimination claims and 90 were national origin claims.¹⁰ In the two year period 1994-95, there were 38 complaints filed with HUD claiming race, national origin or a combination of race and national origin discrimination, along with another protected category such as sex or family size.¹¹

It is difficult to reach any definitive conclusions from these figures. The State Division of Human Rights did not have a breakdown for cases originating only from New York City. HUD's figures, though only for the city, were not available for the same time period as those reported for the Commission and the State Division. Despite these differences, a reasonable hypothesis is that if these figures cited by Professor Schill are accurate—that the average black or Hispanic housing seeker may face a discriminatory incident in 40-50% of their searches—then there are far more incidents of housing discrimination occurring than ever make it to the complaint stage of all three administrative enforcement agencies combined, which should be the primary vehicles for enforcing our fair housing laws.¹²

8. In New York State, 12.1% of Hispanics also identify themselves as Black, whereas in California the figure is only 1.2%, and in Florida 3.4%. 1990 US Census Data, available at <<http://www.census.gov/cdrom/lookup>>, Database: C90STF1A.

9. Schill, *supra* note 2, at 1230.

10. NEW YORK STATE DIVISION OF HUMAN RIGHTS, ANNUAL REPORT 1991-93, at 11.

11. Computer print out provided by the Director, Enforcement Center, HUD Fair Housing and Equal Opportunity New York/New Jersey Office (February 21, 1996) (on file with the author).

12. Part I of Professor Schill's paper systematically analyzes the statistical evidence of discrimination in renting, buying and lending. Although he is understanda-

There are several possible reasons for this problem. Most civil rights enforcement agencies don't typically have a high public profile, despite the fact that each periodically advertises their presence and their work.¹³ Furthermore, there exists a lack of public confidence in the ability of the Commission to achieve results, particularly because of the substantial case backlog.¹⁴ Thus, in all probability, no action will be taken in time to actually affect the claimant's housing search.¹⁵

Additional factors have more to do with the realities of the typical housing search in New York City. New York City is overwhelmingly a rental market.¹⁶ Although figures fluctuate, the typical vacancy rate is low, around 3-4%.¹⁷ As a result, the market for housing is highly competitive. Usually prospective buyers or renters are under time constraints—they must provide the typical thirty day notice to their existing landlord. Then a tenant is under the pressure of an expiring lease to find a new apartment just as their existing lease is ending.¹⁸ Therefore, if minority housing seekers experience discrimination during their search, they may forego

bly cautious about the conclusions that can be drawn from the national surveys, what is most striking about the data is that when they are conservatively applied to a housing market of the size of New York's, the inescapable conclusion is that many victims of discrimination are simply not filing complaints. See Schill, *supra* note 2, at 998-99 & n.34.

13. See TASK FORCE ON THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, TASK FORCE REPORT 97 (1988) [hereinafter TASK FORCE REPORT]. One of the recommendations called for the Commission to develop a more comprehensive public information and education program. While subsequent annual reports from the Commission show some progress, particularly in anti-bias efforts in the schools, there is not as much visibility around their housing bias efforts.

14. Although there do not appear to be any comprehensive studies or surveys measuring the views of persons who have experience discrimination and their attitude toward the Commission, anecdotal evidence from conversations with several members of the civil rights bar revealed diminished confidence on their part in utilizing the Commission as an effective forum for their clients. The Commission is faced with the dilemma that if it encourages such a study, it might verify the anecdotal evidence and bring the agency under public criticism at a time when it is honestly struggling to improve.

15. *Id.*

16. In New York City there are 2,992,169 housing units, of which 2,012,023 are rental units. 1993 NEW YORK STATE STATISTICAL YEARBOOK 295 (1993).

17. *Id.* But see Deirdre Carmody, *Graduates' Guide to Apartment Hunting*, N.Y. TIMES, Apr. 25, 1982, § 8, at 1 (calculating the vacancy rate at 2.13% citywide and only 1.9% in Manhattan).

18. See generally Nick Ravo, *Big Demand And Short Supply Lift Rents In Manhattan*, N.Y. TIMES, Apr. 23, 1995, § 9, at 1; Michael deCourcy Hinds, *Tales of Apartment Hunting: How Some Succeeded*, N.Y. TIMES, Feb. 16, 1986, § 8, at 7; Deirdre Carmody, *Hard to Find, Harder to Afford: A Decent Manhattan Apartment*, N.Y. TIMES, July 19, 1984, § 8, at 1. Each article chronicles the high demand and short

spending time to file a complaint to devote their full attention to securing a new place to live.¹⁹

These factors indicating a victim's possible aversion to filing a complaint suggest that the real incidence of housing discrimination is just as high as the data cited by Professor Schill. Even if the accuracy of the figures is debatable, the Commission must begin to explore ways to improve both its public profile as a committed guardian of civil rights and its actual delivery of services in the community. Hopefully, as a result of those efforts, future studies will show marked improvement in the ratio of the probable incidents of housing discrimination in New York and the number of legal remedies actually pursued.

II. The Consequences of Racial Discrimination

Prof. Schill's paper focuses on some of the more material dimensions of the impact of housing segregation on members of the minority community,²⁰ including an increase in the concentration of poverty in minority neighborhoods,²¹ a significantly lower rate of home ownership among minority home seekers, diminished employment opportunities and an increase in the social problems normally associated with concentrations of poverty.²² These factors together greatly diminish the opportunity for neighborhood quality for minorities. Another impact of this discrimination is the diminished choice for educational opportunity, especially for families with young children who rely almost exclusively on neighborhood schools.²³ Each of these effects is critically important and should rightfully draw the attention of agencies like the Commission.

The consequences of racial discrimination in housing were best described in the landmark decision *Brown v. Board of Education*.²⁴ Chief Justice Warren wrote that state imposed segregation "generates a feeling of inferiority as to [the black children's] status in the

supply of decent housing in the city and the extraordinary efforts necessary for a renter to get good housing.

19. Cf. Schill, *supra* note 2, at 1023-24. It took an average of seventeen months to resolve a housing discrimination claim in 1992-93. This unfortunate reality is fairly well known in community housing circles, where referrals for assistance often originate.

20. *Id.* at 999.

21. *Id.* at 1003.

22. *Id.* at 1004.

23. New York City ranks third in the nation for major cities with the most segregated school systems. Seventy five percent of the black children in New York attend a segregated school. See ANDREW HACKER, *TWO NATIONS* 168 (1995).

24. 347 U.S. 483 (1954).

community that may affect their hearts and minds in a way unlikely ever to be undone."²⁵ Warren referred at least in part to Dr. Kenneth Clark's psychological studies on black children in segregated schools, concluding that the stigma of state enforced separation had profound effects on Negro children,²⁶ including a diminished sense of self-worth on the part of the victim and a distorted sense of social identity.²⁷

Although courts have historically provided monetary awards for emotional harm, courts have only recently begun applying this remedy to housing discrimination.²⁸ Usually courts would calculate the difference in amenities between an apartment sought and one denied, plus the increased cost of being forced to secure more expensive living quarters,²⁹ changes in interest rates and mortgage application fees,³⁰ as well as any time a plaintiff may have lost from work because of the discrimination.³¹ Courts have also awarded damages for the general denial of the individual's civil rights.³² In some cases, courts will award punitive damages, or, in the case of the Commission, civil fines which follow a fairly well established pattern. The egregiousness of the behavior, the number of persons affected by the discriminatory conduct and past offenses of a land-

25. *Id.* at 494.

26. *Id.* at 495 n.11 (making specific reference to psychological studies by Clark and other psychologists).

27. Critics of Clark's work have attacked his conclusions and the viability of his study as a basis for the courts conclusions. *See, e.g.,* Harold Gerard, *School Desegregation: The Social Science Role*, 38 AM. PSYCHOL. 869, 870-72 (1983). Despite its weaknesses, subsequent work has substantiated the claim that a discriminatory event or series of events can cause measurable psychological harm. *See* Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39 (1992).

28. *See* JOHN RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL 6-1 to 6-8 (1995). *See also* Alan Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages In Fair Housing Adjudications*, 26 J. MARSHALL L. REV. 3 (1992). Through a combination of more awareness and better preparation, civil rights lawyers are winning larger awards for emotional distress than in previous years.

29. *Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985) (awarding additional rent).

30. *HUD v. Morgan*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,008, at 25,142 (H.U.D. A.L.J. July 25, 1991) (awarding increase in carrying costs).

31. *HUD v. Properties Unlimited*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,009 (H.U.D. A.L.J. Aug. 5, 1991) (awarding costs for missed workdays and travel to and from the hearing).

32. *HUD v. Tucker*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,033, at 25,350 (H.U.D. A.L.J. Aug. 24, 1992) (holding that the loss of a civil right encompasses any tangible injury that resulted from the discrimination other than emotional distress).

lord or broker are factored into a calculus of harm and attached to some scale of civil penalties.³³

These remedies are generally categorized as objective, because they are usually supported by evidence that is easy to present in economic terms.³⁴ An area that bears great scrutiny by the Commission, however, is the emotional harm aspect of housing discrimination cases. There are a number of cases brought by the Commission in which damages for emotional distress have been awarded.³⁵ Nevertheless, more can and should be done in this area, especially at the earliest stages of housing discrimination cases filed with the Commission. Given the existing procedures for processing cases at the Commission, this is an area where improvements can be fully and easily integrated into the case management system.

Judges tend to focus on the compensatory damages, because they are more easily classified and measured, and punitive damages, because they reflect the law's purpose to deter future transgressions by punishing egregious conduct.³⁶ Judges must also realize that discrimination can be a crippling experience for those who are subjected to it, and uncovering the nature of the experience requires not only skill and training, but also insight and empathy.³⁷

33. See Heifetz & Heinz, *supra* note 28, at 9 (punitive damage awards focus on the respondent's conduct).

34. *Id.* at 10.

35. The Commission has broad equitable powers for fashioning remedies pursuant to Section 8-120(a) of the New York City Administrative Code, and has historically used its authority to award damages for emotional harm. See *Freidman v. Swartz*, Compl. Nos. FH-290102488-DG and FH-82032389-DH, Rec. Dec. and Ord. (July 24, 1990), *adopted as modified*, Dec. and Ord. (N.Y.C.C.H.R. June 6, 1991) (awarding \$5,000 to each Complainant for the denial of an apartment).

36. See Heifetz & Heinz, *supra* note 28, at 9 ("[j]udges arrive at a final assessment of damages by synthesizing their legal knowledge, understanding, and experience, together with the weight of the evidence in the particular case").

37. Three professionals who have direct experience in assessing emotional harm in housing discrimination cases have slightly different approaches to the issues raised in their work. Administrative Law Judges Heifetz and Heinz believe that relying upon the testimony of the victim, expert witness testimony or corroborating evidence from friends or family, judges are as prepared to assess emotional damages as they are any other form of relief that rests on subjective as well as objective factors. See *id.* at 17-24. Another view is that lawyers, and by implication judges, need to be sensitized through careful training to understand and therefore effectively respond judicially and humanly to the full range of feelings that a victim of discrimination may experience. See generally Heinrich, *supra* note 23. See also Michael Seng et al., *Counseling the Victim of Discrimination in a Fair Housing Case*, 26 J. MARSHALL L. REV. 53 (1992); Dr. Hugh Butts, *Housing Bias Takes a Psychiatric Toll*, THE MEDICAL HERALD, Aug. 1994, at 15. Dr. Butts is a practicing psychiatrist and consultant with the Columbia

Psychiatrists and psychologists described the experience of facing a discriminatory incident as a trauma to the psyche, no less so than emotional traumas that have been given more recognition under the law.³⁸ Frequently, however, the depth of the emotional harm is an underdeveloped aspect of housing cases. Most lawyers focus on developing the evidence to support the allegation that the discrimination actually occurred. Since most cases rely on circumstantial evidence that can be difficult to prove, evidence of the emotional experience of the victim is usually provided through their own testimony.³⁹ Yet in discrimination cases it is not unusual for the victim to repress the impact of the discriminatory event, and thus be unable to testify in regard to the effects of the trauma of the discrimination.⁴⁰ The mental health profession has reminded us that every act of racism, even those that might seem slight, is nevertheless a real, measurable and very destructive blow to the psyche and self-esteem of its victim.⁴¹ The task for lawyers in this field, and here I include all the personnel who are part of the investigatory and adjudicatory process at the Commission, is to translate our medical understanding of the impact of discrimination on the psyche and its potential long range consequences into preservable and demonstrable evidence at the earliest stages of their contact with the victim. This essay will not explore this issue, but merely point out how critical the recognition of the existence of discrimination is to both the claimant's sense of justice and the important role it can have in the ultimate resolution of housing discrimination cases.⁴²

It is important for the staff at the Commission to acknowledge the emotional harm aspect of its cases throughout the processing of a discrimination claim. Thus, the Commission's conciliation agree-

Fair Housing Clinic. He believes that expert witnesses are essential to presenting to a tribunal a fuller understanding of the nature of emotional trauma and that cross cultural differences between the victim and judge or jury might have to be factored into expert testimony in order to fully value the experience of a black victim.

38. See Heinrich, *supra* note 27, at 47; Butts, *supra* note 37, at 15.

39. See RELMAN, *supra* note 28, at 6-2; Heifetz & Heinz, *supra* note 28, at 19 n.86 ("When evidence of emotional distress amounts to no more than a few lines of testimony from the victim, counsel appear to have focused their energy primarily on liability issues to the neglect of remedy issues, which are often the primary, if not exclusive, reason the case progressed to trial.").

40. See Butts, *supra* note 37, at 15; Heinrich, *supra* note 27, at 48. Both point to denial as a common characteristic reaction by victims of discrimination.

41. *Id.*

42. See RELMAN, *supra* note 28, at 6-5 (commenting that in the last three years there has been an increase in the number of compensatory damage awards, most of which have focused on the depth of emotional harm suffered by the victims).

ments and successful mediations often result in a resolution in which an acknowledgement that a wrong was done, along with an apology and an agreement not to allow discrimination to occur again, is part of the resolution of the case. This outcome at least implicitly recognizes the psychologically damaging impact that the discrimination had on the victim.⁴³ This is the type of action by the Commission which should be encouraged and expanded.

The Commission should also consider working more closely with mental health practitioners to train its investigators and attorneys to recognize and develop this type of evidence.⁴⁴ Continuous use of an emotional harm check list may facilitate this process and preserve and record evidence for the future stages of the case.⁴⁵ Since the percentage of probable cause findings is quite low,⁴⁶ the gathering of any more information on the emotional state of the complainant could await a finding of probable cause. Since some cases are mediated or settled even before probable cause finding is found, an emotional harm check list could be a valuable tool for the mediators even at the very earliest stage of the complaint process. Following a probable cause determination the check list could be a starting point for efforts to substantiate the nature and the effects of the emotional harm. The Commission can then refer claimants to mental health services not only to assist them by providing evidence of the harm through their reports or expert testimony, but also to play a positive role in helping the claimant regain his/her equilibrium.⁴⁷

Victims of discrimination who choose the agency route will first encounter administrative intake personnel and at another point in the process will see or hear from an investigator. It is not until after a probable cause finding—which may take a year or more—that the process moves forward toward either a hearing or further mediation or conciliation.⁴⁸ Unless this evidence is recorded at the intake stage the emotional trail may become cold and the victim may quite understandably attribute the effects from that traumatic

43. NEW YORK CITY COMMISSION ON HUMAN RIGHTS, 1995 ANNUAL REPORT 11 (1995).

44. Interviewing for evidence of trauma at the intake stage of a complaint requires a special skill.

45. See RELMAN, *supra* note 28, App. at 4N; Conrad Johnson, Emotional Harm Checklist (Jan. 24, 1996) (unpublished training materials for Fair Housing Legal Training sponsored by the Open Housing Center Inc., on file with the author).

46. Schill, *supra* note 2, at table 6.

47. Butts, *supra* note 38, at 15.

48. See NEW YORK CITY COMMISSION ON HUMAN RIGHTS, 1995 ANNUAL REPORT 9 (1995).

event to other causes.⁴⁹ If intake workers and investigators are trained to look for emotional harm evidence at the earliest practical stages of a complaint, not only will the evidence be preserved for the later stages of the proceeding, but the mere acknowledgement of the reality of emotional harm by the official investigating body will begin the process of the victim becoming whole once again. In fact, early recognition and acknowledgement of the effects of the discrimination can begin the healing process, regardless of the eventual outcome of the case.⁵⁰

Delving into the realm of psychic harm is not an area where attorneys are most comfortable.⁵¹ Also, it is understandable that in an agency beset with fiscal problems, issues of staff turnover and case backlog, undertaking any new initiative would be a matter of concern. However, any early acknowledgement of the emotional harm that accompanies discrimination could potentially have a profound meaning to those who have been victimized.⁵²

III. The Effects of Discrimination on the Victim's Future Housing Search

The psychological consequences of racial discrimination may influence the behavior of the victim in his or her future housing searches. Professor Schill correctly points out that the concentration of a single race or nationality in a particular area of the city is not by itself proof that the neighborhood formed as a result of discrimination.⁵³ While some of these concentrations can be attributed to a desire by minorities to live in an area where they feel comfortable, the psychological impact of housing segregation has a collective effect for all minorities. One of the reasons that African Americans prefer a racially balanced neighborhood is that otherwise they face many different forms of discrimination, many of which are not actionable under law, which generate feelings of a need to be protected from the rejection and animosity that be-

49. See Seng, *supra* note 37, in which a hypothetical client is analyzed by a psychologist. Speaking of her past experiences with discrimination and the way in which they merged with her recent housing discrimination incident, the authors write that "she has absorbed influences from both the larger society and her family as she grew up. She used denial as a coping mechanism, encapsulating the pain and anger, confusion and self doubt, engendered by these experiences, as it were sealing them off . . . she designated them ancient history, split them off and buried them." *Id.* at 64.

50. Dr. Hugh Butts, Lecture before the Columbia Fair Housing Clinic (Feb. 29, 1996) (reviewing his forensic psychological report on one of the clinic's clients).

51. Seng, *supra* note 37, at 55.

52. Butts, *supra* note 37, at 15.

53. Schill, *supra* note 2, at 995.

comes part and parcel of the daily experience of being a minority in a predominantly white culture.⁵⁴ The desire to live in a racially balanced neighborhood might reflect the building of a kind of psychological safety net where discrimination would have a smaller effect than it would in an environment where black social life is more dependent on white society.⁵⁵

The cautious approach that blacks take toward integration might also reflect a recognition that whites could only be free from cultural biases by creating a neighborhood environment, outside the normal construct of the dominant culture. Under those circumstances blacks and whites could meet and interact on a truly egalitarian basis.⁵⁶ This paradigm of equality, though rarely achieved,⁵⁷ demonstrates deep insights by the blacks surveyed into one of the lesser acknowledged aspects of racism. Blacks and whites both become trapped in stereotypes and suspicions, so that a truly integrated neighborhood, an almost mythical model of equality, is a potential way out for both.

The psychological effects of discrimination that traumatize the psyche of the victim may also affect his or her behavior in the housing market. The data cited by Professor Schill indicates that the experience of discrimination while attempting to find housing runs very deep in the black community.⁵⁸ Because everyone seeks housing at one time or another, and oftentimes more than once, the number of discriminatory events that minorities face is multiplied over their lifetime. Whenever someone is rejected on the basis of an immutable characteristic such as race, he or she experiences a profound sense of loss of control over their life.⁵⁹ Many experience a loss of self esteem, and varying degrees of de-

54. See MASSEY & DENTON, *supra* note 3, at 90-91 (observing that blacks' statistical preferences for the level of integration of a neighborhood are driven in part by a very real fear of white hostility to their presence).

55. *Id.*

56. *Id.* at 91.

57. *Id.* at 64. The table calculating the degree of spatial isolation of black residents shows that with few exceptions, in most metropolitan areas it is very unlikely that blacks and whites share a neighborhood.

58. Schill, *supra* note 2, at 998-99. See also Richard Morin & Dan Balz, *Shifting Racial Climate: Blacks and Whites Have Greater Contact But Sharply Different Views Poll Finds*, WASH. POST, Oct. 25, 1989, at A1 (when asked about discrimination in housing 52% of blacks surveyed said that they had been the victims of housing discrimination).

59. Butts, *supra* note 37, at 15 ("While post traumatic stress symptoms are frequent sequelae to housing discrimination, a vast array of symptoms may occur, depending on the level of personality disorganization of the victim."). See also Heinrich, *supra* note 23, at 47 ("The syndrome is similar to those symptoms that are associated

pression or anxiety is common.⁶⁰ Their expectations, as well as aspirations, diminish.⁶¹ Victims feel that they themselves are somehow at fault for the rejection they experienced.⁶² Given these common reactions to trauma, African-American renters or buyers may disregard entire segments of the housing market, regardless of actual discrimination. These self imposed limitations, in addition to externally imposed limitations, result in racially concentrated neighborhoods. Thus, the concept of free choice in the housing market must, like most other social characteristics, be differentiated along lines of racial groups.

Finally, we should not ignore the corresponding psychological impact on whites who consciously or unconsciously choose to live in homogeneous "white" neighborhoods.⁶³ Their contact with people of color is limited, thus depriving them of the social interaction necessary to dispel myths and stereotypes.⁶⁴ Although surveys demonstrate that an overwhelming number of whites believe in equality, it can become a mere abstraction in a segregated community. Thus, as whites falsely perceive a world where equality exists, the social reality is continued segregation. This situation produces characteristics of social psychosis where the problems of discrimination cannot be addressed because so many whites simply do not see blacks as part of their existence. This racial blind spot contributes to the persistent obstacles to establishing integrated communities.⁶⁵

with the Post Traumatic Stress Syndrome" although the trauma of discrimination may not bear all the elements of the syndrome as classified by DSM-III-R).

60. Butts, *supra* note 37, at 15.

61. Seng, *supra* note 37, at 59-66 (describing how their hypothetical victim of discrimination, although about to graduate from medical school, is fearful about her future and feels that she has to mask the anger and pain that she experienced).

62. *Id.*

63. MASSEY & DENTON, *supra* note 3, at 97 (concluding that anti-black prejudice, though not as overtly expressed as in the past, is still the driving force behind residential segregation). Concerning whites' choice to live in white neighborhoods, Massey & Denton state that "[s]ome method must exist . . . to limit black entry into a few neighborhoods and to preserve racial homogeneity in the rest. Although white prejudice is a necessary precondition for the perpetuation of segregation, it is insufficient to maintain the residential color line; active discrimination against blacks must occur also." *Id.* See also JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1984) (arguing that we have entered an era of "metaracism," which the author likens to an aversive personality disorder characterized by distance, lack of human feelings, and detachment).

64. See MASSEY & DENTON, *supra* note 3, at 92-95.

65. Joel Kovel offers his underlying thesis of the effect of racism on the white psyche:

IV. Commission Procedures

Professor Schill's history of the evolution of fair housing law and the growth of the City Commission on Human Rights demonstrates the City's commitment for equal housing opportunities, despite the often considerable opposition.⁶⁶ The City Fair Housing statute, though similar to Title VIII of the Civil Rights Act of 1968, predates the passage of the federal statute by twenty years, demonstrating a dogged determination by political forces in the city to give real substance to our legal concept of equality.⁶⁷

Unfortunately, the City's fair housing laws have always existed in a schizophrenic environment. Although they profess our collective commitment to equality, they allow people in the market place to select their housing within the limits of their income on any biases that they wish. Although landlords, brokers and sellers are prohibited from discriminating, individuals seeking housing are not.⁶⁸ This fact may have influenced the changing priorities at the Commission over the years. The Commission has helped open up segregated neighborhoods to minority residents,⁶⁹ and has uncovered and prosecuted pattern and practice cases, particularly against real estate brokers.⁷⁰

This evolution raises concerns about the future direction of the Commission. With the cuts in the Commission's budget, significant changes in the staff and the Mayor's view that the agency should concentrate on more efficient enforcement,⁷¹ it is hard to tell whether the Commission has been able to develop a coherent vision of the city and the place of the agency within it, or whether it is precariously locked into a reactive position. This is particularly

As humans we demand self expression and recognition. We insist on the integrity of the "I", which recognizes itself in the other person and is recognized in turn. Racism, however, is the domain of the Other. . . . [T]he Other is seen not for what it is, but for what it evokes. Thus the real being of the black person becomes insignificant in contrast to the intrinsically inconsequential color of his or her skin.

KOVEL, *supra* note 63, at xliii.

66. Schill, *supra* note 2, at 1007-08.

67. *Id.* at 1006-10.

68. *Id.* at 995 (recognizing that individual preference plays a role in ethnic concentration). See also MASSEY & DENTON, *supra* note 3, at 109 (underscoring the persistence of discrimination despite the general acceptance of the principle of open housing).

69. Schill, *supra* note 2, at 1101.

70. *Id.* at 1012-13.

71. *Id.* at 1019.

unfortunate given the breadth of the city open housing law and the expanded categories of people who need its protection.

Since the enactment of Local Law 39 in 1991, New York has distinguished itself by having not only one of the oldest, but also one of the most progressive open housing statutes in the country.⁷² Although the expansion of protected classes has resulted in increased case responsibility, and a burdened agency budget, it has also offered hope and the opportunity for equality for many who were suffering discrimination in ways similar to those from the historically protected categories of race, color, creed and national origin.⁷³ Despite its problems, the Commission has established itself as a major voice to help define the meaning of equality for the city's citizens.⁷⁴

The road ahead, however, is not without pitfalls. Professor Schill has pointed out the case backlog is a significant issue that the Commission must address, unfortunately without additional resources.⁷⁵ The Commission's use of mediation and conciliation techniques seems promising, not only to save time and money, but also to provide a reasonable measure of satisfaction for the parties involved.⁷⁶

Against the backdrop of new complaints being filed every day and a very slowly receding backlog, the Commission must be vigilant to insure that the rights of individual claimants are not sacrificed in pursuit of expediency. Given the lengthy case backlog at the Commission, claimant's choices in reality are either mediation or a wait of more than two years for a resolution of their case. The need for victims of housing discrimination to have closure to these episodes in their life creates considerable pressure to seek an early solution. Although alternative dispute resolution in some cases will not only be timely but also appropriate, the Commission must scrupulously guard against any undue influence on the claimants' choice. Although it is too early to effectively evaluate mediations' overall impact on the backlog of cases, the figures show that there

72. *Id.* at 1015-18 (discussing the similarities and differences between the city, state and federal statutes). A distinguishing feature of the city law that is truly progressive is its coverage of alienage and sexual orientation. *Id.*

73. *Id.* at 1021 (noting that disability and sexual orientation now make up the two largest categories of housing discrimination complaints).

74. *Id.* at 1006-24 (describing the history of the Commission and some of its more significant accomplishments).

75. Schill, *supra* note 2, at 1019-20.

76. In addition to the non-adversarial nature of these processes providing a more humane resolution to conflicts, they are efficient and resolve cases in far less time than the normal adjudication process. See NEW YORK CITY COMMISSION ON HUMAN RIGHTS, 1995 ANNUAL REPORT 11-14 (1995).

has been a 44% increase in cases handled through mediation in 1995, and it may prove therefore to be a valuable tool for that purpose.⁷⁷

The Commission's annual report does not indicate whether it has devised a method for evaluating its mediation efforts. Although both claimants and defendants may be drawn to this process in order to reduce delays and to reduce the costs of litigation, it is equally important that both parties leave with a sense that the process was both fair and efficient. Despite the pressures on the Commission's budget, an outside evaluation might be a worthwhile item to contract out or seek to support through private grants. An independent and well publicized evaluation of the mediation process will not only be invaluable to the Commission, but may increase public awareness and public support for this process.

The Commission's Rules of Practice should also be reviewed for their fairness and effectiveness. In November, 1995, the Commission issued new Rules of Practice.⁷⁸ The revised rules restate the Commission's powers to close cases and dismiss complaints contained in the New York City Administrative Code,⁷⁹ but provide no new guidance concerning the application of these powers. Section 1-22 of the Rules states that:

The Law Enforcement Bureau may, in its discretion, dismiss a complaint for administrative convenience at any time prior to the taking of testimony at a hearing. Administrative convenience shall include, but not be limited to, the following circumstances:

- (1) Law Enforcement Bureau personnel have been unable to locate the complainant after diligent efforts to do so;
- (2) the complainant has repeatedly failed to appear at mutually agreed-upon appointments with the Law Enforcement Bureau or the Office of Mediation and Conflict Resolution personnel, or is unwilling to meet with the Law Enforcement Bureau or the Office of Mediation and Conflict Resolution personnel, provide requested documentation, or to attend a hearing;
- (3) the complainant has repeatedly engaged in conduct which is disruptive to the orderly functioning of the Law Enforcement Bureau;

77. *Id.* at 13.

78. 10 NEW YORK CITY RULES & REGULATIONS tit. 47, ch. 1, subch. C (1995 & Supp. 1996).

79. NEW YORK, N.Y., ADMIN. CODE § 8-113 (1996).

(4) where the complainant is unwilling to accept a reasonable proposed conciliation agreement . . .⁸⁰

Although the first three grounds that may constitute administrative convenience are similar to procedures at HUD⁸¹ and the State Division,⁸² the reasonable conciliation language in 1-22(a)(4) and the fact that the Commission may dismiss a case for other administrative reasons leaves the Commission with unusually broad discretion without any further guidance or standards. The Commission has failed to adequately address the issue of the administrative closure of cases, and did not anticipate the problem of consistency of application.

HUD, like the Commission, faces a significant case backlog, but has chosen to address the issue of administrative closure in cases by putting closure procedures within an overall policy context. HUD's Notice 94:1 begins with an acknowledgement that inconsistencies in the administration of case closure have been a problem.⁸³ The agency's general policy is to close cases only when an investigation cannot be completed.⁸⁴ If there is a complete investigation, the appropriate resolution is either a finding of reasonable cause or a finding of no reasonable cause.⁸⁵ If no reasonable cause is found, the closure is based on the merits.⁸⁶ The HUD procedures prohibit the use of administrative closure in lieu of a dismissal on the merits. The Commission, on the other hand, may close a case either for one of the four specified reasons⁸⁷ or for other reasons of administrative convenience.⁸⁸

HUD's approach towards administrative closures emphasizes the integrity and thoroughness of the investigatory process. Even if the agency finds no reasonable cause, claimants will at least have had the benefit of a thorough examination of the facts, measured against the requirements of the law.⁸⁹ This process is consistent because it instructs all parties involved in the investigatory process

80. 10 NEW YORK CITY RULES & REGULATIONS tit. 47, § 1-22.

81. See U.S. Department of Housing and Urban Development, Administrative Closure of Cases Under the Fair Housing Act, Notice 94-1 [hereinafter Notice 94-1].

82. Subtit. J, Part 465.5.

83. See Notice 94-1, *supra* note 81.

84. *Id.*

85. *Id.*

86. *Id.*

87. See 10 NEW YORK CITY RULES & REGULATIONS tit. 47, § 1-22 (a)(1)-(4).

88. *Id.* at § 1-22(a)(5)-(6).

89. See Notice 94-1, *supra* note 81, at 2.

to review the viability of a complaint by applying the same reasonable cause standards in each case.

Both HUD guidelines and the Commission rules provide three instances when administrative closure is appropriate. Closure applies (i) when an investigation cannot be completed;⁹⁰ (ii) when the complainant decides not to proceed; or (iii) when a trial in some other forum has already begun.⁹¹ The HUD guidelines, however, are distinctly different from the Commission's in that they expressly prohibit administrative closure if the claimant refuses to sign a conciliation agreement.⁹²

In analyzing the HUD guidelines, several basic premises become clear. First, they emphasize the importance of a claimant's feeling that his or her case has been fully investigated. For example, even when fairly objective criteria for closure are employed, such as the inability to locate a claimant, the guidelines require specific steps to be taken to locate the individual before recommending closure. Second, intake and investigative personnel are advised to encourage claimants to pursue cases to resolution, and to discourage claimants from agreeing to settlements to which the agency is not a party. This reinforces the agency's role both in monitoring the application of the discrimination laws and in scrutinizing the issues that prompted the complaint in the first place.⁹³

The Commission rule, however, strikes a different balance between the policy of enforcement, the role of the agency, and the rights of claimants. The two significant areas of difference are that the discretion to close cases is not limited to the specific reasons in the section,⁹⁴ and the Commission specifically reserves the right to close a case based on a claimant's refusal to accept a "reasonable" conciliation agreement.⁹⁵

90. 10 NEW YORK CITY RULES AND REGULATIONS tit. 47, § 1-22(a)(1)-(4).

91. Though not specifically addressed by the Rules of Practice, claimants at the Commission have a right to seek a dismissal of their complaint under Section 8-113(6) of the New York City Administrative Code. The genesis of this provision was the TASK FORCE REPORT, *supra* note 13. The report recommended that the statute be amended to allow for administrative dismissal of cases. *Id.* at 45. The recommendation seeks to balance interests of the claimant for a thorough and efficient review of their claim, and that of the Commission. The report goes on to say that due to the limited litigation resources of the Commission, claimants cannot expect all cases to go to a trial. The Commission must also have the discretion to dismiss a case if a reasonable settlement offer is refused. *Id.* at 46-48.

92. See Notice 94-1, *supra* note 81, at 2.

93. *Id.*

94. 10 NEW YORK CITY RULES AND REGULATIONS tit. 47, § 1-22(a).

95. *Id.* at § 1-22(a)(4).

There are several possible reasons behind the Commission's retention of such broad discretion. Just like private litigants, the Commission must consider the costs of litigation. The "reasonable agreement" rule may reflect the idea that the public interest is best served when the work of the Commission facilitates a resolution of a complaint. Because the Commission represents the public interest and not the specific complainant, the Commission views resolution as meeting its general mandate. The Commission's rules specifically reject the approach at HUD where any claimant who has a probable cause finding will have the final say in the ultimate decision to bring their complaint to a hearing.⁹⁶

Arguably, there may be good reasons behind the City's approach to case closure. Reserving a considerable degree of agency discretion over each case may facilitate the application of mediation, conciliation and litigation to enforce the statute. The Commission would have the ability to pressure claimants, who have an unrealistic view of their cases, to settle. Such pressure is fair if, in the judgment of the Commission, the respondents have made a good faith attempt at restitution, and would also decrease the costs of litigation for both parties. In some cases, reasonable settlement achieves just as much as proceeding through litigation. In addition, the issue of resources is significant. HUD specializes in housing matters whereas the Commission's responsibilities include employment, public accommodations, housing, as well as public education and investigative and reporting responsibilities along a wide range of bias issues.⁹⁷

Furthermore, there is nothing in the Commission's rules that provide any specific guidance on where and when a settlement is reasonable. The reasonableness of settlements is an evolving concept both within a case and among similar or dissimilar cases.⁹⁸ If too many cases are settled without the courts and administrative law judges having the benefit of hearing from advocates in individual cases who advance new theories on evidence, damages, and remedies, the agency will stagnate. The discussions that occur in the isolated setting of the Commission's settlement approval pro-

96. *Id.* at § 1-22.

97. NEW YORK, N.Y., ADMIN. CODE §§ 8-101 to 8-108.

98. See RELMAN, *supra* note 28, at 7-1.

cess are no substitute for the innovative advocacy which arises in an adversarial setting.⁹⁹

Unfortunately, decisions under the new Rules of Practice are being made in the shadows of the Commission's burgeoning caseload. Despite the Commission's strong record in seeking affirmative relief in its cases, fiscal pressures and their accompanying political pressures, are real and can often intrude into the processes of an agency in seemingly subtle, yet significant ways. And the sheer breadth of the Commission's discretion concerning administrative closure could easily lead to an uneven approach to the application of these rules.

Although claimants may appeal an administrative dismissal,¹⁰⁰ the Commissioner has no real guidance on standards to apply when reviewing the discretionary decisions of the Law Enforcement Bureau.¹⁰¹ Both the Commission and the public would be better served by a more specific section 1-22 that better articulates the purposes and policies supporting administrative closures. Individual cases could then be measured against these standards. HUD approached this problem by eliminating the provision for closure for failure to accept a reasonable settlement offer. The Commission should consider the same course, at least until the Rules of Practice can be amended to address the issues of unequal application and what constitutes a reasonable settlement offer.

99. *Id.* at 6-4 (observing that awards for emotional harm have increased over the last three years, as lawyers now prepare these issues more thoroughly and present expert witnesses and corroborating evidence).

100. NEW YORK, N.Y., ADMIN. CODE § 8-113(a)(6)(f).

101. 10 NEW YORK CITY RULES & REGULATIONS tit. 47, § 1-22(a)(4). The Rules of Practice of the Commission only reflect half of the recommendations of the Task Force Report. The arguments concerning agency efficiency and resource allocation are expressed in the broad discretion granted by Section 1-22 of the Rules. Unfortunately, other recommendations designed to provide guidance have been omitted. The Task Force Report recommended that if the Commission exercised its discretion to close a case because of the complainant's refusal to accept a reasonable settlement offer, not only should there be a right to an appeal, but "[a]dministrative review of such dismissals should be treated similarly to the review of determinations that no probable cause exists." TASK FORCE REPORT, *supra* note 13, at 48. Whereas HUD uses this standard along the full continuum of its case review process, the Task Force felt that it was at least necessary at the appeal stage. *See id.* But neither the Rules of Practice, nor the language concerning appeals in Section 8-113(6)(f), articulate a cognizable standard for application or review of the reasonable settlement offer requirement.

V. The Future of the Commission

The pivotal issue the Commission faces in the foreseeable future is how to reduce its backlog of cases while continuing to effectively carry out its present duties. Professor Schill has outlined some of the obstacles to this effort. The following section proposes approaches to solving these problems.

First, since all three administrative agencies responsible for enforcing housing discrimination laws face the same diminishing or stagnant resources and burdensome case backlog,¹⁰² the Commission might explore the possibility of cooperation with the State Division and HUD. The Commission may not be able to shift resources to focus on pattern and practice cases, but it could enlist one of the other administrative agencies to be more active in that aspect of their enforcement work. Also, the agencies could focus existing resources on particular areas of the city or on particular types of housing practices by comparing individual complaints by borough and census tract to reveal which neighborhoods are attracting minority housing seekers and where they are experiencing resistance.¹⁰³ Furthermore, cases from the three agencies might be coordinated so that a cluster of cases from a particular borough or neighborhood can be resolved in a similar time frame. Although this is not a classic approach to pattern and practice discrimination litigation, it could have a dramatic impact on a region within the city where housing discrimination is prevalent.

Close cooperation among three separate governmental agencies is not without significant obstacles. Governmental agencies of all types are very "turf conscious" and competitive, and bureaucratic inertia is always difficult to overcome. But the current prevailing anti-government sentiment in the country makes this an opportune time to be creative and take the risk of initiating a different approach. Any effort to reduce duplication and improve services to the public might meet uncharacteristic support from the political sector, and at the very least might lead to the perception that the Commission has a progressive vision for the future enforcement of fair housing laws in New York City.

102. Schill, *supra* note 2, at 1023-24.

103. For example, all three agencies need not focus on brokers if expertise and resources from one office might reasonably take the lead in that effort, allowing the others to concentrate on other areas. If specific regions are identified, groups like the Open Housing Center might be contracted with or simply encouraged to focus their testing in these areas. The Open Housing Center is a not-for-profit organization that tests, conducts referrals, counsels housing seekers who are actively looking for integrated areas to live in, and refers cases to the private bar.

Second, if the Mayor or the City Council would support the legislation necessary for the Commission to qualify as a local agency "substantially equivalent" to HUD, it would qualify the City as a participant in the Fair Housing Assistance Program (FRHP).¹⁰⁴ Under FRHP, the City would receive \$1,200 for every closed case.¹⁰⁵ The administrative changes, however, would need to include providing claimants with the option to go to court.¹⁰⁶ Because of this, any income the city might receive for participation might be far outweighed by the cost of additional staff attorneys necessary at the Commission and at the Corporation Counsel's office to insure that claimants had this option.¹⁰⁷

Finally, the Commission should follow the recommendation from the Task Force Report of 1988 and actively enlist the support of the private bar to help process cases more quickly and reduce its backlog.¹⁰⁸ One possible role to consider is to have private lawyers litigate some of the Commission's cases. Litigation is time consuming and occupies the full attention of the Commission's staff attorneys. If private attorneys could take on some of the backlog of cases the Commission staff might be able to improve the processing time on new cases. A second possibility is that private lawyers could act as mediators under the supervision of the Mediation and Conflict Resolution Unit. The third possibility is that other city agencies could employ private attorneys as per diem administrative law judges.¹⁰⁹ Since the lawyers in all three of these capacities would not be permanent members of the Commission's staff, they would only need to be called upon periodically to free Law Enforcement Bureau members for other duties. In addition to enlisting private attorneys for those roles, the Commission could also

104. See 42 U.S.C. § 3616a (1994).

105. Schill, *supra* note 2, at 1025.

106. See 42 U.S.C. § 3612 (1994).

107. As the city continues to experience fiscal difficulties, approval of any additional funds by the Mayor or the City Council is unlikely.

108. TASK FORCE REPORT, *supra* note 13, at 64. Although the Law Enforcement Bureau's supervision of the investigatory process seems to have had some positive effects in reducing the time to process a case, their efforts might be improved if the Commission could fashion a role for the private bar to play in their overall enforcement effort.

109. Currently, the Department of Environmental Protection, the Parking Violations Bureau, and the Taxi and Limousine Commission all employ part time private attorneys as administrative law judges. Although insufficient resources might seem to be an obstacle, the Commission could begin this experiment as a purely pro bono effort. The training session for Lawyers for the Public Interest mentioned in note 45, *supra*, attracted over fifty registrants, and might reflect the degree of committed private attorneys who would be willing to volunteer their time.

establish a referral procedure to the City Bar Association for those claimants who can attract the interest of private counsel through the Association's referral panel.

Since the Commission has impressed upon the Mayor that its function is multi-faceted and critical in a city as racially and ethnically diverse as New York, it must do more to overcome the sense of "invisibility" that Norman Siegal, the Director of the New York Civil Liberties Union described.¹¹⁰ Somehow, the impressive work of the Commission portrayed in its annual report has not made a similar impression in the public consciousness. While this may be a result of case backlogs, staff turnover, demoralization, and threats of an agency shutdown, the Commission, nevertheless, must find new ways to become a more visible presence in the City. The gap between the probable rate of housing discrimination incidents and the number of complaints filed among all three enforcement agencies is testimony to this perceived lack of presence. As the Commission moves into the twenty first century it must rely increasingly on resolve, commitment, creativity and new ideas to overcome the looming specter of a decreasing staff and diminishing budget.

110. Schill, *supra* note 2, at 1023.