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Kathleen C. Engel  
*Cleveland State University*

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# MOVING UP THE RESIDENTIAL HIERARCHY: A NEW REMEDY FOR AN OLD INJURY ARISING FROM HOUSING DISCRIMINATION

KATHLEEN C. ENGEL\*\*

*Marilyn wanted to move out of the dangerous Chicago neighborhood in which she lived. She found an apartment in a suburb, Berwyn, that suited her needs in terms of location, price, and size. When the landlord refused to deal with her or rent her the apartment, Marilyn became discouraged and decided to save money, buy a house, and avoid encountering more discrimination in the rental market.*

*Marilyn eventually moved to a safer neighborhood, but not soon enough. Not long after she was denied the apartment in Berwyn, her son was shot and killed in an act of random violence one block from the home Marilyn was trying to leave.<sup>1</sup>*

Congress passed the Fair Housing Act<sup>2</sup> over thirty years ago, yet housing discrimination persists. One of the harshest consequences of discrimination in housing is that upwardly mobile members of protected groups lose access to desirable communities and the attendant benefits, ranging from safe streets and good schools to productive role models.<sup>3</sup> Fair housing laws and related case law have neither recognized nor provided a remedy for the loss of intangible community benefits due to housing discrimination.

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\* The first use of the term “moving up the residential hierarchy” that I have located appeared in DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1996), and refers to moving to communities “with higher home values, safer streets, higher-quality schools, and better services.” *Id.* at 14.

\*\* Visiting Assistant Professor of Law, Cleveland State University, Cleveland-Marshall College of Law. A.B. 1982, Smith College; J.D. 1988, University of Texas at Austin.

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1. This account is an excerpt from a HOPE Fair Housing Center press release dated April 6, 1999. See also Alan Finder, *Blacks Remain Shut Out of Housing in White Areas*, N.Y. TIMES, Mar. 13, 1989 (chronicling a well-educated, professional couple’s frustrated attempts to secure housing in predominantly white areas).

2. 42 U.S.C. §§ 3601-3619, 3631 (1994).

3. See MASSEY & DENTON, *supra* note \*, at 150 (noting that “by drawing on benefits acquired through residential mobility, aspiring parents not only consolidate their own class position but enhance their and their children’s prospects for additional social mobility”) (citing STANLEY LIEBERSON, *ETHNIC PATTERNS IN AMERICAN CITIES* 133-90 (1963), and JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 17-49 (1987)).

In this article, I demonstrate that claims for lost access to desirable communities can be easily incorporated into an extant category of compensable injuries under the Fair Housing Act. I then introduce a method for assessing the value of this injury. In brief, the method compares the price of housing that a victim of discrimination obtained to the price of the housing he<sup>4</sup> sought and was unlawfully denied to approximate the value of living in the more desirable community. The virtue of the method is that it provides adjudicators with a concrete basis for calculating damages for lost access to a desirable community.

In the first part of the article, I discuss the extent of housing discrimination in the United States, the role discrimination plays in limiting people's access to the bundle of goods and services that desirable communities provide, the fair housing laws, current remedies under the laws, and the failure of the laws to provide a remedy to people who are denied access to desirable communities as a result of discrimination. In Part II, I describe the method for calculating damages for lost access to a desirable community and discuss some of its complexities. In Part III, I discuss the potential impact of these new damage calculations on the fair housing enforcement scheme.

## I. THE PROBLEM AND THE LAW

To understand the benefits of my proposed method for calculating the value of lost access to a community, it is critical to understand the nature of the problem and how the law has addressed it. In this Part, I review the data on rates of housing discrimination in the United States. I then focus on the opportunities people lose when discrimination prevents them from moving into more desirable communities. I conclude this Part with a discussion of the fair housing laws and their failure to provide a remedy for those who are denied the ability to move up the residential hierarchy.

### *A. The Prevalence of Housing Discrimination*

Studies of housing discrimination reveal persistently high levels of discrimination against people of color and families with children. A 1979

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4. To avoid clumsiness, I refer throughout this article to all plaintiffs/complainants as "he" and all respondents/defendants as "she."

study funded by the Department of Housing and Urban Development (“HUD”) estimated that there were two million incidents of housing discrimination on the basis of race each year.<sup>5</sup> More recent evidence reveals that high rates of discrimination continue.<sup>6</sup> In 1989, a HUD-sponsored fair housing study of the number of listings shown to prospective buyers and renters found that in over forty percent of the audits, blacks were shown fewer listings than whites.<sup>7</sup> Similarly, agents showed Hispanic renters fewer units than whites in thirty-five percent of the audits, and showed Hispanic buyers fewer units in over forty percent of the audits.<sup>8</sup> Other audits have uncovered even higher rates of housing discrimination, including one study that found a ninety percent discrimination rate.<sup>9</sup> George Galster, using data from twenty-nine fair housing audits, found that the average discrimination rate was forty-seven percent.<sup>10</sup> In other words, in forty-seven percent of the housing searches, people of color encountered discrimination.

The rate at which landlords and agencies currently discriminate against families with children is unknown because the only studies of familial status discrimination were conducted before the Fair Housing Act<sup>11</sup> extended protection to families with children in 1988.<sup>12</sup> Prior to 1988, researchers

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5. James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1052 (1989).

6. See generally Edward Allen, *Six Years After Passage of the Fair Housing Amendments Act: Discrimination Against Families with Children*, 9 ADMIN. L.J. AM. U. 297 (1995); John Yinger, *Testing for Discrimination in Housing and Related Markets*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 27 (Michael Fix & Margery Austin Turner eds., 1999).

7. See JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 44, tbl. 3.5 (1995).

8. See *id.* These measures are based on gross incidents of discrimination. Net measures adjust for the number of times agents treated applicants of color more favorably than their white counterparts. When agents “favor” applicants of color, they may be steering them to largely minority communities that are typically less desirable. Given my concern with the rate at which discrimination impedes members of protected groups’ access to desirable communities, the gross discrimination rate is the relevant measure. For a discussion of this issue, see *id.* at 44-46.

9. See *id.* at 48 (citing George Galster, *Racial Discrimination in Housing Markets During the 1980’s: A Review of the Audit Evidence*, 9 J. PLAN. EDUC. & RES. 165-75 (1990)); see also Victoria A. Roberts, *With a Handshake and a Smile: The Fight to Eliminate Housing Discrimination*, 73 MICH. B. J. 276, 278 (1994); Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 746 n.6 (1993) (citing MARGERY A. TURNER ET AL., HOUSING DISCRIMINATION STUDY: SYNTHESIS VI-VII (U.S. DEPT. OF HOUS. AND URBAN DEV. 1991) (estimating that the incidence rate of discrimination against black tenants seeking housing was 53% and 46% for Hispanic apartment-seekers).

10. See Galster, *supra* note 9, at 167 & tbl. 1, cited in YINGER, *supra* note 7, at 48.

11. Throughout this article, I refer to the Fair Housing Act as amended in 1988 as “the Act,” “the FHA” or “the Fair Housing Act.”

12. Pub. L. 100-430, 102 Stat. 1619 (1988). Some states extended their fair housing laws to cover families with children before the 1988 amendments to the Fair Housing Act. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 11.6(1) (1998).

estimated that one quarter of landlords refused to rent to families with children, and that two million incidents of such discrimination occurred annually.<sup>13</sup> Although discrimination against families with children likely has decreased since passage of the amendments, it certainly has not disappeared. Between the time of the amendments to the FHA in 1988 and December 1993, familial status claims comprised over half of all claims for which HUD issued charges of discrimination.<sup>14</sup>

### *B. The Impact of Housing Discrimination on the Upwardly Mobile*

The community in which people reside determines the quality of the schools, the safety of the streets, and even the availability of positive role models. As a result, residents of urban communities often flock to the suburbs<sup>15</sup> where they hope to improve their futures and those of their children.<sup>16</sup> Tight housing markets in desirable suburbs<sup>17</sup> can frustrate the search for housing, and discrimination only makes the situation worse.<sup>18</sup> Both society and the individual victims suffer when housing discrimination prevents people from improving their socioeconomic status by moving up the residential hierarchy.

Urban schools simply do not have the same resources as suburban school districts. Poverty, under-funding, and a relatively high percentage of students who need special services combine to prevent many urban schools from meeting their educational goals.<sup>19</sup> For this reason, parents living in urban areas often want their children to attend suburban schools. This is evident in the burgeoning attempts of city parents to use relatives' addresses and false documents to establish residency in communities with superior schools.<sup>20</sup>

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13. See Allen, *supra* note 6, at 300; 134 Cong. Rec. S10,544, S10,553 (daily ed. Aug. 2, 1988) (statement of Sen. Domenici).

14. See U.S. COMM'N ON CIVIL RIGHTS, THE FAIR HOUSING AMENDMENTS ACT OF 1988: THE ENFORCEMENT REPORT 56-57 (1994).

15. See W. DENNIS KEATING, THE SUBURBAN RACIAL DILEMMA: HOUSING AND NEIGHBORHOODS 9 (1994).

16. See MASSEY & DENTON, *supra* note \*, at 14.

17. I use the comparison between inner cities and suburbs to illustrate my point that there are benefits to living in some communities rather than others. The variance in the amenities that communities offer is not just between inner city neighborhoods and suburbs. The quality of services can differ between one urban neighborhood and another and one suburban neighborhood and another.

18. See Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 917 (1991).

19. See YINGER, *supra* note 7, at 140-41; see also MASSEY & DENTON, *supra* note \*, at 141.

20. See Tina Nguyen, *Sleuths on the Trail of Student Interlopers as Classes Brim*, L.A. TIMES, June 12, 1998, at A1 (documenting the use of private investigators and video cameras to detect students who are illegally attending schools in districts with strong academic programs in Southern California); Kim Hill, *Illegal Students are Soldiers in the War on Poverty*, THE SUN PRESS, May 13,

When discrimination prevents parents from relocating to communities with quality schools, their children often become trapped in inferior city school systems.<sup>21</sup>

Schools are not the only services that are weaker in inner cities. Inadequate social and medical services can have a negative impact on the health of inner city residents.<sup>22</sup> Housing discrimination can also limit employment opportunities. If, as some economists and sociologists argue, many skilled and low-skilled jobs are moving out of urban areas and into the suburbs,<sup>23</sup> people living in urban areas may not learn of, or have transportation to, good jobs.<sup>24</sup> Reduced job opportunities due to residential segregation lead to lower earnings and further limit socioeconomic advancement.

Other advantages that accrue to people living in good communities are less tangible, but equally important. For example, children and adults benefit from having role models who are engaged in productive economic activity.<sup>25</sup> In contrast, people living in impoverished parts of cities often “learn what they live” and therefore are more likely to commit crimes, use alcohol and drugs, fail to achieve at school, and have children out of wedlock.<sup>26</sup> Urban decay and dangerous streets also can prevent people from developing

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1999, at A5 (opining that the children who falsify their place of residence in order to obtain good suburban educations are heroes trying to achieve educational opportunity).

21. Although some might assume that people living in inner cities cannot afford to move to the suburbs, economists have found that socioeconomic status alone does not explain the relatively low number of people of color living in the suburbs. See CHARLES M. HAAR, *SUBURBS UNDER SIEGE* 6 (1996); MASSEY & DENTON, *supra* note \*, at 85.

22. See Akwasi Osei, *The Persistence of Differing Trends in African American Mortality and Morbidity Rates*, in *THE METROPOLIS IN BLACK AND WHITE* 128, 137-39 (George C. Galster & Edward W. Hill eds., 1992).

23. See YINGER, *supra* note 7, at 147; WILLIAM J. WILSON, *WHEN WORK DISAPPEARS* 37-42, 65-66 (1996).

24. See Jeffrey S. Lehman, *Updating Urban Policy*, in *CONFRONTING POVERTY* 242 (Sheldon Danziger ed., 1994). See also ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 112 (1992) (noting that residential segregation reduces the opportunities even of middle class blacks).

25. See George C. Galster, *Polarization, Place and Race*, in *RACE, POVERTY AND AMERICAN CITIES* 186, 196 (John Charles Boger & Judith Welch Wegner eds., 1996). See also WILSON, *supra* note 23, at 63.

26. See Ronald B. Mincy, *The Underclass: Concept, Controversy and Evidence*, in *CONFRONTING POVERTY* 119-21 (Sheldon H. Danziger et al. eds., 1994); see also YINGER, *supra* note 7, at 155 (citing a number of studies correlating neighborhood effects with economic and educational outcomes while controlling for personal characteristics that might account for people's relative success); WILSON, *supra* note 23, at 63.

supportive relationships with neighbors, churches, and other social institutions.<sup>27</sup>

Perhaps the most intriguing evidence of the benefits that accrue to people who move out of inner cities and into good suburbs arises out of the Gautreaux Program in Chicago. The Gautreaux Program, which was developed as part of a remedy in a public housing segregation case, gave vouchers to residents of Chicago that they could use to obtain housing in predominantly middle class suburbs or in low income areas of the city.<sup>28</sup> Thousands of people participated in the Gautreaux Program with over half electing to live in the suburbs.<sup>29</sup> Researchers who studied the educational and employment progress of the participants found that adults who moved to the suburbs were twenty-five percent more likely to have jobs than those who used their vouchers to acquire housing in the city.<sup>30</sup> The suburban children also fared better than the children whose parents had elected to use their vouchers in the city. For example, their drop-out rate was fifteen percent lower than that of their city counterparts.<sup>31</sup> Likewise, twenty-seven percent of the suburban youth enrolled in four-year colleges and universities, while only four percent of the city students went on to similar programs.<sup>32</sup> Finally, the suburban participants who did not go to college received higher wages and had better workplace benefits than their urban counterparts.<sup>33</sup>

Although the people who used their vouchers to secure housing in the suburbs may have been more ambitious or capable than those who stayed in the city, the increased economic and educational opportunities in the suburbs may have allowed the suburban Gautreaux participants to succeed in ways that might not have been feasible if they had remained in the City. When discrimination prevents people living in disadvantaged communities from making similar transitions, it reduces their potential for upward mobility.

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27. See Galster, *supra* note 25, at 201-02; see also MASSEY & DENTON, *supra* note \*, at 137-38 (describing how the social disorder that often accompanies areas permeated with poverty leads to alienation and fear within communities); WILSON, *supra* note 23, at 63.

28. See James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education and Social Integration for Low-Income Blacks?*, in RACE, POVERTY AND AMERICAN CITIES 273, 273 (John Charles Boger & Judith Welch Wegner eds., 1996).

29. See *id.* at 275.

30. See *id.* at 280. The suburban participants attributed their labor market success to more jobs in the area, greater safety, positive role models and social norms. See *id.*

31. See *id.* at 283 tbl. 2.

32. See *id.*

33. See *id.*

### C. *The Fair Housing Laws*

The primary federal legislation prohibiting discrimination in housing is the Fair Housing Act, which became law in 1968.<sup>34</sup> In 1988, in response to criticism that the Act's enforcement mechanisms were ineffective, Congress passed the Fair Housing Amendments Act of 1988.<sup>35</sup> The amendments provided more extensive protection and additional enforcement mechanisms.<sup>36</sup>

The key and most-litigated provision of the Act as amended makes it unlawful 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, color, religion, sex, familial status, or national origin."<sup>37</sup>

Sections 1981 and 1982 of the Civil Rights Act of 1866<sup>38</sup> provide supplemental avenues for relief, as does the Constitution<sup>39</sup> in claims against governmental entities, including the United States. In addition, many states and localities have their own fair housing legislation providing for an array of enforcement mechanisms and remedies,<sup>40</sup> and extending protection to classes of individuals beyond those covered by the Act.<sup>41</sup>

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34. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)).

35. Pub. L. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3631 (1994)).

36. Key revisions included removing a \$1000 cap on punitive damages, expanding the relief available in claims initiated by the DOJ, granting HUD enforcement power, eliminating a provision that limited awards of attorneys' fees and costs to those who were unable to pay the fees and costs themselves, and expanding the protected classes to include families and the disabled. *See also* SCHWEMM, *supra* note 12, at §§ 1, §§ 5.3, 25.3(5)(a); Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and their Private "Clients" Under the Fair Housing Act*, 65 GEO. WASH. L. REV. 329, 335-38 (1997); Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 AM. U. ADMIN. L.J. 59 (1993).

37. 42 U.S.C. § 3604(a) (1994). The Act also protects handicapped persons. *See* § 3604(f)(1). Other prohibitions can be found in § 3604(b) (discrimination in the terms, conditions, or privileges of the sale or rental); § 3604(c) (discriminatory advertising); § 3604(d) (misrepresentations about the availability of housing); and § 3604(e) (blockbusting). The Fair Housing Act exempts a landlord from liability if the subject property is a single-family house that the owner is selling or renting, or the unit has four or fewer units and the owner lives in one of the units. 42 U.S.C. § 3603(b). The exemptions are affirmative defenses. *See* *United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990). Landlords who fall within one of the exemptions may still be liable under 42 U.S.C. § 1981 for race discrimination. *See* SCHWEMM, *supra* note 12, at § 9.3(2).

38. 42 U.S.C. §§ 1981, 1982 (1994); *see also* SCHWEMM, *supra* note 12, at § 27.1 (comparing the provisions of the Civil Rights Act and the Fair Housing Act).

39. U.S. CONST. amends. V, XIV. For a discussion of the applicability of constitutional claims to housing discrimination, *see* SCHWEMM, *supra* note 12, at § 28.1.

40. SCHWEMM, *supra* note 12, at § 3.5 & app. C.

41. *See, e.g.*, D.C. CODE ANN. § 1-2515(a) (1981) (barring discrimination on the basis of marital



There are four methods for enforcing the provisions of the Act. Individuals<sup>42</sup> most frequently file administrative complaints with HUD.<sup>43</sup> Others, alternatively or concurrently, proceed directly to federal or state court and file private lawsuits.<sup>44</sup> The remaining two enforcement methods can be initiated only by governmental agencies: HUD can file complaints on its own;<sup>45</sup> and the Department of Justice (DOJ) can bring pattern and practice claims or claims that raise issues of “general public importance.”<sup>46</sup>

When a complainant takes advantage of the HUD administrative process, HUD first determines whether to refer the complaint to an equivalent state or local agency.<sup>47</sup> If HUD retains the claim, it conducts a limited investigation and attempts to conciliate the claim.<sup>48</sup> If the claim does not settle during conciliation, HUD reviews the evidence and determines whether “reasonable cause” exists to believe that the respondent engaged in unlawful housing discrimination.<sup>49</sup> A finding of no reasonable cause leads to a dismissal.<sup>50</sup> If HUD does find reasonable cause, it issues a charge against the respondent.<sup>51</sup> Either or both of the parties may then elect judicial determination,<sup>52</sup> in which case the DOJ will bring a claim on behalf of the complainant in federal court in the name of the United States.<sup>53</sup> Alternatively, the parties can proceed to a

status, personal appearance, family responsibilities, source of income, political affiliation, matriculation, and place of residence); MASS. GEN. LAWS ch. 151B § 4(8) (1998) (prohibiting discrimination based on sexual orientation).

42. During the administrative process, parties are referred to as complainants and respondents. SCHWEMM, *supra* note 12, at §§ 24.1, 24.3(1). For consistency, I use the same terms throughout this article.

43. See 42 U.S.C. § 3610(a)(1)(A)(i); SCHWEMM, *supra* note 12, at § 24.2.

44. See 42 U.S.C. § 3613(a)(1)(A).

45. See 42 U.S.C. § 3610(a)(1)(A)(i). HUD has been criticized for not taking advantage of this authority. See Schwemm, *supra* note 9, at 765-67.

46. See 42 U.S.C. § 3614(a). Although the government has the authority to initiate investigations and file Commissioner’s charges to enforce the Fair Housing Act, at least one scholar contends that “the government’s enforcement efforts have largely failed.” Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 U.C.L.A. L. REV. 1401, 1438 (1998).

47. If the state or locality in which a claim arose has fair housing laws that are substantially equivalent to the Fair Housing Act, HUD must refer the claim to the appropriate state or local agency. See 42 U.S.C. § 3610(f)(1). HUD refers approximately 40% of the filed claims to state or local fair housing agencies. See Gaetke & Schwemm, *supra* note 36, at 343.

48. See 42 U.S.C. § 3610(b)(1).

49. See 42 U.S.C. § 3610(g)(1).

50. See 42 U.S.C. § 3610(g)(3). The complainant may still bring a private action under 42 U.S.C. § 3613. See *supra* note 44 and accompanying text. See also *Marinoff v. HUD*, 892 F. Supp. 493, 496-97 (S.D.N.Y. 1995), *aff’d*, 78 F.3d 64 (2d Cir. 1996).

51. 42 U.S.C. § 3610(g)(2)(A).

52. See 42 U.S.C. § 3612(a).

53. See 42 U.S.C. § 3612(o); UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 14, at 184.

hearing before a HUD Administrative Law Judge (“ALJ”).<sup>54</sup> HUD is the named plaintiff in these proceedings.<sup>55</sup> Complainants do not bear the costs of litigation if their interests are represented solely by HUD counsel before an ALJ or by the DOJ in court;<sup>56</sup> however, if they retain private counsel to intervene on their behalf,<sup>57</sup> they pay their attorneys’ fees and litigation costs.

#### *D. Remedies Under the Fair Housing Act*

The Fair Housing Act provides an array of potential relief: compensatory damages, civil penalties, punitive damages, injunctions, and attorney’s fees. Compensatory damages fall into two categories—tangibles and intangibles—within which there are a number of subcategories. Tangible damages include lost wages for time spent searching for alternative housing,<sup>58</sup> the cost of temporary housing, the cost of storing furniture, additional moving costs, the cost of alternative housing and utilities, losses associated with increased time and money spent commuting, charges for psychotherapy, and time spent preparing the case and attending the hearing.<sup>59</sup> In addition, when fair housing organizations bring claims, adjudicators<sup>60</sup> can award compensation for the value of the resources the organizations had to divert from other programs to litigate the claims.<sup>61</sup>

Emotional distress constitutes the bulk of the claims for intangible losses. A complainant can establish emotional distress through direct testimony or the fact finder can infer it from the evidence even without proof of “psychological” injury or other medical evidence.<sup>62</sup> Other categories of intangible injuries include loss of civil rights,<sup>63</sup> inconvenience,<sup>64</sup> and lost

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54. 42 U.S.C. § 3612(b).

55. See 24 C.F.R. §§ 103.410(c), 180.310(a) (1998).

56. See Gaetke & Schwemm, *supra* note 36, at 330.

57. The Fair Housing Act authorizes such intervention. See 42 U.S.C. § 3612(c) (intervention in a hearing before an ALJ); § 3612(o)(2) (intervention in a civil action).

58. “Alternative housing” refers to the housing in which a victim of discrimination resides following a discriminatory rejection by a landlord, seller or real estate agent.

59. See generally SCHWEMM, *supra* note 12, at § 25.3(2)(b) (itemizing the various injuries compensable under the Fair Housing Act); Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Adjudications*, 26 J. MARSHALL L. REV. 3, 10-14 (1992) (listing categories of economic damages).

60. I use the word adjudicators because both ALJs and judges render fair housing decisions.

61. Heifetz & Heinz, *supra* note 59, at 14-17.

62. *Id.* at 17-18.

63. Until the early 1990’s, adjudicators occasionally awarded presumed damages in fair housing cases for violations of complainants’ civil rights. See, e.g., HUD v. Murphy, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,002, at 25,053 (July 13, 1990). In 1992, however, the Sixth Circuit, relying on the Supreme Court’s decision in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), rejected a claim for damages based solely on a

housing opportunities.<sup>65</sup> Adjudicators rarely compensate complainants for these latter injuries and, when they do, the awards are small.<sup>66</sup>

Courts can award punitive damages, but may not impose civil penalties.<sup>67</sup> Conversely, ALJs can impose civil penalties but cannot award punitive damages.<sup>68</sup> Civil penalties in HUD proceedings are akin to punitive damages

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violation of a complainant's rights under the Fair Housing Act. *See Baumgardner v. HUD*, 960 F.2d 572, 581-83 (6th Cir. 1992). Since then, deprivations of complainants' civil rights have generated only nominal damage awards. *See HUD v. Dutra*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,124, at 26,063 (Nov. 12, 1996); *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113, at 25,978 (Sept. 12, 1995), *relief modified based on settlement agreement pending appeal*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,120 (Oct. 1, 1996).

The *Baumgardner* court did leave open the possibility that there were situations in which it would be appropriate to award presumed damages based on a violation of the Fair Housing Act. *See Baumgardner*, 960 F.2d at 583. *See also Woods v. Beavers*, 922 F.2d 842 (6th Cir. 1991) (declining to reverse trial court decision based on claim that jury instruction allowed an award of presumed damages).

For arguments in favor of allowing presumed damages for victims of housing discrimination, see Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83, 94-105 (1981).

64. Adjudicators have inconsistent notions of what constitutes a claim for inconvenience. The factual foundation needed to support these claims appears to turn on who is hearing the case. Sometimes inconvenience refers to tangible damages such as increased commuting costs based on the location of the complainant's alternative housing. Other times it is more akin to emotional distress damages. *See Heifetz & Heinz*, *supra* note 59, at 24-26.

65. Lost housing opportunity damages can be based on several different types of loss. One ALJ has awarded lost housing opportunity damages when the lost housing provided intangible benefits that were "not reflected in the market price of the denied housing or otherwise addressed in the prayer for damages." *Heifetz & Heinz*, *supra* note 59, at 26. *See discussion infra* accompanying notes 76-90. Another ALJ construes complainants' claims for lost housing opportunity damages as claims for damages based on their loss of civil rights and awards only nominal damages. *See HUD v. DiBari*, HUDALJ 01-90-0511-1, at 11-12 (visited Mar. 7, 2000) <<http://www.hud.gov/alj/pdf/dibari.pdf>>; *HUD v. Bangs*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,040, at 25,418-19 (Jan. 5, 1993).

66. *See, e.g., HUD v. Welch*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,125, at 26,070 (Dec. 2, 1996) (awarding \$500 for lost housing opportunity); *HUD v. Wagner*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,032, at 25,338 (June 22, 1992) (awarding \$350 for lost housing opportunities); *HUD v. Frisbie*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,030, at 25,326-27 (May 6, 1992) (awarding \$2500 for lost housing opportunity and \$500 for inconvenience); *HUD v. Jeffre*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,020, at 25,298 (Dec. 18, 1991) (awarding \$2500 for lost housing opportunities); *HUD v. Holiday Manor Estates Club*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,016, at 25,232-33 (Nov. 26, 1991) (awarding \$500 for lost housing opportunity and \$750 for inconvenience), *aff'd in part and rev'd. in part*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,027, at 25,231 (Mar. 23, 1992). For a more exhaustive list of types and amounts of damage awards, see SCHWEMM, *supra* note 12, at App. E.

67. *See* 42 U.S.C. § 3613(c) (1994). In pattern and practice cases, courts can award civil penalties. *See* 42 U.S.C. § 3614(a),(d)(1)(C).

68. *See* 42 U.S.C. § 3612(g)(3).

except that a respondent pays the penalty to the federal government rather than to the complainant, and the size of the penalty is based on the number of times the respondent has been found in violation of the Act.<sup>69</sup> The maximum penalty for a first-time offender is \$11,000.<sup>70</sup> No limits apply to the imposition of punitive damage awards.

Equitable and declaratory relief are also available under the Act.<sup>71</sup> Typical relief includes a preliminary order that the seller or landlord not transfer or rent the property until resolution of the claim, a final judgment ordering the seller or landlord to transfer or rent the property to the victim of discrimination, or an order that the seller, landlord, or agent cease all discriminatory housing practices.<sup>72</sup> Other provisions allow the prevailing party in cases brought directly in court to recover attorneys' fees and costs; however, they are not available to the United States.<sup>73</sup> The Act also allows prevailing intervenors to recover attorneys' fees unless "special circumstances make the recovery of such fees and costs unjust."<sup>74</sup>

#### *E. The Lack of Remedies for Lost Access to Communities*

Adjudicators of claims brought under the Act do not adequately compensate people for the injury they incur when landlords, sellers, or real estate agents unlawfully deny them access to valuable communities.<sup>75</sup>

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69. See 42 U.S.C. § 3612(g)(3).

70. See 24 C.F.R. § 180.671(a)(1) (1999).

71. 42 U.S.C. § 3612(g)(3) (granting authority to ALJs); 42 U.S.C. § 3613(c)(1) (granting authority to judges).

72. See, e.g., *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975) (affirming district court ruling ordering defendant home owners to convey their home to plaintiffs). See generally SCHWEMM, *supra* note 12, at § 25.3(4)(d). The utility of equitable remedies to individual complainants is questionable. The Fair Housing Act prohibits courts from issuing equitable relief that would "affect any contract, sale, encumbrance or lease consummated before" the issuance of the court's equitable orders. See 42 U.S.C. § 3613(d). In a tight housing market, a landlord who unlawfully denies a unit to an applicant likely will be able to rent the unit before the complainant can obtain a preliminary injunction. Similarly, a final judgment ordering a defendant to transfer a dwelling to the complainant is usually too late; most plaintiffs secure alternative housing long before their cases go to judgment. See Armstrong, *supra* note 18, at 930.

73. See 42 U.S.C. § 3613(c)(2).

74. 24 C.F.R. 180.705(b) (implementing § 3612 to allow ALJs to award intervenors in HUD proceedings attorneys' fees and costs). The right of intervenors to recover attorneys' fees in "elected" cases is not explicit; however, all relief, including attorneys' fees, that is available to plaintiffs who bypass the HUD procedure and proceed directly to court is available to intervenors in elected cases. See 42 U.S.C. §§ 3612(o)(3), 3613(c)(2).

75. See Armstrong, *supra* note 18, at 923 (noting that compensatory damages do not compensate for lost access to good schools and neighborhood services). In the discussion accompanying *infra* notes 85-90, I identify four cases in which ALJs have acknowledged that communities can have a value to complainants; however, the ALJs who rendered these decisions clearly were uncertain how to characterize the complainants' claims and how to compensate them for their loss.

Although at first blush damages for lost housing opportunities<sup>76</sup> would appear to redress this injury, ALJs<sup>77</sup> typically award lost housing opportunity damages in only two, limited situations: if the physical attributes of the alternative housing were inferior to the unit the complainant sought and was denied; or if the desired unit had a unique value to the complainant that was not reflected in the price of the unit.<sup>78</sup> Adjudicators have awarded damages based on the physical qualities of alternative housing in cases in which the complainants had to live in a small and poorly heated trailer,<sup>79</sup> and an apartment with an unfinished bathroom, leaks, and inoperable windows.<sup>80</sup> Awards for this type of lost housing opportunity do not capture the loss experienced by a complainant who was forced to live in an inferior community. Such awards compensate only those who were forced to live in inferior dwellings.

Likewise, lost housing opportunity awards, based on the injury complainants experience when denied housing that had a unique value<sup>81</sup> to them that was not reflected in the price of the housing,<sup>82</sup> do not encompass the loss complainants experience when denied access to a desirable community. Examples of the former type of loss include the value to an

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76. The origin of claims for lost housing opportunities is unclear. The first published ALJ decision to refer to an injury based on lost housing opportunity was *HUD v. Morgan*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,008, at 25,139 (July 25, 1991), *aff'd in part, rev. in part*, 985 F.2d 1451 (10th Cir. 1993). In *Morgan*, HUD sought “damages for the opportunity which was lost because the [complainants] were deprived of their opportunity to purchase the [sellers’] home.” *Id.* This language suggests that HUD attorneys introduced the notion of lost housing opportunity claims. *See also* Heifetz & Heinz, *supra* note 59, at 26 (“Complainants in several administrative cases have sought damages for what has been styled as ‘lost housing opportunity.’”).

77. Thus far, only ALJs have awarded damages for lost housing opportunities, although one court has awarded emotional distress damages to a couple who was “forced to remain in less desirable housing.” *Pollitt v. Bramel*, 669 F. Supp. 172, 176-77 (S.D. Ohio 1987). In addition, another court has affirmed an ALJ award for lost housing opportunities. *See Banai v. HUD*, 102 F.3d 1203, 1208 (11th Cir. 1997).

78. As discussed in *supra* note 65, one ALJ equates claims for lost housing opportunities with claims for the loss of rights per se and awards only nominal damages.

79. *See HUD v. Welch*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,125, at 26,070 (Dec. 2, 1996).

80. *See HUD v. Burns Trust*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,073, at 25,683 (June 17, 1994), *reconsidered upon unopposed motion to remand in* [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,092, at 25,840 (Jan. 17, 1995).

81. I refer to this category of claims as “unique value” lost housing opportunity claims.

In economic terms, these awards compensate for the “consumer surplus” that would have accrued to a complainant had he been able to acquire the desired housing. *See* HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS* (1987).

82. *See* Heifetz & Heinz, *supra* note 59, at 26. For an ALJ opinion granting this type of award, see, e.g., *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113 (Sept. 12, 1995).

infirm complainant of living in a one story unit that was convenient to her physical therapist<sup>83</sup> and the loss a complainant incurred when he had to rent alternative housing that was farther away from the area he covered as a sales representative.<sup>84</sup> A claim for damages based on lost access to a desirable community falls outside the unique value category of lost housing opportunity claims because the benefits of living in a community are not personal to any given complainant.

There are four published opinions by ALJs<sup>85</sup> that discuss complainants' allegations that discrimination forced them to live in neighborhoods with more crime and inferior schools.<sup>86</sup> In one of these decisions, *HUD v. French*,<sup>87</sup> the ALJ framed the loss as one arising from the unique value of the dwelling to the complainants. The ALJ held that the value to a mother of renting an apartment in a safe neighborhood in the best school district was

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83. See *Banai v. HUD*, 102 F.3d 1203, 1208 (11th Cir. 1997).

84. See *HUD v. Bangs*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,040, at 25,409 (Jan. 5, 1993); see also *HUD v. Ineichen*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,099, at 25,893 (Apr. 4, 1995) (discrimination forced family to leave community "where they had lived for many years and where they had established solid, nurturing relationships with friends, neighbors, schools and other institutions"); *HUD v. Colber*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,096, at 25,864 (Feb. 9, 1995) (alternative housing was farther from complainant's mother's home); *HUD v. Burns Trust*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,073, at 25,683-84 (June 17, 1994) (eviction caused complainant with AIDS to lose comfortable, clean, quiet, wheelchair accessible home near caregivers and public transportation); *HUD v. Sams*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,069, at 25,651 (Mar. 11, 1994) (lost housing opportunity award based in part on fact that alternative housing was farther from the family's church, and the children's piano lessons), *aff'd*, 76 F.3d 375 (4th Cir. 1996) (unpublished table decision).

85. There are no published court decision awarding damages for the loss experienced by people who are prevented from moving into desirable communities.

86. See *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113, at 25,978 (Sept. 12, 1995) (compared to housing obtained, denied housing was in an area with a lower crime rate and within the best school district); *HUD v. Kogut*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,100, at 25,905-06 (Apr. 17, 1995) (emotional distress and lost housing opportunity damages award based, in part, on location of alternative housing in crime ridden area); *HUD v. Sams*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,069, at 25,651 (Mar. 11, 1994) (lost housing opportunity award based in part on increased crime in the area of the alternative housing); *HUD v. Lashley*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,039, at 25,405-07 (Dec. 7, 1992) (damages awarded to high school student who, as a result of discrimination, had to transfer to a high school that had a "'bad reputation' for guns, drugs and gangs").

In assessing the "irreparable injury" prong of claims for equitable relief, courts have recognized that living in desirable communities has some value. See, e.g., *Banks v. Perk*, 341 F. Supp. 1175, 1185 (N.D. Ohio 1972) (holding that "the loss of being able to escape the never-ending and seemingly unbreakable cycle of poverty" was one basis for enjoining the defendant municipality from continuing its practice of refusing to locate low income housing in white neighborhoods).

87. *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113 (Sept. 12, 1995).

“particular and uncommon,” even though there was no evidence that the unit had a personal value to the mother that exceeded its rental price.<sup>88</sup> To the contrary, the quality schools and safe streets would have benefited any potential tenant, not just the complainant, and likely were reflected in the price. The ALJ may have characterized the dwelling as “particular and uncommon” because the extant notions of what constitutes a lost housing opportunity have not encompassed claims based on the intrinsic value of a community.

In the other three decisions, the ALJs mentioned that the discrimination prevented the complainants from having access to quality schools and safe neighborhoods, but the ALJs circumvented the dilemma of how to categorize the complainants’ losses by issuing one award for all of the complainants’ intangible injuries.<sup>89</sup> As a result, it is impossible to determine the category of intangible injuries to which the ALJs attributed the complainants’ claims for damages based on their lost access to good schools and safe streets. These four decisions reveal that, in a very small number of cases, ALJs have recognized that home-seekers incur a compensable injury when landlords, sellers, and real estate agents deny them access to safe streets and good schools. These decisions, however, are anomalies.<sup>90</sup>

The reality is that when discriminatory practices prevent home-seekers from moving up the residential hierarchy, the fair housing remedies fail to compensate for their injury. This outcome is contrary to the Supreme Court’s unequivocal pronouncement that civil rights remedies should provide complete relief:

[T]he scope of relief under [Title VII] is intended to make the victims of unlawful discrimination whole, and . . . the attainment of this objective rests not only upon the elimination of the particular unlawful . . . practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful . . . practice be, so far as

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88. *Id.* at 25,978.

89. In *HUD v. Lashley*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,039, at 25,048 (Dec. 7, 1992), the ALJ awarded \$10,000 for emotional distress, humiliation, inconvenience and lost housing opportunity, and emphasized that the complainant had to transfer to a more dangerous school. *Id.* at 25,407. In *HUD v. Sams*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,069 (Mar. 11, 1994), the ALJ’s award for intangibles of \$24,000 included compensation for the emotional distress and lost housing opportunity experienced by seven complainants based in part on their having to live in an area with more crime. *Id.* at 25,651. Lastly, in *HUD v. Kogut*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,100 (Apr. 17, 1995), the ALJ awarded \$25,000 for emotional distress, lost housing opportunity and physical harm to a complainant who had to move to a crime ridden area. *Id.* at 25,905-06.

90. Such decisions represent only four of hundreds of published fair housing opinions.

possible, restored to a position where they would have been were it not for the unlawful discrimination.<sup>91</sup>

#### F. Summary

High rates of housing discrimination persist. Discrimination can preclude those who seek to move up the residential hierarchy from improving their socioeconomic status and that of their children. Fair housing laws and the cases arising under them have failed to provide an adequate remedy for the loss these home-seekers experience.

### II. THE PROPOSED REMEDY

In the preceding section, I identified a previously overlooked injury arising from housing discrimination. In this section, I suggest a novel remedy for this injury. Two hurdles combine to inhibit adjudicators from compensating complainants for the loss they experience when landlords, sellers, and real estate agents prevent them from living in desirable communities. First, existing notions of the injuries that qualify as lost housing opportunities do not encompass lost access to communities. The second and more difficult hurdle is determining the value, in monetary terms, of living in a given community.<sup>92</sup>

The first hurdle is surmountable. ALJs already recognize that a complainant has a lost housing opportunity claim if his alternative housing is inferior. Lost access to community claims parallel inferior housing claims. In addition, a few ALJs implicitly have recognized that complainants are entitled to relief when discrimination prevents them from attending good schools and living in safe neighborhoods. It seems likely that adjudicators<sup>93</sup>

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91. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (quoting 118 CONG. REC. 7168 (1972)); see also *Louisiana v. United States*, 380 U.S. 145, 154 (1965) (holding that courts have a “duty to render . . . decree[s] which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future”). Although *Louisiana v. United States* was a Voting Rights Act case and *Albemarle* arose under Title VII, courts have relied on both cases when interpreting Title VIII. See, e.g., *Williamsburg Fair Hous. Comm. v. New York City Hous. Auth.*, 493 F. Supp. 1225, 1250-51 (S.D.N.Y. 1980).

92. See *Armstrong*, *supra* note 18, at 923 (noting the difficulty in assessing the value of the “social and economic benefits of exposure to mainstream lifestyles”); Heifetz & Heinz, *supra* note 59, at 26.

93. The Supreme Court has recognized that people can derive intangible benefits from living in a community. See *Trafficante v. Metropolitan Insurance Company*, 409 U.S. 205 (1972) (extending standing to white tenants who brought claims that their landlord’s discriminatory practices denied them the benefit of living in an integrated community); see also *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109-16 (1979).



would be willing to recognize claims for lost access to community under the lost housing opportunity umbrella.

The second hurdle—approximating the value of living in a desirable community—can be overcome by using information on housing prices. The price of a dwelling reflects its physical characteristics and amenities as well as the quality of the community in which it is located. One can isolate the “community effect” of the price by comparing the price of the housing a complainant obtained with the price of the housing he sought in the more desirable community. The difference in price<sup>94</sup> can be used to determine the value of living in the more desirable community. I refer to this as the “calculating lost access to community method” or “CLAC method.”<sup>95</sup>

The use of prices, including housing prices, to infer the value of intangible attributes has a long tradition in economics.<sup>96</sup> A number of economists have used housing price data to calculate intangibles like the value of clean air and good schools. One team of researchers analyzed housing price data in Los Angeles and found that the monthly value of living in an area with clean air was as high as \$128.46.<sup>97</sup> Another team of researchers calculated the value of living in a “good” school district by looking at housing prices in several Cleveland area communities and determining how much of the sale price of the housing was attributable to the

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94. In essence, the difference in price is a residual that can be attributed to the value of the better community. The law recognizes the concept of residuals. For example, in the context of employment discrimination, residual wage differences have been attributed to gender and race discrimination.

A recent article in the Boston Globe provided an illustration of residual housing price differences. See Doreen Iudica Vigue, *A Town House Divided . . .*, BOSTON GLOBE, Aug. 14, 1998, (Metro), at B1. Cambridge and Somerville are abutting suburbs of Boston. Cambridge is a trendier community with better schools. See *id.* Where the two towns abut, there is a duplex that consists of two townhouses—one is located in Cambridge, the other in Somerville. See *id.* The features and design of the two townhouses are identical, except that the Cambridge unit has off-street parking valued at \$15,000-\$20,000. See *id.* The units went on the market simultaneously in 1998, and the Somerville townhouse sold for \$40,000 less than the Cambridge unit. See *id.*

95. The CLAC method could be employed in HUD and court proceedings.

96. By using a formula to calculate lost access to community damages, complainants may be more likely to recover damages and receive larger awards for this type of lost housing opportunity than the other types, which often yield low awards or fail altogether for lack of proof. See Heifitz & Heinz, *supra* note 59, at 25 (noting that most lost housing opportunity claims fail because of inadequate proof).

Similarly, when the CLAC method leads to larger awards, it may be more likely that they will be upheld on appeal. Professor Schwemm has observed that appellate courts are particularly likely to reverse sizeable lower court awards for housing discrimination when the awards are not based on tangible economic injuries. See Schwemm, *supra* note 9, at 760. Courts may have greater confidence in CLAC-generated awards and may thus give them the same deference they give to calculations of economic losses even though the underlying injuries are intangible.

97. See David S. Brookshire et al., *Valuing Public Goods: A Comparison of Survey and Hedonic Approaches*, 72 AM. ECON. REV. 165, 169-73 (1982); David Harrison, Jr. & Daniel L. Rubinfeld, *Hedonic Housing Prices and the Demand for Clean Air*, 5 J. ENVTL. ECON. & MGMT. 81 (1978).

quality of the schools.<sup>98</sup>

A. *The Application of the CLAC Method to Claims of Discrimination in Rental Housing*

The first step when using the CLAC method is determining which prices to compare and how to compare them. In the case of rental housing, one possible measure is the difference between the rental price of the housing the complainant sought and the rental price of the housing he obtained, as long as the dwellings had similar amenities. Take, for example, a complainant who was denied a \$1000 per month apartment in a good inner ring suburb and moved to or had to remain<sup>99</sup> in a \$600 per month apartment in a rough city neighborhood. If the units had the same number and type of rooms, had equivalent amenities, and were located in similar types of buildings, the \$400 rent differential would be the monthly value of living in the better community.<sup>100</sup> The advantage of comparing just these two prices is the simplicity of the calculation. The disadvantage is that random factors could influence either or both of the prices and distort the values generated by the CLAC method.<sup>101</sup>

An alternative would be to use average prices of comparable units in the community where the complainant sought to live and the one in which his alternative housing was located. For example, if the respondent refused to rent a four bedroom, two bathroom home to the complainant, the

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98. See William T. Bogart & Brian A. Cromwell, *How Much More is a Good School District Worth?*, 50 NAT'L TAX J. 215 (1997); see also Sandra Black, *Do Better Schools Matter?: Parental Valuation of Elementary Education*, Q.J. ECON. 577 (1999) (assessing the value parents place on homes in good school districts). These researchers looked at communities the borders of which were different from the school district boundaries. In these communities, children living in the same neighborhood in the same city attended school in different districts depending on where their homes fell within the school district lines. Homes located in the better school districts sold for higher prices than comparable homes in the same municipality but in different school districts. See Bogart & Cromwell, *supra*, at 226.

99. The price of the housing the complainant was living in at the time of the discrimination is relevant only if he remained there after the discriminatory rejection. This is because the purpose of the CLAC method is to establish a complainant's loss based on what he was denied versus what he obtained. To illustrate this point, imagine a complainant who was lawfully evicted from his apartment in an unsafe neighborhood. If the complainant was denied an apartment in a highly desirable community, and ultimately moved to a less desirable community that was not as bad as where he had been living previously, his damages should be the difference between his alternative housing and the housing he sought, not his original housing and the unit he sought.

100. The complainant would also incur rental savings that arguably should be offset against his loss. As I discuss later, see *infra* text accompanying notes 131-42, the law does not contemplate offset in this situation.

101. For example, if the price of the complainant's alternative housing was under-market, the value of the desirable community would be inflated using the CLAC method.

complainant would compare the average rental price of a four bedroom, two bath home in the community in which he sought to live with the average rental price of a comparable home in the community in which his alternative housing was located. Although there are drawbacks to using averages—for example, the parties likely would need experts, which would increase litigation costs, and there would be an increased risk of jury confusion—the use of averages would eliminate the distortion that could arise when basing the calculation on the prices of specific units. Courts thus may be more receptive to calculations based on averages.

Arguably, both measures overstate a complainant's loss if the complainant would not or could not use all the services the desirable community provided. For example, a young able-bodied tenant could not take advantage of a community transportation program for the elderly. This argument erroneously assumes that the price of a rental unit reflects the value of all the benefits of living in a community. This is not the case. Rather, housing prices reflect the value the marginal person places on living in the community. For people who would be willing to pay even one dollar more than the stated rental price to have access to the community, the CLAC method actually understates their loss.<sup>102</sup>

The examples used thus far assume that a complainant's desired housing had similar attributes to the alternative housing. Calculating damages using the CLAC method becomes a bit more complicated when the features of the two housing units are dissimilar. In this situation, the difference between the price of the complainant's desired and alternative housing could reflect the difference in the dwellings' amenities and not the value of the two communities. A better comparison might be between the price of the desired housing and a comparable dwelling in the community in which the complainant acquired alternative housing. Alternatively, the complainant could use the averages technique discussed above, in which case the value of the community would be the difference between the average price of housing of the type he sought in the desirable community and the average price of similar housing in the community in which he secured alternative housing.<sup>103</sup>

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102. See Bogart & Cromwell, *supra* note 98, at 219.

103. If the amenities of the complainant's alternative housing were also less desirable, he could bring a claim for lost access to community damages based on having to live in an inferior community and a claim for lost housing opportunity based on having to live in inferior housing. The reference point for the former claim would be the communities and for the latter claim, the physical attributes of the units.

Likewise, if the housing a complainant was denied had a personal value to him that was not reflected in the price, he could recover these unique lost housing opportunity damages in addition to his lost access to community damages.

Once a complainant establishes the monthly value of living in a community, he needs to project this value over time by multiplying the monthly value times the appropriate number of months (“the multiplier”). Depending on the facts in a case, a number of different multipliers might be appropriate. The most straightforward multiplier would be the number of months the complainant lived in the less desirable community following the discriminatory rejection. Respondents might object to this measure unless the complainant could prove that he attempted to mitigate his damages.<sup>104</sup>

The various multipliers used to determine awards for the cost of alternative housing<sup>105</sup> are appropriate for calculating lost access to community damages. For example, ALJs have used the period from the time the complainant commenced residing in his alternative housing until the time when he was “no longer obligated to remain in the alternative housing and [was] free to occupy the denied housing.”<sup>106</sup> This measure is usually the length of the lease for the alternative housing. In the context of a lost access to community claim, use of this multiplier would assume that the complainant was bound to remain in the less desirable community only for the term of the lease for his alternative housing.

A second measure ALJs use in calculating alternative housing costs is the period from the time the complainant began residing in his alternative housing until he was “able to occupy comparable housing at a comparable cost.”<sup>107</sup> This measure incorporates a duty to mitigate. A final option used for assessing alternative housing costs is the number of months between the discriminatory act and the hearing.<sup>108</sup>

### *B. The Application of the CLAC Method to Claims of Discrimination in Housing Sales*

For cases involving discrimination in sales, extrapolating the value of a community from the price differential is more complicated. The difference between the selling price of a house a complainant sought and the selling price of a comparable home he purchased in a less desirable community would not be a realistic appraisal of the complainant’s loss. If, for example, a complainant sought to buy a \$150,000 house in a good neighborhood and his alternative, comparable housing cost \$100,000, the value of his lost access to

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104. See *infra* Part II.C for a fuller discussion of the duty to mitigate.

105. See *supra* note 58.

106. Heifetz & Heinz, *supra* note 59, at 13.

107. *Id.* at 13-14.

108. *Id.* at 13.

the community based on the price differential would be \$50,000. This result, however, would be misleading because the \$50,000 is reflected in the equity of the house, which will be returned to the complainant in cash when he sells it.<sup>109</sup>

A better approach would be to use the sale price differentials in a manner that mimics the use of rental price differences in rental discrimination cases. This can be done by thinking about the opportunity cost to our hypothetical person who pays an extra \$50,000 to live in a better community. His opportunity cost is the discounted present value of the interest he could have earned on the \$50,000 if he had invested it in an income-generating vehicle.<sup>110</sup> This lost income reflects the value of living in the better community. Assuming a five percent interest rate and a five percent discount rate, the discounted present value of the interest he could have earned on the \$50,000 would be \$4,648 over two years, \$10,823 over five years, and \$19,304 over ten years.<sup>111</sup>

The larger the price differential between the housing costs in the comparison communities, the higher the opportunity cost—and therefore the value—of living in the better community. This feature of the calculation is important. The larger the jump a complainant sought to make up the residential hierarchy, the greater his loss when the respondent's discrimination prevented him from moving. Similarly, the longer a

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109. In addition, the complainant's lost access to community injury would be the same whether he lived in the less desirable community for a day or two years.

110. This calculation assumes no inflation, no change in housing prices, no depreciation, and no maintenance costs. Relaxing these assumptions would complicate the calculation, but not change it in any material way. For example, if there was an expectation that a home would appreciate, the anticipated appreciation would be reflected in the amount the complainant was willing to pay for the house.

111. Issues like the interest rate, discount rate, and the appropriate time period to use for calculating the discounted present value would be left to adjudicators based on the facts of each case.

There is no need to make an adjustment for taxes the complainant would have paid because the market price is net of taxes. In other words, the price adjusts according to the tax liability. As an illustration, assume the actual value of the house in the desirable community is \$152,000, the annual taxes \$2000, and the annual value of the services the community provides \$10,000, the price of the house would be adjusted to \$150,000. In one of the few studies of the relationship of taxes to housing prices, researchers found that housing prices in high tax communities were higher because of the high value of services they provided. See Bogart & Cromwell, *supra* note 98, at 227. The researchers interpreted these results to mean that the housing prices reflected the value of the community services net of taxes.

All the variations discussed in the previous section on calculating the value of a community when a complainant is a renter could apply when the complainant is a buyer. Thus, the price differential could be based on the average market price of comparable housing in the desirable community and the community in which the complainant obtained housing in lieu of the prices of the actual houses sought and obtained. Similarly, if the houses sought and obtained were not comparable, the calculation could be based on the price of the desired housing and a comparable dwelling in the community in which the complainant's alternative housing was located.

complainant expected to stay in the better community, the larger his damages.

Another possible method for calculating lost access to community damages would be to establish the value of a community based on the difference in the size of a complainant's actual interest payments. As an illustration, reconsider the previous example using the \$50,000 price differential. The first step would be to calculate the discounted present value of the interest the complainant actually would have paid on the \$50,000. The second step would be to compound the discounted present value of the interest; this calculation would account for the opportunity cost that arose because the complainant would not be able to invest the money that he would be spending on interest. The total after discounting and compounding would reflect the value the complainant placed on living in the more desirable community. This method is problematic, however, because the difference in interest payments would vary depending on the size of the complainant's down payment and his credit history.

An alternative to using house sale prices to calculate lost access to community damages would be to use data on rental prices; the complainant's damages would be based on the difference between the average cost of renting a house that was comparable to the one he sought to buy and the average cost of renting a comparable house in the community in which his alternative housing was located. The problem with this method is that there may not be enough comparable houses for rent in either or both of the communities to make reliable comparisons.

Even after determining the monthly value of living in a community, an adjudicator must still determine the appropriate period of time for which a complainant is entitled to compensation. The time periods previously discussed in claims involving discrimination in rental housing may be too limited in the sales context because of the transaction costs a seller incurs. For example, limiting a complainant's damages to the period from the time of the discrimination until he was able to purchase comparable housing at a comparable cost in the desirable community does not take into account the non-reimbursable costs he would incur selling his alternative housing and buying the housing in the desirable community. His remedy would thus have to include his transaction costs in addition to the damages generated by the CLAC method.

### *C. The Duty to Mitigate*

A complainant arguing for a remedy using the CLAC method would have to demonstrate that he attempted to find alternative housing in the desired

area after he was rejected. Otherwise, he could chose to live in a less expensive, less desirable community and then use the CLAC method to unfairly enhance his damages. One ALJ, in considering a claim for lost housing opportunity damages, implicitly acknowledged this requirement.

In *HUD v. Ineichen*,<sup>112</sup> the complainants sought rental housing when the unit in which they were living was sold.<sup>113</sup> They attempted to rent an apartment that was one block from where they were living, but the landlord rejected them because they had too many children.<sup>114</sup> The complainants ultimately moved from their “neighborhood with valued amenities” to an apartment that was noisy, infested with roaches and located in an area where there was drug dealing and other criminal activity.<sup>115</sup> They sought damages based, in part, on the inferior location of their new housing.<sup>116</sup> The alternative apartment cost less than both the complainants’ former apartment and the apartment they sought to rent.<sup>117</sup> The ALJ noted that some of the complainants’ “discomfort” with their alternative dwelling was attributable to the fact that it was less expensive.<sup>118</sup> He went on to state that “victims of housing discrimination cannot be compensated for living in less desirable alternative housing as such.”<sup>119</sup>

The ALJ observed, and appeared to be motivated by, the fact that the complainants had not introduced any evidence that they had been unable to find alternative housing in the neighborhood in which they had been rejected.<sup>120</sup> This suggests that the ALJ would have been more receptive to the complainants’ claim for lost housing opportunity damages if they had demonstrated that the respondent’s discrimination precluded them from living in their former neighborhood. Just the same, the ALJ awarded the complainants \$4000 for emotional distress and lost housing opportunity without discussing the basis for the lost housing opportunity portion of the award.<sup>121</sup>

In another case, *HUD v. Wagner*,<sup>122</sup> the ALJ who decided *Ineichen*

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112. [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,099 (Apr. 14, 1995).

113. *Id.* at 25,889.

114. *Id.* at 25,888.

115. *Id.* at 25,889, 25,893.

116. *Id.* at 25,893.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,032 (June 22, 1992).

effectively equated the failure to mitigate lost housing opportunity damages with expressing a preference for the inferior housing. In *Wagner*, the complainant acquired alternative housing that was less expensive than, and inferior to, the housing he had originally sought.<sup>123</sup> He remained in the inferior unit for two years.<sup>124</sup> The ALJ implied that because the complainant had not pursued housing comparable to that which he had been denied, he revealed his preference to live in a less expensive, alternative dwelling. His “injury”—the lost amenities—was, therefore, partly the result of his own exercise of choice, and not solely the consequence of the landlord’s discriminatory behavior.<sup>125</sup>

The duty to mitigate is also revealed in damages for a different, but related, claim in housing discrimination cases. When a complainant brings a claim to recover the increased cost of alternative housing, he too has a duty to mitigate.<sup>126</sup> To receive compensation for increased rental costs, a complainant must prove that he made a reasonable effort to obtain housing comparable to that which he was denied.<sup>127</sup> This requirement naturally extends to claims relying on the CLAC method: if a complainant seeks damages for lost access to services in a community as a result of a landlord’s, seller’s, or agent’s discrimination, he can recover damages if he demonstrates that he sought, but was unable to obtain, comparable housing that would provide the same community amenities.

The failure to mitigate would not necessarily bar recovery for lost housing opportunities using the CLAC method. Depending on the facts in a case, an adjudicator might elect to reduce rather than bar a complainant’s recovery if he failed to mitigate.<sup>128</sup> In both *Ineichen* and *Wagner*, the ALJ allowed the complainants to recover damages for their lost housing opportunities, but reduced the amount of their awards because of their failure to mitigate.

Complainants might not always have a duty to mitigate their lost access to community damages. A complainant could argue that it would have been futile for him to try to mitigate his damages if the discriminatory landlord owned the only significant apartment complex in the community<sup>129</sup> or if the

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123. *Id.* at 25,337-38.

124. *Id.*

125. *Id.* The ALJ noted that the complainant could not receive lost housing opportunity damages as compensation for “living in a less expensive apartment, as such.” *Id.* at 25,337.

126. SCHWEMM, *supra* note 12, at § 25.3(2)(b) (1998).

127. Heifetz & Heinz, *supra* note 59, at 13 (1992).

128. In Title VII cases, the failure to mitigate a back pay award is not an automatic bar to recovering back pay. *See Booker v. Taylor Milk Co.*, 64 F.3d 860, 867-68 (3d Cir. 1995); *but see Sellers v. Delgado College*, 902 F.2d 1189, 1196 (5th Cir.) (failure to mitigate precluded back pay award).

129. Schwemm, *supra* note 63, at 112.



discriminator was a real estate agency that had a monopoly on the listings in the community.<sup>130</sup>

#### *D. No Right to Offset a Complainant's Savings*

When a respondent's discriminatory actions force a complainant to live in a less expensive community, the complainant typically incurs savings in rent or interest payments<sup>131</sup> that arguably should be offset against any award based on the complainant's lost access to community. This offset could significantly reduce, or potentially moot, a complainant's lost access to community damages. Although at first blush it appears that offset should apply,<sup>132</sup> principles governing tort remedies suggest otherwise.

A fundamental principle of tort remedies<sup>133</sup> is that offset is permitted only if the defendant's bad act caused a benefit to accrue to the same interest for which the plaintiff seeks compensation.<sup>134</sup> Otherwise, a plaintiff would not be made whole and the defendant would be allowed "to force a benefit [on the plaintiff] against his will."<sup>135</sup> For the purpose of determining the applicability of offset to damages using the CLAC method, the question is whether lost access to community damages fall within the same "interest" as rental or interest savings. A complainant using the CLAC method alleges damages based on the intangible benefits he would have derived from living in the

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130. See, e.g., *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451-52 (4th Cir. 1990) (applying the futile gesture doctrine from employment discrimination law to hold that a plaintiff could maintain her housing discrimination suit against a housing development cooperative even though she had not made an effort to purchase a house. Because the cooperative had a policy of not selling to black people, it would have been futile for the plaintiff to have made an offer).

131. There could not be any claim that real estate taxes should be offset because the sales prices used with the CLAC method are net of taxes. See *supra* note 111.

132. Using conventional microeconomics, the plaintiff's damages would be determined by the amount of money required to put him at the utility level he would have enjoyed but for the discrimination. The amount of money required to do this would depend on the nature of the plaintiff's preferences. This economic approach, which effectively allows for limited offset, differs in important and subtle ways from the legal approach to calculating damages. For reasons discussed *infra*, the law allows a plaintiff to recover the full damages generated by the CLAC method regardless of any benefit the plaintiff may have derived from not being able to obtain the housing of his choice, i.e. the law will allow full recovery without offset.

133. In *Curtis v. Loether*, 415 U.S. 189, 195 (1974), the Supreme Court implicitly held that tort principles govern Fair Housing Act remedies; cf. *United States v. Burke*, 504 U.S. 229 (1992).

134. See RESTATEMENT (SECOND) OF TORTS § 920 (1979). For an example of the application of this principle, see *illus. 6*:

A tortuously imprisons *B* for two weeks. In an action brought by *B* for false imprisonment in which damages are claimed for pain, humiliation and physical harm, *A* is not entitled to mitigate damages by showing that at the end of the imprisonment *B* obtained large sums from newspapers for writing an account of the imprisonment.

135. See *id.* at cmt. f.

desirable community. This injury is not a pecuniary loss.<sup>136</sup> In contrast, any claim for offset is pecuniary. Such a claim asserts that the respondent's bad act saved the complainant money and the respondent is, therefore, entitled to an offset of the complainant's savings.<sup>137</sup> Thus, if a complainant sought damages for lost access to a desirable community, his claim for damages and any demand by the respondent for offset would relate to separate and distinct interests<sup>138</sup> and the respondent would not be entitled to offset.<sup>139</sup>

ALJs have had the opportunity to consider whether offset should apply when a respondent's discriminatory acts enabled a complainant to pay less in rent than he would have paid but for the discrimination. This issue arises when complainants bring claims for lost housing opportunities or inconvenience even when their alternative housing cost less than the housing they were unlawfully denied. For example, in *Banai v. HUD*,<sup>140</sup> the complainants lived with relatives after being illegally denied an apartment.<sup>141</sup> Neither the ALJ nor the reviewing court that affirmed the ALJ's award for lost housing opportunity damages addressed offsetting the complainants' award by any rental savings they incurred when they were living with their

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136. The claim is akin to recognized lost housing opportunity claims, which have uniformly been considered claims for intangible injuries. See Heifetz & Heinz, *supra* note 59, at 17.

137. One might argue that the plaintiff's reliance on rental prices to calculate his loss converts his claim to a pecuniary loss; however, his reliance on the rental prices is simply operational.

138. If the complainant's underlying claim were pecuniary, the landlord might have a valid claim for offset. This situation arose in *Allen v. Gifford*, 368 F. Supp. 317 (E.D. Va. 1973). In *Allen*, a black couple sought to purchase a home from a developer, who refused to consummate the sale. *Id.* at 318-19. The couple was ultimately able to purchase the home, but lived for several months in a hotel. *Id.* at 319. In a 42 U.S.C. § 1982 claim against the developer, they claimed as damages the cost of living in the hotel. *Id.* at 321. The court noted that during the period the plaintiffs were living in the hotel, they did not have to make the mortgage payments they would have made had the developer initially allowed them to purchase the house. *Id.* The court went on to say that the mortgage payments "might be considered an offset" against the plaintiffs' damages claim. *Id.*

It is noteworthy that in the context of Title VII, in which claims for back pay are restitutionary, one court went so far as to prohibit a defendant from offsetting a plaintiff's pecuniary savings against her pecuniary loss. In *EEOC v. Service News Co.*, 898 F.2d 958 (4th Cir. 1990), the court refused to offset the plaintiff's savings in child care against her back pay award. *Id.* at 964. Both the back pay award and the savings in child care were pecuniary in nature, but the court held that the defendant "should not escape liability for back pay . . . merely because [the plaintiff] would have used some of her paycheck to pay . . . child care." *Id.*

139. See RESTATEMENT (SECOND) OF TORTS § 920 cmt. b (1979) ("Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited."); see also *Marciniak v. Lundborg*, 450 N.W.2d 243, 248-49 (Wis. 1990) (relying on the Restatement in a wrongful birth case to hold that the defendant could not offset the non-financial benefits the child would provide the parents against the parents' claim for expenses to raise the child). For a fuller discussion of how courts have applied the restatement principles to wrongful birth cases, see Mark Strasser, *Misconceptions and Wrongful Births: A Call for a Principled Jurisprudence*, 31 ARIZ. ST. L.J. 161, 189 (1999).

140. 102 F.3d 1203 (11th Cir 1997).

141. *Id.* at 1205.

relatives. In fact, there are no cases in which respondents have sought or ALJs have discussed offsetting a complainant's rental savings.<sup>142</sup>

Similarly, when courts and ALJs have considered the reverse situation—where complainants' alternative housing cost more and had better amenities than the housing they were unlawfully denied—they have allowed the complainants to recover the increased cost of their alternative housing without offsetting the value of the added amenities.<sup>143</sup> In this situation, respondents have argued that complainants are unjustly enriched if they recover damages for their increased housing costs because they benefit from the amenities the more desirable housing offers them.<sup>144</sup> Adjudicators have applied the principle of “cover” from contract law<sup>145</sup> to reject this defense. In the context of housing discrimination, cover allows complainants who have engaged in reasonable searches for substitute housing to recover their increased rental costs without taking into account any benefits that accrued to them from living in housing with greater amenities.<sup>146</sup> The rationale is that the respondents forced the complainants to increase their allocation of monetary resources for housing, which precluded them from spending money on other goods and services.<sup>147</sup>

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142. If respondents are entitled to offset rental savings, one would expect that ALJs would be reducing complainants' awards by their rental savings. See *HUD v. Kelly*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,034, at 25,363 (Aug. 26, 1992), *aff'd in part and rev'd in part*, 3 F.3d 951 (6th Cir. 1993), *modified on remand by* [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,090 (Dec. 1, 1994) (awarding lost housing opportunity damages based in part on the inferior amenities at the complainant's alternative housing without recognizing any rental savings that may have accrued to the complainant when she continued to live with her parents after illegally being rejected for a rental unit), *aff'd in part and rev'd in part*, 97 F.3d 118 (6th Cir. 1996); *HUD v. Leiner*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,021, at 25,268-69 (Jan. 3, 1992) (allowing the complainant to recover as “inconvenience” damages the increased commuting expenses she incurred when she moved in with her great-grandmother after illegally being denied housing, and not discussing any rental savings that the complainant presumably incurred as a result of living with her great-grandmother); *HUD v. Rollhaus*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,019, at 25,250 (Dec. 9, 1991) (alternative housing increased commuting distance for which ALJ awarded recovery based on federal mileage rate; however ALJ did not consider complainant's savings in rent while she lived with her parents between time she was denied apartment and secured alternative housing).

143. See *Morgan v. HUD*, 985 F.2d 1451, 1458 (10th Cir. 1993); *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 111-12 (3d Cir. 1981); *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113, at 25,975 (Sept. 12, 1995).

144. See *Miller*, 646 F.2d at 111-12 (rejecting an argument that the defendants should not be liable for the plaintiffs' increased housing costs because the plaintiffs “received fair economic value” in the form of greater amenities for the rent they paid).

145. See, e.g., U.C.C. § 2-712 (1989).

146. See cases cited *supra*, note 143.

147. See *Miller*, 646 F.2d at 112. This rationale parallels the Restatement principles governing the applicability of offset. See *supra* note 134 and accompanying text.

The reasoning motivating the application of cover when a complainant's alternative housing costs more applies equally to situations in which a complainant is forced to buy less than he desires and receives a financial benefit as a result.<sup>148</sup> In both situations, the respondent has taken away the complainant's power to choose where he lives<sup>149</sup> and how he spends his money. Regardless of whether the respondent's bad acts generated unexpected savings in living expenses or better living quarters for the complainant, as long as the complainant sought comparable housing, the respondent should not receive credit for benefits that the complainant neither sought nor desired.<sup>150</sup>

It is true that prohibiting offset may result in a complainant having extra cash in his pocket when a respondent prevents him from obtaining housing in a more expensive community; however, Congress has countenanced the unjust enrichment of victims of discrimination in pursuit of the goals of the Fair Housing Act. The clearest example of this is the enhanced punitive damages provisions in the 1988 amendments to the Fair Housing Act.<sup>151</sup> Punitive damages indisputably provide a windfall to plaintiffs, but Congress deemed them necessary to stem the tide of housing discrimination.<sup>152</sup>

#### *E. The Validity of Using Formulas to Place a Value on Intangible Injuries*

The CLAC method uses housing prices to generate the value of a complainant's intangible lost access to a desirable community. Although courts have been reluctant to allow plaintiffs to use formulas to give numerical values to their intangible injuries, the CLAC method may be more reliable than other efforts to scientifically calculate intangible losses.

The most well-known attempts to calculate intangible injuries mathematically use willingness-to-pay studies to determine the monetary

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148. See RESTATEMENT (SECOND) OF TORTS § 920 cmt. f (1977).

149. The loss of choice alone is not a compensable injury. See *Baumgardner v. HUD*, 960 F.2d 572, 581-83 (6th Cir. 1992) (setting aside an ALJ award of \$2500 for civil rights injury that the trial court had based in part on the complainant's loss of the right to choose where to live).

150. This is true even if a complainant elects to live in a home with greater amenities, but in a less desirable neighborhood. An example would be a complainant who attempted to rent a \$1500 per month studio apartment in Greenwich Village and, after being unlawfully rejected for the unit, rented a four bedroom house in Queens for the same price. The respondent's bad acts caused the complainant to incur unexpected and unwanted savings; the manner in which the complainant chose to spend his increased savings is irrelevant to his claim for lost access to community damages as long as he attempted to mitigate his loss by continuing to look for housing in Greenwich Village.

151. Pub. L. 100-430, 102 Stat. 1619 (1988).

152. See *Armstrong*, *supra* note 18, at 916-18 (arguing that class-based equitable remedies under the Fair Housing Act would be consistent with Congress's willingness to make plaintiffs more than whole as reflected in the 1988 amendments to the Fair Housing Act).

value of a good quality of life in personal injury cases<sup>153</sup> and to establish the amount a defendant should pay for damage she caused to natural resources.<sup>154</sup> Critics have declared both methods suspect because they rely on “hypothetical” data to determine damages. In the personal injury context, economists rely on data estimating how much consumers will pay to avoid risk of harm to infer the value that individuals place on a good quality of life.<sup>155</sup> Plaintiffs hope that by establishing the monetary value of their losses through economic calculations, they can increase the size of their awards. Trial courts generally have excluded expert testimony based on willingness-to-pay studies in personal injury cases because there is no consensus among economists in support of this method for quantifying the value of enjoyment of life, and because the data reflects lay opinions and therefore is not “expert.”<sup>156</sup>

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153. Similar attempts have been made in the employment setting. Plaintiffs have relied on experts to calculate the diminution in the quality of their lives as a result of the defendants’ discrimination. Dona S. Kahn & Bernard R. Siskin, *Litigating Employment Discrimination Cases 1997*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 377, at 423 (1997).

154. See, e.g., Brian R. Binger et al., *The Use of Contingent Valuation Methodology in Natural Resource Damage Assessments: Legal Fact and Economic Fiction*, 89 NW. U. L. REV. 1029 (1995).

155. One economist, Stanley Smith, uses data on how much people are willing to pay for safety devices, compensating wage differentials for workers in dangerous jobs, and government cost-benefit studies related to safety, to determine the value of plaintiffs’ lost quality of life. See *Mercado v. Ahmed*, 756 F. Supp. 1097 (N.D. Ill. 1991), *aff’d*, 974 F.2d 863, 869 (7th Cir. 1992). Smith refers to the plaintiff’s loss as a hedonic injury. This concept refers to the notion that the price of a good should reflect the utility a consumer should receive from all dimensions of the good. For example, if two identical apartments rent for \$1000 and \$1500, respectively, the latter apartment should have public services and other amenities that have a value of \$500 per month. See generally WILLIAM T. BOGART, *THE ECONOMICS OF CITIES AND SUBURBS* 279-84 (1998).

For other cases in which parties attempted to introduce testimony by Dr. Smith, see *Sherrod v. Berry*, 629 F. Supp. 159 (N.D. Ill. 1985), *rev’d*, 856 F.2d 195 (1988) (en banc); *Fetzer v. Wood*, 569 N.E. 2d 1237 (Ill. App. Ct. 1991).

For comprehensive discussions of the use of “willingness to pay” evidence, see Erin O’Hara, Note, *Hedonic Damages for Wrongful Death: Are Tortfeasors Getting Away with Murder?*, 78 GEO. L.J. 1687, 1697-1706 (1990); Tina M. Tabacchi, Note, *Hedonic Damages: A New Trend in Compensation?*, 52 OHIO ST. L.J. 331, 339-40 (1991).

156. See, e.g., *Mercado*, 756 F. Supp. at 1103. The Seventh Circuit’s decision affirming the trial court’s exclusion of Smith’s testimony in *Mercado* includes a rich discussion of how Smith uses willingness-to-pay data and the criticisms of his methods. See *Mercado v. Ahmed*, 974 F.2d 863, 869-71 (7th Cir. 1992). Other courts have rejected numerical valuations of hedonic damages because: (1) generalized quality of life valuations are irrelevant to the loss experienced by a particular plaintiff; (2) calculations of hedonic damages are speculative and unreliable; and (3) loss of quality of life damages are contemplated in awards for pain and suffering. Economists’ valuations of life differ by up to eight million dollars. See Reuben E. Slesinger, *The Demise of Hedonic Damages Claims in Tort Litigation*, 6 J. LEGAL ECON., Fall 1996, at 17, 26 app. 1.

Critics of the use of mathematical calculations of hedonic damages to establish lost quality of life predict that, if legitimized, claims based on willingness-to-pay studies would consume between 10 and 15 percent of the gross national product. See Kahn & Siskin, *supra* note 153, at 425 (citing numerous challenges to Smith’s methodology).

Similar criticisms have arisen when government agencies have used survey data to assess the cost of damage to natural resources. The government uses willingness-to-pay surveys, querying how much people would be willing to pay to protect wildlife and natural areas, or to clean up toxic sites,<sup>157</sup> to place a monetary value on damage to the environment. Critics argue that damage assessments using this method, known as the Contingent Valuation Method, are unreliable because they are based on hypothetical answers to hypothetical questions and because the people answering the surveys lack sufficient information to make informed estimates of the amount they would be willing to pay to preserve the environment.<sup>158</sup>

The CLAC method should not fall prey to the criticisms that have plagued the use of willingness-to-pay studies. The CLAC method relies on actual prices and real transactions, not artificial or hypothetical transactions concocted for assessing damages. Furthermore, as discussed previously, economists have recognized that housing prices do reflect the value of intangible benefits of living in a community.<sup>159</sup>

#### *F. Summary*

The CLAC method, by measuring a community's effect on housing prices, provides a tool for assessing the loss a home-seeker experiences when denied access to a desirable community. Although complex fact situations may make application of the method complicated at times, there are ways to address the complexities without compromising the applicability or the validity of the method.

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157. See Binger et al., *supra* note 154, at 1032. For an application of Contingent Valuation Methodology (CVM), see *General Electric Co. v. Department Of Commerce*, 128 F.3d 767, 772-74 (D.C. Cir. 1997).

158. The use of willingness-to-pay studies has been more widely accepted in assessing environmental damage than personal injuries because Congress gave governmental agencies a broad mandate to find the best available method for assessing environmental damage, and CVM is the best method available. See David S. Brookshire & Michael McKee, *Is the Glass Half Empty, Is the Glass Half Full? Compensable Damages and the Contingent Valuation Method*, 34 NAT. RESOURCES J. 51, 70 (1994).

For another critique of the Contingent Valuation Method, see Jeffrey C. Dobbins, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879 (1994); but see Brookshire et al., *supra* note 97, at 165 (after testing Contingent Valuation Method against hedonic price analysis, determining that, if anything, the Contingent Valuation Method understates the damage).

159. See *supra* text accompanying notes 96-98.

### III. ENFORCEMENT OF THE FAIR HOUSING LAWS AND THE CLAC METHOD FOR CALCULATING DAMAGES

In Parts I and II of this article, I focused on recognizing a remedy for an overlooked and important injury that victims of discrimination experience. A full assessment of this remedy requires consideration of how it will interact with existing enforcement of the fair housing laws. In the following section, I discuss how the CLAC method affects sellers', agents', and landlords' decisions to discriminate. I then discuss how the method could influence the decisions of discrimination victims to file claims. In the concluding section, I consider whether the CLAC method could lead to excessive deterrence and the relative merit of the CLAC method versus punitive sanctions.

#### A. Incentives for Landlords, Agents, and Sellers

The fair housing laws are designed to compensate victims of discrimination and deter potential discriminators by creating incentives for victims of discrimination to bring claims and obtain relief.<sup>160</sup> This enforcement system is based on the assumption that sellers, landlords, and agents get a private benefit<sup>161</sup> from discriminating. Damage awards are intended to offset these private benefits.

A number of factors influence landlords', sellers', and real estate agents' decisions to discriminate. Some discriminate simply because they are bigoted.<sup>162</sup> Others fear that property values will decline if members of protected groups, particularly people of color, move into their communities.<sup>163</sup>

Landlords may be more inclined than sellers to discriminate because they

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160. See Armstrong, *supra* note 18, at 919 (noting that the Fair Housing Act, by "relying on individual action[,] allows persons who oppose the law to disobey or disregard it until another individual acts to stop them").

161. Those agents and sellers who unconsciously discriminate do not engage in this type of cost-benefit analysis but they still may derive financial benefits from their unconscious discrimination.

162. See, e.g., HUD v. Leiner, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,021, at 25,262 (Jan. 3, 1992) (rental agent who was the wife of the landlord, and who rejected a black woman applicant, stated to HUD investigator that "[t]hese people do not pay their rent . . . [T]hey don't clean their apartments, they leave it like a pigsty. . . You put five blacks or Hispanics in an apartment and you have a pigsty").

163. See MASSEY & DENTON, *supra* note \*, at 94. Landlords and agents are not the only people concerned about property values. Sellers' neighbors may have the same concerns and put pressure on the sellers not to sell to people of color. Sellers who own parcels in the community in addition to the one they are selling may also discriminate because they perceive it is necessary to maintain property values. See, e.g., Allen v. Gifford, 368 F. Supp. 317, 320 (E.D. Va. 1973) (developer refused to sell lot to black family because he thought his investment would lose value if the family moved into the area).

have ongoing relationships with their tenants and an ongoing interest in their property. They may worry that existing tenants will move out or that it will be hard to attract new tenants if they rent to the “wrong” people.<sup>164</sup> Landlords who are motivated by fears and stereotypes may believe that if they rent to families with children, the children will damage their property<sup>165</sup> or bother other tenants.<sup>166</sup> Others may refuse to rent to single mothers<sup>167</sup> because they worry that the women will have “strange” men around, that they won’t pay the rent, or that their single status reflects weak morals.<sup>168</sup>

Landlords can even be well-intentioned discriminators. In one case,<sup>169</sup> a landlord violated the fair housing laws by refusing to rent an apartment to a family with young children because the unit was in a building next to a parking lot that was used by large trucks.<sup>170</sup> Some state laws actually give landlords an incentive to discriminate. For example, landlords with buildings in states that require them to remove lead paint from rental units in which a young child lives or will live<sup>171</sup> have an incentive to discriminate against families with children.<sup>172</sup>

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164. *See, e.g.*, *Steele v. Title Realty Co.*, 478 F.2d 380, 383 (10th Cir. 1973) (landlord refused to rent apartment to a black applicant citing “problems arising with other renters if he permitted any [black people] to move into the area”). *See also* HACKER, *supra* note 24, at 38 (chronicling that for whites, the presence of African-americans in the neighborhood gives rise to concerns about crime and interracial dating).

165. *See, e.g.*, *HUD v. Sams*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,069, at 25,647 (Mar. 11, 1994) (landlord refused to rent to a large family because of previous damage to the house).

166. *See* *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113, at 25,969-70 (Sept. 12, 1995) (landlord refused to rent upstairs apartment to a woman with a teenage daughter because “teenagers are loud and noisy and would disturb the downstairs tenants”); *see also* *Gonzalez v. Rakkas*, No. 93 CV 3229 (JS), 1995 WL 451034, at \*1 (E.D.N.Y. July 25, 1995) (landlord rejected Honduran applicant for apartment on grounds that “Spanish people . . . like to have loud music”).

167. Men also face discrimination. *See, e.g.*, *Baumgardner v. HUD*, 960 F.2d 572, 574 (landlord refused to rent to several men on the grounds that men are “messy and unclean”).

168. *See, e.g.*, *Walker v. Crigler*, 976 F.2d 900, 902 (4th Cir. 1992) (rejecting applicant who was a single mother because “she had experienced problems with the boyfriends of single women in the past”).

169. *Chapman v. Portfilio*, (MCAD Docket No. 87-SPR-0109).

170. *See also* *HUD v. French*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,113, at 25,971 (Sept. 12, 1995) (landlord unlawfully rejected applicant with child on the grounds that it was dangerous for young children to live in his second floor unit).

171. *See, e.g.*, MASS. GEN. LAWS ch. 111 § 197 (1996)(with some exceptions, requiring landlords to remove or cover any paint, plaster or soil that contains dangerous levels of lead paint from any premises inhabited by children under six years old).

172. *See, e.g.*, *HUD v. DiBari*, HUDALJ 01-90-0511-1, at 3-4 (visited Mar. 7, 2000) <<http://www.hud.gov/alj/pdf/dibari.pdf>> (landlord refused to rent apartment to families with children because he believed the unit contained lead paint); *see also* Jeff Kramer, *Family Alleges Bias on Lead Paint*, BOSTON GLOBE June 10, 1995, at 26 (chronicling the experience of a family with a baby who was unable to find housing in the Boston area because of the de-leading laws).



From the perspective of a real estate agent, complying with a landlord's or seller's discriminatory request may be in her financial interest.<sup>173</sup> An agent who refuses to accept a listing because a landlord or seller has expressed discriminatory preferences loses a potential commission.<sup>174</sup> Rental commissions can be as high as several thousand dollars for a single apartment. Sales commissions are even larger. An agent's potential lost revenue is not necessarily limited to the loss of an isolated commission. If she refuses to discriminate on behalf of a landlord or seller who owns multiple units, the agent may be forsaking a regular and significant source of revenue.<sup>175</sup> A profit-maximizing agent could sacrifice many thousands of dollars in commissions if she refuses to discriminate.<sup>176</sup>

Agents sometimes discriminate in the absence of an explicit request from a landlord or seller. For example, agents working in a white community may believe that they will alienate customers or other brokers if they rent or sell to people of color.<sup>177</sup>

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Even in states that do not require de-leading, landlords who own units that contain lead paint can be liable if children living in their units ingest the paint and are poisoned, which is an added reason for landlords to reject applicants with children.

173. See John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 AM. ECON. REV. 881, 892 (1986) (finding that real estate agencies discriminate because they want to keep their customers—landlords and sellers—happy).

Even though it may be financially advantageous for agencies to discriminate, there are some agencies that actively participate in enforcing the law. See, e.g., *Banai v. HUD*, 102 F.3d 1203, 1205 (11th Cir. 1997) (real estate agent, upon learning that a landlord was rejecting an applicant on the basis of his race, informed the applicant of the landlord's unlawful rejection and terminated the listing agreement with the landlord); *HUD v. DiBari*, HUDALJ 01-90-0511-1, at 3-4 (visited Mar. 7, 2000) <<http://www.hud.gov/alj/pdf/dibari.pdf>> (real estate agency refused to list landlord's apartment after the landlord rejected couple because wife was pregnant).

174. See, e.g., *HUD v. Pfaff*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,085, at 25,777 (Oct. 27, 1994) (the rental agent told the landlord that she would not honor his refusal to rent to a family with five children, and the landlord then tore up his contract with the agency), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996).

175. See YINGER, *supra* note 7, at 166.

176. The benefit of discriminating actually rises in response to a decline in the willingness of other agencies to discriminate. If all but one agency in a given locality refuses to honor landlords' discriminatory preferences, the discriminating agency will capture more listings than all the other agencies. To discourage agencies from discriminating, adjudicators should impose damage awards that exceed the benefit of discriminating that accrues to one agency when all other agencies refuse to discriminate.

177. YINGER, *supra* note 7, at 163-64, 184 (concluding that "many . . . agents tend to protect their current and potential business with prejudiced whites"). See also HACKER, *supra* note 24, at 35-36 (noting that most whites are unwilling to live in communities in which half the residents are of color); Harriet B. Newburger, *Discrimination by a Profit-Maximizing Real Estate Broker in Response to White Prejudice*, 26 J. URB. ECON. 1 (1989) (modeling real estate brokers' incentives to discriminate).

Agents may also perceive that discriminating will save them time. If, for example, an agent suspects that a seller will not sell to people of color, she will not waste her time showing the house to applicants of color. As the former deputy general counsel of the National Association of Realtors, Robert Butters, has written, agents' "results-based compensation system encourages agents to maximize the number of successful transactions they can arrange in a given period of time." Robert D.

The cost to landlords, sellers, and agents of discriminating is the possibility of having to defend a housing discrimination claim and pay damages.<sup>178</sup> Although it is difficult to obtain an accurate appraisal of typical damages awarded in fair housing cases,<sup>179</sup> the consensus is that housing discrimination claims are difficult to win<sup>180</sup> and do not generate large awards.<sup>181</sup> The majority of complainants file their claims with HUD<sup>182</sup> where

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Butters, *The Real Estate Industry's View of Audit Results: Comments*, in CLEAR AND CONVINCING EVIDENCE 153, 155 (Michael Fix & Raymond J. Struyk eds., 1992).

178. Being found in violation of the law is not the only risk a seller or landlord assumes when she discriminates. A landlord risks a loss in revenue if her unit remains vacant. A seller risks a financial loss if her house does not sell immediately, or sells at a lower price. The magnitude of these risks depends on how tight the market is for residential real estate and whether prices have adjusted to changes in supply and demand. See Kushner, *supra* note 5, at 1056.

179. Some studies include judgments but not settlements, and others include trial outcomes, but not results from hearings before ALJs. Settlement data is particularly difficult to obtain because settlements between private parties are often confidential. The best source of data on outcomes is from agencies that have reporting requirements; however, this data excludes cases heard in court and may exclude confidential settlements between intervenors and respondents. A further problem is that no studies incorporate injunctive relief in calculating average awards.

180. See Selmi, *supra* note 46, at 1452 n.206 (citing Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989)).

181. There have been a handful of housing discrimination cases in which the judgments were substantial. See, e.g., *Timus v. Davis, Inc.*, No. 91 Civ. 0882 (D.D.C. 1992) (awarding victim of familial status housing discrimination damages of \$2.4 million dollars); *Darby v. Heather Ridge*, 827 F. Supp. 1296 (E.D. Mich. 1993) (awarding \$450,000 to plaintiffs who brought claim of race discrimination under the Fair Housing Act). The opinion of one authority on housing discrimination is that cases with large awards are aberrations and unlikely to be the reference points for sellers, landlords, or agents who are deciding whether to discriminate. See Kushner, *supra* note 5, at 1070. *But see* SCHWEMM, *supra* note 12, at § 25.3(2)(c).

Damage awards are low because most complainants do not incur significant actual damages, and emotional distress damages, which form the bulk of most awards, are rarely meaningful. See F. Willis Caruso et al. *Discrimination in Rental Housing*, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION (1998); Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 YALE L. & POL'Y REV. 375, 380 (1988).

There are a number of possible explanations for low emotional distress awards. It may be that fact-finders feel that housing discrimination does not cause appreciable distress. See, e.g., *Portee v. Hastava*, 853 F. Supp. 597, 615 (E.D.N.Y. 1994), *aff'd*, 104 F.3d 349 (2nd Cir. 1996) (vacating child's compensatory award on the grounds that a child's "sadness at not getting a basketball hoop, a pool, or his own room [was] touching, but [was] inadequate to support an award of more than nominal damages"); *Darby v. Heather Ridge*, 827 F. Supp. 1296, 1300 (E.D. Mich. 1993) (reducing \$187,160 emotional distress award to \$37,160 because the only evidence of distress was the plaintiffs' testimony that they experienced sadness and a loss of self-esteem and that they did not enjoy being with other people). Adjudicators may be particularly reluctant to award emotional distress damages to complainants who immediately found alternative housing.

Another explanation for low emotional distress awards is that victims of housing discrimination are unlikely to have impartial witnesses to their distress. See Larry R. Rogers & Kelly N. Kalus, *From One Dollar to \$2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases through Basic Tort Litigation Tactics*, 26 J. MARSHALL L. REV. 29, 34 (1992) (recommending that plaintiffs present expert and other witnesses to maximize emotional distress damages). The search for housing is private and usually does not involve anyone other than roommates and family members. In contrast, a plaintiff with a physical injury is more likely to have disinterested witnesses who can testify

most claims are resolved through conciliation or are administratively closed.<sup>183</sup> Of the claims that were conciliated in 1991, the median settlement was \$600. Comparable figures for 1992 and 1993 were \$750 and \$775, respectively.<sup>184</sup> 1987 data on claims that HUD referred to equivalent state agencies revealed average awards of \$135.41 per complainant.<sup>185</sup>

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to his pain and suffering. Adjudicators may be disinclined to award significant emotional distress damages when a complainant's evidence of distress comes solely from interested parties. See Teresa Coleman-Hunter & Gary L. Fischer, *Fair Housing Testing—Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1133 (1995) (taking the position that adjudicators may give greater credibility to tester's testimony than the testimony of the actual victims because they are dispassionate observers); Shanna L. Smith, *The National Fair Housing Alliance at Work*, in RESIDENTIAL APARTHEID: THE AMERICAN LEGACY 237, 249 (Robert D. Bullard et al. eds., 1994) (criticizing HUD and Department of Justice attorneys for failing to refer victims of housing discrimination to psychologists who, by determining the nature and extent of the of victims emotional distress, could help articulate their injuries); see also Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39 (1992) (documenting methods for proving emotional distress damages in fair housing cases).

In the absence of sufficient proof that the housing discrimination caused a complainant's distress, adjudicators may attribute the complainants' distress to factors other than the discrimination. See Schwemm, *supra* note 12, at § 25.3(2)(c) (noting that proof of a plaintiff's intangible injuries is "often sketchy"); Heifetz & Heinz, *supra* note 59, at 21.

Another factor that may contribute to low awards is that most respondents are small real estate firms, local landlords, or home-owners. Adjudicators tend to reserve large awards for intangible injuries for large corporations. Schwemm, *supra*, at 380-81.

Whatever the cause for low awards in fair housing discrimination cases, it is unlikely that adjudicators will increase the size of awards on their own. This is because ALJs and judges consider and rely upon awards in other cases in determining how much they will award in the cases they are deciding. See Allen, *supra* note 6, at 352 (arguing that "ALJ's [sic] slavish adherence to their own precedents inevitably guarantees modest awards"); Heifetz & Heinz, *supra* note 59, at 18-19. For examples of decisions in which adjudicators have adhered to the range of awards in previous cases, see, e.g., Hamilton v. Svatik, 779 F.2d 383, 389 (7th Cir. 1985) (reviewing other cases to determine whether \$12,000 jury award for intangible injuries "shocked the conscience"); Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 190-91 (7th Cir. 1982) (reducing emotional distress awards of \$25,000 for each plaintiff to \$10,000 on the grounds that the awards were more than twice the amount any previous plaintiffs had recovered for intangible injuries in a housing discrimination case); Portee, 853 F. Supp. at 612-15 & n.9 (reviewing numerous housing discrimination and other civil rights cases in deciding to set aside a housing discrimination award of \$280,000 on the grounds that it "shocked the judicial conscience"); Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 353 (W.D. Tenn. 1982) (awarding \$10,000 compensatory award after considering comparable awards in other fair housing cases); Young v. Parkland Village, Inc., 460 F. Supp. 67, 72 (D. Md. 1978) (deciding emotional distress award by picking an amount that fell within the mid-range of other awards). But see SCHWEMM, *supra* note 12, at § 25.3(2)(c) (arguing that, in fact, damages in housing discrimination cases are on the rise and predicting that the trend will continue).

182. See SCHWEMM, *supra* note 12, at § 24.2 (documenting that the majority of filings were with HUD before the 1988 amendments); Selmi, *supra* note 46, at 1408 & tbl. 2 (documenting this phenomenon following the passage of the 1988 amendments).

183. Of the cases HUD processed in 1991, almost half were administratively closed and 33% settled through conciliation. See Schwemm, *supra* note 9, at 768 (citing UNITED STATES DEP'T OF HOUS. AND URBAN DEV., THE STATE OF FAIR HOUSING 1991: A REPORT TO CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT 7 (1993)).

184. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 14, at 37.

185. Kushner, *supra* note 6, at 1099-1100 (noting that awards rendered by state and local agencies

The few complainants who remove their claims to court or proceed before ALJs receive larger, although still not substantial, awards.<sup>186</sup> The U.S. Commission on Civil Rights found that the average<sup>187</sup> ALJ award for race-based housing discrimination in 1993 was \$39,214 and the average court award was \$28,378.<sup>188</sup> The same study found that the average ALJ award for familial status-based housing discrimination in 1993 was \$7075.<sup>189</sup> The average court award for familial status cases was \$3776.<sup>190</sup> DOJ data, aggregating settlements and verdicts in cases in which the DOJ represented the complainants as a result of one or both of the parties electing judicial determination, revealed median awards of \$9500 in 1996, and \$7500 in 1995.<sup>191</sup> Other data on outcomes at trial found that the median trial verdict from 1992 to 1995 was \$41,829 for housing discrimination claims brought by the private bar and \$25,500 for claims in which the plaintiffs were represented by Department of Justice attorneys.<sup>192</sup>

It is important to note that these studies use the aggregate amount of awards, and, as a result, inflate the damages any one respondent would expect to pay.<sup>193</sup> It is not unusual for a housing discrimination case to have several complainants and several respondents. By using the total amount awarded in each case, the studies reflect the median and mean awards per-case, not median and mean amounts per-complainant or per-respondent.

For real estate agencies that have “defense costs”<sup>194</sup> or indemnity

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have been described as “an insult to the victim and a joke to the real estate industry”) (citing *Residential Segregation Stifling Black Advancement, Professor Testifies*, 15 [Current Developments] Hous. & Dev. Rep. (BNA) 695 (1988)).

186. In 1991, only 3% of all claims filed with HUD proceeded to a hearing or trial. Of this 3%, 63% were heard in court and the remainder were heard by ALJs. See Schwemm, *supra* note 9, at 768-69 (citing UNITED STATES DEP’T OF HOUS. AND URBAN DEV., THE STATE OF FAIR HOUSING 1991: A REPORT TO CONGRESS PURSUANT TO SECTION 808(E)(2) OF THE FAIR HOUSING ACT 7, 12 (1993)).

187. Because of the asymmetrical distribution in housing discrimination awards, the calculation of means, rather than medians, in this study likely resulted in an overstatement of the amount of typical awards. See Selmi, *supra* note 46, at 1419-20 & n.74 (noting that the standard deviation was over two million dollars in one calculation of the mean award for certain classes of housing discrimination cases).

188. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 14, at 62-63.

189. See *id.* at 63.

190. See *id.*; see also Allen, *supra* note 6, at 342-43 (noting that familial status cases in particular have generated modest awards and providing explanations for lower awards in familial status cases).

191. See Selmi, *supra* note 46, at 1420 n.76.

192. See *id.* at 1419 tbl. 4. To the extent data on trial awards includes attorneys’ fees, the amount plaintiffs actually receive is less than these studies suggest. See *infra* text accompanying notes 199-200. This is less true in administrative proceedings, where complainants typically are not represented by counsel.

193. See U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 14, at 62.

194. Defense costs insurance pays the cost of defense up until the time of judgment. See Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV. 1721, 1729 (1997); see generally Francis J. Mootz III, *Insurance Coverage of Employment*

insurance,<sup>195</sup> the threat of having to defend a claim and possibly pay a judgment may be further reduced.<sup>196</sup> The agency can discriminate knowing that, if it is sued, the insurance company will provide settlement funds, or pay to swamp the plaintiffs with a vigorous defense<sup>197</sup> without the agency having to fund the settlement, defense, or, in the case of indemnity insurance, the judgment.

### *B. Incentives for Victims of Discrimination*

From the perspective of victims of discrimination, the benefits of filing claims are twofold: vindication of their rights and the potential for the recovery of damages. The previously discussed studies calculating damage awards in housing discrimination cases overstate a complainant's potential recovery to an even higher degree than they overstate a respondent's potential sanction. This is because the studies often include attorneys' fees<sup>198</sup> and civil penalties<sup>199</sup> in the amount of awards even though these sanctions are paid to the complainants' attorneys or the government.

The costs to victims of filing claims can be formidable. Complainants have to participate in discovery, preparation of their claims, and trials. They and their families may be subject to depositions and an array of inquiries into their private lives. When complainants claim emotional distress damages, respondents often have a right to psychotherapy records and, if the emotional distress caused physical symptoms, complainants usually must produce their medical records as well.<sup>200</sup> Complainants also may be obliged to produce

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*Discrimination Claims*, 52 U. MIAMI L. REV. 1 (1997).

195. Liability insurance for intentional torts is generally considered to be against public policy. *See, e.g., Windmill Pointe Village Club Ass'n v. State Farm Ins. Co.*, 779 F. Supp. 596, 598-99 (M.D. Fla. 1991) (holding that an insurance company did not have to indemnify or pay the costs of defending a housing discrimination claim because it was an intentional tort and therefore against public policy for the insurer to provide coverage).

Where state laws prohibit insurance companies from indemnifying defendants who have been found liable for intentional torts, the law may permit insurance companies to pay the cost of settling an intentional discrimination claim against their insured before there has been any decision on liability.

196. Insured real estate agencies do, however, run the risk that their insurers will increase their premiums or deny them future insurance if they make a claim under their policies.

197. *See Armstrong, supra* note 18, at 919 n.56 (noting that generally the party discriminating will have more financial resources to draw upon to out-litigate the victims of discrimination).

198. Attorneys' fees are often the bulk of plaintiffs' awards. *See Allen, supra* note 6, at 342-43.

199. Civil penalties are paid to the federal government. *See U.S. COMMISSION ON CIVIL RIGHTS, supra* note 15, at 64.

200. For a discussion of defendants' right to psychotherapy records when plaintiffs bring claims for emotional distress damages, see generally David A. Robinson, *Discovery of the Plaintiff's Mental Health History in an Employment Discrimination Case*, 16 W. NEW ENG. L. REV. 55 (1994). The status of defendants' rights to therapy records recently was called into question by the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). In *Jaffee*, the Court extended the

their financial records if a respondent challenges their qualifications to rent or buy the housing they were denied.<sup>201</sup>

Complainants who want to file their claims directly in court or to intervene in an action filed by HUD or DOJ need to secure attorneys. This can be a formidable obstacle for complainants who cannot afford or do not want to pay an attorney on an hourly basis. Even altruistically oriented civil rights attorneys<sup>202</sup> have to consider the odds that their clients will prevail and that the cases will generate sufficient income.<sup>203</sup> Given that housing discrimination cases are difficult to win,<sup>204</sup> risk averse attorneys will be reluctant to take housing discrimination claims on a contingency basis.<sup>205</sup>

Even when successful, attorneys have no guarantee that they will recover their actual fees and costs.<sup>206</sup> Although prevailing plaintiffs are entitled to recover attorneys' fees under the provisions of the Act, if a case settles, attorneys are usually compensated based on a percentage of the settlement amount<sup>207</sup> and their clients waive any claim for statutory fees.<sup>208</sup> A realistic

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communications privilege to psychotherapists to preclude a defendant from obtaining a psychotherapist's records of communications with a plaintiff. *Id.* at 18. The *Jaffee* plaintiff did not seek emotional distress damages so it is unclear whether the holding applies when plaintiffs bring claims for emotional distress.

201. The burden-shifting formula set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), applies to housing discrimination cases in which there is no direct evidence. One element of the complainant's prima facie case is that he applied for and was qualified to rent or purchase the unit he was denied. For an exhaustive list of cases applying *McDonnell-Douglas* to fair housing claims, see SCHWEMM, *supra* note 12, at § 10.2 n.26.

202. This is not true for attorneys in the public or non-profit sectors or attorneys engaged in periodic pro bono activities who derive their income from other sources.

203. See Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 208 (January 1997); Selmi, *supra* note 46, at 1452.

204. Selmi, *supra* note 46, at 1413. Between 1991 and 1994, HUD issued "cause" determinations in only 15.6% of the complaints it investigated. Given that respondents prevailed in at least some of the claims for which HUD found probable cause, the frequency with which respondents were found liable in claims filed with HUD was less than 15.6%. *Id.*

205. See Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 J. ECON. LITERATURE 1067, 1084 (1989) (citing evidence that hourly fee attorneys accept cases that contingent fee attorneys reject because the former do not have to share the risk with their clients).

206. See, e.g., *Lamb v. Sallee*, 417 F. Supp. 282, 287-88 (E.D. Ky. 1976) (awarding \$730 for attorneys' fees even though defendant did not refute calculations in fee petition seeking \$1500 in fees and costs).

207. See Davies, *supra* note 203, at 199-200 (arguing that the process of settling civil rights cases is now "the equivalent of a personal injury negotiation").

208. In light of *Evans v. Jeff D.*, 475 U.S. 717 (1986), defendants can make it a condition of settlement that plaintiffs' counsel waive their right to fees. The possibility that a defendant might condition settlement on a waiver of fees creates a further disincentive to attorneys accepting housing discrimination cases. For a case discussing the ethical issues this creates for attorneys, see *Lazar v. Pierce*, 757 F.2d 435, 437-39 (1st Cir. 1985), in which plaintiff's counsel waived fees as a condition of settlement and subsequently sought fees under the Equal Access to Justice Act. The attorney unsuccessfully argued for fees on the grounds of duress: the defendant's conditioning of the settlement

lawyer who is deciding whether to accept a housing discrimination claim will assume that the parties will settle prior to trial.<sup>209</sup> Given the low settlement amounts in housing discrimination claims and the high costs of litigation, the attorney can expect to be poorly compensated if she accepts the case.<sup>210</sup>

For optimistic attorneys who evaluate cases based on the assumption that they will recover statutory fees, there are hurdles that can arise with a fee petition. Before awarding fees, a court has to determine whether the plaintiff is entitled to attorney's fees and, if so, whether the amount requested is reasonable.<sup>211</sup> Litigation of these issues can take as much time and as many trips to court as the trial itself.<sup>212</sup>

Attorneys representing clients who intervene in HUD proceedings or claims brought by the DOJ in court may have a difficult time proving that their clients are entitled to attorneys' fees and that the amounts are reasonable. The Fair Housing Act allows intervenors to recover their attorneys' fees unless "special circumstances make the recovery of such fees and costs unjust."<sup>213</sup> Special circumstances that would preclude an award include a finding that the intervenor's efforts "did not contribute to

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on the waiver of attorneys' fees "left [the attorney] no ethical choice but to settle under [the defendants'] terms." *Id.* at 437.

209. See THOMAS J. MICELI, *ECONOMICS OF THE LAW* 156-57 (1997) (noting that less than 10% of civil cases go to trial); see also SCHWEMM, *supra* note 12, at § 25.3(5)(b). It is not surprising, then, that attorneys considering whether to accept housing discrimination claims consider the amount of available damages more than they do the provisions for statutory attorneys' fees. See Selmi, *supra* note 46, at 1453-54.

210. Davies describes the allocation of fees as a percentage of settlement as a partial fee waiver because the actual time the attorney spent on a case exceeds what she is paid. See Davies, *supra* note 203, at 218.

211. See, e.g., HUD v. Dutra, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,129, at 26,091 (May 13, 1997) (reducing attorneys' fees claimed by over 40% on the grounds that counsel had spent an excessive amount of time prosecuting the case and preparing the fee application); HUD v. Kelly, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,114, at 25,983-84 (Sept. 21, 1995) (declining to award fees for excessive time spent on fee application, time spent on petition for rehearing that was never filed, and time used securing a loan for complainant); HUD v. Dedham Hous. Auth., [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,031, at 25,330 (May 26, 1992) (in determining the fee award, reducing attorney's hourly rate from \$150 to \$110).

212. See Selmi, *supra* note 46, at 1453 (discussing litigation of fee applications in Fair Housing Act and Title VII cases).

In *Marable v. H. Walker & Assocs.*, 644 F.2d 390, 397 (5th Cir. 1981), the court reversed the trial court's judgment for the defendants. On remand to assess damages and attorney's fees, the trial court reduced the attorney's hourly rate and the number of hours he had expended. See *Marable v. H. Walker & Assocs.*, 704 F.2d 1219, 1221-22 (11th Cir. 1983). To collect his fees, the plaintiff again had to file an appeal. See *id.* at 1222. See also *City of Riverside v. Rivera*, 477 U.S. 561, 581 (1986) (in a police misconduct cases, allowing attorneys' fees 6 years after the jury rendered its verdict and after 2 appeals to the Supreme Court).

213. See *supra* note 70 and accompanying text.

achieving” the favorable result.<sup>214</sup> The combination of a significant risk of losing and uncertain compensation can make housing discrimination claims unappealing to attorneys<sup>215</sup> and, in turn, prevent victims of discrimination from securing representation.

### *C. The CLAC Method's Effect on Incentives*

The CLAC method will increase potential damage awards<sup>216</sup> and will thus cause victims of discrimination and landlords, sellers, and agents to adjust the cost-benefit calculus they use in deciding whether to file claims or whether to discriminate, respectively. For victims, the possibility of recovering several thousand dollars in lost access to community damages may be enough to motivate them to file a claim when they might not have done so otherwise.<sup>217</sup> This will be especially true for those with little or no actual damages, and those for whom it will be difficult to prove emotional distress.<sup>218</sup> The larger awards may also entice more attorneys to accept housing discrimination claims.

For landlords, sellers, and agents, an increase in the amount of awards will increase the cost of discriminating. This change in incentives likely will be greatest for agents who work in areas that are gateways to upward

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214. HUD v. Dutra, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,129, at 26,089 (May 13, 1997), quoting *Donnell v. United States*, 682 F.2d 240, 247 (D.C. Cir. 1982). The court in *Donnell* held that factors to consider in determining whether an intervenor contributed to the success of the litigation include: “whether the governmental litigant adequately represented the intervenor[’s] interests by diligently prosecuting the case . . . whether the intervenor[] proposed different theories and arguments . . . and whether the work it [sic] performed was of important value to the court.” See *Donnell*, 682 F.2d at 249. For an application of this principle, see, e.g., HUD v. Simpson, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,044, at 25,447 (Apr. 16, 1993) (awarding intervenor only half the requested fees, in part, on the grounds that the attorney’s work “was of limited value to [the ALJ hearing the claim]”).

215. Professor Davies makes the same argument with respect to police misconduct cases in which victims’ injuries are minor and thus insufficient to entice attorneys to take on their claims. See *Davies*, *supra* note 203, at 199-200. She also notes that even when claims are meritorious attorneys are reluctant to take on low damage cases. See *id.* at 233. In contrast, attorneys may be more willing to accept the risk of losing an employment discrimination claim because actual damages such as lost wages can be significant. As a result, the high risk is balanced or exceeded by the high potential return. See *generally id.* at 265-66.

216. When complainants successfully bring lost access to community claims, their overall compensatory awards will be larger because their lost access to community damages are in addition to the damages that are already available to them. For example, a plaintiff with a lost access to community claim also could have a claim for damages based on the unique value the unit had to him. In addition, to the extent that courts are concerned with the ratio between actual and punitive awards, larger compensatory awards can also lead to larger punitive awards.

217. Of course, only those potential complainants who have consulted with attorneys are likely to know of the availability of lost access to community claims.

218. See *supra* note 181.



mobility.

#### *D. The Risk of Too Much Deterrence*

Assuming that the CLAC method would, indeed, lead to larger awards in housing discrimination cases, it is important to determine whether the method would generate too much deterrence. An optimal enforcement scheme should result in high compliance with the fair housing laws without encouraging frivolous lawsuits or reducing the supply of housing.<sup>219</sup> Although it may be impossible to know with precision whether damage awards in fair housing cases are at optimal levels, some back-of-the-envelope calculations suggest that the current level of awards may be too low.

Over the course of the first twenty years after the Fair Housing Act was passed, there were four hundred reported federal fair housing decisions.<sup>220</sup> Assuming that eight to fifteen percent of civil cases go to trial,<sup>221</sup> a rough estimate of the average number of federal housing discrimination claims filed per year from 1968-1988 would be between 133 and 250. These figures need to be adjusted to account for the fact that they do not reflect unreported decisions, claims filed in state courts or agencies, or claims that settled.<sup>222</sup> They also do not reflect the likely increase in filing rates since the 1988 amendments to the Fair Housing Act. A generous assumption would be that the current number of housing discrimination claims filed in federal courts, HUD, and state courts and agencies annually is ten times<sup>223</sup> the larger of these numbers, or 2500. There were an estimated two million incidents of illegal housing discrimination each year between 1968 and 1988.<sup>224</sup> Assuming that discrimination rates are at their historical levels, one incident of discrimination is detected and pursued for every 800 incidents that occur.

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219. For example, if potential sanctions are too high, landlords who are committed to discriminating might elect to turn their rental units into condominiums and sell them, which could reduce the number of available rental units in the community.

220. See Massey & Denton, *supra* note \*, at 200 (citing GEORGE METCALF, *FAIR HOUSING COMES OF AGE* (1988)).

221. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 405 (1982) (concluding that 85 to 90 percent of civil cases filed in federal court settle); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) (summarizing data suggesting that slightly less than 8% of civil suits filed in state and federal court go to trial).

222. On the other hand, by assuming that these decisions were not pre-trial, my calculations actually overstate the number of claims filed.

223. A study of the percentage of employment discrimination claims that resulted in published opinions in 1986 found that 27% of all claims result in published opinions. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1140 (1990).

224. See Kushner, *supra* note 5, at 1052.

To assess the level of deterrence associated with a one in 800 rate of enforcement, we also need to know the potential cost to a landlord, seller, or agent of discriminating. The previously cited studies of damages in fair housing cases<sup>225</sup> revealed typical award levels of between \$135.41 and \$41,829. Again, conservatively adjusting these levels upward by a factor of ten to \$1351 and \$418,290, the expected cost of discriminating to a landlord, seller, or agent would be somewhere between one dollar and sixty-nine cents, and 522 dollars. In other words, the current enforcement system would fail to deter a landlord whose private value from discriminating exceeded \$522.<sup>226</sup> This potential cost is low when, for example, you compare it to the thousands of dollars it costs landlords to remove lead from rental units. Even when using extremely conservative assumptions, these rough estimates indicate that the expected cost of discriminating is lower than the financial benefits of discriminating that accrue to many agents, sellers, and landlords.<sup>227</sup>

The low expected cost of discriminating is driven by very low enforcement rates.<sup>228</sup> These low enforcement rates are due, in part, to the fact that discrimination is hard to detect.<sup>229</sup> Flagrant discrimination is rare.<sup>230</sup> Most landlords, agents, and sellers know their obligations under the fair housing laws and employ subtle tactics<sup>231</sup> to “put off” or reject applicants<sup>232</sup> without revealing their discriminatory motives.<sup>233</sup> Discrete discrimination is difficult to detect, particularly at the contract formation stage when an

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225. See *supra* notes 186-91 and accompanying text.

226. Of course, this assumes that the landlord is not risk averse and is not afraid of other factors that could accompany allegations of discrimination, such as negative publicity.

227. See Kushner, *supra* note 5, at 1055 (arguing that sub-optimal awards are one explanation for persistent housing discrimination); see also YINGER, *supra* note 7, at 214 (noting that “[e]ven with an effective enforcement system, many housing agents will find a way to discriminate if they have a strong financial incentive to do so”); Newburger, *supra* note 177, at 18 (arguing that the penalties for discriminating must be at least as high as the cost of not discriminating).

For related discussions of economic efficiency in the context of Title VII, see John J. Donahue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987); John J. Donahue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986); Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987).

228. This calculus may vary depending on where the agency is located. At least one authority, Professor Kushner, argues that a few select cities with attorneys dedicated to fair housing generate most of the fair housing decisions. See Kushner, *supra* note 5, at 1070.

229. See Armstrong, *supra* note 18, at 919 (“When enforcement is relatively uncertain, violators are more likely to risk that their violations will not be prosecuted or that such prosecutions will be unsuccessful.”).

230. Veronica M. Reed, *Fair Housing Enforcement: Is the Current System Adequate?*, in *RESIDENTIAL APARTHEID: THE AMERICAN LEGACY* 223 (Robert Bullard et al. eds., 1994).

231. See Kushner, *supra* note 5, at 1070; see also Schwemm, *supra* note 9, at 754-55 (recognizing the need for testers because “more subtle forms of rejection [have] become the norm”).

232. I use the term “applicants” to refer to both potential buyers and potential tenants.

233. See Hunter, *supra* note 181, at 1129-30 (providing examples of benign statements that are used to conceal discriminatory motives).

applicant does not know how the landlord, agent, or seller treated other applicants.<sup>234</sup> Slightings and rejections are part of the search process. When they occur, home-seekers move on to the next listing.

The presence of real estate agencies that are willing to screen applicants on landlords' and sellers' behalf makes detection even harder. Agencies carry an array of listings and can gather information about applicants before deciding which dwellings to show them. When an applicant seeks the services of an agency, the agency can sort through its listings and disclose only those dwellings for which the applicant meets the landlords' or sellers' criteria.<sup>235</sup> An agent who knows, for example, that a particular landlord only will rent to whites, will not tell a black applicant about the landlord's unit.<sup>236</sup> The unsuspecting apartment-seeker will never know that the agency withheld a listing from him. A landlord, particularly one with only a few units, cannot discriminate this gracefully.<sup>237</sup>

There are times, however, when applicants do uncover discrimination. For example, an applicant may become suspicious if a seller continues to advertise that her home is for sale after telling the applicant that she had

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234. See Reed, *supra* note 230, at 223. This is not true when applicants have "testers" inquire about the same units. These "testers" not only help reveal the suspected discrimination, but also help the plaintiffs prove their claims at trial. See *Asbury v. Brougham*, 866 F.2d 1276, 1280-81 (10th Cir. 1989) (noting that when the plaintiff inquired about renting a unit at an apartment complex, she was told there were no vacancies; however, her white sister-in-law, who went to the same complex the next day, was told there were apartments available immediately); *HUD v. Leiner*, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,021, at 25,262 (Jan. 3, 1992) (after pregnant, black complainant was told apartment she sought had been rented, co-worker called rental agent who told her about an available apartment that fit the description of the unit that the landlord had denied complainant); see also Roberts, *supra* note 9, at 276 ("Because housing discrimination is often practiced with a 'handshake and a smile' there is tremendous difficulty in proving discrimination unless testers are available.").

235. See, e.g., *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528, 530 (7th Cir. 1973) (citing evidence that in response to a query whether he would rent to blacks, a real estate agent said, "[w]e don't have to show them everything. Ha. We can misplace a few pages").

It is unlikely that agents refuse to show units that they have specifically advertised; however, they can advertise in ways that allow them to discriminate. They can use general descriptions of available units, e.g. "several two and three bedroom apartments available," without disclosing the addresses or other identifying information. When home-seekers respond to the ads, agents can determine which two or three bedroom apartments would be "appropriate" to show the tenants. The more listings an agent has, the more opportunities she has to discriminate. Agents "discriminate when the circumstances are 'right.'" See YINGER, *supra* note 7, at 39.

236. Agencies can advertise only those units owned by non-discriminatory landlords and keep a stash of discriminatory listings that they only disclose to applicants who meet the landlords' criteria. See YINGER, *supra* note 7, at 165.

237. Landlords with high incentives to discriminate will be the most inclined to use real estate agencies. For example, landlords with units containing lead paint have a powerful financial incentive to discriminate. By steering families away from leaded units, agencies can insulate landlords from the risk of paying damages for lead poisoning or the cost of de-leading their units.

accepted an offer on the house. Similarly, a landlord's policies<sup>238</sup> or manner in rejecting an applicant<sup>239</sup> can cause an applicant to question the landlord's sincerity and motives.<sup>240</sup> When an applicant does detect discrimination, he still has to decide whether the benefits of filing a claim exceed the costs.

### *E. The Virtues of the CLAC Method Over Punitive Sanctions*

When compensatory damages do not generate sufficient deterrence, punitive sanctions are intended to punish and increase deterrence.<sup>241</sup> For a number of reasons, punitive damages and civil penalties do not serve their intended role in fair housing cases. First, punitive damage awards in general are neither frequent nor significant.<sup>242</sup> Second, although a finding of intentional discrimination under the Fair Housing Act arguably supports imposition of punitive damages on the grounds that the plaintiff proved either that the defendant acted with intent or that she lied about her motives,<sup>243</sup> factfinders are not always inclined to award punitive damages based on a violation of the Act alone. Instead, they often require evidence that the defendant's behavior was egregious before allowing a punitive award.<sup>244</sup>

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238. In *Asbury*, 866 F.2d 1276, the managing agent of an apartment complex had a policy of telling anyone who called the company inquiring about available units that there were no vacancies and encouraging the callers to visit the office. *Id.* at 1282. As the court noted, this enabled the management company to identify the race of the applicants before making representations about the availability of units. *Id.*

239. See, e.g., *Barrett v. Realty World*, 17 Mass. Discrimination Law Rep. 1665, 1668 (1995) (complainant felt suspicious following rejection by real estate agency).

240. An applicant who detects discrimination still may not know that the landlord, seller, or agent violated the law.

241. When a law is under-enforced, punitive damages further the deterrent function of the law. See MICELI, *supra* note 209, at 35 (noting that, from an economics perspective, punitive damages are justified where there are enforcement "errors").

242. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 304-07 (1987); see, e.g., *Baumgardner v. HUD*, 960 F.2d at 573, 583 (6th Cir. 1992) (reducing a \$4000 punitive damage award to \$1500 against a landlord who usually did not engage in discrimination).

243. See SCHWEMM, *supra* note 12, at § 25.3(3)(b).

244. See ROBERTS, *supra* note 9, at 276-77; see, e.g., *Crumble v. Blumthal*, 549 F.2d 462, 467 (7th Cir. 1977) (affirming trial court's denial of punitive damage award and holding that "the fact that a wrong is an intentional act does not compel an award of punitive damages"); *Miller v. Towne Oaks East Apts.*, 797 F. Supp. 557, 562 (E.D. Tex. 1992) (awarding compensatory damages after finding that apartment manager violated the Fair Housing Act, but declining to award punitives because the defendant's conduct was not "egregious enough"); *United States v. Lepore*, 816 F. Supp. 1011, 1024 (M.D. Pa. 1991) (disallowing punitive damages on grounds that the defendants' conduct was not "egregious enough" even though defendants knew that they were violating the law); *but cf.* *United States v. Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (holding in light of evidence that the defendant intentionally discriminated against the plaintiffs that district court erred in directing a verdict for the defendant on plaintiff's claim for punitive damages).

The recent Supreme Court decision in *Kolstad v. American Dental Ass'n*, 119 S. Ct. 2118 (1999),

Most landlords and real estate agencies know their responsibilities under the fair housing laws and are unlikely to engage in overt and offensive discrimination that would qualify as egregious.<sup>245</sup> Similarly, where there is no evidence that defendants were motivated by ill will, factfinders may be disinclined to impose heavy sanctions.<sup>246</sup>

Third, in deciding whether to award and the size of a punitive sanction, ALJs and courts consider the size and financial condition of the respondent or defendant.<sup>247</sup> Because most landlords, sellers, and real estate agencies are individuals or small entities with limited assets,<sup>248</sup> when civil penalties or punitive damages are awarded, they tend to be low.

Lastly, when a court or ALJ concludes that punitive sanctions are appropriate, there are explicit and implicit limits on the awards. The Fair Housing Act explicitly limits civil penalties to \$11,000 for first offenders.<sup>249</sup> At best, these small penalties marginally increase deterrence. Implicit limits on punitive damages may further reduce awards. The implicit limits arise

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calls into question the legality of the “egregious” requirement some courts have imposed in assessing punitive damages in housing discrimination cases. In *Kolstad*, the Court reviewed a D.C. Circuit en banc holding that a jury could not consider a punitive damages claim under Title VII because there was no evidence that the defendant’s conduct was egregious. The Supreme Court rejected the District Court’s requirement that the defendant’s conduct be egregious and held that “an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages.” *Id.* at 2124-25. Given that courts have looked to Title VII for guidance in interpreting the Fair Housing Act, *Kolstad* likely signals that courts will retreat from the egregiousness requirement in fair housing cases.

245. See Schwemm, *supra* note 63, at 120. This is less of an issue in HUD proceedings, where ALJs tend to impose civil penalties upon a finding of intentional discrimination alone. See SCHWEMM, *supra* note 12, at § 24.9(4). The egregiousness of the defendants’ behavior influences the amount, but not the likelihood, of the penalty.

246. See, e.g., Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998) (finding that the level of jurors’ outrage at a defendant’s actions influences the amount they award in punitive damages); see, e.g., HUD v. Dutra, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,129, at 26,089 (May 13, 1997) (noting that civil penalty of \$5000 had been imposed on the respondent because respondent had committed a “serious violation”); HUD v. Welch, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,125, at 26,071 (Dec. 2, 1996) (imposing a \$2000 penalty where landlord discriminated out of concern for the safety of children who were potential tenants).

The level of civil penalties may also be influenced by the type of claim. One study found that the typical civil penalty in a familial status housing discrimination claim is \$2000. See Allen, *supra* note 6, at 353.

247. See, e.g., *Phillips v. Hunter Trails Community Ass’n*, 685 F.2d 184, 191 (7th Cir 1982); HUD v. Blackwell, [2A HUD Administrative Decisions] Fair Housing-Fair Lending (Aspen Law & Bus.) ¶ 25,001, at 25,017 (Dec. 21, 1989), *enforced*, 908 F.2d 864, 873-74 (11th Cir. 1990).

248. See Schwemm, *supra* note 181, at 380-81.

249. The caps increase with each violation. See 42 U.S.C. § 3612(g)(3) (1994); 24 C.F.R. § 180.670(b)(3)(iii) (1999).

As of 1998, ALJs had only heard cases involving first-offender respondents. See SCHWEMM, *supra* note 12, at § 24.9(4).

from courts' reliance on reference points that lead to deflated awards. For example, one factor in assessing the reasonableness of a punitive damage award is the disparity between the punitive award and available civil penalties, which are capped.<sup>250</sup> Similarly, although there is no requirement that the amount of a punitive damage award bear an exact relationship to the amount of the compensatory award,<sup>251</sup> courts consider the amount of any compensatory award in determining the reasonableness of a punitive award.<sup>252</sup> To the extent adjudicators base punitive damage awards on low compensatory awards and civil penalties, they fail to resolve the problem of under-enforcement.

Certain features of the CLAC method may make it a better source of additional deterrence than punitive sanctions.<sup>253</sup> The amount of damages awarded using the CLAC method does not depend on factors external to a complainant's injury. For example, the size and financial resources of the respondent will have no bearing on the amount of a complainant's award for lost access to community benefits. Similarly, the egregiousness of the respondent's behavior, as well as her wealth, will be irrelevant to the calculation of an award using the CLAC method. Lastly, awards in other cases and civil penalty provisions will not influence the size of the complainant's lost access to community award.

The final virtue of CLAC-based damages is their precision. Awards based on the CLAC method compensate for an actual injury and generate a specific dollar amount in damages. In contrast, the decision whether to award

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250. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 583-84 (1996); see also *Broome v. Demou*, 17 F. Supp.2d 211, 229 (S.D.N.Y. 1997) (applying *BMW* to uphold punitive damage claim, in part, on the grounds that it was not "disproportionately excessive" when compared with available civil penalties under the Fair Housing Act).

251. See generally *BMW of North America, Inc.*, 517 U.S. at 582-83 (discussing the absence of a limit on the ratio between punitive and compensatory damages for the purpose of determining the constitutionality of punitive awards).

252. In *Fountila v. Carter*, 571 F.2d 487, 492 (9th Cir. 1978), the plaintiff brought a housing discrimination claim under 42 U.S.C. § 1982. The jury had awarded her compensatory damages of \$1 and punitive damages of \$5000. *Id.* at 488. The Court reversed the punitive damages award based on the disparity between the compensatory and punitive awards. *Id.* at 492, 495. See also *Baumgardner*, 960 F.2d 572, 583 (6th Cir. 1992) (holding that civil penalty, which exceeded the compensatory award, was "excessive, unjust and improper").

253. Other solutions to observed under-enforcement and inadequate deterrence include addressing the problem at the detection stage by instituting wide-spread testing programs. Testing would require a significant commitment from the government, which at this point appears illusive. See *Selmi*, *supra* note 46, at 1425-27.

Another proposal has been to find a justification for larger punitive awards. Alex Navarro proposes a formula for calculating punitive damages in cases brought by testers that takes into account under-enforcement of fair housing laws and that would generate larger punitive awards in tester cases. See Alex S. Navarro, Note, *Bona Fide Damages for Tester Plaintiffs: An Economic Approach to Private Enforcement of the Antidiscrimination Statutes*, 81 GEO. L.J. 2727 (1993).

punitive sanctions and how much to award are arbitrary. Adjudicators who are disinclined to make arbitrary awards may feel more confident awarding lost access to community damages because they are capable of precise calculation.<sup>254</sup>

#### *F. Summary*

The available data suggest that deterrents in the current enforcement scheme are insufficient to prevent discrimination by many landlords, sellers, and agents. It is therefore unlikely that the added deterrence the CLAC method may provide will be excessive.<sup>255</sup> In fact, the CLAC method may provide the deterrence that punitive sanctions should, but do not, provide.

### IV. CONCLUSION

In 1992, Congress authorized the establishment of a program entitled Moving to Opportunity, which allows low-income renters to use federally-subsidized housing vouchers to rent units in suburban communities.<sup>256</sup> This program demonstrates that Congress is aware of the need to create housing opportunities for people who seek to move up the residential hierarchy. Distributing housing vouchers will not create the intended mobility as long as housing discrimination persists. By recognizing the injury people experience when denied access to desirable communities and adopting the CLAC method, we can increase compliance with the fair housing laws and begin to remedy the inequality created by housing discrimination without altering the existing remedial scheme or generating excessive deterrence.

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254. Adjudicators who are concerned about being reversed on appeal may also feel more confident awarding damages based on the CLAC method than punitive sanctions. *See supra* notes 158-59 and accompanying text.

255. *See Schwemm, supra* note 63, at 105 (“[R]eliance on private suits as the primary enforcement mechanism of the fair housing statutes means that damage awards must be substantial enough to serve the functions of deterrence and vindication as well as compensation.”).

256. Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 156-57 (1996); W. Dennis Keating, *The Parma Housing Racial Discrimination Remedy Revisited*, 45 CLEV. ST. L. REV. 235, 249 n.89 (1997).