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Victor M. Goode
City University School of Law

Conrad A. Johnson
Colombia University School of Law

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Cover Page Footnote
Victor M. Goode is an Associate Professor of Law, City University School of Law; B.A., Northwestern University; J.D., Rutgers Newark School of Law. I would like to thank the dedicated staff of the Open Housing Center of New York with whom I have served as a Board member for the last eight years and whose work to end housing discrimination helped inspire this Article. Conrad A. Johnson is a Clinical Professor of Law, Columbia University School of Law; B.A., Columbia University; J.D., Brooklyn Law School. I am grateful to the following people for their assistance with various aspects of this project: Professors Mary Marsh Zulack, Victor Goode, and Harriet S. Rabb. Additional thanks are owed to Esther Hoffman, Rochelle Shoretz, John P. Relman, Charles Cronin, Shavonne Norris, and Dr. Hugh F. Butts. This Article is dedicated to my children, for whom I hope that over time, this serves only as a reminder of past practices, not current events.

EMOTIONAL HARM IN HOUSING DISCRIMINATION CASES: A NEW LOOK AT A LINGERING PROBLEM

*Victor M. Goode**
*and Conrad A. Johnson***

INTRODUCTION

With the United States Supreme Court's condemnation of legal segregation in *Brown v. Board of Education*[1] in 1954, and a vigorous civil rights movement that led to the passage of the 1964 Civil Rights Act,[2] the nation entered the beginning of a new era in race relations. This, and future civil rights legislation, would be characterized by the development of a national agenda for ending discrimination and promoting equality.[3] One area that was not included in this initial congressional effort, but later found its way into the legislative agenda, was the subject of housing discrimination. Despite the relatively few debates and the near absence of any extensive record from committees, Congress finally passed the Civil Rights Act of 1968.[4] This provision, enacted as 42 U.S.C. §§ 3601-3619 and § 3631, and also known as the Fair Housing Act

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1. 347 U.S. 483 (1954).

2. Pub L. No. 88-352, 78 Stat. 241 (codified as amended in scatered sections of 42 U.S.C.).

3. The term "the Second American Revolution" was coined over half a century ago to refer to this period of change. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at xxiii (1988). The struggle to pass the 1964 Civil Rights Act is certainly a continuation and extension of the civil rights concepts enshrined in the Fourteenth Amendment and the Civil Rights Act of 1868.

4. *See* Jean E. Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 160 (1969) (noting that the combination of the assassination of Martin Luther King and the release of the Kerner Commission Report following massive rioting in 1968, prompted Congress to pass a version of the Fair Housing Act that

("FHA"), prohibits discrimination in the lease, sale, or rental of housing on the basis of race, color, religion, sex, familial status, or national origin.[5] Nevertheless, many recent commentators have agreed that few areas of the law have failed to achieve their lofty goals as dramatically and persistently as our nation's fair housing statutes.[6] The dream of ending discrimination in housing, which many hoped would provide the vehicle for integrating neighborhoods, schools, and eventually the nation's consciousness, has been largely unrealized.[7] Some have argued that this has been primarily due to the deficiencies in the law itself.[8] Others criticize the limited enforcement it has received,[9] but most agree that persistent opposition to the integration of our housing market has left Title VIII as an ironic component of the civil rights arsenal.[10] The law certainly stands as a bold and optimistic proclamation. As stated by Senator Walter Mondale, one of its sponsors, the Act would replace the nation's ghettos by "truly integrated and balanced living patterns."[11] While some civil right measures have been curtailed over the years, Title VIII has been uniformly supported by the few Supreme Court decisions that have reviewed the constitutionality or

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was almost identical to the bill introduced by Senator Mondale that had been previously rejected).

5. 42 U.S.C. §§ 3604-3619 (2003); *id.* § 3631.

6. *See* Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909, 913-15 (1991) (commenting on Congress's continued legislative efforts to combat housing discrimination and the remaining deficiencies in the current state of the law).

7. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 2-3 (1993) (stating that continued segregation in urban America has been largely overlooked for the past twenty years).

8. Armstrong, *supra* note 6, at 910-12 (arguing that although the 1988 amendments did remove the limitations on damages and added the option of seeking an administrative remedy, systemic housing segregation could only seriously be addressed by an equally large scale enforcement effort on the part of the government).

9. Guido Calabresi, *Preface* to THE FAIR HOUSING ACT AFTER TWENTY YEARS: A CONFERENCE AT YALE LAW SCHOOL 7, 7-8 (Robert G. Schwemm ed., 1989).

10. The 2002 Fannie Mae National Housing Survey found that only thirteen percent of whites and twenty percent of African-Americans cite a neighborhood's ethnic makeup as key to their choice of where to purchase a home. THE GROWING DEMAND FOR HOUSING: 2002 FANNIE MAE NATIONAL HOUSING SURVEY 5 (2002), *available at* http://www.fanniemae.com/global/pdf/media/survey2002.pdf (last visited Mar. 15, 2003). Nearly half (forty-seven percent) of the African-American respondents, however, said that they are treated less fairly than other groups in the home-buying process. *Id.* at 11. These statistics illustrate the disparity between a growing acceptance of multiracial communities on the one hand, and African-Americans' experiences of housing discrimination on the other.

11. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

the application of the statute.[12] Since its adoption over thirty years ago, lower courts have mainly adopted an interpretation of the Fair Housing Act that reflects an effort to fulfill its broad legislative purpose.[13] Many state agencies have also adopted the principle prohibitions of Title VIII,[14] and with its 1988 amendments, the law has been strengthened, broadened, and attorney's fee provisions have permitted the private bar to play a primary role in its enforcement.[15] Nevertheless, housing discrimination remains persistent and Title VIII is a mere stopgap measure for a social issue that seems intractable.[16]

Despite repeated judicial sanctioning of the most egregious forms of housing discrimination, there are areas of fair housing law and litigation that warrant a closer examination because they reveal the legacy of racial discrimination that continues to infect the process of change in this field. This Article will examine one aspect of compensation remedies in fair housing cases. While the general scope of potential damages under Title VIII has been well established for many years,[17] one area of potential relief that remains fraught with uncertainty is adequate compensation for emotional

12. While the Supreme Court has never ruled on the constitutionality of Title VIII, several lower courts have addressed the issue. United States v. Parma, 661 F.2d 562, 571-73 (6th Cir. 1981); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 120 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973). "All of these court decisions have been rendered by lower federal courts. . . .The Supreme Court, in almost 20 years since Title VIII was enacted, has not decided a single substantive case under the Fair Housing Act." BUREAU NAT'L AFFAIRS, THE NEW FAIR HOUSING LAW: IMPACT AND ANALYSIS 20 (1988).

13. One of the early cases that addressed the breadth and scope of Title VIII was *Trafficante*. In that case, the Court said that Congress intended the FHA to be construed broadly to carry out its mandate to achieve fair housing opportunities, and that the interpretations by the United States Department of Housing and Urban Development ("HUD") be given considerable weight. *Trafficante*, 409 U.S. at 211.

14. For a full list of state laws prohibiting housing discrimination, see 1A ASPEN LAW & BUS., FAIR HOUSING- FAIR LENDER (2001).

15. *Trafficante*, 409 U.S. at 211 (describing private lawyers as "private attorneys general," for the purposes of enforcement); *see* Keith Aoki, *Recent Developments, Fair Housing Amendments Act of 1988*, 24 HARV. C.R.-C.L. L. REV. 249, 262 (1989) (listing the extension of coverage to the handicapped and families, strengthening the administrative review process, increasing penalties, and permitting attorney fees for successful plaintiffs).

16. MASSEY & DENTON, *supra* note 7, at 187.

17. An early case is *Steele v. Title Realty Co.*, in which a prospective tenant sued a real estate broker under the FHA. 478 F.2d 380, 382 (10th Cir. 1973). The Tenth Circuit stated that, "[d]amages in cases of this kind are not limited to out-of-pocket losses but may include an award for emotional distress and humiliation." *Id.* at 384. Later, after the 1988 amendments to Title VIII, a California district court held that "[t]he FHA. . .entitles the original plaintiff in a private action for violation of the provisions of the Act to seek an award of 'actual and punitive damages.' This includes

distress.[18] While the general trend of cases, in both administrative agencies and courts, indicates that significant progress has been made in the recognition and understanding of emotional harm, failures to adequately address this issue continue.[19] Although administrative judges appear more receptive to evidence of emotional harm and are more likely to award significant damages now than in the past,[20] the federal bench has not demonstrated a similar consis-

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damages for emotional distress, humiliation, and mental anguish." Ambruster v. Monument 3: Realty Fund VIII Ltd., 963 F. Supp. 862, 865 (N.D. Cal. 1997).

18. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 25-17 to 25-21 (2002).

> Establishing the size of a Title VIII damage award has turned out to be a most uncertain process. Awards of actual damages in private fair housing cases have ranged from as little as $1 to as high of $1 million and more. The case law provides little in the way of explanation for these variations or of guidance or standards for evaluating future fair housing claims.

Id. at 25-17 to 25-20.

19. *See* Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745, 758-60 (1993). Professor Schwemm notes that:

> [t]he upper level of damage awards in fair housing cases has increased dramatically in recent years. Four cases in a thirteen-month period from 1991 to 1993 illustrate this phenomenon. First, in December 1991, a Los Angeles case involving rental discrimination against blacks and Hispanics was settled for $1,100,000, the first time a Title VIII case had exceeded the one million dollar figure. In May of 1992, a jury in Washington, D.C., awarded $850,000 to a black homeseeker and two fair housing groups against a condominium complex that had used only white models in its advertisements. A few months later, another Washington jury awarded $2,000,000 in punitive damages and $415,000 in compensatory damages to an individual and two fair housing groups in a rental case involving familial status discrimination. . . . The results in these cases reflect a general trend toward much higher awards that make the size of earlier fair housing verdicts seem paltry by comparison.

Id. at 759. *But see* Portee v. Hastava, 853 F. Supp. 597, 607-09 (1994) (reversing a jury's damages award, saying that it was shocking to the judicial conscience, despite testimony concerning the impact of the discrimination on an interracial couple's relationship, the wife's performance on her job, the husband's attempt to lessen the trauma through drinking, and the impact on a minor child who was subjected to one of his first experiences with racism. Also, in *Johnson v. Hale*, the district court refused to order any compensation for emotional harm. 13 F.3d 1351, 1352 (9th Cir. 1994). On remand, the judge ordered $125 for each victim. *Id.* at 1353. In *United States v. Lepore*, a victim was only awarded $500 for emotional distress. 816 F. Supp. 1011, 1025 (M.D. Pa. 1991). These amounts represent a near total disbelief that discrimination produced emotional harm and it is precisely this uneven, potentially biased, and idiosyncratic approach that is addressed in this Article.

20. Schwemm, *supra* note 19, at 757 n.89 ("All of the large HUD ALJ awards for intangible injuries" have been made in race cases). This may reflect the fact that unlike state or federal court judges, the HUD administrative judges are specialists in discrimination matters and may have become more sensitive to these issues as a result.

tency toward accepting claims of emotional harm.[21] Despite the progress in judicial recognition of the emotional harm caused by racism, there is still a disturbing trend that diminishes the value ascribed to the harm suffered by victims of housing discrimination and limits proper compensation.[22]

There are many variables that affect the awarding of emotional harm damages.[23] Achieving full compensation for emotional harm resulting from discrimination presents special practical problems and raises theoretical issues that deserve greater attention. This is particularly true in light of the new perspectives on racial discrimination emanating from the critical race and feminist legal movements.[24] Insights from these theoretical perspectives and social science studies suggest that when confronted with the full panoply of remedies designed to fully compensate the victim of housing discrimination, some juries and judges are unable to comprehend the depth of harm from discrimination and do not see an African-American plaintiff through an empathetic, unbiased lens.[25] Compensating a victim of racial discrimination requires a level of empa-

21. Deborah Dubroff, *Sexual Harassment, Fair Housing and Remedies: Expanding Statutory Remedies Into a Common Law Framework*, 19 T. JEFFERSON L. REV. 215, 228 (1997).

22. The current focus on the emotional harm component of a housing discrimination case owes much to the early work of Professor Robert G. Schwemm. In 1981, Professor Schwemm pointed out that courts and administrative agencies were reluctant to recognize the depth of emotional harm caused by discrimination. Robert G. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 HARV. C.R.-C.L. L. REV. 83, 104 (1981). He argues that the legal theories that underlie compensation for emotional harm were common in housing discrimination cases, but pointed out several reasons for the very low awards that he tracked in both administrative agencies and courts. *Id.* at 93-94. These include the lack of any definitive guidelines, the presumption that the victim will react to discrimination like a "reasonable person" (the traditional tort standard), the possibility of jury bias, and the receptivity of the judge. *Id.* at 101, 108-09, 115.

23. *Id.* at 86.

24. *See, e.g.*, Angela P. Harris, *Foreword* to *The Jurisprudence Of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994) (describing the Critical Race movement, she states, "CRT inherits from traditional civil rights scholarship a commitment to a vision of liberation from racism through right reason. Despite the difficulty of separating legal reasoning and institutions from their racist roots, CRT's ultimate vision is redemptive, not deconstructive."). The Authors attempt to apply "right reason" in Part III of this Article where recommendations are made for addressing the issue of emotional harm in housing discrimination cases.

25. *See* 1 HUGH F. BUTTS, THE BLACKNESS OF DARKNESS 99 (1993).

> A frequently expressed sentiment is the view that white Americans lack empathy for Blacks and as a result can not [sic] identify with racism and oppression, and take steps to extirpate them. Without accepting or rejecting that view, one wonders at the difficulty in developing empathy toward any group that is regarded as lowly or inhuman. Thus, the development of empathy

thy and understanding that consists of more than a careful weighing of the evidence.[26] While this Article does not assert that bias by the fact-finder is the single cause of low damage awards, there is concern about the unevenness and general devaluation of many emotional harm awards, their causes, and consequences.[27] Emotional harm claims in housing discrimination cases tend to subtly reflect the shadow of racism in this country.[28] It is the persistence of segregated housing patterns that contributes to a lack of understanding of the impact of racism and a diminished sense of empathy that is so essential in compensating the full nature of the dignitary harm that flows from housing discrimination.[29]

While the pioneering work in critical race theory is one of the lenses through which the present theories of compensation are examined, particularly as it applies to African-American victims of housing discrimination, this Article also draws on other resources. The Authors have utilized the insights of personal experience in the fair housing clinic as a means of developing a practical strategy to address this problem.[30] This approach has led to a review of relevant social science data that offers some explanations and perspectives on the effects of discrimination on its victims.[31] More importantly, this Article attempts to address the issue with

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appears to be secondary to an understanding of the barriers, resistances, myths, and unconscious conflicts that inhibit that development.

Id. Dr. Butts has testified as an expert witness in a number of Title VII and fair housing cases and has lectured on this subject at the Columbia Law School Fair Housing Clinic.

26. *See* Curtis v. Loether, 415 U.S. 189, 198 (1974) (recognizing that jury bias may deprive a victim of discrimination the full consideration she deserves).

27. Schwemm, *supra* note 22, at 121-22.

28. MASSEY & DENTON, *supra* note 7, at 97.

29. *See, e.g.*, Diane Maluso, *Shaking Hands With a Clenched Fist: The Effects of Interpersonal Racism*, *in* THE PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION 50 (Bernice Lott & Diane Maluso eds., 1995). Maluso outlines findings from sociological studies that have shown that reducing biases and stereotypes occurs most effectively in social interactions where there is interracial contact between persons of equal status, "in the pursuit of common goals." *Id.* at 58. This contact must be sustained and is enhanced by strong institutional support or authority figures. *Id.* at 74. In other words, the interpersonal activity that would normally occur in an integrated community can be a major factor in achieving the conditions for a lessening of bias. But conversely, the absence of integrated social experiences makes it more difficult to overcome social biases.

30. Conrad Johnson has been teaching a fair housing clinic at Columbia Law School for the past eleven years. Victor Goode worked with him and Professor Mary Zulack as a visiting clinical professor from 1994 through 1996 and served on the Board of the Open Housing Center. Their many discussions on this issue motivated the development of this Article.

31. *See infra* Part II.

recommendations for presenting emotional harm issues so that both plaintiffs' attorneys and members of the judiciary can develop a deeper and more comprehensive understanding of the effects of emotional harm on victims of discrimination.[32] In examining these issues, there will be a review of the use of medical and psychotherapeutic treatment and the use of expert witnesses. It will also suggest an approach for educating fact finders about the nature of the emotional harm that flows from a racist event.

There are no empirical studies that adequately explain how and why decision-makers value emotional harm in housing discrimination cases in a manner that differs so greatly from the victim's experience and the scientific evidence of the effects of trauma resulting from discrimination.[33] This Article argues that biased perceptions, a lack of information about the depth of emotional trauma, or racial insensitivity may affect this process and it will change only with a renewed effort and a different approach to these cases from the civil rights bar.[34] It is also an attempt to provide information that may assist in the proper evaluation of emotional injury with data from social science sources that have not

32. Professor Schwemm's pioneering work in this field has laid the foundation for future inquiries, including this Article. He points out that amassing the evidence of emotional harm may be difficult. SCHWEMM, *supra* note 18, at 25-31 to 25-33. We also believe that attorneys who take on housing discrimination cases do so out of a personal and professional commitment to end this extremely destructive aspect of discrimination in our society. This Article attempts to expand on this base by taking a look at data drawn from inter-disciplinary sources, particularly the fields of psychology, psychiatry, and sociology. While many of the problems in the development of the emotional harm aspects of a discrimination case remain as Professor Schwemm described them in 1982, studies in the social sciences have added considerable depth and theoretical insight to those issues. Armed with this additional information, practitioners may be even better prepared to plan the strategy of their case. For a fuller discussion of these practical issues, see *infra* Part III.

33. In stark contrast to the almost cavalier perspective offered by some judges, see Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144, 145-47 (1996).

> [R]acist events (unlike losing one's car keys or getting stuck in a traffic jam) are inherently demeaning, degrading, and highly personal; they are attacks upon and negative responses to something essential about the self that cannot be changed: being an African American. Racist discrimination thereby has a higher potential to erode the physical and mental health of African Americans.

Id. at 147. "[T]he single most common problem presented by African Americans who seek psychotherapy is anger about racism in their lives." *Id.* at 160.

34. Schwemm, *supra* note 22, at 107 n.124 (referring to the Court's opinion in *Curtis v. Loether*, 415 U.S. 189 (1974), when acknowledging that low awards for emotional harm may be due to jury prejudice).

previously been marshaled primarily for this purpose.[35] Evidence of emotional harm must be presented in a manner that reveals the full scope of its effects. The under-valuation by decision-makers is not for the most part an open hostility to the reality of racial harm as much as it is a lack of understanding and a reflection of the cognitive distortion of race and racial issues that is a social phenomena as well as a legal one.[36] This Article will explore these dynamics from the perspective of relevant social science data and examine how they affect the analysis and understanding of evidence of emotional harm.[37] Part I provides an overview of the current state of emotional harm cases. Part II discusses the issue of bias in the process of reviewing discrimination cases from the perspective of critical race theory and recent social science data. In Part III, this Article examines the cycles of ignorance that have contributed to an under-valuation of emotional harm in housing discrimination litigation. Finally, suggestions are made about how to gather relevant psychological and medical information on the effects of discrimination and how to incorporate that information into a case so that the full extent of emotional harm is more properly understood and the victim of discrimination is made whole.

I. EMOTIONAL HARM OVERVIEW

Title VIII of the 1968 Civil Rights Act has been the primary legal instrument at the federal level for attacking housing discrimination for the last thirty years.[38] The Act has had mixed results, but has

35. While the use of expert witnesses, particularly psychologists or therapists, has been previously recommended, this Article attempts to expand upon those more general recommendations. In particular, the issues of exploring bias from fact-finders are examined, contextualized, and an individualized picture of the harm suffered by people of color is presented. For a very valuable early treatment on emotional harm issues, see Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39, 39 (1992).

36. *See generally* GORDON ALLPORT, THE NATURE OF PREJUDICE (1st ed. 1954). This is one of the definitive works on racism and bias. He queries whether "discrimination and prejudice [are] facts of the social structure or of the personality structure." *Id.* at 514. The answer, according to this Article, is both. Allport describes racism as a social problem that has historical roots. *Id.* at 208-11. He describes how prejudice is learned behavior by all groups and its belief structure is acquired from the social order as the individual personality develops. *Id.* at 17-19, 297-310.

37. The premise of this Article is not that every judge and jury is biased against minority plaintiffs. It is more likely that judges and juries in many cases may be no better prepared than the general population in understanding the effects of discrimination and in their ability to give full value to those effects when the evidence is presented.

38. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 15 (1983). In 1968, the Supreme Court, in *Jones v. Alfred H. Mayer Co.*, gave new life to the Recon-

generally received judicial support, and over its brief life there has been very little dilution in its scope and application.[39] Unlike the Equal Protection Clause of the Fourteenth Amendment and Title VII of the 1964 Civil Rights Act, which have gone through an evolution of expansion followed by a more restrictive interpretation by the Courts,[40] the FHA and its post-Reconstruction predecessor, 42 U.S.C. § 1982, have both received supportive judicial interpretations and have changed very little.[41] Yet, despite this generally favorable judicial treatment, housing discrimination remains a persistent social problem, which seems to elude any solution through litigation.[42] Persistent patterns of residential segregation are a constant reminder of the lack of progress that this country has made toward the integration of living space.[43] This Ar-

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struction era statute, 42 U.S.C. § 1982, which guarantees all persons the right to sell, lease, and convey property. 392 U.S. 409, 413 (1968). The Court held that § 1982 of the Civil Rights Act of 1866 barred racial discrimination in the sale, rental, and lease of housing. *Id.* at 413. While the language of the FHA and § 1982 differ, both have as their underlying principal Congress's authority to bar discrimination in housing. *Id.*

39. The courts have generally supported the scope of coverage of the FHA, although some procedural aspects of the FHA have been limited by the Supreme Court. *See, e.g.*, Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 98 (1979) (dealing with standing); *Curtis*, 415 U.S. at 195 (dealing with the right to a trial by jury); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 205 (1972) (dealing with standing). In *Trafficante*, the Court reiterated its decision to follow Congress's intent to construe the act broadly. 409 U.S. at 209-10.

40. An example of this trend is the requirement for a finding of discriminatory intent articulated by the Court in *Washington v. Davis*. 426 U.S. 229, 238-39 (1976). This interpretation is generally seen as a limiting factor on the use of the Equal Protection Clause in proscribing racial discrimination. *See* Derrick A. Bell, *Foreword: Equal Employment Law and the Continuing Need for Self-Help*, 8 LOY. U. CHI. L.J. 681, 683 (1997). Similarly, the school desegregation cases saw the Fourteenth Amendment scaled back as a tool for creating integrated public schools. In *Milliken v. Bradley*, inter-district desegregation remedies were restricted. 418 U.S. 717, 741 (1974). The decision in *Freeman v. Pitts* raised the de facto–de jure distinction to a doctrinal level that all but trumped the principle of integration as a continuing legacy of *Brown*. 503 U.S. 467, 469 (1992). Ironically, one of the reasons for the "re-segregation" of the schools in Dekalb County Georgia, described in *Pitts*, was "white flight" from the district. *Id.* at 506. This gradual change in housing patterns along racial lines altered the Court's ability to make student assignments in a manner that could remedy the effects of the previously legally segregated schools.

41. *See* SCHWEMM, *supra* note 38, at 227-98 (discussing the procedures for enforcement and cases supporting Title VIII).

42. MASSEY & DENTON, *supra* note 7, at 60-82.

43. *Id.* This point has been brought out in dramatic fashion by Massey and Denton. They cite considerable evidence that housing discrimination remains one of the most persistent and damaging legacies of America's history of racial subordination. *Id.* Their data shows that despite our efforts to enforce fair housing laws at the state and federal level, society has made very little progress toward the desegregation of our living space. *Id.* at 64. They also say that the main factor is the continued sense in a considerable portion of white society that while civil rights may be desirable in

ticle argues that one corollary to the persistence of housing discrimination is the devaluation of the experience of its victims. While there is little evidence that this phenomenon is motivated by ill will or open hostility by fact-finders, their reluctance to comprehend and value the full extent of the psychological damage of racism and the true toll that it imposes on its victims continues to be reflected in low awards for many FHA claimants.[44] Racial bias does not suffice as the sole explanation for low and frequently uneven compensatory damages in all cases. For the most part, fact finders and jurors, the majority of whom are white, view racial issues no differently than the general population.[45] But there are misperceptions about race that remain prominent in American culture, which can affect numerous areas of decision-making, including the courts, unless a conscious and consistent effort is made to identify and remove them.[46]

Since 1974, with the decision of the Supreme Court in *Curtis v. Loether*,[47] courts have had broad equitable powers as they apply the FHA to violations and lower courts have been awarding damages for the emotional harm suffered by victims of racial discrimination.[48] The typical framework for relief in these cases is for the plaintiff to seek an injunctive remedy, compensatory damages, pu-

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theory, the "not in my backyard" phenomenon is especially strong when it comes to sharing neighborhood living space and the subsequent potential for social interaction. *Id.* at 79-82. Finally, their findings show that while this phenomenon affects white acceptance of Asians and Latinos to varying degrees, its most persistent and stubborn resistance is applied to the African-American. *Id.* at 67, 77. *See* Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for an Old Injury Arising From Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1154-55 (1999).

> A 1979 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. More recent evidence reveals that high rates of discrimination continue. 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. 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. Other audits have uncovered even higher rates of housing discrimination, including one study that found a ninety-percent discrimination rate.

Id. at 1155.

44. *See supra* notes 19-22.

45. *See infra* Part II.

46. *See* Maluso, *supra* note 29, at 72-75 (noting various misperceptions about race in society and some methods of changing those perceptions).

47. 415 U.S. 189 (1974).

48. SCHWEMM, *supra* note 38, at 254.

nitive damages, or some combination of all three.[49] The principle that underlies this remedy is that an aggrieved party should be "made whole," through the remedial process.[50] The courts have generally adopted this "make whole" theory in housing discrimination cases.[51]

In *Curtis*, the Supreme Court stated that emotional harm in a housing discrimination case was similar to defamation or intentional infliction of emotional distress in tort law.[52] Emotional harm can be recognized in any claim for damages as long as sufficient evidence establishing a causal link to the discriminatory act is proven.[53] The importance of this holding cannot be understated because Title VIII, § 3613(c)(1), had no specific language to guide courts on awarding damages.[54] The *Curtis* Court was unperturbed by this omission and found an adequate rationale in tort remedies bolstered by the general equitable powers vested in the federal courts to hold that the legislation authorized equitable relief, including damages similar to the tort of intentional infliction of emotional distress.[55] While some states had previously enacted anti-discrimination laws authorizing courts and administrative agencies to offer similar relief,[56] *Curtis* firmly established this principle in

49. *Id. See, e.g.*, Seaton v. Sky Realty Co., 491 F.2d 634, 635 (7th Cir. 1974). While the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 42 U.S.C. 1982 to 1988 (codified as amended in scattered sections of 42 U.S.C.), does not contain specific language authorizing the award of damages or equitable relief, the modern interpretation of the statute has held that the full range of equitable remedies is available to a federal court in fashioning a remedy for any violation of the statute. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 409 (1968). While Title VIII, only specifically authorizes the award of actual damages, it has been interpreted to provide for damages for emotional harm. Slatin v. Stanford Research Inst., 590 F.2d 1292, 1294 (4th Cir. 1979).

50. Schwemm, *supra* note 22, at 91. The concept of remedies in discrimination cases broadly encompasses the right of a successful plaintiff to have access to the variety of equitable relief that will provide real compensation for the injury that the plaintiff suffered, including emotional harm. DAN B. DOBBS, THE LAW OF TORTS 829 (2000). While the typical case does not usually involve considerable direct costs, the emotional harm compensation as well as potential punitive damages can add to the overall costs. *Id.* at 1053-54.

51. *Slatin*, 590 F.2d at 1294.

52. 415 U.S. at 195.

53. *Id.* at 196.

54. *Id.* at 197.

55. *Id.* at 196.

56. For a summary of state and federal cases and other resources dealing with the emotional harm component of housing discrimination, see 1 KENTUCKY COMM'N ON HUMAN RIGHTS, STAFF REPORT 82-1, DAMAGES FOR EMBARRASSMENT AND HUMILIATION IN DISCRIMINATION CASES—THE RIGHT TO COMPENSATION FOR PSYCHIC INJURY RESULTING FROM HOUSING DISCRIMINATION 69-79 (1982).

the federal enforcement arsenal of the FHA.[57] While none of these early cases relied specifically on the dicta from *Brown*, the acceptance by later federal courts that emotional harm flowed from discrimination was certainly strengthened by the Supreme Court's acknowledgment of dignitary harm for a victim of racial discrimination.[58] This theory of discrimination and emotional harm alluded to in *Brown*,[59] also echoed studies of the harm caused

57. *Curtis*, 415 U.S. at 198 (affirming that Title VIII violations could result in damages for emotional harm and that the defendant was entitled to a jury trial).

58. It is worth noting that Justice Marshall, one of the architects of the *Brown* litigation, wrote the *Curtis* opinion.

59. The trial court in *Briggs v. Elliot*, one of the four cases consolidated into the *Brown* decision heard testimony from Dr. Kenneth Clark, a social psychologist who testified as an expert witness. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 353 (1976). Dr. Clark used a doll preference study to demonstrate that legally imposed segregation had a detrimental psychological impact on the African-American students in the segregated Claridon County schools. *Id.* at 353-54.

One of the controversial points of Dr. Clark's study was its focus on the self-deprecation or self-hatred aspects that were triggered by racial discrimination. *Id.* at 353. The premise of his theory was that the victim internalizes the accusations and characterizations of inferiority from the perpetrator or dominant class and begins to accept them as true. *Id.* In the doll study, this phenomenon manifested as a preference by the young black girls for white dolls and an explicit rejection of racial characteristics associated with their own race depicted in the brown doll. *Id.* at 330-31, 354. This overt rejection of aspects of one's self was presented to the Court as evidence of emotional damage that resulted from imposed segregation. *Id.* at 353-54.

There were, however, problems with the Clark study from both a legal and scientific perspective. Dr. Clark conceded at the time of the trial that it wasn't possible to isolate the effects of school segregation from other influences of racial injustice and thereby satisfy the standard of direct legal causation. *Id.* at 379. Later social scientists have refuted the validity of Dr. Clark's study because of the small size of his sampling and the somewhat ambiguous terminology that Clark used in questioning the children about their identification with either the black or white doll. *See* Ernest Van Den Haag, *Social Science Testimony in the Desegregation Cases—A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69, 74-76 (1960). But despite these weaknesses, Dr. Clark had fashioned his study and findings on evidence from other more comprehensive surveys and relied on the general belief among social scientists at that time that segregation caused emotional harm to its victims. KLUGER, *supra*, at 318-19. Other studies have verified his basic contention that, in addition to whatever material deprivation might characterize the conditions of the segregated school, legally imposed segregation did cause psychological damage. *Id.* at 319.

While the doll study was legally problematic for establishing a clear chain of causality, pioneering work by the famed psychiatrist Dr. Frantz Fanon was also exploring similar issues of emotional damage flowing from the skewed social relationship of one race holding social, political, and economic dominance over another in his path breaking work *Black Skin, White Mask*. FRANTZ FANON, BLACK SKIN, WHITE MASK 141 (1967). In her analysis of the complete body of Fanon's work, Irene L. Gendzier, states that:

> Fanon discovered that the alienated Martiniquean existed only where there was a dominant society that had reduced him to an inferior status. What

by discrimination that were being conducted during that same period in the social science community.[60] These studies explored the idea that racial discrimination was a particularly pernicious form of personal degradation, and one whose psychological impact is often subtle and only fully exposed with the assistance of social science experts.[61]

Courts have traditionally employed two overlapping approaches to claims of emotional harm in fair housing cases: traditional tort theory[62] and constitutional torts.[63] In traditional tort theory, the infliction of emotional harm was initially disfavored, but was later

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> concerned Fanon with respect to the Martiniquean, was the gradual process of alienation from his culture and tradition, and the fact that this was accompanied by self-hatred or at the least, a profoundly disturbed ambivalence. The rejection of the self came as a result of identification with the Other and as a result of the acceptance of the Other's image of one's "inferior" caste.

IRENE L. GENDZIER, FRANTZ FANON: A CRITICAL STUDY 50 (1973). While Fanon's work was preoccupied with a social psychoanalytic dimension of colonialism and was, therefore, unencumbered by legal standards of causality, it is clear that the psychological damage that he and Dr. Clark examined stemmed from the same source—racism. *Id.* at 46-47. The attendant social structures needed to enforce these beliefs, such as school segregation in the United States, or colonialism in the case of Martinique and the other non-white French colonies, while considerably different in form, were essentially the same. *Id.* at 6-8. In fact, Fanon's emphasis on the gradual process of this phenomenon might account for the varied results that Dr. Clark received when he performed the doll test in northern integrated schools and southern segregated schools.

In *United States v. Security Management Co.*, an apartment manager was sued under the Fair Housing Act. 96 F.3d 260, 260 (7th Cir. 1996). In the course of determining the liability of the two insurers, the United States Court of Appeals for the Seventh Circuit found that although the complaint did not expressly allege emotional harm, that "racial discrimination, when encountered, is such an affront to one's intelligence and individuality that we may assume, for our purposes, the presence of an allegation of psychological injury." *Id.* at 268. A more recent case cites *Security Management* for the proposition that "one can reasonably assume that a person who is the object unlawful discrimination will suffer emotional harm." United States v. Wapinski Real Estate, 2000 WL 28271, at *9 (N.D. Ill. Jan. 10, 2000).

60. *See, e.g.*, ALLPORT, *supra* note 36. *The Nature of Prejudice*, published in 1954, the year of the *Brown* decision, represented a compilation of studies and theories that Professor Allport began developing during the war years. It is a wide-ranging work that has influenced many future works on the subject. For a retrospective on the importance of *The Nature of Prejudice*, see Roy J. deCarvalho, *Gordon W. Allport on the Nature of Prejudice*, 72 PSYCHOL. REP. 299, 301-05 (1993).

61. *See, e.g.*, Jane Goodman-Delahunty & William E. Foote, *Compensation for Pain, Suffering and Other Psychological Injuries: The Impact of* Daubert *on Employment Discrimination Claims*, 13 BEHAV. SCI. & L. 183, 187-89 (1995).

62. DOBBS, *supra* note 50, at 821. The most common emotional harm torts are those based on intentional infliction of emotional distress. *Id.* at 822. In the Restatement Second, the three elements of this tort are: 1) severe emotional distress; 2) caused by intentional or reckless conduct; and 3) that is extreme and outrageous. *Id.* at 826. This tort is generally recognized and applies these basic requirements for recovery. *Id.*

recognized as a legitimate claim for which damages might be awarded.[64] The intentional infliction of emotional distress and negligent infliction of emotional distress are its two variants.[65] Despite this history with emotional harm issues, courts have generally taken a conservative approach toward the infliction of emotional distress claims, and this general caution carried over into the field of housing discrimination.[66] There are many understandable reasons for this caution. Some include the general difficulty in placing a monetary value on emotional harm, the difficulty in determining the actual degree of harm, especially when the same degree of offense may affect people very differently, the potential for exaggeration, the lack of objective measures, and low award precedent.[67] Courts have also commented on the difficulty in making emotional harm fit traditional tort economic theories, and the fear that emotional harm will be a corollary claim to virtually every offense, no matter how trivial.[68] While these concerns are understandable, courts addressing civil rights claims have never been required to rigidly adhere to a traditional tort framework.[69] In addition, adhering too closely to this caution can mask any subtle biases that might affect the fact-finding process, and an overly cautious approach would stand in contrast to the recognition in the social sciences that some degree of emotional harm will result from any act of discrimination.[70] Any difficulties in measuring its magnitude and impact in the legal context are separate and distinct from reservations about its basic validity.

Emotional harm has been generally classified as "humiliation, embarrassment, emotional distress, and other such intangible harms to the plaintiff's personality."[71] The effects of emotional

63. *Id.* at 81. Constitutional torts or civil rights torts concern the intentional deprivation of a right protected by the Constitution, or a federal statute. *Id.* at 81-84. The most common constitutional torts involve Fourth Amendment claims, Eighth Amendment claims, and Fourteenth Amendment claims, including any of the procedural or substantive protections flowing from the Equal Protection Clause. *Id.* at 84.

64. *Id.* at 824-25.

65. *Id.* at 822-23. Negligent infliction of emotional distress has no bearing on housing discrimination claims because once there is a finding of discrimination, the act is considered intentional.

66. Schwemm, *supra* note 22, at 121.

67. *Id.* at 85-86.

68. *See* DOBBS, *supra* note 50, at 81-82. "Civil rights violations are torts. They have generated an important specialty in which the courts look to common law tort rules as models without necessarily accepting their limitations." *Id.*

69. Martell v. Boardwalk Enter. Inc., 748 F.2d. 740, 750 (2d Cir. 1984).

70. *See, e.g.*, Johnson v. Hale, 940 F.2d 1192, 1193-94 (9th Cir. 1991).

71. SCHWEMM, *supra* note 18, at 25-21.

harm in housing discrimination cases may also lead to increased anger, frustration, depression, resentment, or shame.[72] Fear that the discriminatory event will reoccur may lead to withdrawal from contact with others or diminished social involvement with friends or family.[73] Physical symptoms may also accompany the psychological trauma.[74] These may include indigestion, ulcers, nervousness, loss of appetite, loss of sleep, impotence, nausea, and intensified allergic reactions.[75]

While compensation for the loss of rights that are protected by statute or the Constitution is a well accepted legal principle, only nominal damages are generally awarded for lost rights.[76] As a result, many victims must rely on their emotional harm claim as their primary basis for economic compensation. Two reasons immediately come to mind for taking special care to develop the emotional damages phase of a housing discrimination case. First, in most instances, the economic losses, or the out-of-pocket expenses that result from housing discrimination, are not typically extensive.[77] By the time the issues are litigated, the plaintiff will likely have found alternative housing.[78] Secondly, the emotional harm experienced is often one of the primary motives for seeking legal redress, but that motivation might diminish if it is not acknowledged and developed early in a case.[79]

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72. *See* Complaint No. FH5841219900 at D34 to D35, Mitchell v. DiSilva (No. 93-130) New York City Commission of Human Rights, Recommended Decision and Order, Dec. 12, 1993. In this case Dr. Hugh Butts, a psychiatrist specializing in the effects of discrimination, testified as an expert witness about the general symptoms of victims of discrimination as including feelings of numbness, withdrawal, difficulty in concentrating and focusing, depression, anxiety, and the diminished quality of care given to children. *Id.* at D-34 to D-39.

73. *Id.* at D-34 to D-35.

74. *Id.* at D-34.

75. Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective: Assessing Compensatory Damages In Fair Housing Cases*, 26 J. MARSHALL L. REV. 3, 20 (1992).

76. SCHWEMM, *supra* note 18, at 25-21 to 25-23.

77. *Id.* at 25-24 ("Most fair housing cases do not involve major economic loss.").

78. *See id.* at 25-23 (noting that many plaintiffs mitigate damages by securing alternative housing). While these issues certainly vary from case to case, in most markets the difference in cost between the housing that was denied and the housing that the victim eventually had to accept will not be great. *Id.* at 25-23 to 25-24. In mortgage discrimination cases this may vary because the difference of even a point amortized over the life of a mortgage can be considerable, but injunctive remedies would typically require the renegotiation of the mortgage before the difference in value had accumulated to a substantial degree. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION 25-14 (1994).

79. *See, e.g.*, Joe R. Feagin, *The Continuing Significance of Race: Anti-Black Discrimination in Public Places*, 56 AM. SOC. REV. 101, 101 (1991) (describing the range

Early decisions have implicitly recognized the link between discrimination and emotional distress by generally allowing some monetary recovery for intangible harm if there is credible evidence to support it.[80] Usually, these damage claims are established through the testimony of the plaintiff about the emotional impact of the discrimination.[81] Emotional harm may even be inferred from the circumstances of the housing transaction.[82] Moreover, there is no requirement of corroborating testimony of any kind and no requirement for expert medical evidence to establish a claim.[83] While traditional tort theory usually requires a showing of outrageous conduct by the defendant and severe emotional harm for recovery,[84] this higher standard has not been applied in housing discrimination cases.[85] This seemingly relaxed standard, however, may create the false impression that emotional harm damages are relatively easy to establish and are uniformly receiving wide acceptance.[86] While the approach by the courts to find emotional harm by inference is both significant and appropriate, the related inference, that the fact-finder can accurately assess the extent of the trauma from the testimony of the victim alone seems less supported by a careful review of damage awards.

In fact, Professor Schwemm, in his chronicle of housing discrimination cases, has pointed out that severe and particularly outrageous conduct by the defendant, along with the nature of the plaintiff's reaction, continue to be critical factors in receiving favorable recognition of emotional harm.[87] While this assessment

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of responses to racist events by African-Americans that usually begin with an assessment of the situation and include consideration of a range of responses from immediate self help/direct confrontation to challenging the act through a lawsuit).

80. *Id.*; SCHWEMM, *supra* note 18, at 25-31 to 25-33.

81. SCHWEMM, *supra* note 18 at 25-31 to 25-32.

82. Marable v. Walker, 704 F.2d 1219, 1220 (11th Cir. 1983) ("damages for emotional distress in cases of this type 'may be inferred from the circumstances as well as proved by the testimony.'").

83. SCHWEMM, *supra* note 18, at 25-32.

84. DOBBS, *supra* note 50, at 81.

85. *See, e.g.*, Seaton v. Sky Realty Co., 491 F.2d 634, 638 (7th Cir. 1974); Parker v. Shonfeld, 409 F. Supp. 876, 880 (N.D. Cal. 1976); *see also* Schwemm, *supra* note 22, at 115.

86. *See, e.g.*, SCHWEMM, *supra* note 18, at 25-32 to 25-33. He comments that courts exercise a great deal of discretion in these matters. *Id.* at 25-36; *see* Schwemm, *supra* note 22, at 84-86 (describing the absence of clear standards or a predictable pattern to predict the strength of a claim for emotional harm).

87. SCHWEMM, *supra* note 18, at 25-37. It is important to note, however, that the reliance on the outrageousness of the defendants' conduct by some judges in cases that Professor Schwemm has tracked is more similar to the requirements of intentional infliction of emotional distress from tort theory. Even though the courts have

accurately reflects how courts have been leaning towards traditional tort theory in housing cases, it also points to some of the inherent flaws in this approach. Although racial epithets or threats of violence clearly meet the outrageous conduct requirement under traditional tort theory and have caused some courts to award high damage awards, the typical discrimination case today involves more subtle forms of discrimination.[88] Even though different forms of discrimination may vary in intensity or in relative degree of personal threat, this fact does not automatically mean that significantly less emotional harm has occurred.[89]

Plaintiffs will react differently to the same adverse stimuli.[90] The impact of racism must be understood in the context of both the incident and the parties involved. Important contextual issues to examine include whether this is the first time the plaintiff attempted to find new housing, whether the plaintiff is seeking to change their neighborhood circumstances, or if there is a spouse or child depending on the plaintiff to find suitable housing. These are only a few variables that can affect the plaintiff's emotional response to the adverse stimulus of discrimination.

Furthermore, as Professor Schwemm has pointed out, the success or failure of an emotional harm claim often depends on "whether the plaintiff is believable, likeable, or vulnerable to stress, and whether the fact-finder is receptive to this type of

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never required this approach, and have regularly applied the more relaxed standard that implicitly rejects it, there remains a tendency for some courts to view the emotional harm suffered by the plaintiff as directly proportional to the defendants' conduct. *See, e.g., id.* While this may apply to some cases, the danger here is that it should not be applied as a general rule. The reasons why this approach inevitably fails to capture the real damages experienced by many victims of discrimination will be discussed more fully in Part II.

88. Teresa Coleman Hunter & Gary L. Fischer, *Fair Housing Testing— Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1128 (1995) ("While certainly not universally true, the general nature of race-based housing discrimination is covert, although overt discrimination still exists.").

89. *See* Ezra H. Griffith & Elwin J. Griffith, *Racism, Psychological Injury and Compensatory Damages*, 37 HOSP. & CMTY. PSYCHIATRY 71, 72 (1994). The authors indicate that courts tend to review these cases from the traditional intentional infliction of emotional distress framework. *Id.* This assumes that once the act and the proximate cause is established, the distress will be directly proportionate to the severity of the act. *Id.* While there may be sound public policy reasons for this approach, such as deterrence of egregious acts, it fails as sound medical science because the psyche of each individual is different. *Id.* at 74. Some members of racial minority groups may have steeled themselves against racial slights, whereas others are far more sensitive. *Id.* Overall, the authors argue "greater psychiatric input would result in a better assessment of emotional distress so that plaintiffs can produce their evidence of psychological damage in a more professional framework." *Id.* at 75.

90. *Id.* at 73.

claim.[91] It is unfortunate that this subjectivity of perception inherent to a certain degree in all cases, that opens the "objective" fact-finding process to the distortions of skewed racial perceptions. This possibility is heightened when the fact finder must consider cross-cultural empathy and how racism affects society. This is a task for which judges and juries may not have had any special training, but which is critical to fully evaluate the evidence of discrimination and its effect on an individual plaintiff.

Regardless of the court's willingness to accept only plaintiff's testimony to establish an emotional harm claim, other factors should be considered before relying entirely on the victim to fully articulate the nature of the harm suffered. "Many plaintiffs will lack insight into their [psychological] injuries, particularly when the harm [from emotional stress may] develop slowly over a protracted period [of time]."[92] Secondly, they may be poorly equipped to compare themselves with other healthy individuals, particularly when discriminatory events are common in the lives of people of color.[93] There may also be social disincentives or factors that discourage plaintiffs from acknowledging and exhibiting their private sentiments about their injury.[94] It is also not uncommon for victims of discrimination to suppress any discussion about their injuries, especially if being open and forthcoming might cause them to reveal issues of sexual or emotional vulnerability.[95] This is particularly true in an environment where social norms characterize people who display anger or pain as weak or unprofessional.[96]

Each of these factors argues for two careful considerations in presenting this phase of a discrimination case. First, the ability of the fact-finder to fully comprehend the effects of racism should not be assumed. It must be developed as fully as possible within the limitations of the trial.[97] Considerable social science data points to

91. Schwemm, *supra* note 22, at 116. This judicially preferred approach to plaintiff's testimony can also create a double bind. In order to establish liability and to be seen as believable on factual issues, a client must be seen as objective, reliable, and not susceptible to overstatement or instability. *Id.* But a plaintiff's success in conveying these very attributes can create the impression that they were not devastated by the defendant's conduct. *Id.* at 121.

92. Goodman-Delahunty & Foote, *supra* note 61, at 187.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 187-88. This not only raises issues concerning the willingness of a plaintiff to reveal this aspect of themselves in open court, but also their willingness or ability to be exposed to their lawyer.

97. *Compare* Portee v. Hastava, 853 F. Supp. 597 (E.D.N.Y. 1994), *with* Broome v. Biondi, 17 F. Supp. 2d 211 (S.D.N.Y. 1997). In *Portee*, the district court judge re-

significant cultural and experiential differences in how whites and people of color perceive the same information.[98] Therefore, it may be necessary to construct a "cultural bridge" as part of the trial strategy before the cross-cultural empathy can be established. Secondly, although the focus of proof must be on the individual plaintiff, and not on the experience of any particular group, the connection of the plaintiff to her group is also critical.[99]

Finally, feminist literature offers useful insights on how harm in a social context gets transformed, distorted, or not recognized at all when translated into a legal context. Several of these feminist theories offer transferable lessons for race discrimination cases. In her essay discussing the experience of women and traditional legal concepts of harm, Professor Suzanne Levitt states that "the compara-

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versed the jury verdict of $100,000 for each of the two adult plaintiffs and $80,000 for their child, calling it clearly outrageous and shocking to the judicial conscience. *Portee*, 853 F. Supp. at 613-14. On the other hand, in *Biondi*, the judge upheld emotional harm damages totaling $114,000 dollars for each of the two plaintiffs in a suit against a co-op that had discriminated against a middle class interracial couple who were both professionals. *Biondi*, 17 F. Supp. 2d at 215, 226. While the difference between these two awards may correctly be attributed to the different financial capacities of the defendants, it is also clear that Judge Carter in the *Biondi* case was already very familiar with emotional harm issues from his own practice as a lawyer with the NAACP. The History Makers Biography, Robert Carter, *at* http://www.thehistorymakers.com/biography/biography.asp?bioindex=106&category=LawMakers (last visited Mar. 15, 2003). In *Portee*, the record suggests that the judge approached the case with some degree of skepticism, despite testimony that the discrimination caused the husband to withdraw, start drinking, have problems at work, and begin to doubt his ability to support his family. *Portee*, 853 F. Supp. at 608 n.7. His wife testified that she lost some concentration at work and was depressed. *Id.* at 607-08. The court seemed particularly critical that neither party sought medical assistance, despite testimony on how the loss of their preferred rental plunged their lives into turmoil. *Id.* at 608. He also cited a string of low emotional harm awards and reduced the jury's verdict. *Id.* at 616. While cases with such different facts cannot form a symmetrical comparison, a few important issues do seem relevant. The *Biondi* plaintiff's testimony did not characterize their trauma as significantly greater than the Portees to warrant twice the damages. *See Biondi*, 17 F. Supp. 2d at 223. Both cases involved discrimination of a subtle type, and neither involved confrontations or public humiliation. It is possible that a significant factor in the difference of the awards was the level of knowledge about emotional trauma and discrimination possessed by the judge.

98. *See infra* Part II.

99. *See, e.g.*, Landrine & Klonoff, *supra* note 33, at 147. The authors argue that "Afrocentric consciousness," or a strong sense of group identity:

> may be a personality factor (like hardiness for generic life events) which moderates the negative impact of racist events. By providing a cognitive framework for understanding and responding to racist events, an Afro-centric consciousness should decrease the perception of racist events as one's own fault, increase adaptive coping, increase social support seeking, and thereby decrease the negative health and psychological impact of these events.

Id.

tive model (of harm) begins with the assumption that what 'is,' ordinarily, is not harm. Instead, harm is a deviation from what is considered ordinary."[100] She also points out that as various forms of the oppression of women have historically been accepted as social norms, this social reality in turn influences and even dominates our legal concepts of what constitutes harm.[101] The effect of this social process over time is that the very pervasiveness of particular types of harm against women renders it normative, thereby difficult to legally accept as worthy of a significant or substantial judicial response.[102] The very pervasiveness of forms of gender oppression (which can include racism), creates a social context that supports the belief that some degree of this phenomenon is inevitable, and therefore not within the calculus of a gross deviation from what is expected to be the pitfalls of normal existence. Thus, when fact-finders are asked to see the behavior of individuals who commit acts that are racist or sexist, as harmful, if they have even subtly accepted the "normativeness" of these practices either consciously or unconsciously, they must first make a cultural and social progression beyond their own experience and beliefs before the legal parameters of what must be done can become clear.

A parallel dilemma arises for the victims of discrimination when subtle, yet pervasive forms of racism are accepted as social norms. Because people of color inevitably develop the capacity to persevere in spite of assaults on their dignity, this very capacity can create the impression that the emotional harm that they experience is not severe.[103] Similarly, on an internal level, this coping capacity can transform itself into a pattern of denial by victims of the severity of their trauma and become rationalized as a necessary adjustment to the harsh realities of life.[104] It is important for both advocates and fact-finders to understand this phenomenon in evaluating emotional harm. While society has made progress in changing old norms and valuing the experiences of people of color and

100. Suzanne J. Levitt, *Rethinking Harm: A Feminist Essay*, 34 WASHBURN L.J. 531, 532 (1995).

101. *Id.* at 532-33.

102. *See id.* at 537-38. Leavitt cites judicial responses to sexual harassment and spousal abuse cases as examples of social harm. *Id.* at 534-38. She attributes the slow and grudging acceptance/non-acceptance of these social harms into the traditional legal framework as background radiation, potentially worthy of attention, but basically like background noise, something that individuals are aware of, but learn to tolerate. *Id.* at 532-33.

103. *See, e.g.*, Landrine & Klonoff, *supra* note 33, at 146.

104. Goodman-Delahunty & Foote, *supra* note 61, at 185-87.

women, social science studies clearly demonstrate that more work still needs to be done.

II. THE POTENTIAL FOR BIAS BY JUDGES AND JURIES

A. Some Social Science Evidence

1. *Bias as a Form of Racism*

Whenever one begins a discussion of racial issues, it is critical at the outset to clarify language and definitions. Bias, or prejudice, as a general concept is a component of the set of beliefs or values that form the categories in which individuals view the world and organize the information acquired.[105] Forming these categories is a normal process and helps to psychologically process the myriad of information received[106] These inputs are, for the most part, rational in that they are built upon accurate information.[107] The associations that individuals create from these categories tend to follow and reflect a normal pattern of logical thinking.[108]

On the other hand, this process of creating categories also leads to the forming of clusters, and projecting the characteristics that are assigned to the cluster onto individual phenomena.[109] The most common result of this process occurs when attention is not paid to the details or particularities of the individual phenomena, and individuals unconsciously accept ideas based on the projection or juxtaposition that is applied from the category to the larger cluster.[110] Ordinary bias results when this process presents an oversimplification of the world and a distortion or inaccuracy based on one's limited experience, inability, or aversion to see the illogic or incompleteness of those views.[111] The tendency is to at least initially form ideas about the world in keeping with first-hand experience, even though this may include projections of fantasy,

105. ALLPORT, *supra* note 36, at 6-14.

106. *Id.* at 27 ("[M]an has a propensity to prejudice. This propensity lies in his normal tendency to form generalizations, concepts and categories, whose content represents an oversimplification of his world of experience.").

107. *Id.* at 22. ("[G]enerally a category starts to grow up from a 'kernel of truth.' A rational category does so, and enlarges and solidifies itself through the increment of relevant experience.").

108. *Id.* ("Categories may be more or less rational . . . Scientific laws are examples of rational categories. They are backed up by experience . . . Even if the laws are not 100 percent perfect, we consider them rational if they have a high probability of predicting a happening.").

109. *Id.* at 20.

110. *Id.* at 21.

111. *Id.* ("This principle holds even though we often make mistakes in fitting events to categories and thus get ourselves into trouble.").

emotional issues, or information acquired and accepted through social and cultural influences.[112]

Racial bias, as the term is used here, is the extension of this process as it is formed and shaped by the historical and cultural patterns of race and racism in America.[113] This social process has resulted in a distorted and stereotyped projection of a dominant and normative "I" and a different and subordinate "other" onto the categories of race.[114] More importantly, racial bias is a reflection of a failing to bridge this gap by consciously accepting accurate information, which moves away from stereotypes and relies rigorously upon logical thinking and individualization.[115]

In 1954, Professor Gordon Allport, in his critical study, *The Nature of Prejudice*, advanced the theory that logical thinking is more often the norm for most Americans.[116] In fact, up to eighty percent of white Americans harbored enough antagonism toward members of racial minority groups that it would likely affect their behavior

112. *Id.* at 27. It should also be noted that this pattern of thinking is not limited to whites as a dominant social group. Members of minority groups can also be biased based on their perceptions of other groups and their misapplication of false group characteristics to an individual. *Id.* at 38-39. Discrimination is distinguished here between interpersonal bias, which operates across racial, ethnic, and gender boundaries, and institutional bias, which is socially constructed by those who control the major social institutions in society. Bernice Lott & Diane Maluso, *Introduction: Framing the Question* to THE SOCIAL PSYCHOLOGY OF INTERPERSONAL DISCRIMINATION, *supra* note 29, at 2-3.

113. *See generally* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (7th ed. 1994), for a full historical treatment of racism in America. While the literature on race and racial discrimination in America is too voluminous to note here, one seminal work does stand out. *An American Dilemma: The Negro Problem and Modern Democracy* has been a foundation for work by modern scholars of all disciplines on racial discrimination. GUNNER MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1962). Myrdal's study chronicled the history and pervasiveness of discrimination and bias in American culture, and argued that until those issues were addressed America would never attain the status of a full and complete democracy. *Id.* at 1020-24.

114. ALLPORT, *supra* note 36, at 37, 41 (describing a person in-group and a personal reference group in contrast with "an outsider").

115. *See* Charles Lawrence, *The Id, Ego and Racial Discrimination: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987). Lawrence's theory suggests that individuals are infected by the biases inherent in a racist society. *Id.* Utilizing a psychoanalytical model, he argues that as long as society reflects racial domination and subordination in its social structure, individuals will be subconsciously influenced by these stimuli, and will tend to reflect them in various ways. *Id.* at 322-23. When this occurs, despite the best efforts toward objective thinking, all will subconsciously project the emotional and experiential issues that were referred to in Allport's work on prejudice. *Id.* at 337. This results in so-called "objective legal standards" actually being constructed on flawed, unconscious foundations. *Id.* at 344-45.

116. ALLPORT, *supra* note 36, at 17-27.

in some way on a daily basis.[117] He viewed these findings as evidence supporting his theory on the social reproduction of racial bias.[118] One significant aspect of Allport's early theories was that he did not see these distortions as in any way inevitable or linked to human nature.[119] While he found evidence to explain racial bias as mostly affected by social and cultural variables that influenced and shaped attitudes, his theories were broad and eclectic enough to recognize the role of cognitive influences as well.[120]

The importance of his dual perspective of cognitive and social factors is two fold. First, Allport focused on the social dimensions of racism, particularly how the reformation of social institutions that had been constructed along lines based on racial stereotypes could be restructured.[121] But he did not see this as the only approach to attacking racism.[122] He also recognized that the cognitive inputs that shape belief, perception, and consciousness are not intrinsic to human behavior.[123] Thus, he saw the social and cultural variables, reflected in racist beliefs and causing racist behavior as

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117. *Id.* at 78.

118. *Id.* at 79. Allport moved away from theories that characterized racism as an aberrant individual psychosis and instead saw it as a distinctly social phenomena with deep historical origins. *Id.* at 208-13.

119. *Id.* at 17-19.

120. *Id.* at 165-77. While later cognitive theorists would expand considerably on Allport's work, his initial studies laid the framework for later experiments that demonstrated that racially biased beliefs did not always follow Allport's continuum and become discriminatory conduct. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186-88 (1995). In fact, the cognitive theorists argue that racial biases are often a set of unconscious constructs and beliefs. *Id.* at 1188. Behavior may then follow these cognitive pathways without ever manifesting as a rational or conscious decision of choice. *Id.* For an excellent discussion of these theories and how they demonstrate the counter-productive aspects of anti-discrimination law, especially the intent standard in Title VII jurisprudence, see *id.* at 1204-07.

121. ALLPORT, *supra* note 36, at 504-13.

122. *Id.* at 469, 477, 493, 495, 510 (describing how racism can be attacked by changing laws, a greater role for social scientists in government, and appropriate use of the mass media, particularly influential media, like film, individual therapy, and intercultural education).

123. *See* deCarvalho, *supra* note 60, at 299. Allport was critical of a purely psychoanalytic approach to prejudice because of its tendency to see discriminatory behavior as the reflection of "infantile, repressed, defensive, and irrational" parts of the human psyche. *Id.* at 303. Allport did accept some aspects of the psychoanalytic theory. *Id.* at 303-04. In particular, he saw the perpetrators of discrimination as often developing fears and aggressions that were turned against minorities, but he rejected the idea that these were impulses that might affect individuals. *Id.* at 304. He strongly urged the view that racial bias was more a situational construct, created by social forces and, therefore, more susceptible than the psychoanalytic construct to change through countering social forces. *Id.*

being susceptible to reformation through conscious social policy.[124] This theory, in fact, has supported the main public policy rationale underlying civil rights laws and enforcement efforts.[125] At the same time, while the more cognitive elements of his theory have been the subject of numerous social science research efforts, very little is known about how to translate those findings into broad, meaningful social results.[126] This may account for the fact that while beliefs about race in this country have undergone significant positive change, many forms of racially influenced behaviors have changed much more slowly, or in some cases very little at all.[127] The cognitive theorists who have been able to shed further insight on why information designed to dispel stereotypes and biases is not always reflected in a social context have drawn from and expanded on Allport's theory. They have pointed out how the changes in social structures, particularly those reflected in the law, are often removed from the day-to-day experiences of most citizens and do

124. *Id.* at 304-06.

125. For an example of a positivist approach to anti-discrimination echoing Allport's theory, see CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 1 (1985) ("The legal remedies [President Kennedy] have proposed are the embodiment of this nation's basic posture of common sense and common justice."); *see also* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("we conclude that in the field of education separate but equal has no place."). There are numerous examples of a positivist approach to anti-discrimination principles that echo Allport's view that racial bias is learned behavior, reinforced by social conditions, but behavior that can and should be changed. The most influential is *Brown*, with its bold pronouncement that separate but equal was no longer consistent with the premise of the Fourteenth Amendment. *Brown*, 347 U.S. at 495. Another is Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2003). Each represents a sweeping view of the potential for change, albeit a vision frequently unrealized.

126. *See* Krieger, *supra* note 120, at 1168-69 (arguing that the entire theoretical framework for the intent standard formulated by the Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), is based on a flawed understanding of how conscious decisions concerning race actually occur).

127. A dramatic example of this dissonance between attitudes and behavior has been chronicled in *American Apartheid*. In this extensive examination of housing patterns in the post Title VIII period, these authors have reluctantly concluded that African-Americans face high degrees of racial isolation in almost every major American city. MASSEY & DENTON, *supra* note 7, at 76. They also found that the vast majority of African-Americans support the ideal of integration. *Id.* at 88. They reported surveys of white Americans that revealed that by 1978, eighty-eight percent of whites supported the basic principle of non-discrimination in the housing market. *Id.* at 91. But white Americans "remain uncomfortable about its implications in practice and are reluctant to support legislation to implement it. Moreover, negative stereotypes about black neighbors remain firmly entrenched in white psyches." *Id.* at 92.

not automatically reproduce themselves as new beliefs and behaviors.[128]

2. *The Impact of Cultural Bias*

Researchers from the National Opinion Research Center ("NORC") have sought to explain the discrepancy between attitudes about race and social behavior as the "lag effect theory."[129] This theory contends that as civil rights laws and changing social attitudes interact to form new social norms, there will always be a lag time between the belief in equality as a social ideal and a corresponding change in social behavior.[130] This "gap" means that while individuals are forming new ideas and value, they may continue to be influenced by older beliefs.[131]

Attitudes on matters of race have changed a great deal since the 1940s.[132] More recent studies show that on many levels whites, as a group, are willing to reject many of the extreme stereotypes that have historically been common components of American culture and have strongly influenced white people's perceptions of people of color, particularly African-Americans.[133]

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128. For an excellent description of cognitive theory, see Krieger, *supra* note 120, at 1161-66. In analyzing the basic flaws in current Title VII jurisprudence, particularly its reliance on findings of intentional discrimination to justify a remedy, she describes how this standard is at odds with cognitive psychological theory. *Id.* at 1166-68. In summarizing cognitive theory, she points out that its key element is that people act on Allport's categories, also referred to as schemas. *Id.* at 1188. But, for the most part, individuals do so without a conscious awareness. *Id.* Since these behaviors lie outside general awareness, they are also rarely the object of institutional constructs. *Id.* at 1213-17. In other words, institutional racism is not seen, because individuals do not see themselves as racist. *Id.* In the Title VII field, this results in constructing a legal rule about intentional conduct that is inconsistent with what is known about human behavior. In Krieger's view, this results in a whole set of unconsciously motivated conduct that will never meet a conscious standard for intentional behavior. *Id.* at 1217. This flaw is compounded because the "racial blind spot" gets transformed into a rule supposedly designed to help find and respond to racial discrimination. *Id.*

129. *See* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 135-36 (1985). The lag effect represents the time it takes for an expressed attitude to become internalized. *Id.* It is then that the individual's behavior is most likely to fall in synchronization with their expressed values. *Id.* The authors caution that this is a hypothesis drawn from the data and there are some studies that are inconsistent with this theory. *Id.* They point out that school integration shows an inverse relationship to the data, with the increase in implementation resulting in a decrease in attitudinal support. *Id.* at 136.

130. *Id.* at 135.

131. *Id.*

132. *Id.* at 193-95.

133. *See id.* For example, in 1958, only four percent of whites surveyed supported interracial marriage. *Id.* at 74-76. By 1983, that figure had increased to forty percent.

NORC has tracked these "racial attitudes" by utilizing research questionnaires that recorded the answers to a similar series of questions asked repeatedly from 1942 to 1983.[134] This method provided a reliable way of evaluating and comparing changes in attitudes over time. In areas such as views on interracial marriage, and willingness to accept African-Americans in neighborhoods, in schools, or social venues, the early responses all showed the depth of racial bias prior to the modern civil rights era.[135] They have also tracked the steady upward acceptance trend, demonstrating the moderation of open racial hostility and the formation of beliefs that reflect a rejection of, or at least a meaningful distancing from, racial stereotypes and biases.[136] In keeping with Allport's early theories, these NORC surveys have led to the conclusion that many older racial stereotypes have given way to more accurate, non-stereotypical thinking about people of color.[137] More importantly for this analysis of race and emotional harm, this trend also reflects the upward trend in the ability of most whites to perceive African-Americans with the same degree of sympathy and empathy as they with other white people.[138] The data reveals a more

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Id. While this is hardly an unqualified endorsement of a fully integrated society, it does illustrate the trend toward greater acceptance.

134. *Id.* at 45-46, 55.

135. *Id.* at 193.

136. *Id.* at 193-94

137. *Id.* at 193-95. In 1997, when asked how they felt about a relative marrying an African-American, sixty-seven percent of whites surveyed either opposed or strongly opposed the idea. Maria Krysan, *Comments on the 2002 Data Update to Racial Attitudes in America: Trends and Interpretations Revised Edition* (2002), *at* http://tiger.uic.edu/~krysan/writeup.htm (last visited Mar. 15, 2003). The most recent data from the 2000 survey shows opposition declining to thirty-eight percent. *Id.* In another attitudinal question, whites were asked how they felt about living in a neighborhood that was fifty percent African-American. *Id.* In 1990, forty-eight percent opposed or strongly opposed the idea. *Id.* In 2000, that figure went down to thirty-one percent. *Id.*

138. SCHUMAN ET AL., *supra* note 129, at 202. These NORC studies focused on residential integration, school integration, job treatment, public facilities, the political arena, personal relations, and general attitudes about African-Americans and current events. *Id.* at 47-48, 53. Unfortunately, many of the questions in the NORC survey were designed to examine the extreme forms of racism that were open, prevalent, and reflected the social policy of the day. They are less useful in discerning the more subtle aspects of racism. Nevertheless, their findings are a barometer of how deeply entrenched aspects of racial antipathy are in American culture. For example, in the housing arena, one question simply asked whether one supported the idea of a free market seller's choice, even if that permitted racial discrimination, or a fair housing law that prohibited discrimination. *Id.* at 97. In 1972, only thirty-five percent of northerners supported fair housing, and by 1982, that number had risen to about forty-seven percent. *Id.* Southern responses lagged ten points behind those modest figures. *Id.* These studies also reflect the distinction in white people's belief in equal-

complex and multi-dimensional picture about racial attitudes that supports optimism, but also gives some credence to the argument that perceptual bias remains strong and prevalent in our society, and that the key players in the judicial process can hardly be expected to be fully immune to it.

In 1980, a team of psychologists conducted a review of a number of studies on unobtrusive discrimination and prejudice.[139] The value of their work, as it applies to the arguments in this Article, lies in two key areas. First, they carefully reviewed a vast body of literature in the field of racial studies generally focusing on those that sought to measure the current level of anti-black prejudice and discrimination among whites.[140] Second, they employed a definition of racism that is very close to the definition of racial bias extrapolated from Allport's work and employed in this Article.[141] Their findings correlate closely with the thesis of this Article that perceptual bias remains strong in society and is, therefore, likely to be present in the process of assessing how an African-American plaintiff may have been harmed by discrimination.[142] In their review of the literature on cross-cultural racial perceptions, the authors reiterated the findings supported by the NORC polling data that "anti-black attitudes were prevalent and moderately strong among the white population as a whole at least until the late 1950's and early 1960's."[143] They point out, however, that new surveys and studies from 1963 through the 1970s generally interpreted the NORC data

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ity as a principle, versus their support of concrete policies to enforce that principle. For example, more than ninety percent of whites currently support the principle of equal treatment in employment, jobs, schools, and public accommodations, but the figures for support for government action to enforce that principle are considerably lower. *Id.* at 135. Two other trends emerge. The more interpersonal the proposed integration, the less support there is for government enforcement. *Id.* at 136. Conversely, there is more support for public activities, such as public accommodations. *Id.*

139. Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 546 (1980).

140. *Id.*

141. *Id.* at 546.

> Racism has been defined in a variety of ways. For clarity of exposition, we follow P. Katz and define racism as the differential treatment of individuals on the basis of their racial group membership. Racism may be examined at two levels: One may measure discriminatory behavior, and one may infer prejudiced attitudes. Stereotyping, which involves the presumption of certain attributes in an individual solely on the basis of racial groups, is one form of prejudice.

Id. (citations omitted).

142. *Id.* at 547.

143. *Id.* at 547-48

as revealing a significant decrease in racist attitudes and a significant increase in pro-integrationist and racially unbiased views.[144] This led to a number of other studies that concluded that diminishing racial prejudice in society was a definite trend, and some even to argue that "antiblack prejudice was no longer pervasive in the American white population."[145] They also found, however, that many of these studies relied on self-reporting, typical of questionnaire data, and were contradicted by other studies that demonstrated a dissonance between reported attitudes about race and actual behavior in racially integrated settings.[146] One study, for example, showed that college-age white women registered no prejudice on a questionnaire, but when they believed that the questionnaire would be the basis for actually assigning roommates, they showed significantly more prejudice towards African-Americans.[147]

The unobtrusive discrimination studies that they conducted sought to resolve these discrepancies between values and behavior by examining experiments that fell into three categories: (1) helping behavior studies; (2) aggression studies; and (3) nonverbal behavioral studies.[148] In addition, they reviewed a number of laboratory experiments that were difficult to classify, but were designed to measure how race affected the perceptions of white test subjects.[149] Each of these studies would measure the level of empathy white subjects exhibited toward African-Americans. In the helping studies, staged scenarios were acted out with a white actor in need of assistance, and the identical situation was replayed where the actor was an African-American.[150] Their results demonstrated a clear preference among the white subjects for providing more assistance to the white actor.[151] The aggression studies involved laboratory experiments where white test subjects had an opportunity to express aggression toward an African-American or white participant who was the target in a setting that was designed to allow for aggressive behavior to be socially acceptable.[152] These

144. *Id.* at 548.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 547.
149. *Id.* at 549-56.
150. *Id.* at 548.
151. *Id.* at 549.
152. *Id.* at 552. These studies involved role playing where the subject played the role of a teacher and the student, who was really part of the experiment, could be given a bogus electrical shock based on the number of errors they made in the

were teacher/student scenarios where the person in the role of teacher could mete out mild punishment if the student gave incorrect answers.[153] Despite recording some discrepancies in the findings, their conclusion was that "retaliation, censure and anonymity all affect aggression against black targets, but fail to affect aggression against white targets."[154] In other words, if the behavior of the white "teachers" was subject to censure or retaliation, they moderated their response to the African-American subject, but not the white one. These results suggest a tendency to mask one's true feelings as long as there are likely negative consequences, but carry out aggressive responses when there were no likely consequences. Furthermore, "[t]he data imply that anti-black hostility was pervasive, but subtle . . . [a]ssuming that these subjects are representative of the general population, we may conclude that whites today continue to harbor covert hostility toward blacks."[155] When the conditions were safe (for example, anonymous), with no censure from peers or authority figures, and no possibility for retaliation by the subject, the hostility was more overt and showed as a tendency to increase the level of direct aggression.[156] When safe conditions were not present, the hostility was more indirect.[157]

The conclusions from these and other findings provide further support for the thesis of this Article, that clearly documented and measured bias in the general population must, to some degree, find a corresponding reflection in the judicial process that may have an impact on how the harm caused by discrimination is perceived and valued.

Another key factor derived from these studies is not simply that whites tend to perceive African-Americans as different from themselves, but that the difference becomes an internalized rationale and justification for different and often harsher treatment.[158] While the courtroom setting of a discrimination case does not in-

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teacher/learner scenario. *Id.* at 552-53. In certain cases, the student role was played by a white person and in others by an African-American. *Id.* The intensity of the shock was a measure of direct aggression, and the duration was a measure of indirect aggression. *Id.*

153. *Id.*

154. *Id.* at 554.

155. *Id.*

156. *Id.*

157. *Id.*

158. This Article is merging the theories of Allport on the formation of categories and stereotyped labeling and the studies of Crosby, Bromley, and Saxe that support Allport's theory of the social and historical influences of racial bias on the formation of those categories. *See* Crosby et al., *supra* note 139, at 548-56.

volve the anonymity of some of the experiments, the social distances among the players in the judicial process and the rigidity of the roles and lines of authority are analogous in many ways to the test conditions where white test subjects were in positions of authority over an African-American, and their actions were not subject to supervision or sanction.

Other findings demonstrate additional support that the conscious and unconscious perceptions of white fact-finders are literally and figuratively colored by biases derived from social and cultural institutions.[159] These perceptions are inevitably brought into the courtroom process and may easily become manifest during the trial, including the damages phase of the case, when empathy towards the victim is so crucial to their assessment of the degree of harm suffered.[160]

Evidence from other studies found that in a teacher/student role-play, whites expected to be treated more harshly by African-Americans who assumed the teaching (authority) role than by whites in a similar role.[161] In a shoplifting study, where an African-American person and a white person acted out an identical shoplifting scene, the whites who observed the encounter were more likely to spontaneously report and confirm the crime when the actor was an African-American than when they observed the white actor in the identical behavior.[162] Another study measured friendliness toward a subject in an intercom experiment.[163] When the test subject

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159. *See, e.g.*, Krieger, *supra* note 120, at 1188.

> The second claim posited in social cognition theory is that, once in place, stereotypes bias intergroup judgment and decisionmaking. According to this view, stereotypes operate as "person prototypes" or "social schemas." As such, they function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people. These biases are cognitive rather than motivational. They operate absent intent to favor or disfavor members of a particular social group. And, perhaps most significant for present purposes, they bias a decisionmaker's judgment long before the "moment of decision," as a decisionmaker attends to relevant data and interprets, encodes, stores, and retrieves it from memory. These biases "sneak up on" the decisionmaker, distorting bit by bit the data upon which his decision is eventually based.

Id. She further indicates that empirical evidence shows that people's access to their own cognitive processes is poor. *Id.* Accordingly, cognitive bias may well be both unintentional and unconscious. *Id.*

160. *See* Schwemm, *supra* note 22, at 107.

161. Crosby et al., *supra* note 139, at 554. This perception is important because it suggests a deeply rooted psychological rationale for their own bias, for example, my treatment of "them" cannnot be so bad because they would do the same to me. *Id.*

162. *Id.* at 554-55.

163. *Id.* at 555.

thought the intercom partner was white, the verbal friendliness rating was positive.[164] When they thought the partner was African-American, the friendliness rating was negative.[165] In an interview study, similar results were recorded.[166] If the interviewee was perceived as African-American, the subjects sat further away from the interviewee, made more verbal errors, and terminated the interview sooner than if the same scenario was acted out with a white interviewee.[167] Finally, an experiment utilized a videotape that contained African-American and white actors playing out identical scripts that depicted two males in an interaction that culminated in one shoving the other.[168] The African-American harm-doer was perceived by white subjects as violent, but when the roles were reversed, the white harm-doer was perceived as "playing around."[169] In this study, the white subjects also assigned personality attributions to the African-American harm-doers, but described identical behavior by the white actor as situational.[170] Each of these studies, except the shoplifting experiment, were conducted in laboratory settings and the subjects all reported themselves on questionnaire surveys to be liberal.[171] The shoplifting study, however, carried the added value of closely duplicating a typical life event without the artificial qualities of a lab and its findings were consistent with the lab studies.[172]

There are three inescapable conclusions to be drawn from these studies. First, non-verbal behavior generally lies outside conscious awareness and therefore control is driven by perceptions and biases that each individual brings to a situation.[173] This partially explains the difference between the liberal self-identification of the test subjects, the positive diminishing bias trend in racial attitudes

164. *Id.* (noting that friendliness was measured by a scientifically accepted voice interpretation test).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 556.

170. *Id.*

171. *Id.*

172. *Id.* at 555.

173. *See* Krieger, *supra* note 120, at 1190. She notes that:

> categorical structures—whether prototypes, stereotypes, or schemas—bias what we see, how we interpret it, how we encode and store it in memory, and what we remember about it later. In intergroup relations, these biases, mediated through perception, inference, and judgment, can result in discrimination, whether we intend it or not, whether we know it or not.

Id.

reflected in questionnaire surveys, and the behavior results recorded in the unobtrusive bias studies. Secondly, whites still structure many aspects of their behavior on the basis of psychologically rooted biases against African-Americans, and do so in ways that are beyond their awareness.[174] Finally, although there has been a marked improvement in the social compliance with the new social norms of non-discrimination depicted in our laws, many whites have not internalized these values and made them part of their conscious behavior patterns.[175] As a result, many whites are still overly dependent on external control inputs to achieve truly non-biased conduct.[176] While social control is one of the functions of our civil rights laws, the conduct of judges and juries do not operate for the most part, as subjects of those controls.[177] The personnel within our judicial system are much more dependent on the guidance of their own consciousness, or the limited influence of plaintiffs attorneys in awakening that consciousness as they try and grapple with the complexities of a trial, including the unknown perceptions of white decision-makers.

There are several possible mitigating factors that should be considered in examining the degree that perpetual biases can potentially infect the judicial process. Many of the studies cited above were conducted in the 1970s. If the survey data is accepted as accurate, it means that the NORC trends toward greater racial awareness and liberalization will have continued for the last twenty-five years, and the process of white internalization of non-racist views will have continued to move in a positive direction. Some of the same studies that measured covert white hostility toward African-Americans also documented how this learned behav-

174. Crosby et al., *supra* note 139, at 556-57.

175. *Id.* at 557-59.

176. *Id.* at 556-57. The Crosby study draws three useful conclusions. First, despite the differences between attitudes and behavior about race, positive changing attitudes project a progressive, though not always consistent trend. *Id.* at 560. Secondly, whites are not the only group in society affected by bias. *Id.* Nevertheless, white institutional authority remains stronger than institutions controlled by African-Americans. *See* ANDREW HACKER, TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 22-23 (1995). Third, change from overt racism to subtle racism is a positive change. Crosby et al., *supra* note 139, at 560. "[W]hites have begun to comply with an egalitarian and non-racist ideology." *Id.* One can be hopeful "that internalization follows." *Id.*

177. *See generally* Krieger, *supra* note 120, at 1186-88. Her thesis is that our employment discrimination laws, with their requirement that the victim of discrimination prove that the employer acted intentionally, assumes that we are always aware of the motivation that causes our behavior. *Id.* at 1185. This, she points out, is contrary to the theories and findings from numerous cognitive psychological studies. *Id.* at 1187.

ior reflecting bias could very rapidly be unlearned, or at least controlled, at a behavioral level.[178] When non-racist behavior was modeled under the same conditions as the aggressive behavior teacher/learner tests, the white subjects not only moderated their overt discrimination, but there was no discernable shift to more covert behavior.[179] In other words, the principles and practices of equality can be learned and internalized into new behavior patterns with consistent institutional oversight and support. Another test showed that when there was open censure of discriminatory behavior, or the potential for that censure on the white test subject, both overt and indirect aggression was moderated.[180] These findings suggest that even reluctant whites can be brought around to non-racist behavior through an institutional approach that vigorously and actively promotes those values and carefully monitors transgressions. Judicial studies on the status of minorities and women in the courts are positive examples of such an effort.[181] While it may still be too soon to determine the degree of change that has been brought about by those efforts, they represent an awareness that eliminating bias requires a conscious and consistent effort. As laudable as these efforts are, it is not at all clear whether they have had sufficient reach into the profession and the judiciary to mitigate broader social trends from the nation's deeply rooted racial past.

B. Evidence of Racial Bias in Tort Litigation

Since the Supreme Court formally linked recovery for emotional harm in housing discrimination cases to the dignitary tort of intentional infliction of emotional distress, the field of tort law is a likely source for insights into the presence of racial bias in the judicial process. This is a particularly salient field since both discrimination cases and tort litigation focus on the degree and value of the injury suffered by the plaintiff. Two recent commentators have offered evidence of two forms of racial bias in the field of tort law. One is structural, where the preference for formal economic determinants translates the reality of lower earnings for African-Americans into a projection of future potential worth.[182] The other is a more sys-

178. Crosby et al., *supra* note 139, at 552.

179. *Id.* at 554.

180. *Id.*

181. *See, e.g.*, 1 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, EXECUTIVE SUMMARY 1-9 (1991).

182. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 480-89 (1998) (arguing that the basic categories of physical

temic bias that supports this Article's thesis of racial misperceptions leading to a chronic undervaluing of African-American suffering.[183] The structural bias in the process of valuing African-American claims is depicted in the process of utilizing economic data to extrapolate an "objective" measure of the worth of an injury.[184] This process inevitably captures the lower earnings of African-Americans, which at a societal level is directly linked to discrimination, and projects that figure into potential future earnings as if all the discriminatory disabilities of the past and present must inevitably continue into the future.[185] The racial blind spot, represented by the inability of many white jurists to see this as a perpetuation of past discrimination and to take steps to eliminate it, is another example of how the African-American plaintiff is perceived through a racially skewed reality.[186] The available data confirms the detrimental economic effects of the continued use of this standard. In one study, even after adjustments to account for different diseases, general occupation, and age, awards for African-American plaintiffs were significantly lower than for similarly situated whites, and in another, averaged only seventy-four percent of the average white award.[187]

The systemic bias in the field of tort litigation raises different issues than those confronted in most housing discrimination cases. In some key aspects, however, they are related. In the typical FHA case, the plaintiff will only receive compensation if she proves that she suffered harm, and that it was caused by the conduct of the

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injury, property damage, emotional harm, and related harm all reflect deep gender and racial biases that tend to go unnoticed and unchallenged because they are based on traditional white middle class male norms ranging from the reasonable man to comparative actuarial tables).

183. *See* Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761, 774-77 (1996) (offering data and examples of racial bias in the courts, the personal injury bar, and the law itself, all of which operate to the disadvantage of African-American plaintiffs and frequently result in the devaluation of their claims).

184. *See* Martha Chamallas, *Questioning the Use of Race Specific and Gender Specific Economic Data In Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994) (arguing that the persistent use of economic data that explicitly utilizes gender and racial classifications is an unjustifiable racial classification, and is therefore unconstitutional). She further points out the failure of the law to address the discriminatory effects of job bias, and the continuation of those disabilities into so called objective measures of lost future earning potential, reflecting not only a racial bias in the legal process itself, but continuing support for that bias by judges who refuse to be receptive to alternative formulations. *Id.* at 75-77.

185. *Id.* at 75.

186. Chamallas, *supra* note 182, at 489.

187. Chamallas, *supra* note 184, at 87.

defendant.[188] As in the typical tort case, some elements of harm are relatively straightforward.[189] But proving the elements of emotional harm in the damages phase of a housing discrimination case, as in its tort counterpart, involves more than just presenting factual evidence. It also involves getting judges to understand the case from the perspective of the plaintiff even though emotional harm from discrimination is probably far removed from both their experience and their knowledge.[190] While both civil tort and Title VIII litigation require direct evidence that emotional harm occurred, the evaluation of that evidence and the assignment of a monetary value to it require some understanding and insight into the manner in which racial discrimination operates.[191] The fact-finders must develop a degree of empathy that permits them to evaluate the experience of discrimination from the perspective of a person of color. This does not mean uncritically accepting each of the plaintiff's assertions as true, but neither can it begin with extreme skepticism about whether discrimination is little more than mildly embarrassing or inconvenient.[192] When these cases are viewed in context, a fuller sense of the real extent of the harm that results from discrimination can emerge, and a more accurate and meaningful value can be assigned to the harm. Getting fact-finders to reach that point brings into question issues of perspective, experience, comprehension, and empathy, as well as all the traditional legal skills that plaintiff's attorneys must employ to present their evidence.[193] Unfortunately, what the data from a critical race perspective on tort litigation reveals is that far too often the depth of understanding for full fairness for persons of color in the process is lacking, and the steps necessary to achieve a better understanding are not being taken.[194] Other studies of tort litigation have found

188. DOBBS, *supra* note 50, at 1047-53.

189. SCHWEMM, *supra* note 18, 25-32.

190. McClellan, *supra* note 183, at 794.

191. Schwemm, *supra* note 22, at 121 ("intangible factors will often influence the judge or jury").

192. While considerable progress has been made, skepticism as well as possible bias still may influence low jury awards. *See* Schwemm, *supra* note 22, at 106-07.

193. *See* Arlene Sheskin, *Trial Courts on Trial: Examining Dominant Assumptions*, *in* COURTS AND JUDGES 77, 79-82 (James A. Cramer ed., 1981) (describing courtroom hierarchy affecting decision-making).

194. McClellan, *supra* note 183, at 771. He points out that "[t]he widely shared perception of people of color regarding the pervasiveness of the color line issue are sufficient grounds for discussion of the issue," and he calls for racial orientation and sensitivity training for judges. *Id.* at 771, 794. Professor McClellan calls for systematic empirical studies to examine issues of differential treatment of African-Americans, particularly in the tort system. *Id.* at 772-73.

systemic gender bias in the judicial process as well.[195] As Professor McClellan points out, "unfortunately, race often precludes close empathy with members of other races in tort cases. Race also influences one's view of what is 'outrageous conduct.'"[196]

C. The Institutional Devaluation of African-American Life: Death Penalty Examples

One of the most dramatic examples of how facts can be distorted when they are examined through a racial prism, occurred with the Supreme Court's decision in *McCleskey v. Kemp*.[197] In analyzing the claim of systematic racial discrimination in capital sentencing, the Court's decision turned in significant part on their review of a statistical analysis of the impact of race on the likelihood of capital punishment, later to be known as the Baldus study.[198] This statistical analysis demonstrated that when capital sentencing is evaluated even from the perspective of the criminal law's goal of retribution, the practices of Georgia prosecutors demonstrated that the value to society of the loss of a white life was four times that of the loss of an African-American life.[199] A fuller review of race discrimination in the criminal justice system is beyond the scope of this Arti-

195. In summarizing this finding from a number of judicial commissions, Professor Judith Resnick quotes from a report by one such body in New York. "The perception is that minorities are stripped of their human dignity, their individuality and their identity in their encounters with the court system[.]" Judith Resnick, *Ambivalence: The Resiliency of Culture in the United States*, 45 STAN. L. REV. 1525, 1534. She adds that "[p]hrases like 'there is evidence that bias occurs with disturbing frequency at every level of the legal profession and court system' are uttered, repeated, printed, pronounced, but without much in terrorem effect." *Id.* She also notes that "[u]nexplained disparities in treatment correlate with membership in minority groups and even with gender." *Id.* at 1533.

196. McClellan, *supra* note 183, at 786.

197. 481 U.S. 279 (1987).

198. *See id.* at 286; Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 146 (1998). "McCleskey's primary evidence in support of this claim was the so-called Baldus study, a sophisticated statistical analysis performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth of the role played by race in capital sentencing proceedings in Georgia in the 1970s." *Id.* "The results of the Baldus study are striking. The race of the victim was an overwhelmingly important indicator of the likelihood that a capital sentence would be imposed." *Id.* at 147. "After controlling for the thirty-nine most relevant nonracial variables, murderers of whites were 4.3 times as likely to receive a death sentence as murderers of blacks." *Id.* While this data was used to demonstrate the discriminatory application of capital sentencing, it also underscores the diminished value of the African-American victim. *Id.* at 148.

199. *See id.* at 149. "[W]e claim that the statistics create a strong suspicion of race discrimination—specifically, an overvaluation of the white victim's life." *Id.* at 168.

cle. Yet, it is difficult to imagine how judges and juries in the civil system can fully comprehend the reasonable measure of the harm caused by discrimination when they are surrounded by daily examples of racism reinforced by the institutionally accepted diminished value of an African-American's life represented by the *McCleskey* example.[200] The skewed social perspectives that are exhibited in countless criminal cases because of race suggest that seeing an African-American in a whole, complete, human dimension, considering only that individual's faults and virtues, is truly one of the casualties of racial discrimination in our society.[201]

D. Evidence of Unconscious Bias by Judges

In 1968, a group of Mexican-American activists were charged with violating the California Criminal Code.[202] As part of their defense strategy they challenged the composition of the grand jury that had issued the indictments, alleging that there was racial bias in the selection of the grand jury in violation of the Equal Protection Clause.[203] During the subsequent trial, an unusual event occurred.[204] At that time, the California court system allowed judges to select from the grand jury pool those who would actually serve as grand jurors.[205] In the suit brought on behalf of the Mexican-American activists, the judges who had participated in that selection process had to respond to the allegations that they had committed acts of discrimination.[206] There was no factual dispute that almost all the Mexican-Americans in the pool were passed over.[207] The critical issue was whether the conduct of the judges demonstrated the required discriminatory intent to meet the standard established by the Supreme Court in *Washington v. Davis*.[208]

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200. The term institutional racism is used in a sociological sense, which is obviously different from the accepted legal rules that define "discrimination" in their various judicial contexts. *See* Crosby et al., *supra* note 139, at 554.

201. For a comprehensive analysis of the impact of race on the criminal justice process, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997).

202. Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1721 (2000).

203. *Id.* at 1722.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1832. In *Washington v. Davis*, the Court distinguished between laws that had a discriminatory impact on a protected class and those that had an adverse impact on a protected class but were formulated with a discriminatory motive. 426 U.S. 229 (1976); Lopez, *supra* note 202, at 1832. It held that motive, or intent was a necessary element in order to make out a prima facie case of an Equal Protection Clause viola-

During the trial, more than one hundred judges testified under oath about the criteria that they used in their selection process.[209] While the equal protection claim was ultimately and predictably unsuccessful, the testimony of the judges provided a unique picture of the operation of racial bias in the judicial process. The transcripts of thirty-three of the judges were reviewed by Professor Lopez and revealed that when each judge was asked if their actions were motivated by any intent to discriminate against the potential Mexican American grand jurors, they each denied any discriminatory motive.[210] In stating this emphatic denial, they were probably all aware that for a plaintiff to establish a prima facie case of discrimination, she had to show that the discrimination was intentional and not the result of non-racially motivated influences.[211] In fact, many of the judges may have honesty believed themselves and their process to be completely unbiased.[212]

But despite their testimony, it is difficult to reconcile the contradiction between their behavior, its results, and their perception of their conduct. Professor Lopez saw in this transcript a rare opportunity to examine the behavior of an aggregate of judges who influence the operation of the criminal justice system throughout a county.[213] He argued that to understand their conduct more fully, the inherently rationalizing "intent" standard has to be examined.[214] In critiquing the manner in which courts have embraced this rule, he explained the inherent deficiency in the standard through a theory from the field of social psychology called institutional analysis.[215] It:

> reveals that racism occurs through the purposeful embrace of racial institutions, but also through the non-conscious subscription to racial background understandings and practices. In the latter instances, explicit references to race occur infrequently; to

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tion. *Davis*, 426 U.S. at 239; *see* Village of Arlington Heights v. Metro. Hous. Corp., 429 U.S. 252, 265 (1977).

209. Lopez, *supra* note 202, at 1722.

210. *Id.* at 1730-47, 1757-61, 1845-76.

211. *Id.* at 1786.

212. More recently, an article directed to defendants in Title VII cases advised that since the law itself focuses only on behavior, that white defendants should not be concerned about any "private" attitudes or feelings that they have about race. Stanley L. Brodsky et al., *Racial Inquiries in Depositions and Trials*, 26 J. PSYCHIATRY & L. 533, 536 (1998). In fact, white defendants are advised by some authors that "one can hold a variety of private racial attitudes and not act in a discriminatory manner." *Id.*

213. Lopez, *supra* note 202, at 1722.

214. *Id.* at 1833.

215. *Id.* at 1723-28, 1825-44.

> the contrary, emphatic, heartfelt denials of racist motives often accompany institutional racism. Moreover, institutional analysis shows that remedying nonintentional racism requires openly addressing the role of racial institutions in human cognition. To end non-conscious reliance on racial institutions requires frank references to race; without such attention, racial institutions will persist, unrecognized but prevalent.[216]

He further argues that some of the fault for the continuation of this type of discrimination lies in the structure of the anti-discrimination laws themselves.[217] For example, the intent standard reveals a striking contradiction between the law's definition of discrimination as a consciously motivated act, and the well-documented social/psychological studies that reveal subtle, but significant biases more often lie beneath the surface of these conscious acts, but are no less determinative of behavior than if they were based on obvious logical choices.[218] The thirty-three judges in the Lopez study were first blinded by the unconscious nature of their views on Mexican-Americans, but this denial was further legitimized and reinforced by a legal standard that explicitly excluded any deeper analysis. It is precisely this deeper inquiry that is essential to equip fact-finders with the ability to see the full impact of emotional harm that results from discrimination.

Psychological theories of cognition and behavior support the argument that as long as the culture contains innumerable elements of racism and they are not met with a consistent and evolving counterforce, those factors will continue to be reflected in cognitive functions.[219] Until recently, there has been a distinctive disso-

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216. *Id.* at 1838.

217. *Id.* at 1757-64. Professor Lopez's article is a cogent critique of the contradiction between the legal standard of intent in Equal Protection cases and the unconscious behavior patterns that have been documented in institutional theory. *Id.*

218. *Id.*; *see* Krieger, *supra* note 120, at 1167.

> [D]isparate treatment jurisprudence—indeed the entire normative structure of anti-discrimination law—is based on an assumption that decisionmakers possess "transparency of mind," that they can accurately identify why they are about to make, or have already made, a particular decision. According to this view, if an employee's protected group status is playing a role in an employer's decisionmaking process, the employer will be aware of that role, even if he is not honest (or careless) enough to admit it. Equipped with conscious self-awareness, well-intentioned employers become capable of complying with the law's proscriptive injunction not to discriminate. They will monitor their decisionmaking processes and prevent prohibited factors from affecting their judgments.

Id.

219. Krieger, *supra* note 120, at 1174-77.

nance between the legal structures and institutions and what is known about human cognition, decision-making, and behavior.[220] Legal rules, like the intent standard, have been premised on the belief of a rational, knowledgeable decision-maker. In fact, this premise of rationality is central to the operation of our legal system. Whether one functions as judge or member of a jury, she is assumed to be able to carefully review evidence, filter out extraneous signals, including any biases, and reach rational conclusions.[221] What social science studies have demonstrated, and what many people of color involved in the legal system have been arguing for years, is that the filtering out of racial stereotypes and biases is seldom as simple, logical, and direct, as a voir dire instruction to be fair and open-minded.[222] Whether this process is analyzed through the behaviorist theories of bias,[223] or more recent cognitive theories,[224] or institutional analysis,[225] the results for victims of housing discrimination and other forms of bias are the same. Without a more open awareness and willingness to accept the passive nature of racial bias, their actual experience and the real effects of discrimination on persons of color cannot be fully accepted, understood, appreciated, or valued though monitory compensation.

III. ADDRESSING EMOTIONAL HARM THROUGH LITIGATION

A. Cycles: The Persistence of Discrimination in the Housing Market

In many ways, this Article has been discussing the effects of a series of cycles. On a macro level, there is a cycle that begins with segregated living patterns and the natural tendency to stereotype, which in turn fosters prejudice, leading to discrimination and a perpetuation of segregated living. Left unabated, the cycle is self-perpetuating, deeply troubling, and at the root of many of society's most persistent problems.[226] At its core, this cycle is based on ignorance.

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220. Lopez, *supra* note 202, at 1757-64.

221. Krieger, *supra* note 120, at 1167.

222. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED 3-10 (1979); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 1-14, 111-14 (1992). Both these volumes offer an extensive critique of the alleged racial neutrality of the law and the ameliorating effects of the application of the last forty years of our civil rights laws.

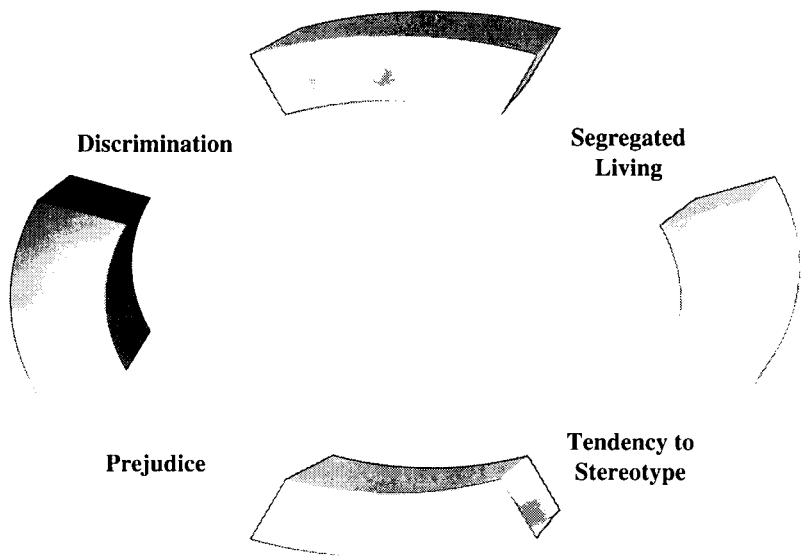
223. ALLPORT, *supra* note 36, at 206-18.

224. Krieger, *supra* note 120, at 1186-1211.

225. Lopez, *supra* note 202, at 1785-1806.

226. For an interesting social science overview of the impact of housing discrimination on education, employment, and poverty, see JOHN YINGER, CLOSED DOORS, OP-

Figure 1
Cycle of Ignorance



To be sure, there are many forms of ignorance, including that peculiar variety that is racial bias. Regrettably, there are some in society whose fear and even loathing of those different from themselves may never be ameliorated with more accurate information or sustained, diverse personal contacts. It is possible, however, that education and an awareness of important, reliable information can cultivate understanding for a meaningful number of those who grapple in one way or another, with the vestiges of racism.[227] That belief leads to this inquiry and an attempt to unpack the cycles of

PORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION 135-58 (1995); *see also* MASSEY & DENTON, *supra* note 7, at 1-16 (noting the importance of location in residential real estate as affecting prospects for property value appreciation, access to quality education and municipal services, as well as other measures of upward mobility that are often the reward, at least for whites, for financial success).

227. See Gordon Allport's conception of racist behavior as being susceptible to reformation through conscious social policy. *See supra* notes 117-125; *see also* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 562 (2002). Professor Greenberg compares intermarriage rates between whites and African-Americans in the general population with the rate among those who have served in "the armed forces, the most thoroughly integrated institution in the United States." *Id.* The comparison is one measure of the extent to which diverse personal contacts and more integrated living patterns lead to significant changes in race-related behavior. Greenberg cites to a study by the noted University of Michigan demographer, Reynolds Farley, who "found that white men who have served in the military were three times more likely to marry black women as white men who never served. White women who served in the military were seven times as likely to marry black men as white women who were lifelong civilians." *Id.*

ignorance that have manifested in an inability for many, to receive full and fair compensation for the emotional injuries that flow from housing discrimination.

The widespread persistence of segregated living patterns in our society is self-evident to most casual observers. The work of Massey and Denton confirms in empirical terms what most objective observers can easily gather from a drive through their hometown.[228] In an environment where one rarely has any sustained contact with the "other," racial bias, drawn from the prevalence of negative stereotypes, often takes a strong hold.[229]

Prejudice in white communities and the housing discrimination upon which it is based remains commonplace.[230] Social science survey evidence indicates that neighborhood preferences among whites present a significant barrier to stable integration. A 1992 Detroit survey provides a useful illustration. The Detroit survey found that four percent of whites would leave a neighborhood that became seven percent African-American, fifteen percent of whites would move if the percentage of African-American residents rose to twenty percent, and twenty-eight percent would flee if African-American integration reached one third.[231] A survey performed by NORC in 1990, indicates that the Detroit survey is representative of national norms.[232]

These figures stand in sharp contrast to the survey evidence regarding the residential preferences of African-Americans which indicates a willingness to live in multi-cultural settings.[233] The same Detroit survey found that while most African-American respondents prefer to live in a neighborhood that was at least fifty percent African-American, nearly all would be willing to live in an integrated neighborhood where the African-American population was as low as one third.[234] Perhaps even more important is evidence from the same survey that twenty-eight percent of African-Ameri-

228. MASSEY & DENTON, *supra* note 7, at 86, 89, 93.

229. *See* Maluso, *supra* note 29, at 72-75 (analyzing the studies on reducing bias that have shown positive results, including cross racial interactions of persons of equal status, the importance that the interactions be sustained, the exposure of whites to high status African-Americans, and the addition of interracial classrooms and interracial learning teams).

230. MASSEY & DENTON, *supra* note 7, at 92.

231. Reynolds Farley, *Neighborhood Preferences and Aspirations Among Blacks and Whites*, *in* HOUSING MARKETS AND RESIDENTIAL MOBILITY 168 (G. Thomas Kingsley & Margery Turner eds., 1993).

232. *Id.* at 162.

233. *Id.* at 169-73.

234. *Id.* at 169-71.

cans are willing to be the first to integrate a white neighborhood.[235] Again, the 1990 NORC survey reflects similar results nationally.[236]

Racial bias provides key players in the real estate industry such as landlords, brokers, and lenders with an economic incentive to discriminate. For example, typically, agents who operate in white neighborhoods depend on white clients for business. As such, the agent is likely to cater to the preferences of her clientele in order to protect and promote her reputation within her client base.[237] That reputation may be significantly damaged if an agent introduces African-American or Latino home seekers into white enclaves. Similarly, such an agent's reputation could be damaged among other brokers, potentially reducing the cooperation that is critical in the real estate sales industry. This is a particularly powerful dynamic in a market where increasingly, homes are sold through multiple listing services which rely on cooperation among agents.[238] Given the ease with which housing discrimination can be disguised, strong economic incentives often prevail over anti-discrimination statutes.

For more than forty-five years, "testing" or "auditing" has been used as a reliable measure of discrimination.[239] Through testing, researchers obtain direct comparisons between the treatment received by white housing applicants as compared with the treatment accorded to equally qualified minority applicants.[240] Testing on a

235. *Id.* at 171.

236. *Id.*

237. In the Columbia Fair Housing Clinic, clients are often unsure of where to place responsibility for the discrimination they have suffered. Frequently, the clients' attempts to secure housing brings them into contact with a wide range of actors, including employees of the owners, brokers, and sometimes the owners themselves. In investigating these cases as part of the litigation process, there is a great deal of finger-pointing on the part of agents who claim that they were only following the directives of their principals. The application of a strict vicarious liability standard by the courts is, in part, a response to this phenomenon. In the ordinary course, principals are not allowed to hide behind the actions of their agents. SCHWEMM, *supra* note 18, at 12-31 to 12-32. Similarly, agents are not allowed to escape liability by claiming that their actions were taken at the behest of their principals. *Id.* at 12-39; *see, e.g.*, Jankowski Lee & Assoc. v. Cisneros, 91 F.3d 891, 896-97 (7th Cir. 1996); Cabrera v. Jakabovitz, 24 F.3d 372, 385-89 (2nd Cir. 1994), *cert. denied*, 513 U.S. 876 (1994); Green v. Century 21, 740 F.2d. 460, 462, 465 (6th Cir. 1984); Hobson v. George Humphreys, Inc., 563 F. Supp. 344, 352 (W.D. Tenn. 1982).

238. *See* YINGER, *supra* note 226, at 180-81.

239. John Yinger, *Testing for Discrimination in Housing and Related Markets*, *in* A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 27, 28 (Michael Fix & Margory Austin Turner eds., 1999), *available at* http://www.urban.org/civil/report_card.pdf (last visited Mar. 15, 2003).

240. *Id.* In a typical fair housing test, equally qualified housing applicants, one white and one African-American, seek the same housing accommodation at closely timed intervals and record the results of their encounters. *Id.*

broad scale in discrete housing markets can reveal the extent to which discrimination occurs within that market. In 1977, the U.S. Department of Housing and Urban Development ("HUD"), funded the Housing Market Practices Survey ("HMPS"), the first national study of housing discrimination against African-Americans.[241] Through HMPS, 3,264 tests were conducted in forty metropolitan areas revealing evidence of significant discrimination against African-Americans in both the sales and rental markets.[242] Moreover, the HMPS report is credited with playing a "major role" in the eventual passage of the 1988 amendments to the FHA.[243]

In the years since the HMPS report, an impressive number of additional studies have been performed. In the period between 1977 and 1990, at least seventy-two other testing studies were conducted.[244] Evidence of housing discrimination was found in all of these studies.[245]

In 1989, HUD sponsored a second national testing study, the Housing Discrimination Study ("HDS"). Through the HDS, 3,745 tests were conducted in twenty-five metropolitan areas to track the frequency of discrimination experienced by African-Americans and Latinos in the sales and rental markets in 1989.[246] The HDS measured a wide range of discriminatory behavior and found that there was a fifty percent probability that both African-American and Latino applicants would encounter some form of discrimination in both the sales and rental markets.[247] The figures indicate that fifty-three percent of African-American renters and fifty-nine percent of African-American home buyers will experience one or more incidents of discrimination while looking for a home.[248] Five similar studies conducted in individual cities in the 1990s found that, "the gross measure of discrimination in rental housing is at least fifty percent (and as high as seventy-seven percent) against both Blacks and Hispanics" in some areas.[249] In analyzing the HDS report, Professor John Yinger applied a form of index that resulted in a "net measure of the average number of acts of dis-

241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 32-33.
247. *Id.* at 34.
248. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T HOUS. & URBAN DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS 42 (1991).
249. Yinger, *supra* note 239, at 34.

crimination a black or Hispanic customer can expect to encounter during each visit to a housing agent."[250] Using this method, the HDS report demonstrated that African-American and Latino home buyers could expect on average, "to encounter about one act of discrimination each time they visit a real estate broker."[251]

In sum, the available evidence shows that the frequency of housing discrimination, from the HMPS report in 1977 to more recent studies in the 1990s, has remained constant.[252] The inexorable conclusion drawn from the available statistical evidence was stated in *A National Report Card on Discrimination in America: The Role of Testing*, issued by the Urban Institute:

> Overall, this research demonstrates that black and Hispanic home seekers continue to encounter discrimination in many aspects of a housing transaction. They are told about fewer available units and must put forth considerably more effort to obtain information and to complete a transaction. These barriers are not absolute, but they impose significant costs on black and Hispanic home seekers relative to comparable whites in the form of higher search costs, poorer housing outcomes, or both.[253]

This macro cycle of segregation, ignorance, and persistent discrimination spins off many micro cycles of harm. As discussed earlier, in one such "micro cycle" segregation leads to a lack of contact between whites and African-Americans, which in turn spawns an inability to see the "other" free from assumptions and negative stereotypes.[254] This devaluation of the individual permits for some, the rationale that allows for discriminatory treatment and a disregard for the emotional harm that is its natural consequence. Where a class of people are seen as undesirable for association or even inferior, it is likely that they will not be treated with the same

250. *Id.* at 36.

251. *Id.*

252. *Id.* at 34.

253. *Id.* at 36. Note also that there is a growing and compelling body of evidence that indicates widespread discrimination against minorities in mortgage approvals, lender advertising and outreach, pre-loan application procedures and loan terms, as well as in the provision of private mortgage insurance. YINGER, *supra* note 226, at 63-85. This might lead one to assume that the courts are inundated with housing discrimination cases. For a variety of reasons, however, housing discrimination is not litigated at nearly the rate at which it occurs. One important factor is the ability of perpetrators to mask their illegal acts. Many victims of differential treatment never realize that their membership in a protected class has just barred them from securing housing accommodations.

254. *See supra* note 29. For an interesting discussion of the extent to which residential segregation has resulted in a profound lack of contact between African-Americans and whites, see Greenberg, *supra* note 227, at 557-59.

respect accorded to an equal.[255] This psycho-social rationale for discriminatory conduct contributes to the persistence of illegal behavior.

B. The Importance of Diversity in the Bench, Bar, and Professional Support Systems: Developing the Context for Racial Empathy

Another micro cycle that is observed is rooted in history and demographics of the legal system. One vestige of this country's history of legalized discrimination in housing, employment, and education can be seen in the demographics of fact-finders: judges and juries. Despite some positive movement towards a more representative bench, the judiciary remains overwhelmingly white.[256] For example, the 1991 Report of the New York State Judicial Commission on Minorities found that of the 1,129 judges sitting in the courts of the New York, all but ninety-three are white.[257] The report goes on to conclude that, "[F]or nearly three hundred years, New York State has had little or no minority representation on the bench."[258]

The dissonance between legal standards, the presumed ability of fact-finders to filter out bias and an emerging understanding of human cognition, behavior, and decision-making, lies at the heart of the undervaluation of emotional harm claims.[259] While there has been a reluctance to challenge the impartiality of judges on the basis of race, the need to do just that is imperative to ensure the proper functioning and integrity of the legal system.[260] Advances in the understanding of the cognitive and behavioral underpinnings of decision-making and a growing body of empirical study on how race can produce differences in perceptions on a wide range of is-

255. *See, e.g.*, Crosby et al., *supra* note 139, at 546; Peggy C. Davis, *Law As Microagression*, 98 YALE L.J. 1559, 1561-69 (1989).

256. Demographics gathered with respect to the federal judiciary, for example, reveal the following statistics as of July 13, 2000. Of the 792 active judges: "82.7% white (655), 10.7% African-American (85), 5.2% Hispanic (41), 0.9% Asian-American (7), 0.3% Native-American (2), and .1% Arab-American (1)." Alliance for Justice, Demographic Portrait of the Federal Judiciary (2000), *at* http://web.archive.org/web/20010208193600/http://www.afj.org/jsp/pfjjan.html (last visited Mar. 15, 2003).

257. 4 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES, LEGAL PROFESSION, NONJUDICIAL OFFICERS, EMPLOYEES AND MINORITY CONTRACTORS 94 (1991). Of the ninety-three "non-white" judges, only seventy-one are African-American. *Id.*

258. *Id.*

259. *See supra* notes 219-225.

260. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 405 (2000).

sues can foster an ability to approach the issue in a less judgmental fashion.[261] As one commentator observed:

> The existence of a persistent racial divide between the response of African Americans and whites to important social, economic, political, and cultural issues evidences the enduring power of racial constructs. In countless surveys, African Americans and whites reveal sharply different perspectives, particularly in response to issues that explicitly refer to race. For example, blacks and whites disagree about the meaning and power of discrimination. Because many issues not explicitly racial in nature carry a racial sub-text, African Americans and whites also express different views about ostensibly nonracial issues such as increasing aid for social programs, downsizing of the federal government, raising taxes, and giving control of welfare to the states.[262]

These differences in perspective often play an active and varied role in valuing emotional harm. Consider that, in New York, compensation for emotional harm may be awarded upon proof of the existence and extent of such harm, and evidence that supports a determination that "a reasonable person of average sensibilities could be fairly expected to suffer mental anguish from the incident."[263] In bench trials, that can occur in trial courts and in all hearings before administrative agencies, who is the "reasonable person of average sensibilities?" Given the demographics of the judiciary, far more often than not, that "reasonable person" is someone whose sensibilities have not been affected by experiences of discrimination and the trauma that is the norm, by medical standards. This does not make fair valuation impossible, but cannot be seen as enhancing the possibility of a knowledgeable assessment.[264]

The "reasonable person" standard, in this context, is an attempt to impose an "objective" perspective on what should be a fact-specific evaluation of harm as it is experienced by each plaintiff within the context of that plaintiff's life.[265] Even when "objective" standards are not formally employed, the very nature of the legal doc-

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261. *Id.* at 424-31.

262. *Id.* at 424-25. It is, of course, important to disclaim any suggestion that all members of any group share the same opinions. The point, however, is that because of the history and continuing power of racism in the United States, the experiences of whites and African-Americans are often quite different and those experiences can affect perceptions.

263. Batavia Lodge No. 196 v. N.Y. State Div. of Human Rights, 350 N.Y.S. 273, 278 (App. Div. 1973), *modified on other grounds*, 316 N.E.2d 318 (N.Y. 1974).

264. Schwemm, *supra* note 22, at 93.

265. SCHWEMM, *supra* note 18, at 25-37 to 25-40; *see* Heifetz & Heinz, *supra* note 75, at 18-21.

trine that applies to evaluations of emotional harm leaves ample room for judicial miscalculation regarding the proper weight that should be accorded to the evidence. This can occur through a lack of sensitivity, inexperience, bias (unconscious or not), or through a substitution, however subtle, of the judge's reaction to the discriminatory behavior for the actual proof adduced at trial regarding the plaintiff's reaction.[266]

Generally, judges in bench trials and at administrative agencies, like juries, have enormous discretion in determining the size of damage awards for intangible injuries such as emotional harm.[267] As a matter of course, the fact-finder's decision regarding the amount of the award will survive appellate review unless it is clearly erroneous.[268]

Trial judges have been repeatedly admonished to articulate the bases for the awards they make.[269] Adherence to this practice, however, seems more the exception than the rule.[270] This, in part, has led to great uncertainty in predicting the valuation of emotional harm and to wide variations in precedent.[271]

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266. Ifill, *supra* note 260, at 417. In the words of Professor Ifill:

> The intuitive sense that minority judges can bring traditionally excluded perspectives to the process of legal decision-making is consistent with the prominent role race plays in shaping the perspectives and values of blacks and whites. I deliberately speak here of both perspectives and values. Perspectives might be defined as "ways of looking at the world" or the eyes through which blacks "see" and "interpret" events, symbols, or people. Because perception is the lens through which judges make decisions, the inclusion of multiple perspectives in judicial decision-making is a critical focus of diversity. Values are also critical to judicial decision-making. Values are the rules or standards by which a community, based on its perceptions, organizes and assigns worth. Values reflect "an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable." Values are the principles which undergird our laws and legal doctrine. Judges interpret law based on their perception of our core societal values. Both perspective and values can strongly influence legal decision-making.

Id.

267. SCHWEMM, *supra* note 18, at 25-43.

268. *Id.*; *see* FED. R. CIV. P. 52(a).

269. *See* N.Y. City Transit Auth. v. State Div. of Human Rights, 577 N.E.2d 40, 47 (N.Y. 1991); *see also* Heifetz & Heinz, *supra* note 75, at 7-8 (reminding readers that litigants before HUD have the right, pursuant to the Administrative Procedure Act, to "hear why the judge rendered a particular decision.").

270. *See* Heifetz & Heinz, *supra* note 75, at 7 (recalling a "history of cases (in district courts) with no apparent nexus between evidence of actual injury and the award of damages to the complainant, and a paucity of published opinions explaining the basis for the awards [in housing discrimination cases].").

271. SCHWEMM, *supra* note 18, at 25-34 to 25-35 ("Predicting the value of an individual case is virtually impossible.").

In addition to assessing the nature of the plaintiff's reaction to discrimination, there are at least two other major areas of judicial review in housing discrimination cases that are susceptible to the same kinds of miscalculations stemming from bias, a lack of applicable life experience, training, or sensitivity. The first involves issues of credibility that are so crucial in the valuation of emotional harm injuries. In the words of Alan W. Heifetz, the Chief Administrative Law Judge ("ALJ") at HUD, "[w]ithout doubt, the most important factor in determining a damage award for intangible injuries is the testimony of the victim."[272] Judges and juries are the chief "finders of fact" in our system of justice.[273] Assessments of credibility are at the heart of what judges do to determine what is or is not true, what did or did not happen. Perception is the lens through which judges make decisions.[274] Judges face the same challenges as everyone else in our society, when attempting to appropriately invoke their life experience and perspective in making decisions.[275] As expressed by Judge Jerome Frank, "[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."[276] Race, in turn, influences perceptions and judges' sense of justice.[277] Such racial "cognitive drifts" among judges may affect critical decisions including the credibility of an African-American witness or the worth of an African-American expert, both of which can adversely affect the valuation of emotional harm damages occasioned by African-American victims of housing discrimination.[278]

The second area of judicial fact interpretation that can greatly influence valuation outcomes involves an assessment of the egregiousness of the defendant's behavior. Professor Schwemm has detailed the enormous importance of a finding that the discriminatory acts were willful and, therefore, more likely to cause more severe emotional harm.[279] Questions of intent or willfulness are also within the purview of perceptions that can be affected by racialized

272. Heifetz & Heinz, *supra* note 75, at 19.
273. *See* FED. R. CIV. P. 52(a).
274. Ifill, *supra* note 260, at 417.
275. *Id.* at 432.
276. *In re* J.P. Linahan, Inc., 138 F.2d 650, 652-53 (2d Cir. 1943)
277. Ifill, *supra* note 260, at 434.
278. *Id.* at 445; *See* Davis, *supra* note 255, at 1571.
279. SCHWEMM, *supra* note 18, at 25-37.

experience.[280] Indeed, there is support for the belief that in our society, with its deep racial divisions, the interpretation of "narratives," as may be contained in the testimony of a defendant in a housing discrimination case for example, are suspect. The suspicion stems from the reality that narratives can be adopted or rejected when viewed through the lens of preconceived ideas, even in the face of evidence or logic to the contrary.[281] The skewed demographics of the judiciary invoke concern that imbalances in perception of the kind outlined above may play a role in the undervaluation of damage awards.

The dissonance between racialized differences in perspective and judicial demographics may find expression in other features of judicial action that dampen the capacity to secure awards that are more in line with the emotional distress that is credibly experienced by many victims of housing discrimination. One such phenomenon is the appearance of an artificial ceiling on damage awards in certain jurisdictions. Professor Schwemm notes the emergence of a $10,000 per plaintiff upward benchmark in emotional distress awards in the Seventh Circuit that stands in contrast to outcomes in other circuits.[282]

Similarly, the Court of Appeals in New York, in an opinion by the Honorable Judith Kaye, who went on to become the current Chief Judge, found it necessary to admonish the Second Department for arbitrarily reducing a $450,000 award for mental anguish and aggravation in an employment discrimination suit, to $75,000.[283] In a rare display of disapproval that, by implication, extended beyond the parameters of the case on appeal, the court cautioned the justices serving on the Second Department bench not to routinely substitute their own abstract notions of an upward limit on emotional harm awards for well supported findings of trial courts.[284] More specifically, the court reversed a decision by the

280. For a useful introduction to the various critiques of the intent standard, see Ifill, *supra* note 260, at 450 n.214.

281. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1085 (1991).

282. SCHWEMM, *supra* note 18, at 25-40 to 25-42.

283. N.Y. City Transit Auth. v. State Div. of Human Rights, 577 N.E.2d 40, 47 (N.Y. 1991).

284. *Id.* at 217-19. Amici, including the Women's Legal Defense Fund, argued that the New York Supreme Court, Appellate Division, Second Department has a practice of substituting their own judgment for that of the trial judge. *Id.* at 209. A large number of Second Department cases were cited where trial court awards were reduced to a top amount of $5,000. *Id.* at 218-19. There is little doubt that this practice caught the attention of the Court of Appeals and precipitated reference to the conten-

Second Department that a maximum of $75,000 would adequately compensate the plaintiff for what the trial ALJ described as, "the most shocking instance of abuse of an employee by an employer."[285]

Another feature of judicial action that may serve to depress awards can be seen in the different approaches taken by various circuit courts in the application of the "eggshell skull" or "thin skull" doctrine in cases involving psychological trauma. In the ordinary course, tortfeasors, such as the defendants in a housing discrimination matter, "take their victims as they find them."[286] This doctrine requires defendants to compensate plaintiffs for unforeseeable psychic injury flowing from preexisting conditions or heightened sensitivity to discrimination.[287] As HUD's Chief ALJ expressed the doctrine:

> Housing discriminators must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable or by an ordinary person. Put otherwise, judges must take into consideration the susceptibility of the victim to injury. This rule can work either to the respondent's financial advantage or disadvantage.[288]

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tions of the amici. *Id.* at 219. The cases submitted to support the claim of a $5,000 ceiling were: Empbanque Capital Corp. v White, 551 N.Y.S.2d 957, 958 (App. Div. 1990); Grumman Aerospace Corp. v. N.Y. State Div. of Human Rights, 542 N.Y.S.2d 681, 682 (App. Div. 1989); Cosmos Forms, Ltd. v. State Div. of Human Rights, 541 N.Y.S.2d 50, 51 (App. Div. 1989); Trans World Airlines, Inc. v. N.Y. Executive Dep't, 537 N.Y.S.2d 868, 869-70 (App. Div. 1989); Arthur Kessler Realty, Inc. v. N.Y. State Div. of Human Rights, 524 N.Y.S.2d 732, 733 (App. Div. 1988); State Univ. Agric. & Technical Coll. at Farmingdale v. State Div. of Human Rights, 520 N.Y.S.2d 814, 815 (App. Div. 1987); Wantagh Union Free Sch. Dist. v. N.Y. State Div. of Human Rights, 505 N.Y.S.2d 713, 715 (App. Div. 1986); Matter of Anchor Motor Freight, Inc., 500 N.Y.S.2d 800, 801 (App. Div. 1986).

285. *Id.* at 210. Of significance is that the Second Department sits in judgment over a disproportionately large portion of New York. The Historical Society of the Courts of the State of New York, The History of the Court, Appellate Division, Second Department, 100th Anniversary (1996), *at* http://www.courts.state.ny.us/history/elecbook/2ddept/pg4.htm (last visited Mar. 15, 2003). As of 1996, more than one-half of the population of the State resides in the Second Department and approximately forty-two percent of intermediate appellate cases were handled by the court. *Id.* The ten counties within the Second Department are: Kings, Queens, Richmond, Nassau, Suffolk, Westchester, Putnam, Dutchess, Rockland, and Orange Counties. *Id.*

286. JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL 6-12 (2001).

287. *Id.*

288. Heifetz & Heinz, *supra* note 75, at 21-22; In *Davis v. Mansards*, a married couple had been the victim of housing discrimination. 597 F. Supp. 334, 347-48 (N.D. Ind. 1984). The court awarded $5,000 to the wife who had been, "decimated. . .emotionally," but only $2,500 to the husband who approached the situation with a "degree of cynicism" and was consequently, "steadied for the blow" even

This rule, which applies to both preexisting physical and psychological conditions, has been followed in the Seventh Circuit.[289] In the Second Circuit, however, victims of housing discrimination may not recover for preexisting psychic trauma.[290] In a culture where racism is common, the refusal to award harm in proportion to the actual damage inflicted, in effect, insulates discriminators from the proper level of economic exposure for their actions. In so doing, it flies in the face of the stated purpose of fair housing laws.

Coming at the point directly, there is one empirical study that specifically links race to judicial outcomes in discrimination cases. The study, *The Effects of Judges' Decision Making on the U.S. Courts of Appeal 1981-96*, tracked case outcomes in the federal court.[291] Among its findings are the following:

> (1) black federal judges regardless of political party affiliation decide cases in favor of plaintiffs in race discrimination cases at statistically significantly higher levels than white male and female judges; and that (2) black federal judges are more likely than even white female judges to decide cases in favor of plaintiffs in sex discrimination cases.[292]

The data from the study further reveals that an appellate panel of three white Republican judges is likely to find in favor of the plaintiff in a discrimination case only ten percent of the time.[293] The likelihood of drawing an appellate panel with even one African-American judge is only twenty-percent.[294] Based on these findings, Professor Crowe, the study's author, concludes that if "'the number of blacks and whites on Appellate Court[s] reflected their proportion in the nation,' . . . it would 'make a difference in how race discrimination cases [would] . . . be decided.'"[295]

The study appears to directly suggest that the lack of full racial diversity on federal appellate courts both determines the immediate outcome of discrimination cases and, in so doing, has played a

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"though he suffered through his wife's depression while sustaining his own reopened wounds." *Id.*

289. *See, e.g.*, Avitia v. Metro. Club of Chi., Inc., 49 F.3d 1219, 1228 (7th Cir. 1995); Brackett v. Peters, 11 F.3d 78, 81 (7th Cir. 1993), *cert. denied*, 515 U.S. 1072 (1994); Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1294 (7th Cir. 1987).

290. Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 908 (2d Cir. 1993).

291. Ifill, *supra* note 260, at 454 n.234.

292. *Id.* at 454.

293. *Id.*

294. *Id.*

295. *Id.* (quoting Nancy Crowe, The Effects of Judges' Sex and Race on Decision Making on the U.S. Courts of Appeal, 1981-96 (1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with the author)).

role in the development of federal anti-discrimination law.[296] According to Professor Ifill, "[t]he empirical work of Professor Crowe supports the weight of anecdotal evidence which suggests that African American and white judges see racial bias differently. At the very least, Professor Crowe's work demonstrates the potential importance of judicial diversity to affect judicial case outcomes."[297]

As is the case with the judiciary, the juries which often sit in judgment on housing discrimination cases are composed primarily of whites.[298] Here again the situation in New York is instructive. The *Report of the New York State Judicial Commission on Minorities* reveals that, "[m]inorities are significantly underrepresented on many juries in the court system."[299] The report further finds that:

> while displays of blatant racism are not common in today's courtrooms, jurors' racist attitudes, whether or not they are actually uttered aloud, frequently determine the outcome of cases involving minority defendants. Studies also show that hidden racial prejudices can distort a juror's perception of the evidence and events at trial.[300]

Certainly, the presence of an all or predominantly white jury does not preclude fairness or an informed evaluation of emotional harm. The lack of racial diversity in juries, however, results in a situation whereby those responsible for valuing the trauma experienced by victims of discrimination are often not equipped with a knowledge base, gained through personal experience or sustained relationships with those outside the dominant culture, sufficient to accurately assess plaintiffs' claims.[301]

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296. *Id.*

297. *Id.* at 454-55.

298. *See, e.g.*, THEODORE EISENBERG & MARTIN T. WELLS, TRIAL OUTCOMES AND DEMOGRAPHICS: IS THERE A BRONX EFFECT? 12 (2002) (indicating eleven percent of federal juries and twelve percent of state juries are comprised of African-Americans), *available at* www.utexas.edu/law/academics/centers/clcjm/civiljustice/Eisenberg.pdf (last visited Mar. 15, 2003). Note that the statistics are based on a sample, albeit a large sample, of juries. *Id.* at 1 n.1.

299. 2 REPORT OF THE NEW YORK STATE COMMISSION ON MINORITIES, THE PUBLIC AND THE COURTS 58 (1991).

300. *Id.* at 57.

301. *See* Ragin v. N.Y. Times Co., 923 F.2d 995, 1005 (2d Cir. 1991) (noting that the process whereby awards for emotional harm are calculated requires "wholly speculative judgments as to credibility."). Speculation of this type necessarily implicates our internal propensity to rely on stereotypes in forming factual conclusions. *See* Davis, *supra* note 255, at 1566-67. There is strong speculation among trial lawyers concerning the relationship between juror demographics and trial outcomes. *See* EISENBERG & WELLS, *supra* note 298, at 2. Moreover, a review of housing discrimination cases involving claims of emotional harm reveals anecdotal evidence indicating that many of the higher awards occur in jurisdictions with higher concentrations of people of

History and demographics also contribute to a cycle that makes it difficult for those who suffer from the emotional harm caused by housing discrimination to receive assistance and support from the two professions that are in the best position to provide relief: the legal and medical professions. Here again, the racism that has constrained the life choices of people of color manifests itself in the demographics of lawyers and doctors.

A useful landmark for a discussion about the under-representation of minorities in the both the legal and medical professions generally is the demographics of the United States population. As a point of reference, the minority group population, according to the 1980 census, was twenty percent.[302] By 2000, whites comprised only 69.1 percent of the population.[303] This trend towards greater

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color. One such example can be found by comparing the judges' responses to emotional harm claims in *Portee* and *Broome*. *See* discussion *supra* note 97. There are, however, no known surveys that claim to correlate damage awards for emotional harm with the demographics of the fact finders. Indeed, empirical studies seeking a correlation between trial outcomes generally and demographics are rare. The most recent and statistically comprehensive such study, known to the Authors, *Trial Outcomes and Demographics: Is there a Bronx Effect?*, concludes that in federal jury trials, "We do find a significant correlation between larger black population percents and the likelihood of a plaintiff trial win in urban job discrimination, products liability, and torts cases." EISENBERG & WELLS, *supra* note 298, at 1. At the same time, the study concludes that, "[i]n federal court trials, we find no robust evidence that award levels in cases won by plaintiffs correlate with population demographics in the expected direction." *Id.* The study concedes that:

> there are limits to what the available data can reveal. The data do not include the makeup of juries in individual cases. Therefore, evidence about demographic influences on juror behavior is indirect. . . . Nor can the data test perceptions based on the interaction between plaintiff and defendant characteristics. For example, these data cannot directly test whether white jurors are hostile to black plaintiffs, and vice versa, because the data do not include the parties' race.

Id. at 9.

302. KENT D. LOLLIS & ROBERT D. CARR, LAW SCH. ADMISSIONS COUNCIL, MINORITY DATABOOK 1 (2002).

303. U.S. Census Bureau, Quick Table, DP-1. Profile of General Demographic Characteristics: 2000 (2000), *at* http://factfinder.census.gov/servlet/QTTable?ds_name=DEC_2000_SF1_U&geo_id=01000US&qr_name=DEC_2000_SF1_U_DP1 (last visited Mar. 15, 2003). In 2000, there were 194,552,774 people who were identified as "white alone" and this figure represented 69.1 percent of the total population. *Id.* The manner in which racial categories are defined by the Census Bureau is interesting. According to the Bureau:

> The data on race were derived from answers to the question on race that was asked of all people. The concept of race, as used by the Census Bureau, reflects self-identification by people according to the race or races with which they most closely identify. These categories are sociopolitical constructs and should not be interpreted as being scientific or anthropological in nature. Furthermore, the race categories include both racial and national-origin groups.

diversity will significantly increase in the coming years.[304] Credible estimates project that whites will no longer be in the majority by mid-century.[305] It is against this backdrop, that the demographics of lawyers and doctors should be considered.

By early 1988, the population of lawyers in the U.S. had grown to nearly 750,000.[306] At that time, when African-Americans, Latinos, Native Americans, and Asian Americans accounted for nearly twenty-five percent of the United States population, that same group accounted for only eight percent of this country's attorneys.[307] Current statistics indicate slightly more diversity within the legal profession, but also some disturbing omens of retrenchment and continued under-representation. The American Bar Association's Commission on Racial and Ethnic Diversity in the Profession[308] concludes that as of 2000, "minority representation in the legal profession is significantly lower than in most other professions."[309] The report adds that, "minority entry into the profession

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U.S. Census Bureau, Census Data Information, Subject Characteristic, *at* http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=subject&id=RACESF1&dsspName=DEC_2000_SF1&back=update&_lang=EN (last visited Mar. 15, 2003). The Census Bureau used "Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity," a Federal Register Notice, published by the Office of Management and Budget. *Id.* "White" is defined as, "A person having origins in any of the original peoples of Europe, the Middle East, or North Africa." *Id.* "It includes people who indicate their race as 'White' or report entries such as Irish, German, Italian, Lebanese, Near Easterner, Arab, or Polish." *Id.*

304. LOLLIS & CARR, *supra* note 302, at 1.

305. U.S. Census Bureau, Projections of the Resident Population by Race, Hispanic Origin, and Nativity: Middle Series, 2050 to 2070 (2000), *at* http://www.census.gov/population/projections/nation/summary/np-t5-g.txt (last visited Mar. 15, 2003). The Census Bureau provides population projections across many variants. For our purposes, these projections are done based on a lowest, middle, and highest series, with the "lowest" representing the minimum projection that can be expected using their methodology. Using the Bureau's "Middle Series" projections, the "White, Non-Hispanic" population will fall below fifty percent, to 49.6 percent by July 1, 2060. *Id.* The ABA's Commission on Racial and Ethnic Diversity in the Profession predicts that the United States population will be "almost 60 percent 'minority' by 2050." COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, AM. BAR ASS'N, EXECUTIVE SUMMARY, MILES TO GO: THE PROGRESS OF MINORITIES IN THE LEGAL PROFESSION, *at* http://www.abanet.org/minorities/publications/milesummary.html (last visited Mar. 15, 2003).

306. GEOFFREY C. HAZZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION, 48-55 (3d ed. 1994).

307. *Id.* at 68.

308. This body was known as the Commission on Opportunities for Minorities in the Profession.

309. COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, *supra* note 305.

> Combined African American and Hispanic representation among lawyers was seven percent in 1998, compared to 14.3 percent among accountants, 9.7

has slowed considerably since 1995."[310] Moreover, "in 1999, the total number of minority law graduates in the United States dropped for the first time since 1985."[311]

It should not be surprising that it can be difficult for lawyers who have not experienced the pain caused by discrimination to understand, appreciate, value, and pursue substantial emotional harm awards.[312] This is particularly important in that:

> Attorneys . . . are frequently the first, and sometimes the only persons to whom the victim pours out the full story of his or her experience. The attorney's . . . verbal and non-verbal responses during the interviews with the victim can either aggravate or alleviate some of the pain and anguish suffered by the victim.[313]

Many advocates who seek to properly present a record in support of a meaningful award of emotional harm damages lack the requisite personal and professional experience.[314] The few scholars and jurists who have written on this subject commonly stress the importance of creating an extensive factual record regarding the manifestations and extent of the harm suffered.[315] This requires the advocate to fully appreciate the varied and often subtle symptoms of discrimination-based trauma that the client might manifest and to have the facility to both elicit and present what is often very personal information in a caring and persuasive manner. Experience and training are typically required, regardless of the personal characteristics of the advocate.[316] Differences in race, age, and

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percent among physicians, 9.4 percent among college and university teachers, and 7.9 percent among engineers. The only professions with lower levels of minority representation were dentists (4.8 percent) and natural scientists (6.9 percent).

Id.

310. *Id.*

311. *Id.*

312. *See* Davis, *supra* note 255, at 1561-64; Lawrence, *supra* note 115, at 519, 525-26.

313. Michael P. Seng et al., *Counseling a Victim of Racial Discrimination in a Fair Housing Case*, 26 J. MARSHALL L. REV. 53, 54-55 (1992).

314. *Id.*

315. Heifetz & Heinz, *supra* note 75, at 19-21.

316. *Id.* The authors nicely articulate the challenge as follows:

> Most attorneys and advocates who counsel the victims of housing discrimination are committed to the cause of fair housing and are sensitive to their client's injuries. Nonetheless, they may fail to pick up on the real hurt and trauma the client experiences during the interview. Because of the necessity to channel the client's complaint into the forms specified in the fair housing laws, the attorney or advocate may miss developing some of the unique injuries suffered by the victim. This failure may seriously affect the outcome of the complaint and it may further scar the victim.

gender can sometimes inhibit a candid exchange of information between attorney and client. Beyond that lies the propensity for attorneys to focus only on "objective" facts, or presume an understanding by the tribunal of the inherent pain associated with discrimination.[317]

In the medical profession, the demographics reveal even less diversity. The best available statistics from the American Medical Association indicate that in 2001, there were 836,156 physicians in the United States.[318] Of that total, only 2.5 percent are African-American.[319] The American Psychiatric Association, in its *Position Statement on Diversity*, acknowledged that, "despite efforts to increase cultural diversity among psychiatrists, data from the AAMC and other sources indicate the continued serious under-representation of certain ethnic minority groups among U.S. medical students, medical school facilities and departments of psychiatry and practicing clinicians."[320] As this Article shall discuss below, these discouraging demographics, combined with inadequate training in the housing discrimination context make it difficult to find psychiatric professionals who have the training and expertise necessary to recognize the wide range of psychological and physiological symptoms associated with the emotional harm that flow from housing discrimination. A review of how we became aware of this problem is illustrative.

When the Fair Housing Clinic began operation in 1989, most of the cases were lodged at the New York City Commission on Human Rights ("the Commission"). At that time, the Commission was the place where many, if not most, New Yorkers went to pur-

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Id. at 55.

317. Seng et al., *supra* note 313, at 55.

318. AM. MEDICAL ASS'N, TOTAL PHYSICIANS BY RACE/ETHNICITY—2001 (2001), *at* http://www.ama-assn.org/ama/pub/article/168-187.html (last visited Mar. 15, 2003).

319. *Id.* Note, however, that the 2001 year-end statistics gathered by the AMA contained race/ethnicity data for about three-fourths of all physicians in the United States. *Id.* The AMA does not, at this time, know the race/ethnicity of thirty-one percent of the physicians in the United States despite efforts to obtain better statistics. *Id.* The AMA estimates that this leads to some underreporting in the number of "minority" categories. *Id.*

320. *See* Am. Psychiatric Ass'n, Position Statement on Diversity (Sept. 12, 1998), *at* http://www.psych.org/pract_of_psych/diversity_98.cfm (last visited Mar. 15, 2003). Indeed, the "Position Statement" went on to note disparities in the treatment of minority patients indicating that, "[s]ome ethnic minority clinicians have been found to treat ethnic minority and socioeconomically impoverished population." *Id.*

sue discrimination cases on a pro se basis.[321] The Commission awards for emotional harm in housing discrimination cases were quite modest.[322] Cases lodged at the Commission were tried by a small cadre of administrative law judges. We thought that if we could influence that small group of judges by providing expert testimony on issues related to emotional harm, then we could better represent our clients, provide a service to the Commission, and benefit those pro se complainants that we could not directly assist.

We set out to identify a group of psychiatrists who would serve, for compensation, as experts on behalf of our clients. Our students scoured the psychological literature in an attempt to discover the names of leaders in what we naively imagined was a "field" dedicated to the study of race-based trauma. In so doing, we discovered a few surprising phenomena. First, there is very little scholarly writing on the race-based harm suffered by victims of housing discrimination.[323] Second, there are very few experts on the topic and a dearth of empirical research in this area.[324] Narrowing the search became less of a problem than finding professionals with adequate training or interest in the traumatic effects of housing discrimination. In the end, only a few psychiatrists who

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321. Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1020 (1996).

322. *See, e.g.*, Holley v. Koscielna, Recommended Decision and Order, Amended Complaint No. FN36020190DN at 17, New York City Commission of Human Rights (1991) (awarding $2,000 to each complainant).

> In instances where mental anguish has been sufficiently demonstrated by credible evidence, this Commission will award compensation in the form of a monetary award. *See Tindull v. Ko*, Rec. Decision and Order, NYCCHR Compl. No. FH304082489-DN (February 25, 1991), *aff'd*, Decision and Order (June 25, 1991) ($1,000 mental anguish award); *Carrera v. Pi*, Rec. Decision and Order NYCCHR Compl. No. FN264092288-DN (February 25, 1991), *aff'd* Decision and Order (June 24, 1991) ($1,000 mental anguish).

Id. at 14.

323. *See* Broome v. Biondi, 17 F. Supp. 2d 211, 225 (S.D.N.Y. 1997) ("Relatively little in-depth research exists concerning the personal costs of discrimination and racial exclusion."). Valuable general references have been made by Professor Schwemm in several of his writings. *See, e.g.*, Kentucky Commission on Human Rights, *supra* note 56, at 76-79; Schwemm, *supra* note 22, at 91-93. Most of these discussions concern emotional harm generally and do not focus on particular aspects of the issue that might be unique to the experience of people of color. *Id.* at 93-94.

324. *See, e.g.*, David R. Williams et al., *Race, Stress, and Physical Health: The Role of Group Identity*, *in* SELF, SOCIAL IDENTITY, AND PHYSICAL HEALTH: INTERDISCIPLINARY EXPLORATIONS 71, 94-96 (Richard J. Contrada & Richard D. Ashmore eds., 1999) (noting the dearth of research on the impact of discrimination on the health of African-Americans).

had acquired expertise in treating victims of discrimination were located.

Ultimately, we began working with Dr. Hugh F. Butts, a prominent psychiatrist with over thirty years experience in treating victims of discrimination.[325] Through our work with Dr. Butts, we learned that there is no formal training in medical school that would introduce medical students to an understanding of race-based trauma.[326] Indeed, the Diagnostic and Statistical Manual of

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325. After graduation from Meharry Medical College in 1953, Dr. Butts did an internship and then a Psychiatric residency at the Bronx Veteran's Administration Hospital. He completed his psychoanalytic training at the Columbia University Center for Psychoanalytic training and research in 1961, and was appointed a Supervising and training Psychoanalyst in 1967. Concurrently, he was appointed an Assistant Professor of Psychiatry at the Columbia University College of Physicians and Surgeons. Between 1962 and 1969 he was the Chief of the Psychiatric Inpatient service and Associate Director of Psychiatry at Harlem Hospital Center. From 1974 to 1979 he was the Director of Bronx State Hospital with a one-year interruption (1975 to 1976) to serve as the First Deputy Commissioner of the New York State Department of Metal Hygiene. From 1974 to 1981 he was a full Professor of Psychiatry at the Albert Einstein College of Medicine, and from 1982 to 1986 has been Visiting Professor of Psychiatry at Meharry Medical College, Nashville, Tennessee.

BUTTS, *supra* note 25.

326. *See States Begin to Mandate Standards For Culturally Competent Services*, PSYCHIATRIC NEWS, Jul. 7, 2000, *available at* http://www.psych.org/pnews/00-07-07/states.html (last visited Mar. 15, 2003); *see also* ELENA COHEN & TAWARA D. GOODE, NATIONAL CTR. FOR CULTURAL COMPETENCE, POLICY BRIEF 1, RATIONALE FOR CULTURAL COMPETENCE IN PRIMARY HEALTH CARE (1999), *available at* http://www.georgetown.edu/research/gucdc/nccc/nccc6.html (last visited Mar. 15, 2003). Among the findings are the following:

> Nationally, health care organizations and programs are struggling with the challenges and opportunities to respond effectively to the needs of individuals and families from racially, ethnically, culturally and linguistically diverse groups. The incorporation of culturally competent approaches within primary health care systems remains a great challenge for many states and communities. Despite similarities, fundamental differences among people arise from nationality, ethnicity and culture, as well as from family background and individual experience. These differences affect the health beliefs and behaviors of both patients and providers have of each other. The delivery of high-quality primary health care that is accessible, effective and cost efficient requires health care practitioners to have a deeper understanding of the socio-cultural background of patients, their families and the environments in which they live. Culturally competent primary health services facilitate clinical encounters with more favorable outcomes, enhance the potential for a more rewarding interpersonal experience and increase the satisfaction the individual receiving health care services. Critical factors in the provision of culturally competent health care services include understanding of the:
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> - beliefs, values, traditions and practices of a culture;
> - culturally-defined, health-related needs of individuals, families and communities;

Mental Disorders ("DSM-IV"), which catalogs the variety of mental disorders, and which is the most widely used measure of both the typology and severity of psychological injury, does not contain any description of racism, prejudice, discrimination, or any discussion of the impact that those forces might have on the human psyche.[327]

When one considers the extent to which racism has a strong and continuing influence on the daily lives of so many, it is remarkable that the medical professionals who specialize in healing the human psyche often lack the training and personal experience necessary for proper diagnosis and treatment.[328] Dr. Butts, has described the prescription for this diversity deficit as follows:

- culturally-based belief systems of the etiology of illness and disease and those related to health and healing; and
- attitudes toward seeking help from health care providers.

In making a diagnosis, health care providers must understand the beliefs that shape a person's approach to health and illness. Knowledge of customs and healing traditions are indispensable to the design of treatment and interventions. Health care services must be received and accepted to be successful. Increasingly, cultural knowledge and understanding are important to personnel responsible for quality assurance programs. In addition, those who design evaluation methodologies for continual program improvement must address hard questions about the relevance of health care interventions. Cultural competence will have to be inextricably linked to the definition of specific health outcomes and to an ongoing system of accountability that is committed to reducing the current health disparities among racial, ethnic and cultural populations.

Id.; *see, e.g.*, James H. Carter, *Racism's Impact on Mental Health*, 86 J. NAT'L MEDICAL ASS'N 543, 544-46 (1994). The author points out that as recently as 1969, the American Psychiatric Association ("APA") discriminated against its African-American members. *Id.* at 544-45. In 1972, the APA acknowledged that the racial attitudes of APA members would have to change in order for its members to adequately treat non-white patients. *Id.* at 545. By 1978, the APA recognized that culture could be a critical element in diagnosing and treating mental disorders, and that "psychiatric literature was replete with misconceptions, inaccuracies, and stereotypes of African-American behavior." *Id.* Despite this resolution from the Task Force, however, resistance by many white psychiatrists continued and misdiagnosis and mistreatment continue to be issues of concern. *Id.* at 545-46; *see* Maluso, *supra* note 29, at 56 (citing studies that found that African-Americans were less likely to be seen by psychologists or psychiatrists and more likely than whites to be seen by para-professionals). Studies also found that "Blacks were hospitalized for fewer days than Whites, had fewer inpatient privileges than Whites, were less likely to receive occupational and recreational therapy that Whites, were restrained and secluded significantly more often than were Whites, and were medicated twice as many days as were Whites." *Id.*

327. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994).

328. Hugh F. Butts, *Some Expert Witnesses Are Blatantly Biased*, MEDICAL HERALD, Oct. 1993, at 17.

> [c]omprehensive, adequate psychiatric training should include: courses in ethnicity, culture, and race; opportunities for conducting short- and long-term psychotherapy with ethnically or racially diverse patients; and opportunities for short- and long-term psychotherapy supervision with ethnically or racially diverse supervisors. Implicit in these training experiences is the view that cultural factors influence psychopathology, and knowledge of those factors is vital to the ability to offer sensitive, comprehensive, psychiatric care.[329]

This is particularly important now, given the demographic trends that point towards growing cultural diversity within the United States population.[330]

This paucity of experts and training can lead to serious repercussions. Frequently, victims of discrimination, in an effort to maintain some degree of social effectiveness, attempt to deny the impact of the discrimination.[331] As a result, some people who might otherwise benefit from consultation with a mental health professional will not seek help.[332] Those who try to find medical attention face the prospect of treatment by someone without the personal experience or training necessary to provide proper diagnosis and treatment.[333] This fundamental lack of support from the medical profession can have an impact, not only on the quality of direct service provided to patients, but also on the ability of legal professionals to fully understand and present a client's case.

D. The Continued Slow Recognition of Emotional Harm

The final cycle is one in which the under-valuation of emotional harm by advocates, fact-finders, medical professionals, and sometimes the victims themselves, leads to inappropriately small awards, diminished client satisfaction, a dearth of counsel who are prepared to be retained under economic terms that most victims

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329. *Id.*

330. The American Psychiatric Association has recognized this problem. In its "Policy Statement on Diversity," the APA announced support for "the development of cultural diversity among its membership and within the field of psychiatry (including in undergraduate and graduate medical education, in faculty development, in research, in psychiatric administration, and in clinical practice) in order to prepare psychiatrists to better serve a diverse U.S. Population." AM. PSYCHIATRIC ASS'N, *supra* note 320.

331. ABRAM KARDINER & LIONEL OVESEY, THE MARK OF OPPRESSION: EXPLORATIONS IN THE PERSONALITY OF THE AMERICAN NEGRO 302-03 (1951); *see* ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 32-36 (1993).

332. Davis, *supra* note 255, at 1565-68; *see* Heinrich, *supra* note 35, at 51.

333. Heinrich, *supra* note 35, at 51-52.

are in a position to offer, and poorer remedial processes.[334] This, in turn, makes it less likely that substantial awards will occur at a sufficiently frequent rate and contributes, to the ineffectiveness of anti-housing discrimination laws.

Despite this, there is one reason that clients repeatedly cite as the motivation for seeking legal redress for housing discrimination. That motivating factor is emotional harm. Experience shows that the upset and outrage that is the natural result of being denied a basic human need, shelter, is the single most potent motivation to litigate. In case after case, clients speak with passion about the hurt that they have endured, their need to force those who caused them pain to take responsibility for breaking the law, and their desire to do what can be done to prevent the repetition of discrimination.[335]

It would be naive to assert that housing discrimination will vanish in the face of consistently high damage awards. Conversely, it would be unrealistic and unduly cynical to suggest that the prospect of significant compensation would have no effect on the willingness of victims to pursue relief or that the specter of a large judgment would not have an impact on some number of potential perpetrators.[336] In any event, it is certain that high awards have a direct impact on the immediate defendants, counsel, and plaintiffs involved in housing discrimination litigation.

Moreover, the power of precedent can be significant in its effect on subsequent awards. It is difficult to read an opinion in a case awarding emotional harm damages that does not rely on or cite to

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334. There are very few providers of free legal services to victims of housing discrimination. Housing discrimination litigation is typically a very costly endeavor when done with the assistance of counsel who are paid at an hourly rate. It is rare for private attorneys to undertake representation of a plaintiff in a housing discrimination dispute on a contingency fee basis. This reflects, in part, a perception within the private bar that housing discrimination cases rarely result in the caliber of recovery that would economically justify the investment in time and effort that is required to properly pursue such cases. As shown earlier, mental suffering is frequently the most significant item of damage in human rights law cases. *See* N.Y. City Transit Auth. v. State Div. of Human Rights, 573 N.E.2d 40, 43 (N.Y. 1991). Therefore, undervaluation can significantly affect the extent to which housing discrimination cases are litigated.

335. There can be other motivations for litigating cases of this type. For example, some clients continue to want the housing that they were denied. To the extent that the desire to recover money or "get rich quick" is the primary motivation, it is unlikely to sustain the type of effort and time necessary to see litigation of this type through to completion, much less collection. This is particularly true where the available public information reflects a paucity of significant financial recoveries.

336. *See* Kale Williams, *Foreword: Maximizing Damages in a Fair Housing Case*, 26 J. MARSHALL L. REV. 1, 1 (1992).

the range of awards previously made by other courts.[337] Though the resort to precedent in arriving at or evaluating suitable awards can be troubling, there can be little doubt that this practice is, and will continue to be, commonplace. As a general rule, awards in other cases should be viewed by the fact finder as instructive, to be used as a guide, but not binding.[338] The Second Circuit, in *Martell v. Boardwalk Enterprises Inc.*,[339] observed that there are, "difficulties inherent in comparing one personal injury award to another because of the differentiating facts in each case limit the precedential value of a court's treatment of awards in other apparently similar cases."[340] This is yet another reason why it is so important for the impact of emotional harm to be fully articulated and properly evaluated in each case.

E. Breaking the Cycle

In the early days of the Columbia Law School Fair Housing Clinic, we began to experience some of the same barriers that we would later learn were common to veteran housing discrimination litigators.[341] In our efforts to secure our clients' goals, we spent the majority of our energies attempting to establish liability. We soon learned, that it was just as important to spend at least as much time preparing our case on damages if we were ultimately to secure adequate remedies for clients.

Over time, experience has shown that measures can be taken in the pursuit a meaningful damage award. These measures should, in the normal course, lead to a trial record sufficient to support higher awards. Further, and perhaps even more importantly, we have found that the provision of competent and caring legal services is itself a significant part of the healing process for many clients. In short, skillful, thorough, sensitive advocacy can constitute relief. To the extent that an attorney can assist the client in properly presenting an important and personal grievance, that attorney can validate the client's experience, promote the societal goals ex-

337. *See, e.g.*, Broome v. Biondi, 17 F. Supp. 2d 211, 216 (S.D.N.Y. 1997); *N.Y. City Transit Auth.*, 577 N.E.2d at 45-46.

338. Martell v. Boardwalk Enter. Inc., 748 F.2d 740, 750 (2d Cir. 1984); *cf.* Senko v. Fonda, 384 N.Y.S.2d 849, 851 (App. Div. 1976) (noting that prior awards "may guide and enlighten the court[s]").

339. *Martell*, 748 F.2d at 750.

340. *Id.*

341. For an interesting discussion of the early efforts to obtain meaningful awards of emotional harm, see 1 KENTUCKY COMM'N ON HUMAN RIGHTS, *supra* note 56, at 23-241.

pressed in the statutes, and assist the client in bringing some closure to a painful and psychologically destructive episode.

Presenting full and accurate information on the issue of emotional harm to the court is a first step in breaking the cycles of ignorance and segregation and making the victims of housing discrimination whole. As a way of concretizing and illustrating the more theoretical aspects of this Article, providing practical assistance to civil rights advocates and their clients, and applying what we have learned about emotional injuries, we offer our "Emotional Harm Checklist."

INTRODUCTION TO USING THE CHECKLIST

Interviewing a client about feelings, particularly with regard to housing discrimination, can be difficult. Feelings are often hard to discuss with friends, much less strangers. In addition, many clients feel the need to deny, to themselves and others, the harm suffered.

It is important to give thought to the process of interviewing on this topic as well as to the content of such interviews. Much can be written about how to encourage the discussion of emotional harm. There are no universal solutions. For now, however, here are a few basic suggestions. First, explain why you are asking such personal questions. Illustrate how the inquiry is connected to achieving the client's stated goals. Second, begin with open-ended questions such as, "how did you feel at the time of the incident?" You should make it possible for the client to speak fully and in her own words. This is important because there is a fine line between conducting a thorough interview and putting words into the client's mouth. Open questions are also good conversation starters. Once the conversation has begun, you can move to the more narrow questions suggested in the Checklist. The Checklist may also be useful in the event that the client is not responding to your open-ended questions.

Differences in race, age, and gender between attorney and client can inhibit the exchange of information. Generally, such differences can be overcome by demonstrating a receptivity and sensitivity to information of this type. Victims of housing discrimination frequently experience severe, confusing, and disquieting reactions. Lawyers can short-circuit full expression by indicating discomfort or skepticism regarding a client's response to the discriminatory event. Many clients look for signs (verbal and non-verbal) that it is okay to talk candidly about such personal, emotionally charged issues.

Tell the client how you plan to proceed with the inquiry, explaining that no detail or sentiment is unimportant or unacceptable. The structure through which facts are gathered can affect the quality and quantity of the information revealed by the client.

Consider proceeding chronologically. For example, ask the client to discuss why she was looking for another place to live or why she chose the dwelling in question. Then move through the time of the discriminatory incident, and to feelings and events thereafter. At each point, ask the client to tell you as much as possible about she felt.

It is also useful to elicit comparisons between the way the client felt, reacted, or thought before the incident regarding the topics listed below, and how she felt at the time of the illegal conduct, one week later, a month later, or more. Feelings and reactions that occur in response to discrimination change over time—sometimes for the better, sometimes for worse. Indeed, finding out from your client what it will take to recover fully, often sheds light on the magnitude and lasting impact of the harm suffered.

Once there is a process for interviewing the client, the attorney will want to conduct a thorough inquiry. The checklist that follows is derived from cases, statutes, articles, expert testimony, and experience. It is included to facilitate a full inquiry and ultimately an adequate recovery. Certainly, no two people experience incidents of this type in the same way. Nevertheless, there is a remarkable similarity in the scope and extent of reactions to housing discrimination. Those similarities are reflected in the checklist that appears below.

THE EMOTIONAL HARM CHECKLIST

1) Background:
   a) Where are you from?
   b) Where are you currently living?
      i) How long have you lived in this area?
      ii) What is your age?
      iii) What is your occupation?
   c) What are your interests?
   d) How often have you taken primary responsibility for finding housing?
   e) Were/are there other members of your household who were/are depending on you to find housing?
2) Have you ever been involved in a housing discrimination lawsuit before?

3) Have you ever been involved in any litigation before?
4) Have you experienced prior incidents of discrimination?
    a) If yes, at a later point in the interview, after the client has fully described her/his reaction to the current discrimination, ask whether the client's reaction to the current discrimination is different from reactions to prior acts of discrimination. If so, to what does the client attribute the differences in reaction?
5) How would you describe your identity (with which protected class(es) does the client identify)?
6) Is the client's membership in the protected class(es) with which she identifies apparent to you upon observation? If not, ask the client how she believes the discriminator knew of the client's membership in the protected class(es).
7) The housing search:
    a) How long had you been searching for housing before this incident?
    b) Why were you looking for housing?
    c) What were you looking for in your new home (more room, a home in a particular neighborhood, proximity to schools, work, recreation, relatives/friends)? What was your price range? What features or amenities did you hope to find?
    d) What symbolic importance, if any, did this new home hold for you? (Was this the first time you were "on your own"? Was the move something you had been saving for? Was it to be a symbol of independence or financial achievement? Was it the reward for hard work or "playing by the rules"? Was it your small piece of the "American dream"?)
8) The "subject premises" (i.e., the dwelling that is the subject of the present controversy) ("SP"):
    a) Fully describe the SP, (if you were not allowed to see the SP, describe the ad that attracted you to the SP). If the client became interested in the SP as a result of an ad, get a copy of the ad and find out how long the ad ran.
    b) What (in detail) attracted you to the SP?
    c) What plans, if any, had you made for moving in, renovating, etc., (how emotionally invested were you)?
    d) How far along in the acquisition process had you gotten before being rejected?

e) What actions, if any, had you taken in reliance, or in the belief that you would be moving into a new home? (These can range from telling family and friends that you were moving, to leaving your prior dwelling or, in some cases, actually moving into the SP.)

9) The discriminatory event:
   a) In complete detail, chronologically describe what happened (i.e., the sequence of events that constitutes the violations of law). Let the client determine where the chronology begins and ends. At each significant event, stop and ask the client what she was thinking/feeling. You might consider audio/video taping the interview (if the client is amenable and if you think it won't curtail the information flow) as a way of capturing all of the communication from the client.
   b) Did anyone witness any portion of these events?
      i) Who (name, address, phone/fax etc.)?
   c) What portion of the events did she witness?
   d) What aspects, if any, of your reaction to the discriminatory events did she witness?
   e) Is the witness willing to be of assistance?
10) Aggravating circumstances:
   a) Was abusive language used? (get as near a precise quotation as possible)
   b) Was this a "public" humiliation in any sense? Where did the discriminatory act(s) take place? Were family members, friends or associates present?
      i) If yes, how did their presence affect you?
   c) Were there any other outrageous circumstances, such as mocking, laughter, disdain or other forms of rudeness by the offending party(ies)?
   d) Were you lied to by the discriminator(s)?
      i) When/how did you find out?
         1. How did you feel when you found out?
11) On how many occasions were you in contact with the perpetrator(s)?
   a) Describe what was said or done on each occasion.
   b) What was your immediate psychological reaction to the discriminatory treatment?
12) Did you experience any of the following common symptoms? (provide details/examples under each applicable category):

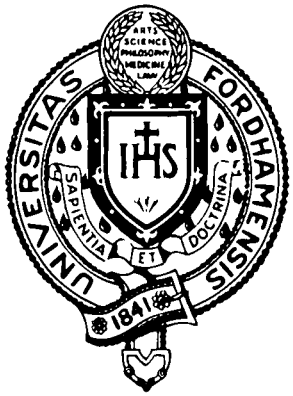
a) emotional numbing, feeling stunned;
b) withdrawal (usually to the home, bed, and away from those in the home; often the client requests that she be left alone.);
c) helplessness;
d) anger (if yes, how intense?);
e) feelings of inadequacy;
f) anxiety;
g) panic attacks;
h) constant reliving of the incident (interference with concentration);
i) confusion;
j) loss of control over matters that affect you;
k) feeling unwanted, unworthy, unappealing;
l) humiliation;
m) sleep disturbance;
n) embarrassment;
o) depression;
p) lethargy, inability or unwillingness to care for self or others, not wanting to get out of bed or leave the home;
q) staying home from work or school? (If yes, give exact dates.) For days missed at work, was there a loss of pay? What excuse was given to the employer? Any negative ramifications on the job or at school for missed days? Get copies of time/attendance records or pay stubs for corroboration;
r) inability to face day-to-day responsibilities;
s) diminished self-esteem;
t) negative changes in appearance ("letting yourself go");
u) irritability, lack of patience;
v) feelings of shock or disbelief;
w) tension;
x) mood swings;
y) morbid sadness;
z) mirthless smiling, sighing;
aa) inability to make decisions;
bb) engaging in self-destructive acts (overeating, increased/renewed smoking, drinking, involvement with drugs, inappropriate use of medications);
cc) increased dependency on others;
dd) lack of humor;
ee) blaming oneself for what happened;

ff) feeling generally discouraged;
gg) Post Traumatic Stress Disorder (see the American Psychiatric Association's "Diagnostic and Statistical Manual of Mental Disorders," commonly called the "DSM IV").

13) Compare the client's feelings and behavior before the incident with the feelings and behavior described in section 5 above.
14) In what ways have the client's reactions to the incident changed over time, for better or worse?
15) Have you experienced any physical reactions to the discriminatory treatment? Provide complete details under each category. (The physical symptoms may be new to the client or an exacerbation of past ailments. For example, the client may either experience a stomach ulcer for the first time or an aggravation of an existing ulcer.)
16) Have you experienced any of the following physical symptoms?:
    a) hypertension;
    b) ulcers or upset stomach/indigestion;
    c) headaches (including migraines);
    d) asthma;
    e) arthritis;
    f) loss of sleep/insomnia;
    g) easily startled (hyper-arousal);
    h) crying (if yes, describe the occasions upon which you cried before the incident and compare with the frequency and extent of crying after the incident);
    i) loss of appetite;
    j) diminished interest in physical pleasures (sex, exercise, eating);
    k) neck/back pain.
17) In the case of both psychological and physical reactions, was a doctor or other health care provider consulted? Whom did you consult? For what length of time? Cost? Was medication prescribed or increased?
18) Were your interactions with friends or family affected? If so, how? (This is a very common and often destructive result of discrimination. Pay particular attention to this inquiry. Methodically probe into each affected relationship. Consider calling the affected person as a witness to corroborate changes in your client's behavior.)

19) Describe whether and/or how you told your wife, husband, partner, children, or friends about the incident.
20) If you have not told people you would ordinarily confide in about the incident, why not?
21) Has the incident affected you on the job?
22) Has your job performance been adversely affected? In what ways? Give details.
23) Have there been any job performance evaluations since the incident? Any changes from pre-incident evaluations?
24) Has the incident affected your relationship with peers or superiors on the job? How so?
25) Has the incident changed the way you interact with or view people of the same class (race, gender, national origin, etc.) as the discriminator(s)?
26) Has the incident changed your outlook?:
    a) on life;
    b) on your beliefs (Do you find yourself thinking, "I worked hard, played by the rules and still was not treated fairly"?);
    c) regarding the faith you had placed in those you had relied on ("my parents never prepared me for this");
    d) regarding current events (becoming more conscious of racism and other forms of discriminatory behavior);
    e) regarding your prospects for the future.
27) How often do you think about the incident? Has that changed over time?
28) Have there been other stress-producing events in your life that would account for the above-listed changes? What are they? When did they occur? How did you react to them? How was/is your reaction to the other stressors different from your reaction to the discriminatory treatment? Could these, or other stressors be the cause of any of the changes listed above? If not, why not?
29) Who can corroborate any of the psychological and/or physical changes listed above? It is often very helpful (though not legally necessary) to have family members, friends, work associates, and health care professionals corroborate the changes you experienced.

30) Have you continued the search for housing? Have you modified the search in any way (restricted the search to neighborhoods where you are not likely to encounter future discrimination, felt it necessary to "announce" your membership in the protected class over the phone or in person, etc.)?
31) What will it take for you to feel fully recovered? Do you think that therapy is required? If so, how long do you think the therapy will need to continue? Would validation or vindication at trial aid the healing process?
32) How long will it take you to recover fully?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