

MAX WEBER MEETS THE FAIR HOUSING  
ACT:  
“LIFE CHANCES” AND THE NEED FOR  
EXPANDED LOST HOUSING OPPORTUNITY  
DAMAGES

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INTRODUCTION..... 79

I. BACKGROUND..... 81

A. The Root of Mobility Based Programs in Life Chances Theory  
..... 82

1. Max Weber’s Life Chances Theory ..... 82

2. Neighborhood Effects and the Geography of Opportunity as  
Understood Through the Lens of Life Chances..... 87

3. The Negative Consequences of Low-Opportunity Areas 88

4. The Benefits of Moving to Higher-Opportunity Areas.... 93

B. Fair Housing Act Background..... 96

1. Brief Overview of the History and Purpose of the Fair  
Housing Act..... 97

2. Shortcomings of the Traditional Liability Model under the  
Fair Housing Act..... 100

II. USE OF LIFE CHANCES UNDER THE FAIR HOUSING ACT ..... 101

A. The Development of Lost Housing Opportunity Damages.... 101

B. Connecting Neighborhood Effects, Life Chances, and Lost  
Housing Opportunity: *United States v. Hylton*..... 105

C. Suggestions for the Calculation of Damages in Determining Lost  
Housing Opportunity in Individual Cases ..... 108

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D. A Transformative Approach to the Use of Lost Housing Opportunity Damages.....	111
III. CONCLUSION .....	114

## INTRODUCTION

Karl Emil Maximillian Weber is suddenly in vogue. Numerous articles discuss this long dead sociologist’s political theories, especially that of the charismatic leader, in terms of the 2016 presidential election.<sup>1</sup> Stephen Bannon, advisor to President Trump, has discussed the goal of dismantling the administrative state,<sup>2</sup> echoing the “iron cage” imagery Weber used to describe late 19th century German bureaucracy.<sup>3</sup> While Weber’s political writings have re-entered the zeitgeist, social science has devoted renewed attention to one of Weber’s other contributions to sociology: the theory of “life chances.” Life chances is Weber’s idea that social status and economic class govern a person’s opportunities to a much greater extent than any personal characteristics.<sup>4</sup> This article views life chances through the narrow lens of residential housing and the effect neighborhoods and geography have on an individual’s opportunities. While this issue has been widely researched and debated, this article delves into the application of this idea to how our legal system compensates those who have been illegally denied housing opportunities.

While discrimination in housing is clearly illegal under the federal Fair Housing Act (“Act”),<sup>5</sup> the traditional model for damages does not consider many of the consequences of the discrimination. This traditional model involves calculating the tangible harm to the victim, along with any

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1. See, e.g., Charles Lane, Op-Ed, *Why the way Trump won makes him more dangerous*, WASHINGTON POST, Nov. 9, 2016, at A13 (applying Weber’s concept of charismatic authority to Trump’s campaign rallies); Ellen Wayland Smith, Jesus Christ, businessman: From John Humphrey Noyes to Donald Trump, THE CONVERSATION (Dec. 14, 2016, 11:04 PM), <https://perma.cc/JP6T-HF5S>; Gianpiero Petriglieri, *Hillary Clinton, Donald Trump, and the Danger of Comparing Different Leadership Styles*, HARV. BUS. REV. (August 3, 2016), <https://perma.cc/KH8F-DC2B>; Matthew Yglesias, *How Max Weber Explains the 2016 Election*, VOX (July 11, 2016), <https://perma.cc/K9RX-CVUC>. The blog postings on this subject are too numerous to list in full. See, e.g., Paul Staniland, *Max Weber on Donald Trump?*, PAUL STANILAND (Nov. 10, 2016), <https://perma.cc/5Y9U-SUQC>.

2. Phillip Rucker & Robert Costa, *Bannon vows a daily fight for ‘deconstruction of the administrative state’*, WASHINGTON POST, February 24, 2017, at A1.

3. See Stephen Kalburg, *The Modern World as a Monolithic Iron Cage? Utilizing Max Weber to Define the Internal Dynamics of the Political Culture Today*, 1.2 MAX WEBER STUDIES 178, 179–80 (2001) (“In [Weber]’s iron cage model, the domination of bureaucracies calls forth a caste of functionaries and civil servants who monopolize power. . . . Devoid of brotherhood, compassion, and heroic ethical action . . . civic virtues and public ethics are . . . threatened with extinction by the mighty, inexorable expansion of calculation, manipulation, and instrumental rationality.”).

4. See *infra* Part I.A.1.

5. 42 U.S.C.S. § 3604 (LexisNexis, Lexis Advance current through P.L. 115-191).

intangible damages.<sup>6</sup> Tangible damages in a rental refusal case can include the higher cost of alternative housing; income lost during the time spent looking for alternative housing; moving costs, storage costs, or packing costs; temporary housing costs; and medical and psychological counseling expenses caused by housing discrimination.<sup>7</sup> Intangible damages, commonly emotional distress damages, can compensate the plaintiff for anxiety, loss of sleep, humiliation, depression, and other effects of the discriminatory act.<sup>8</sup> Due to the fact that these damages often cannot be quantified, emotional distress awards vary greatly.<sup>9</sup>

In addition to these types of damages, plaintiffs may also seek damages for loss of housing opportunity.<sup>10</sup> These damages mean to compensate plaintiffs for any difference in the amenities or desirability of the sought-after property in comparison to the property where the plaintiff ended up.<sup>11</sup> Through awards based on lost housing opportunity, courts have sought to make plaintiffs whole by compensating for the fact that, but for the discriminatory act, plaintiff would have lived in more desirable housing or in a more desirable neighborhood.<sup>12</sup>

However, the damages awarded so far for loss of housing opportunity are only the tip of the iceberg. As currently utilized, lost housing opportunity damages usually fail to consider the long-standing effect of the discrimination suffered. The basic fact of where one lives has a substantial impact on educational opportunities, work opportunities, the ability to own a home, the probability of becoming a victim of or witness to violent crime, and, cumulatively, the possibility of escaping poverty.<sup>13</sup> In children, environmental factors associated with low-income neighborhoods have been found to have a profound effect on health, including differences in brain

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6. Alan W. Heifetz & Thomas C. Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. MARSHALL L. REV. 3, 10–12 (1992); LaDavia S. Hatcher, *A Case for Reparations: The Plight of the African-American World War II Veteran Concerning Federal Discriminatory Housing Practices*, 2 AM. U. MODERN AM. 18, 21 (2006); 15 AM. JUR. 2D *Civil Rights* § 494 (describing the available damages in civil rights claims).

7. Heifetz & Heinz, *supra* note 6, at 10–12; Hatcher, *supra* note 6.

8. Heifetz & Heinz, *supra* note 6, at 16–19; *see generally* Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39 (1992).

9. *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, 1185 n. 181 (1999); *see generally* Larry R. Rogers & Kelly N. Kalus, *From One Dollar to \$2.4 Million: Narrowing the Spectrum of Damage Awards in Fair Housing Cases through Basic Tort Litigation Tactics*, 26 J. MARSHALL L. REV. 29 (1992).

10. Heifetz & Heinz, *supra* note 6, at 24–25; *United States v. Hylton*, 944 F. Supp. 2d 176, 197 (D. Conn. 2013). This case is discussed in depth in Part II.B.

11. Heifetz & Heinz, *supra* note 6, at 25; *see infra* Part II.A.

12. *See Hylton*, 944 F. Supp. 2d at 197; *see infra* Part II.A–B.

13. *See infra* Part I.A.3–4.

development.<sup>14</sup> Research in this field has increased in the past few decades,<sup>15</sup> and this research can be tied back to the sociological concept of life chances articulated by Weber.

This article will discuss the work of sociologist Max Weber, pioneer of the term “life chances,”<sup>16</sup> and how the field of life chances has been adopted and expanded into place-based theories such as “neighborhood effects” and the “geography of opportunity.”<sup>17</sup> This article will then give a brief overview of the purpose of the Fair Housing Act and how its passage was not meant simply to combat offensive behavior, but to increase residential mobility.<sup>18</sup> This article will also discuss how “lost housing opportunity” has previously been used by the courts.<sup>19</sup> This section of the article will include a discussion of *United States v. Hylton*, the published federal court decision that, through expert testimony, explicitly connected Weber’s life chances, sociology’s “neighborhood effects,” and fair housing law’s “loss of housing opportunity” damages.<sup>20</sup> In conclusion, this article will argue for a more expansive view of lost housing opportunity damages in fair housing enforcement cases, going beyond the traditional view of damages to suggest a limited importation of tort concepts to account for future differences in education, income, health, and quality of life, for those who have been subject to housing discrimination.<sup>21</sup>

## I. BACKGROUND

To understand the opportunity for expanded loss of housing opportunity damages it is necessary to review the sociological background for the proposition that places impact the opportunities, and consequent life chances, of their residents. In addition, background on the Fair Housing Act and its purpose is important to understanding why the traditional damages framework has been inadequate in meeting the Act’s goals. With this background in mind, we can see how lost housing opportunity damages present a way to increase damage awards, fairly compensate plaintiffs, and make progress towards a more just, economically mobile society.

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14. *See infra* Part I.A.3.

15. *See infra* Part I.A.3–4.

16. *See infra* Part I.A.1.

17. *See infra* Part I.A.2.

18. *See infra* Part I.B.1.

19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. *See infra* Part II.C–D.

### A. The Root of Mobility Based Programs in Life Chances Theory

While the importance of stable, safe, and affordable housing is generally recognized,<sup>22</sup> the impact of where an individual or family lives on his or her future opportunities has only recently become the subject of extensive research. This research and its findings have significant roots in the early history of sociology.<sup>23</sup> By examining these roots, we can build a strong foundation for the argument for the expanded loss of housing opportunity damages.

#### 1. Max Weber's Life Chances Theory

Karl Emil Maximilian Weber was born on April 24, 1864, in Erfurt, in what was, at the time, known as the Province of Saxony, Prussia.<sup>24</sup> “Max” Weber would take on a variety of occupations and causes during his life, serving as a lawyer,<sup>25</sup> historian,<sup>26</sup> economist,<sup>27</sup> feminist activist,<sup>28</sup> soldier,<sup>29</sup> military hospital administrator,<sup>30</sup> and, eventually, politician<sup>31</sup> in post-World

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22. THE OHIO STATE UNIVERSITY KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, THE GEOGRAPHY OF OPPORTUNITY: REVIEW OF OPPORTUNITY MAPPING RESEARCH INITIATIVES 5 (July 2008), <https://perma.cc/ZD4Z-VHMQ>. As stated in one report:

Housing is the primary conduit to accessing opportunity and building wealth and economic stability in the U.S. Housing location is the critical leverage point to determining access to education, employment, childcare and health care or in determining the likelihood of developing assets/wealth through home equity. Housing can be either an impediment or a conduit to opportunity depending on its location.

*Id.*

23. *See infra* Part I.A.1.

24. JOHN P. DIGGINS, MAX WEBER: POLITICS AND THE SPIRIT OF TRAGEDY 45 (1996).

25. *Id.* at 48 (“Weber first worked as a barrister in Berlin courts. . . .”); RONALD FERNANDEZ, MAPPERS OF SOCIETY: THE LIVES, TIMES, AND LEGACIES OF GREAT SOCIOLOGISTS 80 (2003).

26. SVEN ELIAESON, MAX WEBER’S METHODOLOGIES: INTERPRETATION AND CRITIQUE 54 (2002).

27. *Id.*

28. DIGGINS, *supra* note 24, at 172–75 (describing Weber’s and his wife’s role in political reforms regarding women’s rights).

29. FERNANDEZ, *supra* note 25, at 80.

30. DIGGINS, *supra* note 24, at 183.

31. Weber ran for a parliamentary seat in 1918 as part of the German Democratic Party he founded but was unsuccessful. TONY WATERS & DAGMAR WATERS, WEBER’S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION 20 (Palgrave MacMillan 2016); *but see* ARTHUR MITZMAN, THE IRON CAGE: AN HISTORICAL INTERPRETATION OF MAX WEBER 300–01 (Alfred A. Knopf 1970) (describing Weber as a founder of the party but withdrawing his name from the slate of candidates); *see generally* ANTHONY GIDDENS, POLITICS AND SOCIOLOGY IN THE THOUGHT OF MAX WEBER (MacMillan Press 1972) (for an overview of Weber’s political thought and

War I Germany. Despite bouts in sanitariums and asylums,<sup>32</sup> Max Weber would become known as one of the fathers of sociology, typically classed along with Emile Durkheim and Karl Marx.<sup>33</sup> Weber, and contemporaries such as W.E.B. Du Bois,<sup>34</sup> were part of a new generation of scholars who believed in discarding the search for grand theories or natural laws, focusing instead on the effects of history and culture on the social life of groups and individuals.<sup>35</sup> Weber was not famous during his lifetime, being, as one author described him: “a loner and an enfant terrible [] not the ideal-typical character to pioneer modern social research teamwork.”<sup>36</sup>

Weber’s work is associated with many major issues still being debated today: politics as a means to an end,<sup>37</sup> religion’s influence on capitalism,<sup>38</sup> and the break from classical Marxism to focus on the means of

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how it intersected with his sociological thought); DIGGINS, *supra* note 24, at 206–18 (describing Weber’s proposal of political reforms during and after the first world war and his role in developing Germany’s Weimar constitution). One friend described politics as Weber’s “secret love,” although Weber was disappointed by his role at the Versailles conference and in crafting Germany’s post-war constitution. DIGGINS, *supra* note 25, at 265–266.

32. FERNANDEZ, *supra* note 25, at 78; MITZMAN, *supra* note 31, at 6, 148–63 (describing Weber’s “abyss of six years of psychic collapse”); DIGGINS, *supra* note 24, at 62–65 (describing Weber’s illness and its effect on his work). Weber suffered from debilitating depression and anxiety, however, his background, including a bourgeois upbringing and a large inheritance, allowed him, perhaps in proof of his own *Lebenschancen*, to still live comfortably and concentrate on intellectual pursuits. See FERNANDEZ, *supra* note 25, at 81–82; see also GIDDENS, *supra* note 32, at 55 (discussing Weber’s “strong personal affiliation . . . for the yearnings and the aspirations of the underprivileged.”).

33. ALDON D. MORRIS, *THE SCHOLAR DENIED: W.E.B. DU BOIS AND THE BIRTH OF MODERN SOCIOLOGY* 149 (2015); LAWRENCE A. SCAFF, *MAX WEBER IN AMERICA* 100–16 (2011) (describing Weber’s views on race and his relationship with Du Bois, beginning in the 1890s when Du Bois studied in Berlin and continuing with Weber’s 1904 trip to America); DIGGINS, *supra* note 24 (also describing Weber’s trip).

34. See generally MORRIS, *supra* note 33 (arguing that W.E.B. Du Bois at the Atlanta University, should be acknowledged as the father of American sociology instead of Robert E. Park’s Chicago school).

35. *Id.* at 152.

36. ELIAESON, *supra* note 26, at 59; MITZMAN, *supra* note 31, at 15, 157 (noting Weber’s “volcanic temperament” and the “avenging furies of his own psyche”). Surely, no other father of sociology has been described in such Shakespearean terms. MITZMAN, *supra* note 31, at 143 (comparing Weber to Hamlet).

37. See GIDDENS, *supra* note 31, at 55 (“[D]emocratic government cannot be founded upon any conception of natural law. . . . Democracy is a technique, a means to an end.”). Weber’s feelings on capitalism echoed the quote about democracy typically attributed to Churchill. See WOLFGANG J. MOMMSEN, *THE AGE OF BUREAUCRACY: PERSPECTIVES ON THE POLITICAL SOCIOLOGY OF MAX WEBER* xv (1974) (“[H]e did not deny that capitalism was very far from being the best of all possible systems, he thought that for the time being at least it deserved preference over all other possible economic systems . . .”).

38. GIDDENS, *supra* note 31, at 21 (explaining that religion, which Marx and Nietzsche saw as a burden, was seen by Weber as the spirit behind American capitalism).

bureaucratic control.<sup>39</sup> Much of what Weber actually meant is still debated,<sup>40</sup> although his contributions have become “standard fare” in many areas of sociology, particularly in “investigations of inequality and social stratification,” and have contributed to other fields such as philosophy, history, political science and anthropology.<sup>41</sup> Weber was considered somewhat “schizophrenic” in his output and interests—identifying flaws, but not providing solutions, proposing no clear methodological “programme,” and writing no systematic treatise.<sup>42</sup> One author described Weber as leaving future sociologists “a gigantic quarry with many shiny stones to pick up” and acknowledged that many who have picked up such stones have come to different interpretations of what there is to see in them.<sup>43</sup> This section of the article will focus only on a small sliver of Weber’s output: namely that of his probabilistic theory of life chances.

Weber’s life chances theory has been a lasting contribution to sociology.<sup>44</sup> Weber’s discussion of life chances involved an analysis of power, focusing generally on 1) economic strength, and 2) prestige/status.<sup>45</sup> Here, Weber broke from Marx in unshackling the analysis of class<sup>46</sup> from that of economic strength alone, but also focusing on prestige and politics,<sup>47</sup>

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39. *See also id.* at 35 (“Thus Weber rejects the conception that the expropriation of the worker from his means of production has been confined to the economic sphere alone . . .”); MOMMSEN, *supra* note 37, at xv. Weber’s study of bureaucracy as a means of authority is particularly interesting and quite relevant to the administrative state. *See* DIGGINS, *supra* note 24, at 78–84.

40. ELIAESON, *supra* note 26, at 61–63.

41. SCAFF, *supra* note 33, at 244. “Into the rush of our current century only a few monuments and points of references from the mid-twentieth century have been left standing; Weber’s thought is one of them.” *Id.* at 245. In fact, a rather large amount of ink seems to have been spilled over the very question of whether Weber was a sociologist and, if so, when he became one. MOMMSEN, *supra* note 37, at 3–21. For those interested in Weber’s philosophy of government, *see* MOMMSEN, *supra* note 37, at 72–94 (discussing Weber’s political/sociological perspective on the state’s “three pure types of legitimate domination”: legal/bureaucratic, traditional, and charismatic).

42. ELIAESON, *supra* note 26, at 3.

43. *Id.*; *see* SCAFF, *supra* note 33, at 248 (“[T]he extension of [Weber’s] conceptual language . . . is constrained only by the investigator’s imagination.”). Weber’s topics were so varied that in addition to religion, politics, class, and authority, he even composed a manuscript tracing the role of erotica from Hellenic society through the French Enlightenment. DIGGINS, *supra* note 24, at 168–72; MITZMAN, *supra* note 31, at 215–18.

44. *See* THOMAS BURGER, *Power and Stratification: Max Weber and Beyond*, in *THEORY OF LIBERTY, LEGITIMACY, AND POWER: NEW DIRECTIONS IN THE INTELLECTUAL AND SCIENTIFIC LEGACY OF MAX WEBER* 11 (Vatro Murvar ed., 1985) (describing Weber as contributing to the “study of what today is called ‘Social Stratification’”).

45. FERNANDEZ, *supra* note 25, at 98–01; SCAFF, *supra* note 33, at 115.

46. Weber considered class to be a “phenomena of the distribution of power.” BURGER, *supra* note 45, at 14. Classes consist of “[p]luralities of individuals with approximately equivalent abilities to secure (labor or commodity) market-mediated life chances.” *Id.*

47. FERNANDEZ, *supra* note 25, at 100–01; *see* MITZMAN, *supra* note 31, at 31–32 (explaining how Weber also disagreed with Marx in terms of his focus on the connection between religion and economic systems); *see* MOMMSEN, *supra* note 37, at 50–51, 54 (noting

described herein as status, but what also could be understood in a broad sense as “social capital.”<sup>48</sup> Weber believed that these indicators affected what he termed “*Lebenschancen*,” translated as life chances.<sup>49</sup> Life chances was the idea that indicators of socio-economic status are accompanied by opportunities, and that these opportunities impact, and may determine, an individual’s ability to satisfy basic needs.<sup>50</sup> For instance, an individual’s or family’s wealth plays a role in determining that individual’s opportunities (e.g., education and employment) and abilities to fulfill basic needs such as food, shelter, and, even, emotional fulfillment.<sup>51</sup> In addition, race, religion, and politics would contribute to an individual, family, or community’s prestige in society.<sup>52</sup> Status, so understood, would also impact opportunity.

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that Weber approved of Marx’s materialistic interpretation of history but did not believe it to be the whole story, rejecting Marx’s focus on economic causes alone).

48. Kevin White, *Life Chances*, THE CAMBRIDGE DICTIONARY OF SOCIOLOGY 289 (Bryan S. Turner ed. 2006) (“Weber’s fundamental point in developing the concept of life chances and status groups was to balance Marx’s economic determinism with an account of social life that emphasized that it was the meaning individuals gave to their life experiences that shaped their formation into communities.”); “The term ‘social capital’ connotes that ‘social networks have value’” Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power and Law*, 63 HASTINGS L.J. 803, 825 (2012) (citing ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000)). This capital is raised through “social relations and ties.” *Id.*

49. RICHARD SWEDBERG & OLA AGEVALL, *THE MAX WEBER DICTIONARY: KEY WORDS AND CONCEPTS* 192 (2016); see Erik Olin Wright, *The Shadow of Exploitation in Weber’s Class Analysis*, in MAX WEBER’S ECONOMY AND SOCIETY: A CRITICAL COMPANION 204, 217–18 (Charles Camic, Phillip S. Gorski, & David M. Trubek eds. 2005).

50. See RALF DAHRENDORF, *LIFE CHANCES: APPROACHES TO SOCIAL AND POLITICAL THEORY* 34 (1979) (“[L]ife chances are opportunities for individual action arising from the interrelationships of [dimensions of social structure].” Economist and sociologist Ralf Dahrendorf built directly on Weber’s conception of life chances expanding on Weber’s meaning and particularly on the concept of social structure, arguing that social structure is made up of: 1) bonds or linkages (called ligatures) based on social positions or roles, often with emotional weight; and 2) the options or alternative actions an individual may pursue within a social structure. See *id.* at 30–34. In Dahrendorf’s understanding options are intractably connected with ligatures, as ligatures provide “the foundation of action” upon which an individual’s choices, options may operate. *Id.* at 31.

51. See *id.* at 29 (“Money provides life chances. . . . It has significance whether we use it or not. . . . In some sense it is the epitome of opportunity.”) In its most abstract form “chance [is] the crystallized probability of finding satisfaction for interests, wants and needs, this is the probability of the occurrence of events which bring about such satisfaction.” *Id.* at 73; Richard Breen, *Foundations of a Neo-Weberian Class Analysis*, in *APPROACHES TO CLASS ANALYSIS* 31, 32 (Erik Olin Wright ed. 2005) (describing life chances “as the chances that individuals have of gaining access to scarce and valued outcomes.”)

52. Sometimes described as the “social sphere” or “social honor” this concept of prestige also includes occupational prestige, prestigious lineage, style of life, and formal education. BURGER, *supra* note 44, at 25; see DAHRENDORF, *supra* note 50, at 75 (listing religion, patriotism and family as significant “ligatures”). A formative event in Weber’s class theory is said to have been his 1904 visit to Tuskegee, Alabama, and his recognition of the stigma of mixed race “mulattos.” FERNANDEZ, *supra* note 25, at 98–99. Weber’s trip was in part to study the “complex relations between race, ethnicity, and capitalism in the South” MORRIS, *supra* note 33, at 157. Weber’s experience led him to argue forcefully that racial



Wealth and prestige would impact opportunities, as those with “situationally superior resources” would be more successful in achieving their needs.<sup>53</sup>

Significantly, Weber’s own writing used the word “fate.”<sup>54</sup> As one biographer has summarized, Weber was saying that “each of these forms of social stratification produced such an arbitrary and powerful impact on people’s lives that, despite all the persistence and tenacity a person could manage, class situations or social honor could alone determine the outcome of any person’s existence.”<sup>55</sup> Similarly, where Weber used the word “chance,” he was not referring to random chance, or even to possibility, but rather to a “probability which is invariably anchored in given structural conditions.”<sup>56</sup> In so doing, Weber was anticipating, if not setting in motion, modern fields of inquiry relating to the opportunities accessed by individuals, and the effort to quantify, through probabilistic calculations, the advantages and disadvantages associated with membership in certain groups or statuses. In this way, Weber demonstrated a very modern intersectional understanding of privilege<sup>57</sup> and how privileged groups reduce the opportunities of others.<sup>58</sup> Weber acknowledged that social institutions and social relationships were critical to outcomes, writing that “the peculiarities of social institutions are to a certain extent the rules of the game which have factual validity for the chances . . . to ‘win, ascend . . . and propagate.’”<sup>59</sup>

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inferiority could not be proven by science and that race and ethnicity were “socially and historically constructed and politically conditioned.” SCAFF, *supra* note 33, at 113, 115.

53. BURGER, *supra* note 42, at 13; MAX WEBER: THE INTERPRETATION OF SOCIAL REALITY 87–88 (J.E.T. Eldridge ed., Charles Scribner’s Sons 1971) (translating MAX WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 424–29) (describing the advantages held by a “positively privileged property class”).

54. FERNANDEZ, *supra* note 25, at 100.

55. *Id.*

56. DAHRENDORF, *supra* note 50, at 64–65. Sociologist Robert K. Merton has recognized that what Weber was talking about was differentials in access to opportunity. SWEDBERG & AGEVALL, *supra* note 49 (citing ROBERT K. MERTON, OPPORTUNITY STRUCTURE: THE EMERGENCE, DIFFUSION, AND DIFFERENTIATION OF A SOCIOLOGICAL CONCEPT, 1930S-1950S, 33 (1995)).

57. Eldridge, *supra* note 53, at 73 (“Weber continually refers to social groups that are ‘positively’ or ‘negatively’ privileged, and it is in this interest in privilege which gives unity to his approach to the study of . . . a multi-dimensional theory of social stratification.”). Significantly, Weber criticized American sociological literature for failing to discuss the relationships between the “(so-called) ‘race problem’ and the (so-called) ‘class problem.’” SCAFF, *supra* note 33, at 104.

58. Jeff Manza, *Inequality*, in THE CAMBRIDGE DICTIONARY OF SOCIOLOGY 289 (Bryan S. Turner ed. 2006) (“Weberians have shown that one of the ways in which groups achieve power is by maintaining formal and informal systems of social closure. Formal systems include legal barriers to entry such as occupational restrictions, while informal systems involve less explicit but nonetheless powerful forms of discrimination.”). This is a particularly relevant concept in the area of housing and neighborhoods, where exclusionary zoning, whether intentionally discriminatory or not, often constitutes a type of “opportunity hoarding.” Richard V. Reeves, ‘Exclusionary zoning’ is opportunity hoarding by upper middle class, REAL CLEAR MARKETS (May 24, 2017), <https://perma.cc/BP4H-5RZJ>.

59. MORRIS, *supra* note 33, at 161. A 1944 study of race relations used Weber’s observation of American social clubs as status-generating to comment on the opportunities

2. Neighborhood Effects and the Geography of Opportunity as Understood Through the Lens of Life Chances.

Weber's life chances analysis has been an important theme of the past century of sociological theory and research. However, only in the past few decades have the impact of the places in which we live on future opportunity been thoroughly explored. In this way, place helps to explain the understanding of class and status found in Weber's original theory.<sup>60</sup>

The housing we obtain and the neighborhood we live in affects Weber's concept of wealth, prestige, and the social bonds associated with status and social capital. Each neighborhood can be understood to come with different opportunities or lack of opportunities. Many aspects of this are obvious and apparent. All would agree that a good school system, while not strictly necessary for success in life, would correlate to a better chance of higher education, employment, and the ability to fulfill other needs. Conversely, a neighborhood in which violent crime is an everyday phenomenon could have significantly negative consequences, ranging from the tangible (injury or death) to intangible (anxiety or fear). Weber himself understood the importance of neighborhood, describing neighborhoods, *Nachbarschaftsgemeinschaft*, as the natural foundation of community and defining this as a group of households that help each other in times of distress.<sup>61</sup> Some of Weber's most famous writing on neighbors attempted to describe the "anatomy" of neighborhoods and class in turn-of-the-century Chicago.<sup>62</sup> Such neighborhoods, from a life chances perspective, are both an indication of and a determinant of class and status, and, therefore, of their residents' life chances.

In this way, life chances interacts with two more recent sociological terms: "neighborhood effects" and the "geography of opportunity." "Neighborhood effects" is a term that has been used to explain the effect of neighborhoods on a number of aspects of life from voting patterns to educational opportunities.<sup>63</sup> Neighborhood effects theory developed primarily based on sociology's interest in issues relating to criminal justice.<sup>64</sup>

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for mobility denied to African Americans. See SCAFF, *supra* note 33, at 107 (quoting GUNNER MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 952–53 (1944)).

60. See Alexander, *supra* note 48, at 825–28 (explaining varying conceptions of "social capital" including geographic based elements of social capital).

61. SWEDBERG & AGEVALL, *supra* note 49, at 223.

62. See SCAFF, *supra* note 33, at 42–48.

63. See Maarten van Ham & David Manley, *Neighbourhood effects research at a crossroads. Ten challenges for future research*, 44 *ENV'T AND PLAN. A: ECON. AND SPACE* 2787, 2787 (2012) (defining neighborhood effects as "the idea that living in more disadvantaged neighborhoods has a negative effect on residents' life chances over and above the effect of their individual characteristics.").

64. See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 32–39 (2012).

However, as sociologists have grappled with issues such as poverty, urban planning, and racial segregation, the study of the effect of neighborhoods on other aspects of life, and, therefore, on life chances, has grown.

While neighborhood effects typically focuses on the conditions within a particular neighborhood, the geography of opportunity analysis encompasses a broader view, looking at the location and even placement of resources within a region as a whole, including both city and suburb.<sup>65</sup> The term “geography of opportunity” seems to have been first used in a 1995 article “to refer to the various ways in which geography influences individuals’ opportunity and may even ‘modify the innate and acquired characteristics of participants . . . [and their] ability to plan and sacrifice for the future.’”<sup>66</sup> The authors of this article contended that both the social and economic conditions of individuals’ existence and their perceptions of these conditions affect individuals’ opportunities in life.<sup>67</sup> As used in studies about geography of opportunity, “opportunity” has been defined as “a situation or condition that places individuals in a position to be more likely to succeed or excel.”<sup>68</sup> These studies typically employ data to assign an index or score reflecting educational quality, access to transportation, employment opportunities, and other factors to certain areas.<sup>69</sup> Geography of opportunity analysis therefore focuses on the distribution of resources within and between communities.<sup>70</sup> For instance, “schools, doctors, jobs[,] and the like are unequally geographically distributed across a region, often clustered in areas of ‘high’ opportunity neighborhoods.”<sup>71</sup> Consequently, areas of isolation tend to be low-opportunity areas—areas where, as shown below, residents’ opportunities and life chances are adversely affected.

### 3. The Negative Consequences of Low-Opportunity Areas

The literature on the effects of certain neighborhoods on those within them has intensified in the past few decades.<sup>72</sup> The consequences of living in

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65. Theresa L. Osypuk and Dolores Acevedo-Garcia, *Beyond Individual Neighborhoods: A Geography of Opportunity Perspective for Understanding Racial/Ethnic Health Disparities*, HEALTH & PLACE, Nov. 2010, at 1113, 1113–23.

66. James E. Rosenbaum, Lisa Reynolds, & Stephanie DeLuca, *How Do Places Matter: The Geography of Opportunity, Self-efficacy, and a Look Inside the Black Box of Residential Mobility*, 17 HOUSING STUDIES 71, 71 (2002) (citing George C. Galster & Sean P. Killen, *The geography of metropolitan opportunity: A reconnaissance and conceptual framework*, 6 HOUSING POL’Y DEBATE 7, 9, 12 (1995)).

67. Rosenbaum, *et al.*, *supra* note 66, at 81.

68. GREENDOORS & THE OHIO STATE UNIV. KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, *THE GEOGRAPHY OF OPPORTUNITY IN AUSTIN AND HOW IT IS CHANGING* 6 (Aug. 2013), <https://perma.cc/BEW5-P72U>.

69. *Id.*

70. KIRWAN INSTITUTE, *supra* note 22, at 5.

71. *Id.*

72. van Ham & Manley, *supra* note 63 (“Over the last twenty-five years a vast body of literature has been published on neighborhood effects . . . .”); *see generally* Steven N.

impoverished areas have been well documented. Among other effects, living in an area of concentrated poverty has been found to be associated with individuals' higher levels of violence,<sup>73</sup> failure to finish secondary school,<sup>74</sup> health issues,<sup>75</sup> and teenage pregnancy.<sup>76</sup> Multiple explanations for the effect of neighborhoods abound.<sup>77</sup> The housing stock in low-income neighborhoods can be dilapidated and lead to health problems.<sup>78</sup> Lack of public investment can lead to an inadequate public education.<sup>79</sup> An environment with violent crime may expose residents to trauma and stress, forcing residents to focus on day-to-day survival. Lack of job opportunities can create a cycle of crime and unemployment exacerbated by the refusal of many employers to hire and landlords to rent to those who have been arrested or convicted of a crime.<sup>80</sup> Economic instability may lead to eviction, which as a public record, may lead to a lifetime of housing instability.<sup>81</sup> Such weak connections to the labor force or educational institutions narrow opportunities and play directly into the issue of life chances.<sup>82</sup> And finally, the very knowledge of the lack of opportunity may lead to depressed expectations and aspirations.

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Durlauf, Chapter 50, *Neighborhood Effects*, in HANDBOOK OF REGIONAL AND URBAN ECONOMICS, VOLUME 4 (V. Henderson & J.F. Thisse eds., 2004).

73. SAMPSON, *supra* note 64, at 19.

74. See SCAFF, *supra* note 33, at 34–36 (explaining Weber's views on education as affecting status); David J. Harding, *Counterfactual Models of Neighborhood Effects: The Effect of Neighborhood Poverty on Dropping Out and Teenage Pregnancy*, 109 AM. J. OF SOC. 676, 677 (2003).

75. See *infra* note 93.

76. Harding, *supra* note 74.

77. George C. Galster, *The Mechanism(s) of Neighborhood Effects Theory, Evidence, and Policy Implications* (February 23, 2010), <https://perma.cc/QCB7-K3WJ> (describing 15 different proposed linkages in the literature on this issue).

78. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 296–299 (2016); SHARON VANDIVERE, ET AL., *HOW HOUSING AFFECTS CHILD WELL-BEING, FUNDERS' NETWORK FOR SMART GROWTH AND LIVABLE COMMUNITIES* 9–12 (2006), <https://perma.cc/V579-GHJZ> (summarizing a wide range of research on this issues); Samiya A. Bashir, *Home is Where the Harm Is: Inadequate Housing as a Public Housing Crisis*, 92 AM. J. PUB. HEALTH 733, 733–738 (May 2002).

79. See VANDIVERE, *supra* note 78, at 16–17; David Schliecher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L. J. 78, 106–07 (2017).

80. See U.S. DEPT. OF HOUS. AND URBAN DEV., OFFICE OF GENERAL COUNSEL *GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS*, DEPT. 1–2 (April 4, 2016), <https://perma.cc/59U9-V8R7> (discussing the barriers facing those with conviction or arrest records); Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, 2015 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 1, 1, 12–13 (discussing how criminal records lead to housing barriers through landlord screening).

81. DESMOND, *supra* note 78, at 296–99.

82. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* 56–57 (1987).

Regardless of the reason, the effects of low opportunity areas are real and dramatic, and incredibly hard to escape.<sup>83</sup> Multiple examinations of the issue have found that neighborhoods, not just the individuals within them, are caught in reinforcing cycles that create durable inequality<sup>84</sup> and act upon individuals to limit their ability to escape such poverty traps.<sup>85</sup> This creates a type of “locked in syndrome”<sup>86</sup> in that upward mobility is not determined by individual characteristics,<sup>87</sup> but rather by the allocation of structural pathways out of poverty and its associated low-opportunity areas. Residents are locked into their neighborhoods and an individual’s selection of the neighborhood, rather than creating the neighborhood, may be seen as another effect of the neighborhood based both on lack of actual opportunity as well as reinforced perceptions.<sup>88</sup> Simply knowing that one is living in a low opportunity neighborhood impacts the ability to improve the neighborhood,<sup>89</sup>

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83. Eugene Birch, et al., *Preface to NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA* at xii (Birch, et al., eds. 2011) (explaining how “Residential location affects outcomes in many of the spheres of human experience that are critical in determining individual and household well-being, including health education and crime.”); see Sara Aronchick Solow, Note, *Racial Justice at Home: The Case for Opportunity Housing Vouchers*, 28 *YALE L. & POL’Y REV.* 481, 492–97 (2010) (explaining the negative effects of living in a low-opportunity area and the “exceptional immorality of racial ghettos”).

84. SAMPSON, *supra* note 64, at 98–99 (describing sociological and political analyses of the enduring inequality between neighborhoods).

85. *Id.*

86. *Id.* at 148 (discussing “how certain neighborhoods get locked into a social dynamic that generates further stigmatization, disorder, outmigration, crime civic withdraw, and eventually the deepening of poverty”).

87. *Id.* at 301 (finding little evidence of “Horatio Alger” type mobility based on individual exceptionalism). “To a surprising extent . . . mobility is not much influenced by individual or family characteristics . . .” *Id.* at 300. As should be clear from his life chances theory, Weber himself did not agree with the idea of an overarching individual self-determination, writing:

the better off person feels the never ceasing need for having the right to look upon his advantage as ‘legitimate,’ to consider his position as ‘merited’ and that of the other as somehow ‘self-inflicted’ and ‘deserved’ . . . Every highly privileged group develops the myth of its natural superiority, especially that of its blood . . . even the negatively privileged strata accept this myth.

*Burger, supra* note 44, at 313 (quoting Weber 1968:953–4, 1964:70–2).

88. SAMPSON, *supra* note 64, at 59 (explaining that even if were to find that neighborhoods themselves do not matter, individuals acts as if they do.)

89. DESMOND, *supra* note 78, at 181–82 (“Milwaukee renters who perceived higher levels of neighborhood trauma . . . were far less likely to believe that people in their community could come together to improve their lives.”).

or even to believe in the ability to move out of it.<sup>90</sup> As one article put it: “Horatio Alger lies dead in the streets of the inner-city.”<sup>91</sup>

In addition to neighborhood effects on adult health, which have been documented even after taking individual characteristics into account,<sup>92</sup> perhaps the most striking research in this area has been in the health and development of children in high-poverty neighborhoods.<sup>93</sup> Studies have found that children’s exposure to chronic or traumatic stress in the first two decades of life can have serious effects on brain development, which in turn influences future life chances.<sup>94</sup> Chronic stress in these years has been shown to be linked to more difficulty with emotion identification and regulation.<sup>95</sup>

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90. SAMPSON, *supra* note 64, at 308 (“[S]election bias is itself a form of neighborhood effect.”); Kenneth A. Stahl, *Mobility and Community in Urban Policy: An Essay on Great American City by Robert J. Sampson*, 46 URB. LAW. 625 (2014) (“[M]obility--the choice of whether and where to move--is strongly correlated with the characteristics of the origin neighborhood, and only weakly correlated with individual characteristics such as income or education.”).

91. George C. Galster & Sean P. Killen, *The geography of metropolitan opportunity: A reconnaissance and conceptual framework*, 6 HOUSING POL’Y DEBATE 7 (1995). The full quote continues: “For millions of Americans, the rags-to-riches fable has been reduced to ashes just as surely as many blocks in South Central Los Angeles and other desperate inner-city communities.” *Id.*

92. Florence Wagman Roisman, *A Place to Call Home? Affordable Housing Issues in America, Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 349 (2007); Robert Wood Johnson Foundation Commission to Build a Healthier America, Issue Brief 3, *Where We Live Matters for Our Health: Neighborhoods and Health* 4–5 (September 2008).

Many (but not all) studies have found relationships between neighborhood disadvantage and health even after considering individual characteristics—that is, the links do not appear to be due only to characteristics of the individuals themselves. For example, one study that compared heart disease among people living in different neighborhoods found that individuals who lived in the most socioeconomically disadvantaged neighborhoods were more likely to develop heart disease than socioeconomically similar individuals who lived in the most advantaged neighborhoods.”

Robert Wood Johnson Foundation, *supra* note 92, at 4.

93. Robert Wood Johnson Foundation, *supra* note 92, at 5.

94. Charles A. Nelson III & Margaret A. Sheridan, *Lessons from Neuroscience Research for Understanding Causal Links Between Family and Neighborhood Characteristics and Educational Outcomes*, in *WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* 27, 36, 38 (Greg J. Duncan & Richard J. Murnane eds. 2011) (“Exposure to low socioeconomic status appears to have a profound effect on health and achievement through childhood and adulthood.”).

95. Nelson & Sheridan, *supra* note 94, at 36. “Compelling evidence from a variety of studies suggests that early life stress constitutes a major risk factor for the development and persistence of mental disorders.” Christine Heim & Charles B. Nemeroff, *The Role of Childhood Trauma in the Neurobiology of Mood and Anxiety Disorders: Preclinical and Clinical Studies*, 49 BIOLOGICAL PSYCHIATRY 1023, 1023 (2001); Vincent J. Feletti, *Adverse Childhood Experiences and Adult Health*, 9 AMERICAN PEDIATRICS 131, 131 (2009)

For children, the very stress associated with being in a low socioeconomic area affects the development of brain structure and function.<sup>96</sup> Studies have argued a connection between this and lower executive function,<sup>97</sup> “the ability to suppress distractions at a neural level,”<sup>98</sup> IQ development,<sup>99</sup> verbal ability,<sup>100</sup> and emotional regulation.<sup>101</sup> In a conclusion to one essay summarizing this research, the authors rather chillingly conclude that these early differences are “etched into the structure of our brain.”<sup>102</sup> This is in addition to the health risks (such as lead poisoning) directly stemming from unsafe housing,<sup>103</sup> the learning deficits resulting from substandard schools,<sup>104</sup> the effect of neighborhood violence on the ability of students to perform on

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(“[W]hat happens in childhood—like a child’s footprints in wet cement—commonly lasts through life. Time does not heal; time conceals.”); *see generally* American Academy of Pediatrics, Policy Statement, *Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science Into Lifelong Health*, 129 PEDIATRICS e224 (January 2012) (explaining “toxic stress” and its consequences for children’s health).

96. Nelson & Sheridan, *supra* note 94, at 36–38.

97. *Id.* at 38. “Difficulties in executive function may manifest as differences in academic and job success, permanently altering the likelihood of successful labor-market competition.” *Id.* at 41.

98. *Id.* at 38.

99. Galster & Killen, *supra* note 91, at 29–30 (1995) (“IQs at age 5 were higher for children living with higher concentrations of affluent neighbors (people with incomes greater than \$30,000 yearly), even when the researchers controlled for family background.”).

100. Robert Sampson, et al., *Durable Effects of Concentrated Disadvantage on Verbal Ability Among African American Children*, 105 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE 845, 851–52 (2008) (finding “evidence that the neighborhood environment is an important developmental context for trajectories of verbal cognitive ability.”).

101. Nelson & Sheridan, *supra* note 94, at 36.

102. *Id.* at 41; Jack P. Shonkoff, et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232, e243 (2012) (“The lifelong costs of childhood toxic stress are enormous, as manifested in adverse impacts on learning, behavior, and health, and effective early childhood interventions provide critical opportunities to prevent these undesirable outcomes and generate large economic returns for all of society.”); Galster, *supra* note 77, at 14–15 (describing studies showing exposure to violence and stress to lead to higher rates of pregnancy, poorer pregnancy outcomes, poor educational outcomes, more aggressive behavior, and reduced social cognition).

103. *See supra* note 78, and accompanying text; Galster, *supra* note 77, at 15 (summarizing studies on the effect of environmental toxins).

104. VANDIVERE, *supra* note 78, at 16–17; Schliecher, *supra* note 79, at 106–107.

tests,<sup>105</sup> and the significant impact on self-worth that can impact children from living in areas of low opportunity.<sup>106</sup>

Even having shown the consequences of living in a low-opportunity area, such research would have no justifiable impact on loss of housing opportunity damages without showing that moves benefit such individuals or families' future opportunities. Studies on the long-term effects of housing mobility to areas of opportunity have shown promising results.

#### 4. The Benefits of Moving to Higher-Opportunity Areas

Considering the impact of living in low-opportunity areas, governments have experimented, albeit on a small scale, with initiatives to increase housing mobility for those receiving public housing assistance. Probably the most famous example of geography of opportunity-based policy is the Department of Housing and Urban Development's Moving to Opportunity ("MTO") program. In this 1990s program, families in five U.S. cities living in low-opportunity census tracts, were divided into three groups.<sup>107</sup> One group received no assistance from the program, another received regular housing choice vouchers, and the third experimental group received housing choice vouchers they could initially only use in census tracts with poverty below 10%.<sup>108</sup>

While the overall policy outcomes of this program are still being debated and arguments exist that the program had flaws,<sup>109</sup> recent studies

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105. Sharkey, et al., *High Stakes in the Classroom, High Stakes on the Street: The Effects of Community Violence on Students' Standardized Test Performance*, 1 SOCIOLOGICAL SCIENCE 199, 200 (2014) ("Results from an array of models indicate that students who live on blockfaces where violent crimes occur just before a standardized test perform significantly worse on English language arts (ELA) assessments than students who live on blockfaces where violent crimes occur just after the exam."); see Paul Jargowsky & Mohamed El Komi, *Before or After the Bell? School Context and Neighborhood Effects on Student Achievement*, in NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA 52 (Birch, et al. eds. 2011) ("[S]ubstantial evidence exists in the literature for a neighborhood effect on achievement.").

106. DESMOND, *supra* note 78, at 298.

107. See XAVIER DE SOUZA BRIGGS, SUSAN J. POPKIN, & JOHN GOERING, *MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT GHETTO POVERTY* 44–66 (2010) (giving a detailed description of the creation and implementation of the Moving to Opportunity program in Baltimore, Boston, Chicago, New York, Los Angeles). In a rather apt description of most government programs, this chapter is entitled "Great Expectations and Muddling Through." *Id.*

108. Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment* 6 (Aug. 2015), <https://perma.cc/H8DU-HHP8>.

109. See William Joseph Wilson, *Reflections on Culture and Poverty: Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty*, 629 ANNALS AM. ACAD. OF POL. & SOC. SCI. 200, 207-209 (2010) (discussing some of the ways the Moving to Opportunity program was inadequate); Thomas B. Edsall, Opinion, *Does Moving Poor People Work?*, N.Y. TIMES (September 16, 2014), <https://perma.cc/8RH3-RJLE> (describing



describe a significant impact on children's future education and earnings.<sup>110</sup> These studies consistently found that moving to different areas had a positive effect on a child's future earnings, especially for children under thirteen at the time of the move.<sup>111</sup> For children with an average age of eight at the time of the move, their future lifetime earnings increased by over \$300,000.<sup>112</sup> Such increases in future earning may of course be linked to better education, and better school quality in higher-opportunity neighborhoods. However, it has also been shown that other factors related to the neighborhood differences are important—one study of MTO found that the children who experienced the largest boost in standardized test scores were those whose moves created the greatest changes in exposure to community violence.<sup>113</sup> In addition, both mental and physical health outcomes were found to be significantly improved by these moves.<sup>114</sup> Large reductions in anxiety and depression occurred among parents and women participating in the program, and participants were found to have decreased levels of risk behavior and mental health issues.<sup>115</sup>

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flaws in the Moving to Opportunity program that indicate it did not create dramatic enough moves while also describing research showing that location does matter).

110. Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects* 35 (2017), available at <https://perma.cc/ERS6-6EJ2> (Dec. 2017) (“[C]hildren’s opportunities for economic mobility are shaped by the neighborhoods in which they grow up. Neighborhoods affect children’s long-term outcomes through childhood exposure effects: every extra year a child spends growing up in an area where permanent residents’ incomes are higher increases his or her income.”); Chetty, *supra* note 108, at Abstract (first page after the abstract is 1) (“[M]oving to a lower-poverty neighborhood significantly improves college attendance rates and earnings for children who were young. . . . [O]ffering vouchers to move to lower-poverty neighborhoods to families with young children who are living in high-poverty housing projects may reduce the intergenerational persistence of poverty and ultimately generate positive returns for taxpayers.”).

111. Chetty, *supra* note 108, at 23; Stacy Seicshnaydre, *Missed Opportunity: Furthering Housing Opportunity in the Housing Choice Voucher Program*, 79 L. AND CONTEMP. PROB. 173, 180 (2016).

112. Chetty, *supra* note 108, at 5.

113. Sharkey, *supra* note 105, at 201.

114. Chetty, *supra* note 108, at 1; see George C. Galster, Policy Research Brief: *How Neighborhoods Affect Health, Well-being, and Young People’s Futures*, MACARTHUR FOUNDATION, p. 2 (March 2014) (“The clearest effect of neighborhoods on outcomes is in their impact on health. There is a direct line from exposure to violence to psychological consequences. Likewise, there is a clear line between neighborhood environmental pollutants and poor health.”); Durlauf, *supra* note 72, at 2222–23 (describing the results of MTO); See Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 No. S1 SOC. F., no. S1, at 572–74 (June 2015); see also Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW. J. L. & SOC. POL’Y 25, 45 (2006); see also Janet Currie, *Health and Residential Location*, in NEIGHBORHOOD AND LIFE CHANCES 17 (Birch, et al. eds. 2011) (“[T]he experimental MTO evaluation suggests that moving poor people to better neighborhoods can have important effects on health . . . .”)

115. Chetty, *supra* note 108, at 1; Briggs, et al., *supra* note 107, at 14; see also James Rosenbaum & Stephanie DeLuca, Symposium: The Fair Housing Act after 40 Years:

One of the bases for the MTO program was the result of *Gautreaux v. Chicago Housing Authority*.<sup>116</sup> This 1966 litigation against the Chicago Housing Authority alleged intentional racial discrimination in the selection of public housing sites.<sup>117</sup> After a long and storied litigation over the appropriate remedy,<sup>118</sup> the court ordered that the housing authority create a program moving public housing residents, or those on a public housing waiting list, from one of the lowest opportunity neighborhoods in Chicago to racially diverse areas of the suburbs or city.<sup>119</sup> Studies of the *Gautreaux* order found that moving to a higher level of opportunity affected not just the resources available to individuals but also the belief that individuals could use these resources to better themselves.<sup>120</sup> In other words, both reality and perception changed for many residents moving to a different area.<sup>121</sup> Actual gains were found years later in children's educational attainment,<sup>122</sup> adult employment,<sup>123</sup> and reduction in the receipt of public benefits.<sup>124</sup> *Gautreaux* studies have found that these moves also broke the "lock-in" syndrome

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Continuing the Mission to Eliminate Housing Discrimination and Segregation: *What Kind of Neighborhoods Change Lives? The Chicago Gautreaux Housing Program and Recent Mobility PROGRAMS*, 41 IND. L. REV. 653, 661 (2008) (describing a decrease in depression and anxiety for mothers and daughters). This reduction in anxiety may be connected to gains in perceived safety. See Briggs & Turner, *supra* note 114, at 44–45.

116. *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 909 (N.D. Ill. 1969).

117. *Id.* at 913–14.

118. See generally ALEXANDER POLIKOFF, *WAITING FOR GAUTREAUX* (2006) (giving a blow-by-blow account of the various motions, legal maneuvers, and court orders involved in the litigation).

119. Rosenbaum, *supra* note 66, at 73; Roisman, *supra* note 92, at 346–47.

120. See generally Rosenbaum, *supra* note 66.

121. *Id.*

122. Durlauf, *supra* note 72, at 2220–21 (showing that 54 percent of *Gautreaux* children who moved to the suburbs attended college compared to 21 percent of those who stayed in the city); Engel, *supra* note 9. (stating the comparative percentages at 27 to four percent for enrollment at four year colleges or universities) (citing James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education and Social Integration for Low-Income Blacks?*, in RACE, POVERTY AND AMERICAN CITIES 273, 283 (John Charles Boger & Judith Welch Wegner eds., 1996). Children who were in the suburbs had a drop-out rate fifteen percent lower than that of their city counterparts, were almost seven times more likely to attend college, and even when they did not attend college had higher wages and benefits. *Id.*

123. Roisman, *supra* note 92, at 347 (citing James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education and Social Integration for Low-Income Blacks?*, 71 N.C. L. REV. 1519, 1582 (1993); Adults who moved to high opportunity suburbs were 25 percent more likely to have jobs than those whose moves kept them in the city. Engel, *supra* note 9, at 1158 (citing James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education and Social Integration for Low-Income Blacks?*, in RACE, POVERTY AND AMERICAN CITIES 273, 280 (John Charles Boger & Judith Welch Wegner eds., 1996).

124. JAMES E. ROSENBAUM & STEFANIE DELUCA, *Is Housing Mobility the Key to Welfare Reform? Lessons from Chicago's Gautreaux Program*, THE BROOKINGS INSTITUTE: CTR. ON URBAN MOBILITY & METRO. POL'Y, SURVEY SERIES 4–5 (September 2000); Seicshnaydre, *supra* note 111.

described above, achieving “intergenerational residential success.”<sup>125</sup> In other words, children who moved to areas of higher opportunity continued to reside in such areas up to twenty-two years later.<sup>126</sup> Other studies of placing affordable housing in high-opportunity areas in Yonkers, New York; Mount Laurel, New Jersey; and Baltimore, Maryland, have found similar gains in education and employment.<sup>127</sup> Indeed, recent research argues that MTO research understated the impact of moving.<sup>128</sup> One study has shown that the demolition of certain Chicago public housing projects, forcing residents with children from some of the most disadvantaged neighborhoods in the city, led to a 16% increase in the annual earnings of children who left compared to those children whose developments were not demolished.<sup>129</sup>

As the research cited above shows, the places where people live directly affect their ability to obtain education, earn and grow wealth, and meet basic human needs for themselves and their families.<sup>130</sup> While these effects are pronounced and dramatic among younger children, scholarship has demonstrated that even adults can be profoundly affected by a change in their neighborhood circumstances. Such differences in neighborhood, and in individuals’ resulting life chances, should have an impact on damages under the Fair Housing Act.

## B. Fair Housing Act Background

In analyzing the enactment of the Fair Housing Act, it is clear that a primary purpose of the Act was to increase residential mobility so as to improve access to opportunities such as transportation, education, and

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125. Greg J. Duncan & Anita Zuberi, *Mobility Lessons from Gautreaux and Moving to Opportunity*, 1 NW. J. L. & SOC. POL’Y 110, 113–14 (2006).

126. *Id.*

127. Massey, *supra* note 114, at 584 (describing a New Jersey suburb where affordable housing residents experienced a 22% increase in employment, a 25% increase in family income, and “increased their economic independence three-and-a-half times.”); Solow, *supra* note 83, at 509–10 (citing a study of a housing decree in Yonkers, New York, that found that adults who moved to a high-income area had better employment prospects and were less likely to receive welfare); see Stefanie DeLuca & Peter Rosenblatt, *Walking Away From The Wire: Housing Mobility and Neighborhood Opportunity in Baltimore*, HOUSING POLICY DEBATE, 27:4, 519, 537 (2017) (describing improvements in neighborhood and school changes for participants and predicting an impact greater than MTO although not yet being able to draw long-term conclusions on the impact on families).

128. Justin Wolfers, *Growing Up In a Bad Neighborhood Does More Harm Than We Thought*, N.Y. TIMES, March 26, 2016, at BUS3. This article discusses the dissertation, *Moved to Opportunity: The Long-Run Effect of Public Housing Demolition on Labor Market Outcomes of Children*, by Eric Chyn. This article is forthcoming at the American Economic Review, but is currently available at <https://perma.cc/SB9F-BBL8> (last visited July 11, 2018).

129. *Id.*

130. Stahl, *supra* note 90 (“Impressive data . . . demonstrate[s] that individual life chances are profoundly affected by the character of the neighborhoods in which people live.”).

employment. However, it also becomes clear that the current model of damages in enforcement cases, typically limited to out-of-pocket expenses and emotional distress, has not addressed the true effects of a lost housing opportunity.

#### 1. Brief Overview of the History and Purpose of the Fair Housing Act

In understanding the purpose of the Act, it is important to recognize the atmosphere in which it was finally passed. The previous year, in 1967, Dr. Martin Luther King's open housing movement in Chicago had crashed and receded in face of northern bigotry and violent counter-protests.<sup>131</sup> Riots tore through American cities, and the Kerner Commission Report ("Kerner Report") had warned of "two societies, one black, one white—separate and unequal."<sup>132</sup> Fair housing marches in Milwaukee made national headlines and drew attention to the issue.<sup>133</sup> These circumstances led to a renewed push for civil rights legislation. While the Civil Rights Act of 1964 focused on voting, employment, and schools, the issue of housing, and its direct role in segregation, had not been addressed.<sup>134</sup>

While a federal law tackling discrimination in housing had been long sought, these efforts had been stymied in Congress.<sup>135</sup> Walter Mondale, a freshman Senator from Minnesota and author of the original bill that would become the Fair Housing Act, described the Act as the most filibustered bill

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131. THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY, THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 414–22 (2008); *see generally* Leonard S. Rubinowitz & Kathryn Shelton, Symposium, *The Fair Housing Act after 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation: Non-Violent Direct Action and the Legislative Process: The Chicago Freedom Movement and the Federal Fair Housing Act*, 41 *IND. L. REV.* 663, 684–705 (discussing the positive and negative impacts that the Open Housing movement in Chicago may have had on the drive for federal fair housing legislation); *see also* TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68* 511 (2006) (quoting Martin Luther King, Jr. as stating, "I have never in my life seen such hate . . . [n]ot in Mississippi or Alabama. This is a terrible thing.").

132. SUGRUE, *supra* note 131, at 324–34 (describing these riots); OTTO KERNER, *NAT'L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1* (1968).

133. *See generally* PATRICK D. JONES, *THE SELMA OF THE NORTH* 169–209 (2009) (describing the 200 consecutive nights of marching for open housing in Milwaukee beginning in 1967 and ending in 1968). Milwaukee activist Ben Barken was thanked by President Johnson for the contribution the Milwaukee marches had on the passage of the Fair Housing Act. *Id.* at 208.

134. *See* 42 U.S.C. § 2000e, et seq.; *see generally* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History, New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 *U. PA. L. REV.* 1417, 1452–79 (2003) (providing a history of the 1964 Act and interpreting the political motivations of the politicians involved).

135. Jonathan Zasloff, *The Secret History of the Fair Housing Act*, 53 *HARV. J. ON LEGIS.* 247, 254–60 (2016); *see also* Hon. Charles McC. Mathias, Jr. & Marion Morris, *Fair Housing Legislation: Not as Easy Row to Hoe*, *CITYSCAPE, HUD OFFICE OF POLICY DEVELOPMENT AND RESEARCH*, Vol. 4, No. 3, at 25–26 (1999).

in history.<sup>136</sup> The Act's passage is often associated with the assassination of Dr. King—Dr. King was assassinated less than a week before Congress voted to pass the Act, and President Lyndon Johnson signed the bill into law exactly one week after the assassination.<sup>137</sup> Even with the national attention to this problem and the assassination of Dr. King, the Act's passage still faced many obstacles, and, according to at least one scholar, was passed due to a backroom deal whereby President Johnson agreed not to support a strong Democratic challenger to the Republican Senate Minority Leader, Everett Dirken of Illinois.<sup>138</sup>

Despite the compromises necessary to ensure passage,<sup>139</sup> the Act was a significant piece of legislation. Many explanations of the Act treat it as a mere codification of civil offenses, and this codification was one important aspect of the Act. The Act prohibited a wide range of discriminatory conduct, including the refusal to rent or sell, or otherwise make housing unavailable on the basis of certain protected classes.<sup>140</sup> It also prohibited discrimination in real estate transactions, including in the terms and conditions of financing.<sup>141</sup> Housing providers were prohibited from imposing different terms and conditions on buyers or renters based on protected class membership,<sup>142</sup> from making discriminatory statements, publishing discriminatory advertisements, or indicating a preference for or against those protected classes;<sup>143</sup> and from retaliating against, coercing, or interfering with those asserting rights under the Act.<sup>144</sup> In addition to its legal prohibitions on private discrimination, the Act included language interpreted to require the Department of Housing and Urban Development (HUD), its grantees, and all federal departments and agencies to “affirmatively further fair housing.”<sup>145</sup>

Through categorizing these civil offenses, the Act intended to address documented societal imbalances caused by both public and private

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136. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA, (June 25, 2015, 1:26 PM), <https://perma.cc/LZ4U-7NEA>.

137. Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U.L. REV. 2182, 2183 (2013); see also Mathias & Morris, *supra* note 135, at 25–26 (1999).

138. Zasloff, *supra* note 135, at 266–71; see Mathias & Morris, *supra* note 135 (giving a more traditional history of the reasons why the Senate Republican Leader Dirksen changed his mind on the bill).

139. Zasloff, *supra* note 135, at 271–76.

140. 42 U.S.C. § 3604(a) (1968) (prohibiting these actions on the basis of race, color, religion, sex, familial status, or national origin); 42 U.S.C. § 3604(f)(1) (applying § 3604(a)'s prohibition to the disabled).

141. 42 U.S.C. § 3605(a-b) (1968).

142. 42 U.S.C. § 3604(b) (1968).

143. 42 U.S.C. § 3604(c) (1968).

144. 42 U.S.C. § 3617 (1968).

145. 42 U.S.C. § 3608(d) (1968); see *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271–42371 (July 16, 2015); see also Roisman, *supra* note 92, at 360–68 (explaining the history and interpretations of affirmatively furthering fair housing).

discrimination in housing,<sup>146</sup> but more than merely making discrimination a civil offense, the Act intended to create an integrated society.<sup>147</sup> There was an understanding at the time, displayed in the Kerner Report of 1968, that this segregation could be traced back to a lack of geographic mobility.<sup>148</sup> The Kerner Report recognized the importance of the “spatial mismatch” between where African Americans were forced to live and areas where jobs and other opportunities existed.<sup>149</sup> This led to the final recommendation of the Kerner Report: programs intended to increase the ability of African Americans to escape the “ghetto.”<sup>150</sup> While the report also suggested greater investments in public<sup>151</sup> and subsidized housing,<sup>152</sup> the report emphasized the siting of such housing in areas of opportunity<sup>153</sup> and the need for a federal law

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146. See Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 No. S1 Soc. F., no. S1, at 572–74 (June 2015) (describing both private and governmental segregation leading up to the Fair Housing Act); Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 576–81 (2016) (describing federal and local complicity in segregation); Tex. Dept of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, 135 S. Ct. 2507, 2515–16 (2015) (describing discriminatory conduct, “sometimes with government support” that resulted in segregation); see ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960* 1–39 (1998) (describing the creation and segregation in Chicago public housing); see IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 53–67 (2006) (describing the discriminatory basis on many New Deal federal programs); see generally ANTERO PIETILA, *NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY* (2010) (describing the Federal Housing Administration’s redlining that was a significant factor, along with private discrimination, in creating depressed rates of African American homeownership);

147. See Massey, *supra* note 114, at 571 (describing the hope that outlawing discrimination would desegregate the country); Mathias & Morris, *supra* note 135, at 26 (describing the passage of the Act as promoting racial integration and housing choice); King, *supra* note 137, at 2183–84 (describing the purpose of the Act as “eliminating systemic segregation”); David A. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFFALO L. REV. 5, 8 (describing how while the Act was intended to address both discrimination and segregation, discrimination has emerged as dominant); see *Trafficante v. Metropolitan Life Insurance Co.* 409 U.S. 205, 211 (1972) (quoting Mondale that the goal was to create “truly integrated and balanced living patterns.”).

148. KERNER, *supra* note 132, at 406 (arguing that geographic integration outside the “ghetto” would provide more job opportunities, educational opportunities to segregated minority groups).

149. John Charles Boger, Symposium: The Urban Crisis: *The Kerner Commission Report Revisited: Race and the American City: The Kerner Commission in Retrospect — An Introduction*, 71 N.C.L. REV. 1289, 1317 (1993); see KERNER, *supra* note 132, at 392–93.

150. See generally KERNER, *supra* note 132, at 467–482. While the Kerner Report recommended what we now think of as far-reaching solutions such as massive investment and federal legislation, these recommendations were not the most radical possible, but were tempered by disagreement within the Commission. Tom Wicker, *Introduction* to OTTO KERNER, NAT’L ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, at v, vii (1968) (describing how the recommendation for open housing legislation was softened in response to one member who “kept asking, ‘can’t a man sell his own house to whomever he pleases?’”).

151. KERNER, *supra* note 132, at 475–76.

152. *Id.* at 476–78.

153. *Id.* at 481–82.

addressing housing discrimination.<sup>154</sup> In making these recommendations, the Kerner Report explicitly acknowledged the need for housing mobility to increase the mobility opportunities available to minorities, choosing to focus primarily on integration through mobility, rather than focusing on investing in segregated communities.<sup>155</sup> It was in the light of this background and the Kerner Report's recommendations that the Fair Housing Act's goals of eliminating impediments to mobility and integration were conceived.

## 2. Shortcomings of the Traditional Liability Model under the Fair Housing Act.

The traditional liability model developed for fair housing damages ignores, for the most part, any broad societal objective of the Fair Housing Act, and does not display any recognition of how the effects of discrimination are far-reaching and intransigent. Although the damages awarded in Fair Housing Act cases are often for a mobility-related violation, such as the refusal to rent or sell, the damages awarded do not acknowledge the centrality of mobility to the Act. While agencies and courts have, over the past two decades, recognized greater damages for emotional distress in housing cases, lost housing opportunity is not always pled as damages and only sporadically results in significant awards.<sup>156</sup> Instead, the traditional liability model focuses on repaying a victim for quantifiable damages, without a look at potential future effect of the discriminatory act. Yet, it is only by considering the effect of discriminatory acts on a person's life chances that we can provide adequate compensation for the pervasive effect of housing discrimination on individuals.

In attempting to further the Fair Housing Act's broad purpose, attorneys and academics have looked at a variety of options. The recognition of disparate impact litigation by the Supreme Court in 2016<sup>157</sup> may be used in some circumstances to increase mobility opportunities by expanding

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154. *Id.* at 481 (recommending a "national, comprehensive and enforceable open—occupancy law").

155. *Id.* at 395–08, 481–82 (describing the Kerner Report's "The Present Policies Choice, The Enrichment Choice, and the Integration Choice" and the need for African-Americans to be able to obtain housing outside of low opportunity areas); Boger, *supra* note 149, at 1302–04 (explaining that the report forcefully argued for the integration choice). In the years since the original passage of the Fair Housing Act, these concerns regarding segregation have also been recognized in other areas, most dramatically regarding the segregation of the disabled. *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 599–01 (1999) (describing the prohibition of segregation of the disabled in both the Americans with Disabilities Act and the Rehabilitation Act); see generally John V. Jacobi, *Federal Power, Segregation, and Mental Disability*, 39 HOUS. L. REV. 1231, 1268–97 (2003) (arguing that the Americans with Disabilities Act's integrationist goals can best be achieved through legislation under Congress's spending power).

156. See *infra* Part II.A; see also Heifetz & Heinz, *supra* note 6, at 25–26.

157. Inclusive Cmty., 135 S. Ct. at 2525 (recognizing discriminatory effects under the Fair Housing Act).

affordable housing to high opportunity areas or by increasing the availability of non-predatory mortgage options.<sup>158</sup> In addition, HUD's 2015 rule on Affirmatively Furthering Fair Housing may be used to require communities receiving federal funds to recognize and address segregation and access to opportunity in their jurisdiction.<sup>159</sup> However, today, the Fair Housing Act is still primarily a tool for enforcement in individual cases. It is in these cases that recognition of loss of housing opportunity can provide a more meaningful remedy for individuals. A loss of housing opportunity remedy could assist in addressing the real consequences of a discriminatory denial of housing, and might even lead to transformative changes.<sup>160</sup>

## II. USE OF LIFE CHANCES UNDER THE FAIR HOUSING ACT

The preceding sections have discussed Max Weber's life chances theory and how it connects with more current scholarship regarding neighborhood effects and the geography of opportunity. This discussion is clearly relevant to multiple areas of housing policy, such as the siting of affordable housing developments and fair housing compliance issues.<sup>161</sup> However, even an individual discriminatory act that denies housing in a higher opportunity area is a significant event that can have serious, long-lasting consequences. The remainder of this article focuses on the application of the life chances doctrine to how a discriminatory denial of housing in a higher opportunity area, and its consequent impact on life chances, can be translated into damages that justly compensate plaintiffs.

### A. The Development of Lost Housing Opportunity Damages

One of the challenges facing fair housing enforcement advocates is the lack of substantial damage awards. Most approaches to this problem have argued that increased damages for emotional distress are necessary and that

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158. See generally Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion after Inclusive Communities*, 24 GEO. MASON L. REV. 663, 683–91 (2017) (discussing the effect of disparate impact liability on siting of affordable housing); see also Alex Gano, Comment, *Disparate Impact and Mortgage Lending: A Beginners Guide*, 88 U. COLO. L. REV. 1109, 1133–64 (2017) (discussing the effect of history and future of disparate impact theories on mortgage lending).

159. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42271–42371; see Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFFALO L. REV. 163, 174–195 (2017) (analyzing HUD's final rule on affirmatively furthering fair housing); see generally Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1215–33 (2011) (discussing the importance of affirmatively furthering rule and how it has been applied prior to the HUD regulation).

160. See *infra* Part II.D.

161. See generally Andrea J. Boyack Symposium, Side by Side, *Revitalizing Urban Cores and Ensuring Residential Diversity*, 92 CHL.-KENT L. REV. 435, 438–48 (discussing the impact of affordable housing citing on minority opportunities).



punitive damages should be more readily available.<sup>162</sup> In this discussion, the potential for an expanded view of lost housing opportunity damages has been overlooked.

The research cited above shows the importance of location in providing opportunities for individuals and the significant impact a discriminatory denial of housing may have. However, cases have rarely treated loss of housing opportunity as more than a mere afterthought in terms of damages. Cases awarding significant damages for loss of housing opportunity are rare and few have been published.

The first published fair housing case to use the phrase “loss of housing opportunity” was in *HUD v. Denton*, a case before a HUD Administrative Law Judge (“ALJ”), in November 2011.<sup>163</sup> In this case, while finding liability and awarding other damages, the Administrative Law Judge did not award damages for the loss of housing opportunity, stating in a footnote: “The Secretary has also sought an award for ‘lost housing opportunity,’ but it is not clear from the brief whether damages are sought for economic loss, loss of civil rights or any other loss not included in the damage claim for inconvenience or emotional distress.”<sup>164</sup>

Only a few weeks later however, another HUD ALJ issued a decision in *HUD v. Holiday Manor Estates Club, Inc.* and awarded \$500 to Complainants because they stayed at a shelter for one week before moving into alternate housing.<sup>165</sup> In December of 1991, an ALJ awarded HUD’s full request of \$2,500 in loss of housing opportunity damages, although the analysis of these damages appears to follow a deprivation of civil rights analysis as much as a loss of housing opportunity analysis.<sup>166</sup> Other opinions

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162. See generally, e.g., Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 HARV. C.R.-C.L. L. REV. 279, 311–41 (2001) (regarding the availability of punitive damages in Fair Housing Act cases); see also Victor M. Goode & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases, a New Look at a Lingering Problem*, 30 FORDHAM URB. L.J. 1143, 1150–63 (2003) (regarding the availability of emotional distress damages in Fair Housing Act cases).

163. *HUD v. Denton*, Fair Housing-Fair Lending (P-H) ¶ 25, 014, (HUDALJ Nov. 12, 1991). HUD accepts complaints filed by individuals and organizations under the Fair Housing Act. 24 C.F.R. §§ 103.19, 103.30 (2017). If HUD charges Respondents with a violation of the Act, the case proceeds to a hearing before a HUD Administrative Law Judge, unless either party elects to take the case to federal court. 24 C.F.R. §§ 103.400–103.410 (2017).

164. *HUD v. Denton*, Fair Housing-Fair Lending (P-H) ¶ 25, 17 (HUDALJ Nov. 12, 1991).

165. *HUD v. Holiday Manor Estates Club*, Fair Housing-Fair Lending (P-H) ¶ 25, 24–26 (HUDALJ Nov. 26, 1991).

166. *HUD v. Jeffre*, Fair Housing-Fair Lending (P-H) ¶ 25, 14–15 (HUDALJ Dec. 12, 1991). Other opinions by this same Administrative Judge built on the deprivation of civil rights framework while mixing this with the language of loss of housing opportunity. See *HUD v. Frisbie*, Fair Housing-Fair Lending (P-H) ¶ 25, 11–12 (HUDALJ May 6, 1992) (also awarding \$2,500). This analysis seems to have met its end in *HUD v. Dibari*, in which this ALJ explained that the Supreme Court held that a maximum of \$1 could be awarded

from this time combine the issue of lost housing opportunity with emotional distress damages,<sup>167</sup> or acknowledge the request for loss of housing opportunities but, like *Denton*, deny the request for failure to explain the damages more specifically.<sup>168</sup>

Years after such damages were first awarded, attorneys and ALJs still struggled to fully apply the concept of loss of housing opportunity. For instance, in *HUD (Hughes) v. Colber*, Complainant was awarded \$500 for inconvenience and loss of housing opportunity as the sought after unit was closer to her mother's house and the denial led to an extra two months of searching for a home.<sup>169</sup> Once again, here, loss of housing opportunity damages, while discussed, was combined with other damages, and only resulted in a nominal award.<sup>170</sup> Similarly, in *HUD (Bad Horse) v. Carlson*, only \$750 was awarded for combined emotional distress, inconvenience, and loss of housing opportunity damages.<sup>171</sup>

In 1995, in the first significant damage award for loss of housing opportunity, Complainants were awarded \$5,000 for loss of housing opportunity in *HUD (Turner) v. French*.<sup>172</sup> These damages were awarded primarily as the preferred housing's neighborhood was "nicer and safer."<sup>173</sup> While the ALJ mentioned that the preferred housing was closer to Complainant's child care and a pre-school program, these considerations were obviated by the Complainant's testimony that her dissatisfaction was primarily based on the "nicer and safer" aspects of the sought after neighborhood rather than these other issues.<sup>174</sup> The great majority of damages in the case were based on lost housing opportunity, as the total damage award was \$7,897.<sup>175</sup> While the overall damages were still low, this case stands as

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based on the subjective view of the importance of the violation of a right. Fair Housing-Fair Lending (P-H) ¶ 25, 15–16 (HUDALJ Sept. 23, 1992) (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986)); *HUD v. Bangs*, Fair Housing-Fair Lending (P-H) ¶ 25, 23–24 (HUDALJ Jan. 5, 1993); see also Heifetz & Heinz, *supra* note 6, at 25–27 (describing issues with claiming damages based on a loss of abstract rights).

167. *HUD v. Kelly*, Fair Housing-Fair Lending (P-H) ¶ 25, 18 (HUDALJ Aug. 26, 1992); *HUD v. Lashley*, Fair Housing-Fair Lending (P-H) ¶ 25, 7 (HUDALJ Dec. 7, 1992); *HUD v. Sams*, Fair Housing-Fair Lending (P-H) ¶ 25, 12–13 (HUDALJ Mar. 11, 1994).

168. *HUD v. Harris*, HUDALJ 07-91-0055-1, 1992 HUD ALJ LEXIS 67, at \*30 (August 27, 1992).

169. *HUD v. Colber*, Fair Housing-Fair Lending (P-H) ¶ 25, 096 (HUDALJ Feb. 9, 1995).

170. *Id.*

171. *HUD v. Carlson*, Fair Housing-Fair Lending (P-H) ¶ 25, 132 (HUDALJ June 12, 1995); see also *HUD v. Pheasant Ridge Assocs.*, Fair Housing-Fair Lending (P-H) ¶ 25, 123 (HUDALJ Oct. 25, 1996) (similarly combining types of damages into a lump sum award of \$30,148).

172. *HUD v. French*, HUDALJ 09-93-1710-8, 1995 HUD ALJ LEXIS, \*1, at \*41–42 (Sept. 12, 1995).

173. *Id.* at \*42.

174. *Id.* at \*41–42.

175. *Id.* at \*51.

one of the earlier fleshed-out analyses of loss of housing opportunity damages by any court.

*French* was followed by a Fourth Circuit decision accepting the idea of loss of housing opportunity in fair housing cases. In *Sams v. HUD*, a federal appeals court upheld a HUD ALJ's award of loss of housing opportunity damages, albeit combined with emotional distress damages.<sup>176</sup> The Fourth Circuit held that the judge did not err in finding that the house sought by Complainants "provided more space, more safety, was more amenable to home schooling of the children, was closer to church and other activities, and provided a more stable neighborhood."<sup>177</sup> The court concluded that "[t]he ALJ's conclusion that the [plaintiffs] must be compensated for the loss of housing in an ideal environment is clearly supported by the record."<sup>178</sup> Shortly thereafter, both the Sixth and the Eleventh Circuit, acknowledged ALJ's lost housing opportunity awards in reviews of ALJ decisions.<sup>179</sup>

Despite loss of housing opportunity damages becoming more accepted in the mid-1990s, the next ALJ decision to award damages was in 2008, when \$15,000 in loss of housing damages was awarded in *HUD (Bracken) v. Fung*.<sup>180</sup> In this case, the ALJ found the timing and location of the housing opportunity to be "perfect" for Complainant.<sup>181</sup> In addition, the ALJ expanded this basic view of lost housing opportunity to also take into account that the Complainant's "likely choice of a place to work and live during her professional career was affected by her discriminatory experience."<sup>182</sup> This statement is one of the first indications of a court taking a broader view of lost housing opportunity damages by referring to the effect on plaintiff's future opportunities.

The next case to deal extensively with loss of housing opportunity damages was *HUD (Potter) v. Morgan*.<sup>183</sup> In this case, the Secretary of HUD overturned an award of \$750 in intangible damages and awarded \$15,000.<sup>184</sup> While the order did not expressly specify how much was for loss of housing opportunity as opposed to other intangible damages, it did acknowledge that loss of housing opportunity was a separate form of damages from other

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176. *Sams v. U.S. Dep't of Hous. & Urban Dev.*, 1996 U.S. App. LEXIS 449, \*1, at \*12-13 (4th Cir. Jan. 16, 1996).

177. *Id.* at \*12.

178. *Id.*

179. *Banai v. Sec'y, U.S. Dep't of Hous. & Urban Dev.*, 102 F.3d 1203, 1208 (11th Cir. 1997) (upholding lost housing opportunity damages where the sought-after housing was closer to needed medical treatment); *Kelly v. Sec'y U.S. Dep't of Hous. & Urban Dev.*, 97 F.3d 118, 121 (6th Cir. 1996) (reducing an award for emotional distress and lost housing opportunity).

180. *HUD v. Fung*, HUDALJ 07-053-FH, 2008 HUD ALJ LEXIS 46, \*1, at \*40-44 (Jan. 31, 2008).

181. *Id.* at \*41.

182. *Id.* at \*43-44.

183. *See HUD v. Morgan*, HUDALJ 11-F-090-FH-49, 2012 HUD ALJ LEXIS 33 (Oct. 26, 2012).

184. *Id.* at \*27-28.

intangible damages, and discussed the loss of educational opportunities that would have come with the preferred housing.<sup>185</sup>

Most recently, in *HUD (Brown) v. Saari*,<sup>186</sup> the ALJ discussed loss of housing opportunity damages. Here, while acknowledging that Complainants showed evidence of “the ideal nature of the lost housing opportunity and the inconvenience and distress Complainants endured at being stuck in a less safe neighborhood without amenities such as a garage, fenced-in yard, and snow removal and lawn mowing services,” the ALJ considered this to have been taken into account in the emotional distress award, distinguishing the case from another recent case, *HUD (Doe) v. Woodward*, where the Complainant proved, and was compensated for, these as two separate and distinct harms.<sup>187</sup>

### **B. Connecting Neighborhood Effects, Life Chances, and Lost Housing Opportunity: *United States v. Hylton***

The best example of loss of housing damages came in a federal district court case in 2013. *United States v. Hylton* originated with a HUD complaint, elected to the Federal District Court in Connecticut, and proceeded to trial.<sup>188</sup> The case centered on a Caribbean-American landlord’s refusal to allow his tenants (a mixed-race couple) to sublease their apartment. The landlord initially agreed that the tenants could terminate their lease early as long as they found new, qualified tenants.<sup>189</sup> However, upon hearing that the prospective subletters were an African-American woman and her two children, the landlord withdrew his permission to sublease the apartment, stating that he did not want “too many blacks” at the property.<sup>190</sup> Plaintiffs included both the tenants who were on the lease and the prospective tenants.<sup>191</sup>

At trial, the prospective tenant plaintiffs presented an expert, Professor Lance Freeman, to discuss loss of housing opportunity and to contrast the area in which the prospective tenants lived, the North End of Hartford, and the area where the denied housing was located, Windsor Locks. While testifying Professor Freeman defined life chances as:

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185. *Id.* at \*16–17.

186. *HUD v Saari*, Fair Housing-Fair Lending (P-H) ¶25, 20 (HUDALJ Oct. 6, 2017).

187. *Id.* at 20–23; *HUD v. Woodward*, 15-AF-0109-FH-013, 2016 HUD ALJ LEXIS 4, \*1, at \*5–8 (May 9, 2016) (awarding \$5,000 for loss of housing opportunity based on ideally located home including a porch where she could smoke, artwork, and a yard where she could garden).

188. *United States v. Hylton*, 944 F. Supp. 2d 176, 186 (D. Conn. 2013), *aff’d*, 590 F. App’x 13 (2d Cir. 2014). For a description of the Administrative Law Judge process; *see supra* note 163.

189. *Id.* at 184.

190. *Id.*

191. *Id.* at 182.

the opportunities for individuals living in particular neighborhoods. In other words, how the trajectory of [plaintiffs'] life, their economic upward mobility, their health, their social relationships, how they are affected by the neighborhood, the all [sic] the opportunities, experiences that someone confronts as they age over time.<sup>192</sup>

He went on to explain that his use of life chances in the case was based on the “neighborhood effect thesis,” which he described as “a thesis that has been studied extensively for several decades now, so there’s been probably hundreds of studies that have been done to test the veracity of the neighborhood effects thesis. . . .”<sup>193</sup> In addition to using charts and graphs illustrating the disparities between the neighborhoods, Professor Freeman summarized the scholarship testifying that “the overwhelming evidence suggests that neighborhoods do matter” citing exposure to crime, health risks, and discussing the consequent statistical advantages or disadvantages in an individual’s resulting employment, education, and earnings.<sup>194</sup> Freeman’s testimony on the point concluded that “in all of those ways, the essential relationships imbedded in the neighborhood can affect one’s life chances.”<sup>195</sup>

In interpreting this testimony, the court asked what degree of confidence Professor Freeman could assign to his evaluation of opportunities in the two communities. Professor Freeman responded that “I feel very confident that someone living in Windsor Locks would have a higher quality of life or better life chances compared to someone in the northeast of Hartford.”<sup>196</sup>

The court’s ruling regarding damages based upon Professor Freeman’s testimony bears repeating in full:

Based on the extensive testimony of Professor Lance Freeman, an expert in the field of “neighborhood effects,” the court concludes that there are vast differences between the neighborhoods of Windsor Locks and the North End of Hartford such that a resident of the North End of Hartford has fewer life chances than a resident of Windsor Locks.

In the North End of Hartford, there are a lower proportion of white residents, a substantially higher rate of unemployment, a greater percentage of residents on food stamps, a higher percentage of female-headed households,

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192. Transcript of Trial at 225:01-07, *United States v. Hylton*, 944 F. Supp. 2d 176 (D. Conn. 2013) (311cv1543).

193. *Id.* at 225:10–20.

194. *Id.*

195. *Id.* at 225:20–227:23.

196. *Id.* at 265:04–266:08.

and a significantly higher crime rate, particularly as to violent crime. All of these factors are considered to be indicators of disadvantage. Meanwhile, in Windsor Locks, the home ownership rate is a little over two times greater than the rate in the North End of Hartford whereas the median income is twice as high in Windsor Locks as compared to the North End of Hartford. Both of these factors are indicators of advantage. Based on these statistics, Professor Freeman concluded that there is more opportunity and greater upward mobility and achievement in Windsor Locks as compared to the North End of Hartford. According to Professor Freeman, the North End of Hartford is a particularly disadvantaged area relative to Windsor Locks. He testified that the difference in the rate of violent crime is so dramatic and that such violence, regardless of whether someone is personally a victim of crime, indisputably impacts the quality of life in the neighborhood. Further, Professor Freeman testified that even though Ms. Wilson sends her children to school in Bolton, CT, they are still affected by their peers in the North End of Hartford who are not getting the same high quality education. Based on Professor Freeman's testimony—which the court found credible and compelling—the court awards \$20,000 in damages for lost housing opportunities.<sup>197</sup>

While, to many observers, the most noteworthy aspect of this decision was the “black-on-black” discrimination at issue in the case, even local newspapers emphasized the loss of housing damages as significant.<sup>198</sup> Plaintiff's damage award of \$20,000 may pale in comparison to damages received for injuries in other types of cases, but a \$20,000 award for loss of housing opportunity, and especially an express judicial acknowledgment of the life chances theory, may set a precedent for future cases. While the case was appealed on multiple grounds, the Second Circuit upheld the decision.<sup>199</sup>

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197. *Hylton*, 944 F. Supp. 2d at 197; *See generally* Lance Freeman, Preliminary Report, *Neighborhood Differences between Hartford and Windsor Locks and the Impacts on Opportunity and Life Chances* (May 11, 2012) (unpublished, on file with author).

198. Kenneth R. Gosselin, *Housing Discrimination Case Brings Damages, Highlights Lost Opportunities*, HARTFORD COURANT (Aug. 5, 2013), <https://perma.cc/V2L4-ENMG> (describing Complainant Wilson as having “lost the opportunity to live in a neighborhood of lower crime, higher educational opportunities and greater upward mobility”).

199. *See United States v. Hylton*, 590 Fed. App'x, 13, 19 (2d Cir. 2014). The appeal challenged the award of loss of housing damages only on the basis that the potential renter was not financially qualified to rent the apartment. *Id.* at 18. The court rejected this argument as it was raised for the first time on appeal. *Id.*

### C. Suggestions for the Calculation of Damages in Determining Lost Housing Opportunity in Individual Cases

The cases discussed above may be a guide for the use of housing opportunity damages in future fair housing cases. However, as the preceding section shows, the scholarship and data on the geography of opportunity could be even more powerful in seeking fair housing damages, especially considering the *Hylton* language regarding loss of housing opportunity and life chances.<sup>200</sup> While some of the *Gautreaux* findings were criticized for self-selection as vouchers were only used by families who demonstrated a desire to move to an area of higher opportunity, this only makes the *Gautreaux* findings more applicable to the situation addressed in this paper: individuals and families who sought out and were discriminatorily denied housing in better areas.<sup>201</sup>

This idea of life chances may be especially powerful in cases involving families with children being forced to move to, or stay in, lower opportunity areas or being denied housing in areas of opportunity. As demonstrated by the research detailed above, housing location can have significant effects on childhood development, adult health, education, and employment prospects.<sup>202</sup> For instance, a family with one child may be denied housing they were qualified for in an area where 80% of high school students go to college, and 60% finish with a four-year degree. Instead, the family may find housing in an area where 40% of high school students go on to college, and only 20% finish a four-year degree. Therefore, the move has placed the family's child into an area where she has, statistically, less than half the chance she would have had in the previous area to attend and finish college. Statistics show that the difference in the lifetime incomes for individuals with or without a college degree is approximately \$650,000 over a forty-year career.<sup>203</sup> Such statistical differences in future opportunities, based on spatial geography, can and should be a significant factor in determining loss of housing opportunity damages.

Based on these statistics, it would be tempting to take the annual difference between college and non-college graduate lifetime salaries and simply divide them by the percentage of the lost chance at a college degree. This would follow a loss of future earnings model for damages.<sup>204</sup> The

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200. In cases of buyers who are discriminated against, one professor has suggested an expansion of loss of housing opportunity damages focusing on using the difference in price or value of the home sought by plaintiffs as providing a way of quantifying damages. Engel, *supra* note 9, at 1167–98.

201. Duncan & Zuberi, *supra* note 125, at 112 (describing the self-selection issue in the *Gautreaux Two* study).

202. See *supra* Part I.A.3–4.

203. Russel Heimlich, *The Monetary Value of a College Education*, PEW RESEARCH CENTER (Mar. 7, 2012), <https://perma.cc/HH5B-CR6B>.

204. See 9 FRUMER & FRIEDMAN, PERSONAL INJURY ACTIONS, DEFENSES, AND DAMAGE § 43.08[9] (Matthew Bender, Rev. Ed.) (discussing damages for the loss of, or impairment

concept of compensatory damages for the future effects of a tort is widely accepted even where these damages are less tangible than those resulting from a permanent disability, rendering a person unable to work. Courts have awarded damages for future emotional distress,<sup>205</sup> future loss of reputation,<sup>206</sup> loss of goodwill,<sup>207</sup> and loss of future business opportunities.<sup>208</sup> In these cases, courts look to expert testimony and economic calculations in determining to a reasonable certainty the future loss that is compensable.<sup>209</sup>

However, there would be substantial criticisms of applying this liability model to loss of housing opportunity. First, it could be argued that personal initiative and determination still allow some individuals to achieve success despite their surroundings. This first criticism is not particularly troublesome as these “outliers,” those who rise from difficult surroundings to higher education and job success, are already taken into account in a probabilistic model upon which damages would be based. For instance, to analogize to the use of loss of future earnings in personal injury cases, those whose recoveries are better than “average” and return to work with less loss of income are considered in calculating what is the “average” loss of future earnings. Criticizing a statistical model of disadvantage because some individuals are extraordinary would deny the basic function of statistics, in which outliers on both sides of the mean are taken into account in determining the mean and the probability of divergence from this mean.

However, there are other more troubling criticisms of using a loss of future income standard for loss of housing opportunity damages. For instance, this approach would treat what may be a serious setback as more akin to a permanent disability or a physical injury with a more calculable recovery date. In this way, a loss of future income standard would fail to take into account the possibility of subsequent intervening events. Unlike an injury that causes a temporary or permanent disability, the effect of a

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of, earning capacity). In addition to the typical situation where physical disability results from a personal injury, such damages have even been calculated for psychological injury and have been used in situations in which personal injuries affect children’s probable educational attainment. See Lawrence M. Spizman & John Kane, *Loss of Future Income in the Case of Personal Injury of a Child: Parental Influence on a Child’s Future Earnings*, 5 J. FORENSIC ECON., no 2, 159, 160–162 (1992); see generally Stephen T. Riley, *The Demands for Labor: The Concept of Earning Capacity*, 39 ORANGE COUNTY LAW. \*13, at\*14–16 (1997) (discussing some of the complications of lost future income analysis).

205. See, e.g., *Thomas v. Tex. Dep’t of Criminal Justice*, 297 F.3d 361, 372 (5th Cir. 2002) (awarding \$75,000 in an employment discrimination case).

206. See *Peshak v. Greer*, 13 S.W.3d 421, 427 (Tex. App. 2000) (upholding award of \$15,000 for future loss of reputation in a libel case).

207. See *Network Indus. v. Jungheinrich Aktiengesellschaft*, No. 11CV49 DMS (BLM), 2011 U.S. Dist. LEXIS 6451, at \*6–7 (S.D. Cal. Jan. 24, 2011) (loss of future goodwill can be remedied by compensatory damages).

208. *Carnell Constr. Corp. v. Danville Redevelopment & Hous. Auth.*, No. 4:10CV00007, 2011 U.S. Dist. LEXIS 47125, at \*24–29 (W.D. Va. May 2, 2011) (allowing damages for loss of future business opportunities in a racial discrimination case).

209. See 22 AM. JUR. 2D *Damages* § 728 (2018) (regarding calculations of compensable future wages or earning capacity).



discriminatory act impacting the ability of a family to move into a better neighborhood may be alleviated by future opportunities. Subsequent intervening acts might be the acceptance of a rental application in another neighborhood, investments and improvements in the low opportunity neighborhood, or even winning the lottery. While perhaps rare, such subsequent intervening acts would not be knowable or calculable at the time damages would be assessed for the discriminatory conduct. In other words, the act of illegal discrimination does not have as predictable an effect on the loss of housing opportunity as the effect of a permanent physical or psychological injury on the ability to work.

In addition, one could argue that such damages would further stigmatize the victim. Here, the concern is not stigmatization by the rest of society but rather self-stigmatization. In essence, such an award would provide confirmation that the damage done to people by their surroundings is permanent and irreversible. Even if this is true, an award based on this understanding would only serve to exacerbate the stigmatizing “neighborhood effect.”

Therefore, the goal of damages in these cases should be informed by, but not dependent on, such calculations. While this leaves the calculation of damages somewhat subjective, loss of housing opportunity, like many compensatory damages, will never acquire the precision of out of pocket damages. While the subjective calculations of judges in this area have so far been inadequate, a better understanding of loss of housing opportunity, and the statistical bases of neighborhood effects on life chances, can be used to provide some benchmarks for judges in making these valuations. As explained above, courts must often make judgment calls in calculating compensable future losses and have developed methods of doing so using statistics and economic analysis. In this respect, Professor Freeman’s presentation of this research in *Hylton* can serve as a model for future cases.

Such statistics can provide a judge with important guideposts along the way to calculating loss of housing opportunity damages. The main factors considered should be whether the award makes up the opportunity gap with the lost housing opportunity. For instance, if confronted with a family with a teenager entering high school illegally denied housing in an area where a large percentage of children attend college, courts could look at the cost of tutoring and mentoring, standardized test preparation materials, college preparation materials or even the cost of tuition at a private school, in determining the loss of housing opportunity damages owed to the teenager. Such damages could even be placed in a type of restricted-access trust to ensure that these funds are used for the designated purpose.<sup>210</sup> Such a trust could lessen housing providers’ concerns that this doctrine will lead to an

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210. In some ways this could be analogous to a special needs trust used for disabled individuals with continued medical and other needs. See generally Sebastian V. Jr. Grassi, *Estate Planning for a Family with a Special Needs Child*, 23 PROB. & PROP. 15, 16–17 (2009) (describing considerations regarding special needs trusts).

unjustified windfall, especially where damages are intended to improve a child's future education and opportunities. If no appropriate trust vehicle is available or if the court is hesitant to rule on such a specific sum, the court could even order a housing provider to arrange such services as a form of equitable injunctive relief.<sup>211</sup>

This proposal is not to discount the use of more intangible loss of housing opportunity damages. For instance, as shown above in *Hylton*, a loss of housing opportunity may lead to a drastic increase in the chance of being impacted by violent crime. In such cases, there may not be sufficient literature or data to directly connect this to future education or earnings. However, the evidence is strong that such exposure has an impact on residents in high states of stress and emotional distress, and, for children, may even damage neurological development. Just because these effects may not yet be statistically quantifiable does not mean that they should not lead to significant money damages. In these cases, judges and juries will have to use their discretion, and advocates will be responsible for presenting, in a digestible and persuasive way, the research and evidence for a significant damage award.

The suggestions set forth in this section do not pretend to be a complete or systematic approach to calculating lost housing opportunity damages. Avenues for further research and scholarship abound. The fair housing community, including scholars, advocates, and practicing attorneys, should direct attention to these issues and continue to study how the calculation and presentation of such damages can lead to further precedent and significant awards.

#### **D. A Transformative Approach to the Use of Lost Housing Opportunity Damages**

This article has referenced broad concepts such as life chances and “geography of opportunity” before narrowing its application to the area of individual enforcement damages. However, the use of expanded loss of housing opportunity damages in enforcement may still provide a catalyst to achieving the broad, societal goals envisioned by the Kerner Report and the Fair Housing Act.

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211. See *Grupo Mexicano De Desarrollo v. All. Bond Fund*, 527 U.S. 308, 322 (1999) (stating the equitable relief is flexible and only constrained by its broad traditional boundaries). Courts may be creative in fashioning equitable remedies, and, in addition to damages already suffered, a housing provider could be required to allow plaintiff to rent another available apartment in the optimal neighborhood. Even if no such apartment currently exists, courts could take a page from federal employment law remedies and require the landlord to give the plaintiff priority for the next available apartment. See *Pope v. FCC*, 311 F.3d 1379, 1381–82 (Fed. Cir. 2002) (describing priority consideration in the employment context).

First, damage awards change behavior.<sup>212</sup> One of the main challenges of fair housing enforcement has been the lack of damage awards sufficient to change corporate real estate behavior, deter individual wrongdoing, and convince landlords to develop policies and practices to avoid even unintentional discrimination.<sup>213</sup> Discrimination will always exist, yet expanded loss of housing opportunity damages could make it prohibitively expensive to discriminate.<sup>214</sup> An award of only few thousand dollars may not be enough to convince even a small-scale landlord that discrimination damages are more than a cost of doing business. Therefore, it should be a priority of fair housing advocates to argue for significant loss of housing opportunity damages in addition to out of pocket expenses and damages for emotional distress.

Second, an expanded view of lost housing opportunity damages could have a significant effect on large landlords, financial institutions, and local governments through litigation. If the placement of the subsidized housing in a low opportunity area was found to have been motivated by discrimination or had a discriminatory effect,<sup>215</sup> all residents in such housing could conceivably be eligible for loss of housing opportunity damages.<sup>216</sup> Through the discriminatory placement of housing, the community or developer would have subjected the residents to years of living with the long-

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212. James A. Kushner, *Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1078–79 (1989) (suggesting that higher damages have a deterrent effect); see Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 804–05 (2011) (explaining that enhanced damages are often justified as deterrence); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1080–81 (2010) (regarding the cost of lawsuits changing law enforcement behavior).

213. See Robert Schwemm, *Compensatory Damages in Fair Housing Cases*, 16 HARV. C. R.-C. L. L. REV. 83, 105 (1981) (arguing for presumed damages stating that “damage awards must be substantial enough to serve the functions of deterrence and vindication as well as compensation”); Engel, *supra* note 9, at 1196–97 (describing the current levels of punitive damages and civil money penalties as only “marginally increase[ing] deterrence.”).

214. See John Piccone III, Comment, *We Have Met the Enemy and They Are Us: Saving HUD From Themselves and Protecting the Viability of the Fair Housing Amendments Act*, 36 SANTA CLARA L. REV. 1097, 1129–30 (describing the Fair Housing Amendments act as “allow[ing] the full weight of HUD’s administrative power to come to bear on the defendant, which correspondingly increases the costs for those who discriminate.”)

215. See *supra* notes 157–58 and accompanying text. In addition, evidence of a discriminatory effect may also be evidence of discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

216. While Title VII regarding employment discrimination does not allow monetary damages for claims of disparate impact, the Fair Housing Act contains no such prohibition. See 42 U.S.C. 1981a(a)(1) (2012) (regarding Title VII damages); Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,474 (Feb. 15, 2013) (to be codified 24 C.F.R. pt. 100) (affirming HUD’s interpretation that disparate impact liability includes the possibility of damages and penalties); Robert G. Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME L. REV. 199, 260 n.437 (1979).

standing consequences of residing in a low opportunity area. In such a case, even if the court only awarded nominal damages to each affected individual, damages could quickly reach impressive levels and serve as a significant deterrent. While the resolution of such cases typically focus on injunctive relief regarding the future siting of properties, there is no reason why “victim funds” cannot also be established to compensate affected individuals. Such funds are already common in civil rights settlements where a group of individuals are affected.<sup>217</sup> Such awards could impact future decision-making on the placement of subsidized housing and lead to a consequent reduction in segregation.

Likewise, when financial institutions engage in discriminatory actions such as redlining or reverse redlining, the damages could also include loss of housing opportunity damages to individuals affected by those policies. Cases have already been brought alleging that such discriminatory practices injured the cities in which they occurred.<sup>218</sup> It is only a small step further to allege that the impact of these practices on cities or neighborhoods affect the opportunities of their citizens. Similar housing opportunity claims may arise from the discriminatory effect of foreclosure actions,<sup>219</sup> evictions from public housing,<sup>220</sup> and insurance policies.<sup>221</sup>

Finally, further recognition of loss of housing opportunity damages may have a less practical, but more symbolic impact. Both the Fair Housing Act and the Kerner Report viewed mobility as essential for individuals and families to better their circumstances. However, the importance of mobility and the effect geography has on individuals’ life chances is unrecognized by traditional fair housing remedies. Through increased recognition of loss of housing opportunity damages, the importance of mobility’s place in the Fair Housing Act can be reemphasized. Courts’ recognition of the impact of place, not just in systematic litigation, but in individual enforcement cases, can provide support for a view of housing, as not a mere commodity, but rather

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217. See, e.g., Settlement Agreement, *United States v. J & R Assocs.*, 1:15-cv-11748 (D. Mass. July 6, 2017); Settlement Agreement, *United States v. Appleby*, 2:17-cv-00334-RSM (W.D. Wash. Sept. 6, 2017).

218. Shaila Dewan, *Santander Bank to Face Suit Claiming Bias in Mortgages*, N.Y. TIMES (May 28, 2014), <https://perma.cc/ZM8K-H5T8>. The Santander case was eventually settled for 1.3 million dollars in grants to local low and moderate-income neighborhoods. *Providence Reaches Deal with Santander Bank to Drop “Redlining” Suit*, PROVIDENCE JOURNAL (Nov. 5, 2014), <https://perma.cc/K97U-DZ66>. A similar case regarding reverse redlining brought by the City of Baltimore also achieved significant damages. Relman, Dane & Colfax, PLLC, *Baltimore Settles Landmark Fair Housing Suit Against Wells Fargo*, <https://perma.cc/JDM5-B75T> (last visited February 8, 2018).

219. See generally David Lurie, Note, *Rental Home Sweet Home: The Disparate Impact Solution for Renters Evicted From Residential Foreclosures*, 111 NW. U.L. REV. 239, 247–49 (2016).

220. See generally Michelle Ewert, *One Strike and You’re Out of Public Housing: How the Intersection of the War on Drugs and Federal Housing Policy Violates Due Process and Fair Housing Principles*, 32 HARV. J. RACIAL & ETHNIC JUST. 57, 72–73 (2016).

221. See generally Dana Kaersvang, Note, *The Fair Housing Act and Disparate Impact in Homeowners’ Insurance*, 104 MICH. L. REV. 1993, 1995–97 (2006).

as foundational to the economic mobility that we consider part and parcel of the American dream.

### III. CONCLUSION

Loss of housing opportunity damages have been underutilized since their appearance in Fair Housing Act litigation. Such damages have roots in long-standing, sociological concepts dating back to Max Weber and are firmly grounded in data-based research.<sup>222</sup> While there may be arguments regarding how such damages should be calculated, there is little argument that geography impacts opportunity.<sup>223</sup> As is common, the legal system has lagged behind the social sciences in recognizing this and in developing appropriate remedies. With the growing research on the effects of housing mobility and with further long-term studies of the effect not just on the adults who move, but on future generations of the person's family, loss of housing opportunity damages can be an important tool to change housing provider behavior and effect an important purpose of the Fair Housing Act itself. To allow loss of housing opportunity to be underutilized, or as a mere tool for nominal damages acknowledging physical differences between properties, is to leave an important weapon against housing discrimination unloaded and to fail to follow through on the Fair Housing Act's clear purpose.

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222. *See supra* Part I.A.1.

223. *See supra* Part I.A.2-4.