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Introduction

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[1] the Supreme Court held that plaintiffs who challenged an exclusionary zoning decision under the Equal Protection Clause were required to prove that racial purpose was a motivating factor in the defendant's decision.[2] The Court concluded that the "finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance,"[3] but it remanded the case for a determination of whether this discriminatory effect alone would violate the Fair Housing Act (Title VIII of the Civil Rights Act of 1968).[4] On remand, the Court of Appeals for the Seventh Circuit held that the Fair Housing Act claim should be sustained if "the Village's refusal to rezone effectively precluded plaintiffs from constructing low-cost housing within Arlington Heights,"[5] because "at least under some circumstances a violation of [Title VIII] can be established by a showing of discriminatory effect without a showing of discriminatory intent."[6]

The Supreme Court has not yet addressed the question of whether discriminatory effect or discriminatory purpose is the proper measure of a Fair Housing Act case, and the courts of appeals are divided on the issue. The Seventh Circuit's opinion in *Arlington Heights* relied on two decisions of the Eighth Circuit holding that Title VIII prohibits housing practices with discriminatory effects,[7] and the Third Circuit adopted the same position in a decision that came down after *Arlington Heights*.[8] Taking the opposing view, the Sixth Circuit has rejected an effect test in an exclusionary zoning case similar to *Arlington Heights*,[9] and the Fourth Circuit has also indicated, in a split decision, that it considers proof of discriminatory intent to be required in a Title VIII case.[10] The Second Circuit has produced conflicting decisions.[11] Even among the courts of

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1 429 U.S. 252 (1977).

2 In reaching this conclusion, the Court relied heavily on Washington v. Davis, 426 U.S. 229 (1976), which the year before had held that proof of discriminatory purpose was necessary to establish an equal protection claim of racial discrimination in the context of public employment. *See generally* Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation,* 1977 ILL. L. FORUM 961 (1977).

3 429 U.S. at 270.

4 42 U.S.C. §§ 3601-3619 (1970).

5 Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1295 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).

6 *Id.* at 1290.

7 Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976); United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).

8 Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).

9 Joseph Skillken & Co. v. City of Toledo, 528 F.2d 867 (6th Cir. 1975), *vacated and remanded,* 429 U.S. 1068 (1977); 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985 (1978).

10 Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1973).

11 *Compare* Boyd v. Lefrak Organization, 509 F.2d 1110 (2nd Cir. 1975), *cert. denied,* 423 U.S. 896 (1975) *with* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971). *See also* Citizens Committee for Faraday Wood v. Lindsay, 507 F.2d 1065 (2nd Cir. 1974), *cert. denied,* 421 U.S. 948 (1975); Acevedo v. Nassau County, 500 F.2d 1078 (2nd Cir. 1974).

appeals that have agreed that a showing of discriminatory effect establishes a prima facie case under the Fair Housing Act, there have been differences about the nature of the defendant's burden of justification that should result from such a showing.[12]

One of the reasons that the circuits have split in deciding whether an effect test should govern Title VIII cases is that they have differed over the extent to which the standards developed by the Supreme Court in *Griggs v. Duke Power Co.*[13] and other employment discrimination decisions should be extended to housing cases. *Griggs* held that Title VII of the Civil Rights Act of 1964[14] prohibits job requirements that have the effect of discriminating against blacks, even if they are adopted without any discriminatory motive. The Seventh Circuit in *Arlington Heights* relied heavily on *Griggs* and the similarities between the employment and housing discrimination statutes to hold that proof of discriminatory intent is also unnecessary under Title VIII.[15] On the other hand, the Second Circuit's opinion in *Boyd v. Lefrak Organization* announced that *Griggs* "has never been applied in any Fair Housing Act case, either public or private, and we find it to be inapposite here."[16] It seems apparent that the Supreme Court will eventually have to resolve this conflict and decide whether the discriminatory effect standard of *Griggs* will apply to cases brought under Title VIII, but the Court has thus far shown no inclination to undertake this task.[17]

In the meantime, the importance of the question is growing. The national commitment to fair housing made by Congress in Title VIII is yet to be fulfilled.[18] Widespread housing discrimination is still a common phenomenon,[19] and residential segregation is actually more prevalent now than when the Fair Housing Act was passed a decade ago.[20] Title VIII has now emerged as the principal weapon for challenging exclusionary land use decisions by local municipalities in federal court.[21] On the private side, landlords, realtors, and others

12 *Cf.* 564 F.2d 126; 558 F.2d 1283; 508 F.2d 1179.

13 401 U.S. 424 (1971).

14 42 U.S.C. §§ 2000e-1 to 17 (1970).

15 558 F.2d at 1288-89.

16 509 F.2d 1110, 1114 (2nd Cir. 1975), *cert. denied,* 423 U.S. 896 (1975).

17 The Supreme Court has denied certiorari in a number of cases in which this issue could have been decided. See cases cited in notes 9, 11, and 12 *supra.* In other cases in which the Court could have commented on the substantive coverage of the Fair Housing Act, it has chosen not to do so. *See* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 271 (1977); Warth v. Seldin, 422 U.S. 490, 513 n. 21 (1975). The Title VIII cases decided by the Court thus far have all dealt with procedural issues. *See* Curtis v. Loether, 415 U.S. 189 (1974); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). *See also* Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1978), *cert. granted,* 98 S. Ct. 3068 (1978).

18 *See* 409 U.S. at 210-11.

19 For a brief discussion of housing discrimination in the United States, past and present, see UNITED STATES COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 1-13 (1973).

20 *Id.* at 124-130.

21 *See* cases cited in note 12 *supra* and text accompanying notes 370-415 *supra.* Other legal theories used to challenge exclusionary zoning laws have included racial discrimination under the Equal Protection Clause (*But see* 429 U.S. 252. *Cf.* Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970), cited in *Arlington Heights, supra,* 429 U.S. at 267-68 n.17); discrimination against the poor under the Equal Protection Clause (*see* Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645, 1665 (1971). *But see* James v. Valtierra, 402 U.S. 137 (1971)); discrimination impinging on the right to secure housing (*But see*

who work in the housing market should be apprised of just what the statute does and does not require.

This article addresses the question of whether housing practices that produce discriminatory effects violate the Fair Housing Act. The language and legislative history of the statute are examined, the analogy to employment discrimination law is explored, and the principal Title VIII cases are considered in an effort to determine just what racial discrimination is under the Fair Housing Act.[22] This analysis leads to a suggested approach for evaluating Title VIII cases that are based on discriminatory effect, including how such an effect may be shown by the plaintiff and what significance such a showing should have in terms of the defendant's burden of justification.

I. The Fair Housing Act

A. *Language and Structure*

The starting point for determining what types of practices are proscribed by the Fair Housing Act is the language of the statute itself. Nowhere does Title VIII define discrimination in terms of either purpose or effect.[23] The Act begins by declaring that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[24] The next two sections deal with definitions (42 U.S.C. § 3602) and effective dates and certain exemptions (42 U.S.C. § 3603). The substantive heart of the law is in the various prohibitions contained in § 3604, § 3605 and § 3606.[25] Indeed,

Lindsey v. Normet, 405 U.S. 56, 73-74 (1972)); and discrimination impinging on the right to travel (*see* Comment, *The Right to Travel and Its Application to Restrictive Housing Laws,* 66 NW. U. L. REV. 635 (1971); Comment, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?* 39 U. CHI. L. REV. 612 (1972). *But see* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 422 U.S. 934 (1976)).

22 The focus of this article is *racial* discrimination, but it is worth noting that the Fair Housing Act also prohibits discrimination on the basis of color, religion, sex, and national origin (*see* 42 U.S.C. §§ 3604, 3605, and 3606 (1970)). The principles discussed in this article presumably apply to these other forms of housing discrimination as well. *Cf.* Dothard v. Rawlinson, 433 U.S. 321 (1977); United States v. City of Chicago, 549 F.2d 415, 427 (7th Cir. 1977), *cert. denied,* 433 U.S. 875 (1977) (Title VII cases in which the *Griggs* theory of discriminatory effect was used in sex discrimination cases).

23 The same is true of Title VII of the Civil Rights Act of 1964. *But cf.* the Voting Rights Act of 1965 (42 U.S.C. §§ 1971-1973 (1970)), which restricts the changes that an affected unit of government can make in its voting practices to those approved by the Attorney General or those that do "not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1970). *See, e.g.,* City of Richmond v. United States, 422 U.S. 358 (1975).

24 42 U.S.C. § 3601 (1970).

25 42 U.S.C. §§ 3604, 3605, and 3606 (1970). Another substantive section of Title VIII is 42 U.S.C. § 3617 (1970), which provides:

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

It is unclear whether a violation of § 3617 can be established without first establishing a violation of §§ 3604, 3605, or 3606. *Compare* Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489, 497-98 (S.D. Ohio 1976) *with* Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).

the Fair Housing Act defines a discriminatory housing practice as any "act that is unlawful under section 3604, 3605, or 3606 of this title."[26] Similarly, in its enforcement provisions, Title VIII speaks in terms of "the rights granted" by sections 3604, 3605, and 3606.[27]

The most important provision of these three substantive sections is § 3604(a), which makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."[28] It is this subsection, and in particular the "otherwise make unavailable or deny . . . because of race" phrase, that three circuits have held prohibits housing practices with discriminatory effects.[29]

Some preliminary comments about the language of § 3604(a) are in order here. First, the rather catchall nature of the "otherwise make unavailable or deny" phrase and its location as the last prohibited practice in the subsection after two provisions directed to more specific types of refusals to deal seem to reflect an intention to include almost every housing practice imaginable, and indeed, a number of courts have concluded that this language is "as broad as Congress could have made it."[30] Second, the crucial phrase "because of race" suggests a concern for the defendant's reasons for his conduct, because "a party cannot commit an act 'because of race' unless he intends to discriminate between races."[31] On the other hand, a similar phrase in Title VII—"because of such individual's race"—has been interpreted by the Supreme Court not to require proof of racial motive.[32] Finally, it is interesting to note that § 3604(a), itself, does not use the word "discriminate"; obviously discriminatory housing practices are the object of § 3604(a)'s prohibitions,[33] but it does not speak in terms of discrimination explicitly.

The four other subsections of § 3604 and § 3605 and § 3606 each proscribe different types of housing discrimination. ("Discrimination" or "discriminate" are used in the titles of all three sections and in the body of §§ 3604(b), 3604(c), 3605, and 3606.) Section 3604(b) makes it unlawful to discriminate in the terms, conditions, or privileges, or in the provision of services or facilities in connection with the sale or rental of housing; § 3604(c) prohibits discriminatory advertising or statements with respect to a housing transaction; § 3604(d) proscribes misrepresentations concerning the availability of housing; § 3604(e) outlaws "blockbusting"; § 3605 prohibits discrimination in the financing of housing; and § 3606 bans discrimination with respect to membership or participation in multiple listing and other brokerage services.

One curious fact concerning the language used in these sections is that the

26 42 U.S.C. § 3602f (1970).
27 *See* 42 U.S.C. §§ 3612, 3613, 3615, and 3617 (1970).
28 42 U.S.C. § 3604(a) (1970).
29 *See* cases cited in note 12 *supra.*
30 *E.g.,* United States v. Youritan Construction Company, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd as modified,* 509 F.2d 623 (9th Cir. 1975); Zuch v. Hussey, 366 F. Supp. 553, 557 (E. D. Mich. 1973).
31 558 F.2d at 1288.
32 Griggs v. Duke Power Co., 401 U.S. 424 (1971).
33 *See* text accompanying note 26 *supra.*

proscribed discrimination in § 3604(b) and (d) and § 3605 is put in terms of the "because of race" phrase employed in § 3604(a), while § 3604(c) is directed toward discrimination "based on race," and § 3606 uses the words "on account of race."[34] Perhaps little should be made of such minor differences,[35] but they do serve as a reminder that § 3605, § 3606, and the five subsections of § 3604 are separate provisions that prohibit different types of housing discrimination. A particular housing practice is unlawful if it violates any one of these provisions, although it is possible that some practices might violate more than one.[36] It is not inconceivable, therefore, that a discriminatory effect standard might be appropriate for some of Title VIII's prohibitions, while discriminatory purpose might be the applicable test for others.[37]

There is no question, of course, that purposeful discrimination violates Title VIII. The most typical case under the Fair Housing Act involves a landlord's refusal to rent an apartment to a minority homeseeker, who then alleges that the reason for the refusal is racial discrimination.[38] The focus of this type of case is the landlord's motivation. The defendant usually responds by claiming that he rejected the plaintiff for a legitimate, non-racial reason, such as his policy against renting to people with pets or the fact that the apartment was given to a better qualified tenant, and the courts have recognized that defendants "have a right to refuse approval on any honest basis unrelated to the race" of the prospective tenant.[39] On the other hand, if the plaintiff is successful in attacking the credibility of these nonracial reasons (*e.g.*, by showing that the building is full of pet owners or that the new tenant is actually less qualified than he is), he is likely to prevail, because he has established that the defendant intended to discriminate against him.[40]

The fact that the typical Title VIII case has involved a claim of intentional discrimination does not mean that housing practices with unintended discriminatory results may not also be illegal. The question is whether the Fair Housing Act is limited to prohibiting purposeful discrimination only. In considering this issue, it is important to distinguish between the two uses that may be made of proof of discriminatory effect: discriminatory effect may be shown *as evidence of racial intent* on the one hand or as a claimed *substantive violation* of Title VIII on the other. Proving intentional discrimination in a fair housing case is diffi-

34 "On account of" is also used in § 3617. *See* note 25 *supra*.

35 *See* text accompanying notes 55 and 68 *infra*.

36 *See, e.g.*, Zuch v. Hussey, 394 F. Supp. 1028, 1048-53 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1976); United States v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

37 It is also conceivable that the Civil Rights Act of 1866 (42 U.S.C. §§ 1981 and 1982 (1970)), which also bans housing discrimination (*see* Jones v. Mayer Co., 392 U.S. 409 (1968)), might employ a standard different from Title VIII's. A recent Supreme Court decision states that *Griggs*' discriminatory effect holding involved only § 2000e-2(a)(2) and that whether effect alone also violates other parts of Title VII, such as § 2003-2(a)(1), has not yet been decided. Nashville Gas Co. v. Satty, 98 S. Ct. 347 (1977).

38 *See, e.g.*, Smith v. Sol D. Adler Realty Company, 436 F.2d 344 (7th Cir. 1970); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972).

39 Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1056 (7th Cir. 1972).

40 *See, e.g.*, cases cited in note 38 *supra*. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

cult.[41] One of the ways it can be done is to show that the defendant's practices have had the effect of discriminating against minorities,[42] although this type of proof generally might be available only in cases involving a large apartment complex or housing development. There is no question that proof of discriminatory effect is at least relevant in a housing discrimination case in which the issue is whether the defendant's actions were racially motivated. It is a different matter, however, to say that housing practices with discriminatory effects are themselves unlawful regardless of whether they were racially motivated. Here, the defendant by hypothesis is innocent of any illicit motivation, and the question is whether his conduct is nevertheless unlawful under Title VIII.

The distinction is, of course, much less clear in practice than in theory. In actual litigation, the plaintiff may produce proof of discriminatory effect in the hope that the trier of fact will be persuaded that this proof establishes purposeful discrimination, or, failing this, that the court will hold that the effect alone is sufficient to establish a violation.[43] Thus, a fair housing plaintiff is always well advised to produce proof of intentional discrimination if he can. But the distinction between discriminatory effect as proof of racial purpose and a *per se* violation is important to keep in mind in order to focus on whether Title VIII is limited to intentionally discriminatory practices.

Most of the other sections of the Fair Housing Act have to do with its administration and enforcement. Some of these sections contain language that may be taken as clues as to whether Title VIII is properly directed toward discriminatory purpose or discriminatory effect. For example, § 3608, which places certain administrative responsibilities in the Secretary of Housing and Urban Development, provides that the Secretary "shall administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[44] Thus, the federal government is re-

41 Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases,* 34 MD. L. REV. 59, 61-65 (1974).

A common technique used to prove discrimination in fair housing cases is to have a white "tester" apply to the defendant in the same manner as a rejected minority applicant in order to determine whether the defendant treats white homeseekers differently than similarly situated black homeseekers. The courts have regularly endorsed this method of proving housing discrimination. *See, e.g.,* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 234 n.2 (8th Cir. 1976); United States v. Youritan Construction Company, 370 F. Supp. 643, 647 n.3 and 650 [and cases cited] (N.D. Cal. 1973), *aff'd as modified,* 509 F.2d 623 (9th Cir. 1975); Williamson v. Hampton Management Co., 339 F. Supp. 1146, 1148 (N.D. Ill. 1972). Some courts have even held that the testers themselves have a cause of action if they are subjected to racial discrimination. *E.g.,* Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 897-98 (3rd Cir. 1977); Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486, 488 (E.D. N. Y. 1977). *See also* Pierson v. Ray, 386 U.S. 547 (1967); Evers v. Dwyer, 358 U.S. 202 (1958).

42 *Cf.* Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring): "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."

43 *See, e.g.,* Resident Advisory Board v. Rizzo, 564 F.2d 126 (3rd Cir. 1977), *cert. denied,* 98 S. Ct. 1457 (1978); United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).

44 42 U.S.C. § 3608(d)(5) (1970). Section 3608(c) contains an almost identical charge to all federal executive departments and agencies to affirmatively administer their housing programs "to further the purposes of this subchapter."

quired not merely to avoid discriminatory housing practices, but to promote fair housing affirmatively, and this special requirement means that it cannot adopt a neutral, "color blind" position if this would have the effect of maintaining or perpetuating segregated housing.[45] It might be argued that since this affirmative language does not appear in § 3604, § 3605, or § 3606, these provisions should be interpreted to permit racially neutral housing practices. But even if this were true, the question remains whether a practice adopted for non-racial reasons that has the effect of discriminating against blacks is "racially neutral." The affirmative requirement to advance fair housing contained in § 3608 goes well beyond the requirement to avoid practices with discriminatory effects,[46] so that the absence of the word "affirmatively" in the substantive sections of Title VIII does not necessarily mean that they are limited to racially motivated practices.

The Fair Housing Act provides for three separate, alternative enforcement mechanisms: an administrative complaint to the Secretary of HUD under § 3610;[47] a direct court action without a prior administrative complaint pursuant to § 3612; and "pattern or practice" and "general public importance" cases brought by the Attorney General as authorized by § 3613.[48] Each of these three sections spells out the particular relief that is available under it, with only the direct action section explicitly providing for monetary as well as injunctive relief.[49] The specific authorization in § 3612(c) for a limited punitive damage award in an appropriate case, over and above equitable relief and actual damages, might suggest that illicit motive is not a necessary element in proving a Title VIII violation in a private suit, but that a showing of intentional discrimination might be relevant only in terms of justifying punitive damages. Again, however, this argument, though plausible, does not require that Title VIII extend beyond discriminatory purpose cases, because proof of discriminatory purpose may not be the same as the showing required for an award of punitive damages under § 3612(c).[50]

45 *See, e.g.*, Shannon v. HUD, 436 F.2d 809, 820 (3rd Cir. 1970).

46 *See id.* at 816. *See also* Schwemm, *supra* note 2, at 996.

47 If HUD's efforts to obtain voluntary compliance fail, the complainant may then pursue the matter in a private suit in federal court, which is authorized to enjoin the respondent or take other appropriate action. 42 U.S.C. § 3610(d) (1970). On the other hand, a victim of housing discrimination may sue directly pursuant to 42 U.S.C. § 3612 (1970) without exhausting his administrative remedies. *See, e.g.*, Young v. AAA Realty Company of Greensboro, Inc., 350 F. Supp. 1382, 1384-85 (M.D. N.C. 1972); Crim v. Glover, 338 F. Supp. 823, 825 (S.D. Ohio 1972); Johnson v. Decker, 333 F. Supp. 88, 90-92 (N.D. Cal. 1971); Brown v. Lo Duca, 307 F. Supp. 102, 103 (E.D. Wis. 1969). *See also* Note, *Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968*, 82 HARV. L. REV. 834, 839, 856-57, 862 (1969).

48 For an examination of the Attorney General's authority to bring "pattern or practice" suits pursuant to 42 U.S.C. § 3613 (1970) and the relation of this authority to the proper interpretation of the substantive provisions of Title VIII, *see* text accompanying notes 202-221 *infra*.

49 *See* 42 U.S.C. § 3612(c) (1970). Damages may not be available in an action brought pursuant to § 3610(d) that grows out of an administrative complaint to HUD. *See* Brown v. Ballas, 331 F. Supp. 1033 (N.D. Tex. 1971); Note, *supra* note 47, at 839, 861.

50 Some have argued that proof of purposeful discrimination is sufficient to justify an award of punitive damages (*e.g.*, Adickes v. Kress and Company, 398 U.S. 144, 232-34 (1970) (Brennan, J., concurring in part and dissenting in part)), but most courts in fair housing cases have required an additional degree of wilfulness to support a punitive damage award. *See, e.g.*, Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Marr v. Rife, 503

Thus, the language of the Fair Housing Act is ultimately inconclusive on the matter of whether practices with unintended discriminatory effects are prohibited. The "purposes" and "policies" of the Act are referred to,[51] but are not spelled out. The "rights granted" by Title VIII and the "discriminatory housing practices" proscribed by it are defined only by reference to the various substantive provisions of § 3604, § 3605, and § 3606. These sections ban refusals to deal and other housing discrimination "because of race," "based on race," and "on account of race," and these phrases, in turn, may be interpreted in different ways.[52] Thus, the meaning of housing discrimination under Title VIII is susceptible to varying interpretations, and perhaps this should not be particularly surprising.[53] Under such circumstances, it becomes necessary to examine the legislative history of the Act to understand the congressional concerns that prompted its passage and to determine "the precise meaning of the statute before us."[54]

B. *Legislative History*

Title VIII of the Civil Rights Act of 1968 represents the culmination of three years of congressional consideration of housing discrimination legislation. Its legislative history is protracted and chaotic, spanning such nationally traumatic events as the urban riots of 1967 and the assassination of Dr. Martin Luther King.[55]

Fair housing legislation was first before the Congress in 1966 as a result of a proposal made by President Johnson. The administration bills, S. 3296 and H.R. 14765, differed in a number of respects from what was to become Title VIII,[56] but they did include the "because of race" language in their substantive sections. No explanation or definition of this phrase was given in terms of the purpose-or-effect issue, but the language was similar to that used in Title VII

F.2d 735, 744-45 (6th Cir. 1974).

51 *See* 42 U.S.C. §§ 3601 and 3608(c) and (d)(5) (1970).

52 *See* text accompanying notes 31 and 32 *supra.*

53 "The concept of 'discrimination,' like the phrase 'equal protection of the laws,' is susceptible to varying interpretations, for as Mr. Justice Holmes declared, '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' Towne v. Eisner, 245 U.S. 418 (1918)." Regents of University of California v. Bakke, 98 S.Ct. 2733, 2745 (1978). *See also id.* at 2773 (Brennan, J., concurring in part and dissenting in part) (arguing that in drafting Title VI of the Civil Rights Act of 1964, "Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine").

54 *See* 98 S.Ct. at 2745.

55 *See* Note, *supra* note 47, at 835, 858, 863; Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act,* 1969 DUKE L. J. 733, 734 n.8, 750 n.86 and n.87. For descriptions of the legislative history of Title VIII, *see generally* Dubofsky, *Fair Housing: A Legislative History and a Perspective,* 8 WASHBURN L. J. 149 (1969); *Historical Overview—Equal Opportunity in Housing,* [1973] EQ. OPP. HSING. RPTR. (P-H) ¶ 2301 at 2312-14.

56 The principal difference was that the original proposals did not provide for an administrative remedy as an alternative to a direct action in court, as Title VIII now does (*see* 42 U.S.C. § 3610 (1970) and note 47, *supra*). *See* EQ. OPP. HSING. RPTR., *supra* note 55, at 2312-13.

of the Civil Rights Act of 1964 and may well have been derived from that law.

The Judiciary Committees of both the Senate and the House of Representatives held lengthy hearings on the fair housing proposals. The House committee reported an amended bill, which the full House passed, but in the Senate, where the Judiciary Committee had failed to report a bill, a successful filibuster prevented any floor action on the matter.[57]

Again in 1967, the Administration proposed civil rights legislation that contained provisions relating to housing discrimination.[58] This time, the House Judiciary Committee did not act favorably on the administration bill, but rather reported another bill (H.R. 2516) that was limited to protecting civil rights workers by establishing penalties for certain acts of violence or intimidation directed against them. This bill, which did not include a fair housing title, was passed by the House and referred to the Senate Committee on the Judiciary. The Senate Committee reported an amended version of H.R. 2516, but the full Senate did not consider it in 1967.

When H.R. 2516 came to the floor of the Senate in early 1968, Senators Mondale and Brooke sponsored a fair housing amendment to the bill.[59] This proposal was subsequently withdrawn in favor of a compromise fair housing amendment offered by Senator Dirksen.[60] Even the Dirksen amendment, however, failed initially to command enough votes to end the filibuster that threatened to kill it.[61] Then, on March 1, 1968, came the release of the Report of the National Advisory Commission on Civil Disorders (the "Kerner Commission Report"), with its dramatic conclusion that "America is dividing into two societies, black and white, separate and unequal. . . ."[62] The report included the Commission's recommendation that a comprehensive federal open housing law should be enacted.[63] The Senate voted cloture on March 4.[64] The Dirksen proposal was then debated and agreed to with only minor amendments,[65] and the Senate passed its amended version of H.R. 2516 by a vote of 71-20 on March 11, 1968.[66]

The bill was then returned to the House, where it was referred to the Rules Committee for consideration of the Senate version. On April 4, Dr. King was assassinated, and Washington was shaken by a new round of civil disorders. Within days, the Rules Committee had concluded its hearings and reported the

57 See EQ. OPP. HSING. RPTR., *supra* note 55, at 2313; 112 CONG. REC. INDEX 1183 (1966).

58 *See* H.R. 5700 and S. 1026, 90th Cong., 1st Sess. (1967).

59 *See* Dubofsky, *supra* note 55, at 152 n.12. Hearings on what became the Mondale-Brooke amendment had been held by the Housing and Urban Affairs Subcommittee of the Senate Banking and Currency Committee in August, 1967 (*id.* at 149-50 n.3), but no bill had been reported as a result of these hearings.

60 *Id.* at 155-58.

61 *Id.* at 158.

62 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 225 (1968). For a description of the role played by the Kerner Commission Report in the legislative history of Title VIII, see Laufman v. Oakley Building & Loan Co., 408 F. Supp. 489, 496-97 (S.D. Ohio 1976) and Dubofsky, *supra* note 55, at 158.

63 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 481 (1968).

64 *See* Dubofsky, *supra* note 55, at 158-59.

65 *Id.* at 159.

66 114 CONG. REC. 5992 (1968).

bill, and on April 10, the House voted 250-171 to accept the Senate's amendments, including the fair housing title.[67] The next day, President Johnson signed into law the Civil Rights Act of 1968.

This history shows that even though fair housing legislation had been before the Congress for a number of years, Title VIII, itself, resulted from a relatively short, albeit intense, period of congressional consideration that took place against the background of dramatic national events. The rather chaotic circumstances under which the law was passed led one early commentator to suggest that in interpreting the enforcement provisions of the Fair Housing Act, "it may simply be necessary to recognize that the title was less the result of careful planning than of calculated compromise."[68] In addition, since the statute was enacted substantially unchanged from the way it was first introduced by Senator Dirksen on the floor of the Senate, its legislative history does not include the committee reports and other documents that usually accompany major legislation.[69] Most of the relevant statements concerning its intent and coverage were made in the floor debates on the bill, particularly those in the Senate. Lower courts have remarked on the "somewhat sketchy" nature of this legislative history,[70] and in *Trafficante v. Metropolitan Life Insurance Co.*,[71] the first Title VIII case to reach the Supreme Court, the Court noted that "[t]he legislative history of the Act is not too helpful."[72]

Certainly there is nothing in the legislative history of Title VIII that clearly resolves the question of whether its coverage was to extend to cases of discriminatory effect. The matter was not discussed in Congress, and with the Supreme Court's decision in *Griggs v. Duke Power Co.*[73] still three years away, the lack of interest in the purpose-or-effect issue generally and in the context of housing discrimination in particular was hardly surprising. Intentional discrimination was a way of life in the real estate business, and it was to this situation that the proponents of the Fair Housing Act primarily addressed themselves. Nevertheless, certain points made in the Senate and House debates on Title VIII are relevant to the problem of whether the law covers practices with discriminatory effects, and they do suggest a broader congressional concern than simply banning purposeful discrimination.

For example, the legislative history demonstrates that Congress was aware of the problems of proof inherent in establishing racial intent in a Title VIII case. During the Senate debates, Senator Baker introduced an amendment which would have exempted from coverage any homeowner who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . , or an intention to make any such preference, limitation or discrimination."[74] A number of the bill's proponents, including Senator Mondale, objected

67 114 CONG. REC. 9620-21 (1968).
68 Note, *supra* note 47, at 858. *See also id.* at 835, 863.
69 *See* 564 F.2d at 147 n.29. *But see supra* note 59.
70 *See, e.g.*, 564 F.2d at 147.
71 409 U.S. 205 (1972).
72 *Id.* at 210.
73 401 U.S. 424 (1971).
74 114 CONG. REC. 5214 (1968). Senator Baker's amendment would have broadened the exemption contained in § 3603 that permits an individual homeowner to discriminate in the sale

that the Baker amendment would make proof of discrimination difficult in all but the most blatant cases.[75] Senator Dominick suggested that the amendment "increases the opportunity for discrimination,"[76] and Senator Percy stated, "If I understand this amendment, it would require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce."[77] The Baker amendment was rejected by the Senate.[78]

Another point repeatedly made in the Senate and House debates was the proponents' desire that Title VIII would result not only in greater housing choice for individual blacks, but also in racial integration generally for the benefit of all Americans. A number of examples are cited in the Supreme Court's opinion in *Trafficante,* including Senator Mondale's classic statement that the purpose of the law he proposed was to replace the ghettos "by truly integrated and balanced living patterns."[79] On the House side, Congressman Celler, the Chairman of the Judiciary Committee, spoke of the need to eliminate the "blight of segregated housing and the pale of the ghetto,"[80] and Congressman Ryan saw Title VIII as a way to help "achieve the aim of an integrated society."[81] Aware of the conclusion of the Kerner Commission that America was dividing into two racially separate societies, Congress clearly intended Title VIII to remedy segregated housing patterns and the problems that these patterns caused—segregated schools, unavailability of suburban employment opportunities to minorities, and alienation of whites and blacks due to the "lack of experience in actually living next" to each other.[82] Furthermore, the proponents of the new law, according to *Trafficante*, felt that the victims of discriminatory housing practices and thus the beneficiaries of Title VIII were not only blacks and other minority groups, but "as Senator Javits said in supporting the bill, 'the whole community.' "[83]

This part of the legislative history of the Fair Housing Act indicates that Congress sought to achieve the *result* of an integrated society through this legislation, which was "seen as an attempt to alter the entire character of the housing market."[84] But it is possible to agree that the goals of Title VIII are to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat"[85] and still conclude that Congress thought it could achieve these goals by eliminating only purposeful discrimination. This possibility is somewhat undercut, however, by two remarks made by Senator Mondale. Com-

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of his personal residence if the sale is conducted without the aid of a real estate agent. *See* 42 U.S.C. § 3603(b) (1970).

75 114 CONG. REC. 5218 (1968).

76 *Id.* at 5220.

77 *Id.* at 5216.

78 *Id.* at 5221-22.

79 *Id.* at 3422, cited in Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972). *See also id.* at 210 and n.10.

80 114 CONG. REC. 9559 (1968).

81 *Id.* at 9591.

82 *Id.* at 2274-76 (remarks of Senator Mondale).

83 409 U.S. at 211 (citing 114 CONG. REC. 2706 (1968)).

84 Mayers v. Ridley, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

85 Otero v. New York City Housing Authority, 484 F.2d 1122, 1134 (2nd Cir. 1973).

menting on the role that federal, state, and local governments had played in maintaining segregated housing conditions, he concluded that "[i]t thus seems only fair, and is constitutional, that Congress should pass a fair housing act to undo the effects of these past State and Federal unconstitutionally discriminatory actions."[86] This desire to undo the effects of past discrimination is explicitly provided for in Title VIII with respect to the *federal* government by the affirmative requirements of § 3608(c) and (d)(5), as noted above, but Senator Mondale's comments were directed to local governments as well. Elsewhere he noted:

> Negroes who live in slum ghettoes, however, have been unable to move to suburban communities and other exclusively White areas. In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing. . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.[87]

Thus, the principal sponsor of Title VIII apparently believed that its substantive provisions, apart from § 3608, prohibited governmental practices that maintained the effects of past discrimination, and interestingly enough, the three circuits that have held that discriminatory effect should be the standard under the Fair Housing Act have done so in cases against municipal defendants.[88] In enjoining Philadelphia's interference with the construction of a subsidized housing development in *Resident Advisory Bd. v. Rizzo*,[89] for example, the Third Circuit cited statements from Senators Mondale and Brooke to support its conclusion that Congress was concerned in Title VIII with "eliminating the adverse discriminatory effects of past and present prejudice in housing."[90]

Even if the value of this legislative history were conceded, however, two problems remain. First, the discriminatory effects that Senator Mondale indicated Title VIII would undo were those that had resulted from past discriminatory action, and a case could be made that housing practices with discriminatory effects are condemned by Title VIII only if they can be traced to some intentional discrimination in the past.[91]

Second, the specific problem to which congressional attention was being directed by Senator Mondale was *governmental* discrimination, and conceivably, he and the other proponents of Title VIII intended the law to be more strictly applied to the actions of public defendants than to those of private defendants. Housing discrimination by government officials and agencies might be considered

86 114 CONG. REC. 2698-2703 (1968).

87 114 CONG. REC. 2277 (1968).

88 See cases cited in note 12, *supra*. *See also* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2nd Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); 465 F.2d 630.

89 564 F.2d 126.

90 *Id.* at 147 and n.30 (citing 114 CONG. REC. 228 (1968)) (remarks of Senator Brooke) and 114 CONG. REC. 3421 (1968) (remarks of Senator Mondale).

91 *See generally* Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

more harmful than private discrimination,[92] and to the extent that the constitutional authority for Title VIII was thought to lie in the enforcement power of the fourteenth amendment,[93] it is possible that Congress was empowered, and did intend, to go farther in outlawing discriminatory housing practices when state, rather than private, action is involved. But there is little in the legislative history to support this interpretation. Most of the hearings and debates on Title VIII related to private housing discrimination, and the substantive provisions of the law do not distinguish between public and private defendants. Furthermore, the one time that Congress explicitly considered an intent requirement was when the Senate rejected the Baker amendment, which related exclusively to private discrimination. Thus, even though the congressional power to prohibit discrimination is arguably greater when governmental housing practices are involved, the legislative history of Title VIII does not reveal an intent to enact a stricter standard of liability for public defendants than private defendants, apart from the affirmative requirements placed on the federal government by § 3608.

In summary, the legislative history of the Fair Housing Act does not conclusively establish whether the law was intended to prohibit practices with unintended discriminatory effects. Certainly, this interpretation is not inconsistent with that history, which reveals a Congress concerned with the proof problems of an intent standard and with eliminating practices that adversely affect blacks, at least to the extent that these effects can be traced to prior intentional discrimination. No Congressman ever directly stated whether he thought denying housing or making it otherwise unavailable "because of race" limited the Act's coverage to purposeful discrimination or whether it might include practices with discriminatory effects as well. The "because of race" phrase is similar to the language used in Title VII of the Civil Rights Act of 1964, and it is the Supreme Court's interpretation of this law to prohibit employment practices with discriminatory effects that has been the most persuasive source in the debate over the meaning of the Fair Housing Act. Whether the analogy of these employment cases is apt enough to justify applying the Title VII-*Griggs* standards to Title VIII cases is now examined.

II. The Analogy to Title VII

A. *Intentional Discrimination under Title VII*

Overt and intentional racial discrimination in employment is the most

92 Governmental power and influence over the housing market may be more widespread than that of private firms, and governmental discrimination may be less defensible. *But see* 558 F.2d at 1293. In addition, official discrimination may impose a degree of stigmatic injury on blacks that is absent or at least less apparent in instances of private discrimination. *See generally* Brest, *supra* note 91, at 9-11, 34.

93 *See* note 218 *infra*. However, Title VIII is now generally recognized to have been enacted pursuant to the congressional enforcement power under the thirteenth amendment as well as under the fourteenth amendment. *See* note 230 *infra*. This question of the power of Congress to enact Title VIII, however, is different from the question of what Congress intended the law to cover.

obvious type of violation of Title VII of the Civil Rights Act of 1964,[94] just as purposeful housing discrimination is unquestionably banned by Title VIII. Examples of blatant racial discrimination, however, are rarely seen in employment cases. Rather, Title VII suits generally deal with more subtle forms of discrimination, which may be either purposeful or unintended. For example, a rejected applicant may allege intentional discrimination on the part of an employer, even though the company claims to have acted on the basis of neutral, legitimate considerations, such as the plaintiff's past misconduct.[95] As in the typical fair housing case, the issue in such a "disparate treatment" suit is the defendant's motive, and the plaintiff has the burden of proof on this issue.[96]

In *McDonnell Douglas Corp. v. Green,*[97] the Supreme Court held that a private, non-class action plaintiff could establish a prima facie case of racial discrimination under Title VII by showing (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job that the employer was seeking to fill; (3) that he was rejected despite being qualified for the job; and (4) that after his rejection, the employer continued to seek applicants or hired a white person for the job.[98] Once this showing has been made, the burden shifts to the employer to articulate some legitimate, nonracial reason for the employee's rejection.[99] In a disparate treatment case under Title VII, the company will prevail if the court believes that it acted for legitimate purposes. When the issue is motive, no violation exists so long as the real reason for the company's action is truly nonracial, even though that reason may be subjective or frivolous.[100] On the other hand, the plaintiff is entitled to win if he successfully rebuts the company's claim by establishing that the reason given is only a pretext for racial discrimination. He may try to do this by showing that similarly situated white employees were hired or that the defendant's overall hiring patterns reflect discriminatory results.[101] Thus, proof of discriminatory effect may be used in a disparate treatment case as evidence of racial motive, and there is no reason why this should not also be true in a Title VIII case. The more difficult question is whether the discriminatory effects themselves may be held unlawful without

94 *See, e.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

95 *See, e.g.,* McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

96 Title VII claims based upon "disparate impact" should be distinguished from claims of "disparate treatment." . . . In a disparate treatment case plaintiff alleges and must prove purposeful discrimination in defendant employer's hiring practices, although sometimes discriminatory motive can be inferred from facts showing inequality in treatment. On the other hand, a disparate impact claim alleges only the discriminatory effect of facially neutral employment practices, and plaintiff need not prove that defendant intended to discriminate. International Bhd. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII,* 56 TEX. L. REV. 1, 2 n.3 (1977). *See also* Furnco Const. Corp. v. Waters, 98 S. Ct. 2943 (1978).

97 411 U.S. 792 (1973).

98 *Id.* at 802.

99 *Id.*

100 *See id.* at 803. *See also* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination,* 1977 ILL. L. FORUM 69, 72 (1977).

101 *See* 411 U.S. at 804-05.

proof of intentional discrimination, a question the Supreme Court answered affirmatively for purposes of Title VII in *Griggs v. Duke Power Co.*[102]

B. *Griggs v. Duke Power Co.*

In *Griggs,* the Supreme Court unanimously held that employment practices that "operate to disqualify Negroes at a substantially higher rate than white applicants"[103] violate Title VII unless the defendant proves that they are "significantly related to successful job performance."[104] The practice at issue in *Griggs* was Duke Power's use of a standardized intelligence test and a high school education requirement to screen applicants for certain of its higher paying jobs. Thirteen black workers brought a class action on behalf of themselves and all other black employees and potential employees, seeking to have these requirements enjoined because they operated in a racially exclusionary fashion with respect to jobs above the menial laborer category.[105]

The evidence showed that a battery of standardized tests, including those used by Duke Power, resulted in pass rates of 58% for whites as compared with only 6% for blacks and that 34% of the white males in the state had completed high school, while the comparable figure for black males was only 12%.[106] There was no showing, however, of a discriminatory purpose in the adoption or administration of the diploma and test requirements, and the courts below ruled against the plaintiffs, concluding that a subjective test of the employer's intent should govern Title VII claims.[107] The Supreme Court reversed. Chief Justice Burger's opinion held that "Congress directed the thrust of the Act to the *consequences* of employment practice, not simply the motivation."[108] The plaintiffs' showing of disparate impact shifted the burden to the employer to show that the challenged practice "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."[109] The Court held that the defendant failed to meet this burden of establishing job relatedness primarily because the record showed that white employees who had not completed high school or passed the required tests prior to the institution of these requirements nevertheless had performed satisfactorily in the upper-level jobs.[110]

The plaintiffs' claim in *Griggs* was based on § 703(a) of Title VII, which makes it unlawful for an employer to discriminate against any individual "because of such individual's race."[111] The Supreme Court's opinion did not spe-

102 401 U.S. 424.
103 *Id.* at 426.
104 *Id.*
105 *See id.* at 429 n.5; Griggs v. Duke Power Co., 420 F.2d 1225, 1227-28 (4th Cir. 1970), *rev'd,* 401 U.S. 424 (1971). The plaintiffs did not claim damages or any other relief beyond an injunction against the defendant's use of the testing and diploma requirements. *Id.* at 1236 n.9.
106 401 U.S. at 430 n.6.
107 *Id.* at 428-29.
108 *Id.* at 432.
109 *Id.* at 431.
110 *Id.* at 431-32. *See also id.,* at 427-28.
111 42 U.S.C. § 2000e-2(a) (1970).

The defendant contended that neither of its screening devices violated § 703 (a) and that its use of general intelligence tests was specifically authorized by § 703 (h) (42 U.S.C. §

cifically discuss the meaning of this phrase, but it did observe that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute."[112] That objective, the Court held, was "to achieve equality of employment opportunities and remove barriers that have operated in the past" to hurt minority employees.[113] Certainly, similar objectives could be said to underlie the Fair Housing Act. And the congressional concern with the consequences and operational results of a defendant's practices, rather than with merely his intent, that was stressed throughout the *Griggs* opinion[114] is also evident in the legislative history of Title VIII.[115]

Griggs held that Title VII's prohibition of practices that deprive an individual of employment opportunities because of his race "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[116] Rather than examining the "because of such individual's race" language of § 703(a), the Supreme Court focused instead on the broad purposes underlying Title VII. If it felt that the wording of § 703(a) provided any obstacle to its ultimate holding that discriminatory intent was not required for a Title VII violation, no mention was ever made of it. As a matter of statutory construction, then, this approach is a strong precedent for holding that the "because of race" language used in the Fair Housing Act is also consistent with a discriminatory effect standard.[117]

Just as the *Griggs* opinion did not focus on the specific operational language of § 703(a), neither did the two-stage analysis that it developed for evaluating a Title VII claim spring from the terms used in the statute. Title VII mentions neither "discriminatory effect" nor "business necessity," but after *Griggs,* the keys to these cases have become whether the plaintiff can show that a challenged employment practice operates to discriminate against blacks and, if so, whether the employer can then prove that the practice is job related.[118] The Court's opinion nowhere indicates the source of this approach. Apparently, its principal claim is that it simply makes sense. If a practice or test hurts blacks and does not

2000e-2(h) (1970)), which provides that a company may rely on professionally developed ability tests provided they are not used to discriminate "because of race." The Supreme Court did not pass on the meaning of the "because of race" phrase in this section, because it held that "professionally developed ability tests" only included those tests that were job related. This defense failed in *Griggs,* because Duke Power had not established that its tests were job related. In addition, the § 703(h) defense had no applicability to the high school diploma requirement (*see* 401 U.S. at 433 n.8), which *Griggs* also held violated the § 703(a) prohibition against discrimination "because of such individual's race."

112 401 U.S. at 429. Nor did the *Griggs* opinion discuss the legislative history of § 703(a). The only legislative history considered by the Court had to do with the extent of Title VII's limited authorization of professionally developed ability tests. *See* 401 U.S. at 434-36. *See also* note 111 *supra.*

113 401 U.S. at 429-30.

114 *E.g., id.* at 431.

115 *See* text accompanying notes 55-93 *supra.*

116 401 U.S. at 431.

117 The precedent would be stronger, of course, if *Griggs* had been decided before, instead of after, the passage of Title VIII. Then, the argument could have been made that Congress was aware that its use of the "because of race" phrase would be judicially interpreted to include an effect standard and that it therefore specifically intended to endorse such a standard for the Fair Housing Act (compare note 221 *infra*).

118 *See generally* Lopatka, *supra* note 100, at 74-89.

serve any legitimate employment purpose for the company, it should be enjoined. Not so obvious perhaps is why the burden of proof with respect to the issue of job relatedness should be placed on the employer, although this, too, is sensible. Presumably the company knows why it instituted the particular practice under review, and it is easier for the company to show what these business reasons are than for plaintiff to "prove a negative" (*i.e.*, that there is no legitimate justification for the practice).[119] Since this two-step analysis of *Griggs* is a creature of judicial interpretation rather than of the specific language of Title VII, there is no reason in terms of statutory construction why it could not be applied equally well to fair housing cases.

The *Griggs* opinion also indicated an awareness by the Supreme Court that subtle forms of discrimination might continue if a purpose test were adopted for Title VII. In rejecting Duke Power's claim that it was covered by a specific exemption in Title VII authorizing the use of professionally developed, nondiscriminatory tests,[120] the Chief Justice noted that Congress had objected to a broader version of this exemption that would have permitted any test, "whether it was a good test or not, so long as it was professionally designed. Discrimination could actually exist under the guise of compliance with the statute."[121] As the Court must have realized, one of the results of the discriminatory effect standard adopted in *Griggs* is that a defendant who is intentionally discriminating is less likely to escape liability than he would be under a purpose test.[122] Objective effects are simply easier to observe and prove than subjective intent is.

The difficulty of proof under a purpose standard, however, was not explicitly relied on by the Court as a rationale for holding that employment practices with unjustified discriminatory effects violate Title VII. Here again, it is helpful to distinguish between deciding that such effects are substantively unlawful on the one hand and merely using those effects as evidence that a defendant is intentionally discriminating "under the guise of compliance with the statute" on the other. The reference in the *Griggs* opinion to the concern of the proponents of Title VII that it prohibit disguised as well as blatant discrimination is interesting because similar congressional concerns can be cited in the legislative history of the Fair Housing Act.[123] But it is important to remember that the defendant in *Griggs* had been found to have adopted its diploma and test requirements without any intent to discriminate, and this finding was accepted by the Supreme Court.[124] The racial effects produced by these screening requirements were not offered as proof of a hidden motive; they were themselves unlawful.

Is this decision fair to the company? Surely it is not an obvious proposition that an employer whose job requirements are adopted solely for legitimate business reasons should be held to have violated a federal statute merely on the basis

119 *See* Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation,* 11 HARV. C.R.-C.L. L. REV. 128, 157-58 (1976).
120 *See* note 111, *supra.*
121 401 U.S. at 435 (quoting remarks of Senator Case).
122 *See* Schwemm, *supra* note 2, at 999 n.224.
123 *See* text accompanying notes 74-78 *supra.*
124 *See* 401 U.S. at 428, 432.

of the unintended effects of these requirements. The first response to this concern is that it was up to Congress to decide what fairness required in Title VII and that its determination to attack the consequences of the problem of employment discrimination rather than the motives that originally created it seems appropriate and is certainly not unprecedented. A company is simply made responsible for knowing the law and for making sure its practices conform to it, as is the case with antitrust laws, safety laws, and countless others.

There were other factors in *Griggs*, however, that made its interpretation of Title VII seem eminently fair. Specifically, these included: (1) the fact that the defendant had engaged in intentional discrimination in the past; (2) the fact that the plaintiffs' ability to pass the company's tests was impaired by a history of inferior and segregated education; (3) the fact that the screening devices were not shown to be related to successful job performance; and (4) the limited nature of the relief sought by the plaintiffs. The operational jobs that plaintiffs sought had been closed to blacks by Duke Power until the effective date of Title VII, when the company instituted its testing requirement.[125] These tests, in turn, maintained the effects of this past intentional discrimination, because blacks generally failed them at a substantially higher rate than whites, a fact that the Supreme Court felt was "directly traceable" to the inferior, segregated education that blacks in the area had received.[126] This combination of the company's past discrimination and its use of screening devices that disproportionately excluded blacks as a result of prior state-imposed segregation certainly influenced the Court's decision. As the Chief Justice wrote: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[127]

In addition to the fact that blacks were being frozen out of the higher paying jobs at Duke Power, the company's interest in maintaining its diploma and testing requirements seemed marginal. Both requirements were adopted without meaningful study concerning their relation to job performance, neither measured the ability to learn to perform the particular jobs for which they were used, and white employees who had previously been hired without meeting them had performed satisfactorily.[128] Under these circumstances, the limited relief sought by the plaintiffs—an injunction prohibiting the use of these screening devices—seemed little more than a request that the company stop spending money on a practice that did it little or no good and that substantially injured blacks.

Thus, the equities in *Griggs* did strongly favor the plaintiffs, and it is dif-

125 *Id.* at 426-28.

126 *Id.* at 430. There was no showing in *Griggs* that the individual plaintiffs themselves had actually received inferior educations as a result of having attended segregated schools. Furthermore, the statistics relied on by the Supreme Court to support its conclusion that the testing and diploma requirements had a disproportionate impact on blacks were statewide and national figures that were not shown to have reflected local pass-fail rates. *See id.* at 430 n.6. Thus, in tracing the plaintiffs' poor performance on Duke Power's tests to past discrimination against blacks generally, the Court showed its willingness to view Title VII plaintiffs not merely as injured individuals, but as members of a larger class made up of an entire racial group.

127 401 U.S. at 430.

128 401 U.S. at 427-32.

ficult to imagine that the Supreme Court would not rule the same way in a Fair Housing Act case that involved a similar record. The operative languages of Title VII and Title VIII are similar, and the latter's legislative history includes evidence of a congressional intent to outlaw practices that would perpetuate the effects of past housing discrimination. If a fair housing defendant were shown to have intentionally discriminated before 1968 and then adopted practices that were "fair in form, but discriminatory in operation," those practices should be enjoined under Title VIII, absent a showing that they are required by something akin to "business necessity" as that defense is spelled out in *Griggs*. But this is the easy (and the extremely rare) case. What if there is no history of purposeful discrimination? What if the discriminatory effect of the screening requirements is not traceable to prior state-imposed segregation or is not as substantial as it was in *Griggs?* How vital must the defendant's interest in its practices be in order to sustain his burden under the "business necessity" test? And would the legal standard be different in a case where money damages or an affirmative order are sought in addition to injunctive relief?

C. *Discriminatory Effect After* Griggs

Some of these questions left open by *Griggs* have been answered by the Supreme Court in subsequent Title VII cases, and the others have been addressed by the various courts of appeals. First of all, the lower courts consistently applied *Griggs* to any practice with discriminatory effects, even in the absence of prior intentional discrimination by the defendant,[129] and the Supreme Court recently agreed.[130] Similarly, the suggestion in *Griggs* that its holding might be limited to banning only those practices whose discriminatory effect on blacks was directly traceable to their inferior segregated educations has not materialized. The lower courts have generally not relied on this factor, and the Supreme Court, though referring to it on occasion,[131] has more often ignored it.[132] With respect to relief, the Court has gone beyond the injunction issued in *Griggs* to hold that an award of back pay in a Title VII case should not be conditioned on a showing of discriminatory intent.[133] The courts of appeals have also approved of preferential remedies (*e.g.*, quotas, fictional seniority) regardless of whether the underlying violation was intentional or not,[134] although the Supreme Court has yet to decide

129 *See* Lopatka, *supra* note 100, at 73.

130 *See* Dothard v. Rawlinson, 434 U.S. 321, 326 (1977). *But see* Regents of University of California v. Bakke, 98 S.Ct. 2733, 2758 n.44 (1978).

131 In McDonnell Douglas Corporation v. Green, 411 U.S. 792, 806 (1973), Justice Powell's opinion for a unanimous Court stated that "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *See also* 98 S.Ct. at 2758 n.44.

132 *E.g.*, 434 U.S. 321; Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

133 422 U.S. 405. In light of the equitable nature of Title VII remedies, however, the defendant's good faith may be considered by the court in connection with its decision on back pay. *See* City of Los Angeles, Dept. of Water v. Manhart, 98 S.Ct. 1370, 1380-83 (1978).

134 *See* Lopatka, *supra* note 100, at 135-36.

whether such affirmative action is consistent with Title VII.[135]

With many of these skirmishes resolved, most of the post-*Griggs* battles have been fought over what constitutes sufficient proof to establish "discriminatory effect" in a Title VII case and, once this is done, how a defendant is to meet its burden of proving "business necessity." Plaintiffs have been allowed to prove discriminatory effect and thus establish a prima facie Title VII case by two different methods: disparate impact and minority underrepresentation. The first approach, which was used in *Griggs,* examines the racial effect of a job requirement by comparing the percentage of blacks that are excluded by the requirement against the percentage of whites who fail it.[136] A prima facie case of discrimination may also be established by proof that minorities are underrepresented in the defendant's work force compared to the racial composition of the overall community from which it hires.[137] This second method of proving discriminatory effect was developed by the lower courts on their own after *Griggs,*[138] and the Supreme Court only recently approved it.[139] The theory underlying this approach is that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[140]

Both disparate impact and minority underrepresentation may be used in a single case if the relevant data is available. In theory at least, if either of them establishes discriminatory effect, the burden should shift to the defendant to show business necessity. In fact, however, when the results of these methods of proof conflict, a difficult problem may arise. For example, it is not clear that an

135 The Supreme Court did make clear in *Griggs* that "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." 401 U.S. at 430-31. In McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976), the Court held that Title VII and 42 U.S.C. § 1981 (1970) both protect whites from racial discrimination, but it specifically cautioned that it was not considering the legality of an affirmative action program, "whether judicially required or otherwise prompted." *Id.* at 276. *Cf.* 98 S.Ct. 2733 (specific affirmative action program held to violate Title VI of the Civil Rights Act of 1964).

136 Disparate impact was the basis of the Supreme Court's finding of discriminatory effect in *Griggs.* The Court's opinion noted that Duke Power's high school diploma requirement was met by 34% of the white males in the state, but only by 12% of the blacks. 401 U.S. at 430 n.6. The Court also cited statistics indicating that the use of a battery of standardized tests, including the two used by Duke Power, resulted in a much lower pass rate for blacks than for whites. *Id.* The validity of the disparate impact approach was recently reaffirmed by the Court in a Title VII case involving sex discrimination. Dothard v. Rawlinson, 434 U.S. 321 (1977). *See generally* Shoben, *supra* note 96, at 6-8.

137 *See generally* Shoben, *supra* note 96, 8-9. Minority underrepresentation may also be referred to as the "community composition comparison" approach. *See id.* at 9.

138 *See* cases cited *id.* at 8 n.29.

139 431 U.S. 324 (1977); Hazelwood School District v. United States, 433 U.S. 299 (1977).

140 433 U.S. at 440 (quoting 431 U.S. at 339 n.20). Difficulties may exist, of course, in defining the relevant labor market (*see* Shoben, *supra* note 96, 12-19) and in determining whether "the claimed discriminatory pattern is a product of pre-Act hiring rather than unlawful post-Act discrimination" (433 U.S. at 442. *See also* 431 U.S. at 430.), but this minority underrepresentation approach is now well established as a way of proving discriminatory effect in a Title VII case.

employment test violates Title VII just because whites do better on it than blacks if the company's overall selection procedures result in a work force that reflects the racial composition of the community. The question of whether to focus on the impact of a single requirement or of the employer's overall hiring practices has divided the lower courts and federal agencies,[141] and the Supreme Court has yet to decide the matter.[142]

Whichever method of analyzing the proof of discriminatory effect is used, a court must also determine *how much* discrepancy in the comparable statistics is sufficient to establish a Title VII violation. In *Griggs,* the Supreme Court relied on statistics showing high school completion rates of 34% for white males in the state compared with 12% for blacks and a pass rate on the standardized test of 58% for whites versus 6% for blacks to conclude that both requirements disqualified blacks "at a substantially higher rate" than whites.[143] No effort was made in the opinion to quantify exactly what "substantially" meant. The lower courts have generally not tried to precisely define this concept either,[144] but the results reached in their various Title VII decisions have created a body of law indicating that very little difference in black-white pass rates is needed to trigger the requirement that the defendant show job relatedness.[145] One solution might have been to make the standards for evaluating the business necessity defense turn on how severe the discriminatory effect of the challenged practice was shown to be. For the most part, however, the lower courts have not related the two steps of the *Griggs* analysis to each other. Rather they have first determined whether the statistics show a large enough discrepancy in the way whites and blacks are treated for the "discriminatory effect" label to be applied and then have conducted a separate inquiry concerning the job relatedness of the test under review.

The business necessity defense has come to include three distinct elements.[146] First, the employment practice at issue must actually serve a business purpose; it is not sufficient that the employer sincerely intended that the practice be helpful. In *Griggs,* for example, the Supreme Court rejected Duke Power's argument that its diploma and testing requirements were protected by the fact that they were undertaken to upgrade the quality of the work force, because the company had failed to establish that the requirements were in fact related to successful per-

141 *See* authorities cited at Lopatka, *supra* note 100, at 79-80 nn. 50 & 51.

142 For discussions of the issue of whether to focus on the racial impact of a single requirement or of the overall results of the defendant's hiring practices, see Shoben, *supra* note 96, at 25-32 (taking the position that an overall results approach is unsatisfactory) and Lopatka, *supra* note 100, 79-81 (taking the position that "[a]n entirely logical solution to this problem may not exist." *Id.* at 81).

143 401 U.S. at 426, 430 n.6. *See also id.* at 429 (the standardized test rendered "ineligible a markedly disproportionate number of Negroes").

144 *See* Lopatka, *supra* note 100, at 74 n.26.

145 *See, e.g.,* Chance v. Board of Examiners, 458 F.2d 1167, 1171 (2d Cir. 1972) (passing rate for whites 1½ times greater than passing rate for blacks). Cases in which discriminatory effect has been shown by the minority underrepresentation approach (*see* note 140 *supra*) have usually involved rather severe disparities between the racial compositions of the defendant's work force and the relevant labor market. *See* cases cited in note 140 *supra;* Lopatka, *supra* note 100, at 76 n.36, 77-78.

146 *See generally* Lopatka, *supra* note 100, at 82-89.

formance of the jobs for which they were used.[147] The lower courts have added two other elements to the business necessity defense that go beyond anything found in the *Griggs* opinion. They have held that in order for an employment practice to be protected by business necessity, it must be urgent or essential to the business, and furthermore there must be no acceptable alternative available to the company that would accomplish the same business purpose with a lesser racial impact.[148]

Considering such factors, of course, may require a court to evaluate the costs, efficiency, and even safety of actual and potential employment practices and to balance these against the different racial impact of these alternative practices in determining whether a business necessity defense has been established. In these circumstances, which party has the burden of proof may be of critical importance. *Griggs* makes clear that the burden of showing job relatedness is on the employer.[149] Even if the Supreme Court accepts the additional elements written into the business necessity defense by the lower courts, however, it does not necessarily follow that the burden with respect to the existence of a less discriminatory alternative will also be placed on the defendant.[150]

D. *Suits by the Federal Government: "Pattern or Practice" Versus "Accidental" Discrimination*

Both Title VII and Title VIII provide for enforcement of their substantive sections by "pattern or practice" suits brought by the federal government as well as by ordinary claims brought by private plaintiffs.[151] The government enforce-

147 *See* 401 U.S. at 431-32, 436.

> "Prior to *Griggs,* high school educations and general intelligence tests were widely assumed to be good general predictors of ability. The decision in *Griggs* impels the conclusion that unsupported stereotypical assumptions will not suffice to demonstrate the requisite relationship between the employment practice and a business purpose."

Lopatka, *supra* note 100, at 83.

148 *See generally* Lopatka, *supra* note 100, at 84-89. Thus, for example, in Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971), the court held that the disparate impact of a company's practice of discharging employees for multiple garnishments could not be justified by the time and expense involved in garnishment procedures, nor by the possible loss of the garnished employee's efficiency, which the court considered to be a price that Congress felt must be paid to end discrimination.

149 *See* 401 U.S. at 432.

150 *Cf.* 422 U.S. at 436 (indicating that if the defendant proves that its test is job related, the plaintiff may still establish a Title VII violation by showing that alternative selection procedures were available to the company).

151 *See* 42 U.S.C. § 2000e-6(a) (1970) (Title VII) and 42 U.S.C. § 3613 (1970) (Title VIII). The relevant provision of the Fair Housing Act provides that the Attorney General may bring a civil action in two types of cases: (1) when any person "is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter"; or (2) when "any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance." 42 U.S.C. § 3613 (1970). The government enforcement section of Title VII is more restrictive. Title VII authorizes federal suits against persons who are "engaged in a pattern or practice of resistance" to the law, but only where that pattern or practice "is of such a nature and is intended to deny" the rights protected by the statute. Nothing comparable to the Fair Housing Act's second option involving cases with issues of general public importance is provided for in Title VII.

ment provisions of the two statutes are worded somewhat differently, but they both require a finding of more generalized discrimination by the defendant than do private suits. This has led the Supreme Court in Title VII cases to distinguish between governmental claims, which it has held require proof of discriminatory intent, and private suits, which may be based on *Griggs'* nonmotivational "disparate impact" theory.[152] Since a similar distinction exists in the Fair Housing Act, these employment cases suggest that a discriminatory effect theory should be adopted in appropriate private Title VIII cases as well.

The government enforcement provision in Title VII, unlike its counterpart in the Fair Housing Act, explicitly includes an intent requirement.[153] This alone would be sufficient to require proof of discriminatory purpose in a Title VII case brought by the United States. But in holding that racial motive must be shown in such a case, the Supreme Court has focused not on this explicit intent requirement, but rather on the "pattern or practice" language that is common to both Title VII and Title VIII. This phrase, the Court recently held, means that the government must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[154] Racial discrimination must be shown to be "the company's standard operating procedure—the regular rather than the unusual practice."[155]

The Supreme Court's definition of "pattern or practice" in government suits implies that in a private suit under either Title VII or Title VIII, "accidental" or unusual acts, if discriminatory, would be held unlawful. Certainly this would be true, if the isolated act involved intentional discrimination. Even though it would be inappropriate for the government to sue a company whose bigoted manager once rejected a qualified black applicant it does not mean that the applicant himself would not have a good cause of action. But this would be a case of purposeful discrimination, not one based on discriminatory effect. The

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Title VIII pattern or practice suits are brought by the Attorney General, who also originally had the responsibility for such suits under Title VII. In the 1972 amendments to Title VII, this responsibility was transferred to the Equal Employment Opportunity Commission. See § 5 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 107 (amending 42 U.S.C. § 2000e-6(c) (1970)), and 431 U.S. at 329 n.1.

152 *See, e.g.,* 431 U.S. at 335-36 n.15.

153 *See* note 151 *supra.*

154 431 U.S. at 336. *See also id.* at 336-37 n.16.

155 *Id.* at 336. In developing this definition of "pattern or practice," the Supreme Court cited similar interpretations of this phrase in a variety of civil rights contexts, including one in a fair housing case. *Id.* (citing United States v. West Peachtree Tenth Corporation, 437 F.2d 221, 227 (5th Cir. 1971)). This citation may be taken to suggest that the government's proof in a Title VIII case is to be tested by the same purposeful discrimination standard that applies in comparable Title VII cases, even though the intent requirement spelled out in Title VII was not specifically included in the Fair Housing Act. *See* note 151 *supra.* Lower courts in Title VIII cases brought by the Attorney General, however, have often held that discriminatory effect, not purpose, is the touchstone in these cases. *E.g.,* United States v. City of Black Jack, Missouri, 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). *See also* United States v. Grooms, 348 F. Supp. 1130 (M.D. Fla. 1972); United States v. Real Estate Development Corporation, 347 F. Supp. 776 (N.D. Miss. 1972). Indeed, in the fair housing field thus far, the discriminatory effect theory has been more commonly relied on in government enforcement actions than in private suits, because sufficient statistical data to establish discriminatory effect is more often available in the "big" pattern or practice case than it is in a private dispute.

fact that a single, irregular, intentionally racial incident violates Title VIII does not mean that the effect theory of discrimination accepted in *Griggs* necessarily applies to fair housing cases. *Griggs,* in fact, was concerned not with an unusual act, but with an intentionally adopted company policy whose unintended racial results were held unlawful.

Still, the notion that "accidental" discrimination may violate the Fair Housing Act seems to carry with it a concept of discrimination that is not based on the defendant's illicit motivation. It is noteworthy in this context that the lower courts have been unanimous in holding property owners and real estate firms liable under Title VIII for the discriminatory housing practices of their agents under the doctrine of *respondeat superior.*[156] The agents' discrimination in these cases is invariably intentional, but liability is also imposed on the principal regardless of whether he was aware of his agent's unlawful conduct or not. The only limitation on this doctrine is that the courts have generally not permitted punitive damage to be awarded against a vicariously liable defendant,[157] but otherwise he is fully responsible for discrimination he may have known nothing about. As noted above, this very possibility of distinguishing between defendants who are liable for punitive damages and those who are not suggests that the Fair Housing Act may be violated without an intent to discriminate.

E. *Suits Against Local Governments: The Two-Standard Approach*

The legislative history of Title VIII discussed above demonstrates a congressional intention to subject governmental agencies and officials as well as private defendants to the commands of the new law. Unlike Title VII, which was initially limited to private employers,[158] the Fair Housing Act has never exempted government bodies from its coverage. Indeed, the first appellate decision to conclude that housing practices with discriminatory effects violate Title VIII involved a municipal defendant,[159] and since then the principal fair housing cases that have accepted this nonmotivational theory of discrimination have resulted from challenges to exclusionary zoning by local governments.[160]

1. *Washington v. Davis*

The very fact that Title VII was not extended to governmental employers until 1972 resulted in a number of significant developments in civil rights law

156 *See, e.g.,* Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975); Marr v. Rife, 503 F.2d 735, 740-42 (6th Cir. 1974); United States v. Youritan Construction Company, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified,* 509 F.2d 623 (9th Cir. 1975) (and cases cited therein).

157 *See, e.g.,* Fort v. White, 530 F.2d 1113, 1116-17 (2nd Cir. 1976); Marr v. Rife, 503 F.2d 735, 744-45 (6th Cir. 1974).

158 The 1972 amendments to Title VII extended its coverage to state and municipal employees by removing the exemption of state and political subdivisions as employers that was written into the original law. *See* Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, § 2(1)-(2), 86 Stat. 107 (amending 42 U.S.C. § 2000e(a)-(b) (1970)).

159 436 F.2d 108. *See also* 508 F.2d 1179.

160 *See* cases cited at note 12 *supra,* and text accompanying notes 370-407 *infra.*

generally that are relevant to the interpretation of the Fair Housing Act. Numerous complaints of racial discrimination in public employment were filed before the 1972 amendments to Title VII, but they were based not on Title VII, but on the Equal Protection Clause of the Fourteenth Amendment. Some of these claims were also brought under 42 U.S.C. § 1981,[161] the contract rights section of the Civil Rights Act of 1866, whose companion section dealing with property rights[162] bans racial discrimination in housing.[163] Many of these cases were similar to *Griggs* in that they involved challenges to employment tests that disproportionately excluded black applicants from police, fire, and other municipal jobs.[164] The lower courts that passed on these equal protection claims in the early 1970's generally held that, even though Title VII did not apply, the discriminatory effect analysis of *Griggs* should be followed because there was "no distinction between the constitutional standard and the statutory standard under Title VII."[165]

In 1976, this conclusion was reversed by the Supreme Court in *Washington v. Davis,*[166] which upheld the validity of a verbal ability test used by the District of Columbia police department to screen its recruits. The Court drew a distinction in *Davis* between an equal protection claim, which it held could only be based on purposeful discrimination, and a Title VII claim of the type sustained in *Griggs,* for which discriminatory purpose need not be proved.[167] In so doing, the Court reaffirmed that Title VII prohibits employment practices that disqualify substantially disproportionate numbers of blacks, unless the practices are validated in terms of job performance.[168] "However this process proceeds," Justice White wrote in describing the "more rigorous" Title VII standard, "it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed."[169]

The Supreme Court in *Davis* did apply the Title VII standards to the plaintiffs' § 1981 claim.[170] Nevertheless, this claim, too, failed on the merits. Even though the police department's test excluded black applicants at a much higher rate than whites,[171] the Court upheld the test as job related, because its

161 "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981 (1970).

162 42 U.S.C. § 1982 (1970). Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

163 Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); 392 U.S. 409.

164 *See, e.g.,* Davis v. Washington, 512 F.2d 956, 957-59 n.2, n.6 (D.C. Cir. 1975), *rev'd,* 426 U.S. 229 (1976) (and cases cited therein).

165 *Id.* at 958 n.2 and cases cited. *See also* the public employment cases cited at Washington v. Davis, 426 U.S. 229, 244 n.12 (1976).

166 426 U.S. 229 (1976).

167 *Id.* at 238-47.

168 *Id.* 246-47.

169 *Id.* at 247.

170 *Id.* at 248-52.

171 The failure rate of black applicants who took the challenged test was 57% as compared to a failure rate of 13% for whites. Davis v. Washington, 512 F.2d 956, 958-59 (D.C. Cir. 1975), *rev'd,* 426 U.S. 229 (1976).

results were correlated to performance in the police training program.[172]

Washington v. Davis is an extremely important decision.[173] The significance of its holding that proof of discriminatory purpose is necessary to establish an equal protection violation is muted somewhat in the employment discrimination context by the fact that Title VII now applies to public as well as private employers.[174] Presumably, *Davis*-type claimants will now rely on Title VII and § 1981 whenever possible instead of on the Equal Protection Clause.[175] A similar result would follow in the housing discrimination field if it is ultimately decided that Title VIII or § 1982 is governed by a discriminatory effect standard. But *Davis* remains of vital importance as a general pronouncement on equal protection principles and on how these principles relate to the proper interpretation of statutes designed to protect specific civil rights.

The significance of *Davis* for fair housing purposes lies in its conclusion that the same practice may be judged by different standards, depending on whether a constitutional challenge or a statutory claim is involved[176] and that the "more rigorous" statutory standard does not require proof of discriminatory purpose. The Supreme Court did uphold the police department's test against both types of claims in *Davis*, so the suggested dichotomy between the constitutional and statutory standards was arguably only *dicta*. But the strength of the Court's commitment to two different standards seemed clear in *Davis*,[177] and a year later in *Arlington Heights v. Metropolitan Housing Corp.*,[178] the Court again suggested that this was the correct approach, this time in a housing discrimination case.

2. *Arlington Heights*

Arlington Heights arose out of the efforts of Metropolitan Housing Development Corporation (MHDC) to build a federally subsidized 190-unit townhouse development for low- and moderate-income tenants in the Chicago suburb of Arlington Heights. The population of Arlington Heights in 1970 was about

172 426 U.S. 229, 249-52 (1976). The Supreme Court may decide this term whether the discriminatory effect standard of Title VII—*Griggs* applies in an employment discrimination case under 42 U.S.C. § 1981. *See* County of Los Angeles v. Davis, 566 F.2d 1334 (9th Cir. 1977), *cert. granted,* 98 S.Ct. 3078 (1978).

173 *See generally* Schwemm, *supra* note 2.

174 *See* note 158 *supra.*

175 *See* Lopatka, *supra* note 100, at 113-17.

176 *Cf.* 98 S.Ct. at 2747: "In view of the clear legislative intent, Title VI [of the Civil Rights Act of 1964] must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *See also id.* at 2767-68 (Brennan, J., concurring in part and dissenting in part).

177 *Cf.* General Electric Co. v. Gilbert, 429 U.S. 125 (1976), where the Court relied on the reasoning in an equal protection case (Geduldig v. Aiello, 417 U.S. 484 (1974)) in holding that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. *Gilbert* does not, however, necessarily conflict with *Davis'* determination to judge equal protection cases by a purpose standard and Title VII claims by an effect standard. The Court held that the plaintiffs in *Gilbert* had not even proven discriminatory effect, and that is why their Title VII claim failed. *See* City of Los Angeles, Dept. of Water v. Manhart, 98 S.Ct. 1370, 1379 (1978). *But see id.* at 1383-84 (Blackmun, J., concurring).

178 429 U.S. 252.

65,000 people, 99.9% of whom were white, but about 40% of those eligible to be tenants in the MHDC development were blacks and Mexican-American tenants, so it would increase the Village's minority population by over one thousand percent.[179] The site chosen for the MHDC development was vacant, but zoned for single-family purpose, and MHDC petitioned the Village for rezoning. A number of public hearings were held, where the debate focused not only on the merits of the requested rezoning, but also on the "social issue"—whether racially integrated subsidized housing was desirable in Arlington Heights.[180] The Village had previously approved some 60 zoning changes for market-rate apartment developers,[181] but it denied MHDC's petition. Thereafter, MHDC and three black prospective tenants brought suit in federal court, seeking to have Arlington Heights enjoined from interfering with the proposed development. The plaintiffs alleged that the Village's refusal to permit construction of the subsidized townhouses violated various constitutional and statutory provisions, including the Equal Protection Clause and the Fair Housing Act.

The district court denied relief.[182] Applying an effect standard, it nevertheless held the plaintiffs had failed to make out a case of racial, as opposed to merely economic, discrimination.[183] The court also commented that, although large groups of local residents opposed MHDC's petition because of opposition to minority groups, this factor did not affect the municipal officials, who had been "motivated . . . by a legitimate desire to protect property values and the integrity of the Village's zoning plan."[184]

The Court of Appeals for the Seventh Circuit reversed.[185] It held that the Village's refusal to rezone violated the Equal Protection Clause because its effect was, indeed, racially discriminatory and because that effect was not justified by a compelling state interest.[186] The court noted that although blacks accounted for only 18% of the overall population of the Chicago metropolitan area, they made up 40% of the low- and moderate-income residents who were eligible for the housing proposed by MHDC and were thus affected by the Village's action. Added to this disproportionate racial impact was the fact that the substantial growth that Arlington Heights had enjoyed in recent years had been almost totally limited to whites, making it the most racially segregated large municipality in the Chicago area.[187] With one judge dissenting, the court of appeals also found that the Village's refusal to permit construction of the MHDC development effectively blocked the only chance to have any subsidized, integrated housing in Arlington Heights, thus perpetuating the area's massive residential segregation.[188] Having determined that the municipal action under review was racially discriminatory, the court proceeded to evaluate Arlington

179 517 F.2d at 414.
180 429 U.S. at 257-58.
181 517 F.2d at 412.
182 373 F. Supp. 208 (N.D. Ill. 1974).
183 *Id.* at 210-11.
184 *Id.* at 211.
185 517 F.2d 409.
186 *Id.* at 412-15.
187 *Id.* at 414 n.1.
188 *Id.* at 414-15.

Heights' claimed justifications for the refusal to rezone by the "compelling interest" standard dictated by traditional equal protection analysis and found that neither of the Village's defenses—maintaining the zoning plan and protecting neighboring property values—satisfied this standard.[189]

The Seventh Circuit's opinion dealt exclusively with equal protection issues. Its failure to consider the plaintiffs' claim under the Fair Housing Act was later criticized by the Supreme Court,[190] but in defense of the court of appeals, it must be noted that the plaintiffs themselves had not viewed their statutory claim as different from their equal protection claim.[191] Indeed, the exclusionary land use cases then being decided had rarely focused attention on the Fair Housing Act as a separate basis of relief independent of the Equal Protection Clause.[192] Before the Supreme Court's decision in *Washington v. Davis,* litigants in these cases apparently assumed that the standards for judging constitutional and Title VIII claims were identical, as had their counterparts in public employment cases where *Griggs* was thought to control.[193]

In its decision in *Arlington Heights,* however, the Supreme Court indicated that the Title VIII claim should have been decided first[194] and also implied that it was to be judged by a different standard than the equal protection claim. The Court reversed the Seventh Circuit's decision on the ground that the plaintiffs had "simply failed to carry their burden of proving discriminatory purpose,"[195] as *Washington v. Davis* now required equal protection claimants to do. "This conclusion," Justice Powell's opinion stated, "ends the constitutional inquiry."[196] But it did not end the case. Since there had yet to be a decision on plaintiffs' allegation that the refusal to rezone violated the Fair Housing Act, the Supreme Court remanded the case "for further consideration of respondents' statutory claims."[197]

The Supreme Court's handling of the *Arlington Heights* case suggests that the dichotomy between constitutional and statutory standards that it recognized in *Davis* also exists in the fair housing field. *Arlington Heights* is the strongest hint yet given by the Court that it would be appropriate to apply a "more rigorous" standard than purposeful discrimination in Title VIII cases.[198] A

189 *Id.* at 415.

190 "The Court of Appeals, . . . proceeding in a somewhat unorthodox fashion, did not decide the statutory question." 429 U.S. at 271.

191 558 F.2d at 1286 n.2, 1287 n.3.

192 *See* text accompanying notes 408-415 *infra.*

193 *See* note 165, *supra.*

194 429 U.S. at 271.

195 *Id.* at 270.

196 *Id.* at 271.

197 *Id.* at 271.

198 There is also one hint to the contrary. In Warth v. Seldin, 422 U.S. 490 (1975), the Court dismissed an equal protection challenge to an exclusionary zoning ordinance of a wealthy Rochester, New York, suburb on standing grounds. In the course of his opinion for a 5-4 majority, Justice Powell refused to read the plaintiffs' complaint as stating a claim under the Fair Housing Act in addition to its constitutional claim. *Id.* at 513 n.21. He emphasized the "because of race" language of the operative provisions of Title VIII by way of contrasting its requirements with the *Warth* claim, which was "that the challenged zoning practices have the purpose and effect of excluding persons of low and moderate income from residing in the town, and that this in turn has the consequence of excluding members of racial or ethnic

number of lower courts have already cited *Davis* and *Arlington Heights* as establishing this two-standard approach.[199] For its part, the Seventh Circuit on remand in *Arlington Heights* took the hint and decided that "at least under some circumstances a violation of section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent."[200] The court went on to hold that the discriminatory effect of the Village's refusal to rezone violated Title VIII if no other suitable land was available in Arlington Heights for the MHDC development, and it remanded the case to the district court to determine whether other sites did exist.[201] Thus, *Arlington Heights* represents the most striking example to date of how the two-standard approach can work: a municipal decision that complies with the Equal Protection Clause may be unlawful under the Fair Housing Act.

3. The Rationale for the Two-Standard Approach

Neither of the Supreme Court's opinions in *Davis* or *Arlington Heights* attempts to explain the theoretical basis for evaluating a statutory claim of racial discrimination by a more rigorous standard than is appropriate for a constitutional claim. How can the same state action that is exonerated as nondiscriminatory for equal protection purposes be condemned as discriminatory under a statute passed to enforce the Equal Protection Clause? The *Davis* opinion contains some clues. The principal reason offered by the Court for rejecting a discriminatory effect standard in equal protection cases was its fear of the "far reaching" consequences of such a holding, which "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[202] This the Supreme Court was unwilling to do on its own as a matter of constitutional interpretation. It requires a far less activist Court, however, to give a remedial civil rights statute designed to attack a particular type of discrimination a "far reaching" interpretation in accordance with its "clear congressional intent."[203] *Griggs*, after all, is limited to employment discrimination cases, and if its adoption of a discriminatory effect standard for these cases is considered "wrong," Congress can correct the matter by statute, a process infinitely easier than amending the Constitution.

To understand the Supreme Court's double standard approach as a matter of judicial self-restraint, however, still does not provide it with any theoretical

minority groups. . . . We intimate no view as to whether, had the complaint alleged purposeful racial or ethnic discrimination, Metro-Act would have stated a claim under § 804." *Id.* The implication of this comment in *Warth* appears to be that practices that have the "consequence" of excluding blacks would not violate Title VIII. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

199 *E.g.*, 564 F.2d 126. Stingley v. City of Lincoln Park, 429 F. Supp. 1379 (E.D. Mich. 1977). *Cf.* United States v. City of Chicago, 549 F.2d 415, 435 (7th Cir. 1977) (employment discrimination).

200 558 F.2d at 1290.

201 *Id.* at 1294-95.

202 Washington v. Davis, 426 U.S. 229, 248 (1976).

203 *See generally* Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479 (1975).

foundation. The reason that a practice may be prohibited by a specific civil rights law while not violating the Equal Protection Clause is, *Davis* implies, because Congress intended the statutory standard to be more rigorous.[204] Although the Court did not say so, the congressional power to set this higher standard is presumably derived from the enforcement clause of the Fourteenth Amendment,[205] which has been held in other contexts to authorize Congress to outlaw practices that would not themselves violate the amendment.[206]

For example, in *Katzenbach v. Morgan*,[207] the issue was the constitutionality of a provision of the Voting Rights Act of 1965 that prohibited New York from requiring certain persons educated in Spanish-speaking schools to pass a literacy test in order to vote. Seven years before, the Court had decided that a similar voting requirement did not itself violate the Equal Protection Clause.[208] In *Morgan*, therefore, New York argued that Congress, which had enacted the Voting Rights Act pursuant to the enforcement clause of the Fourteenth Amendment, lacked the power to suspend the state's literacy test, but the Supreme Court upheld the statute. According to Justice Brennan's opinion, the enforcement clause empowered Congress to remedy past equal protection violations that it reasonably believed may have reduced the political power of Puerto Ricans in New York. Furthermore, the congressional enforcement power included the right to find, contrary to the Court's earlier decision, that the literacy test did deny equal protection, and since there was a rational basis for this finding, the Court accepted it.[209]

In short, Congress has the power to decide what "appropriate means" are necessary to enforce the Equal Protection Clause.[210] As *Morgan* held, the enforcement clause "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[211] *Morgan* authorizes Congress to enact appropriate civil right legislation extending minority rights, even to the point of prohibiting conduct that would not itself violate the Equal Protection Clause. With respect to Title VII, this means that once it is de-

204 *See* 426 U.S. at 246-48. *Cf.* 98 S.Ct. at 2747, holding that Congress intended Title VI of the Civil Rights Act of 1964 to be governed by the equal protection standard. *See also id.* at 2767-68 (Brennan, J., concurring in part and dissenting in part).

205 U.S. CONST. amend. XIV, § 5, provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

206 Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966); Jones v. Mayer Co., 392 U.S. 409 (1968) (13th amendment); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (15th amendment).

207 384 U.S. 641 (1966).

208 Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959).

209 384 U.S. at 653-56.

210 *Id.*

211 384 U.S. at 651. Justice Harlan's dissent in *Morgan* expressed the fear that this discretion might give Congress the power to retract, as well as extend, the protections afforded by the 14th amendment (*id.* at 659, 668 (Harlan, J., dissenting)), but the Court's opinion argued that Congress would not be permitted to dilute the constitutional guarantees. *Id.* at 651 n.10. The enforcement power was to be a one-way street only. *But see* Oregon v. Mitchell, 400 U.S. 112 (1970); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).

termined—as it was in *Griggs*[212]—that Congress intended for employment practices to be judged by a more rigorous standard than was applicable in equal protection cases, the constitutional question under *Morgan* becomes only whether there is some rational basis for this determination.[213] If equal protection claims were limited to those cases where purposeful discrimination could be proved, as *Davis* was to hold, it would certainly be rational for Congress to decide that a more rigorous standard was needed to root out all vestiges of discrimination in public employment. In addition, the Supreme Court conceded in *Davis* that the many lower court decisions applying a discriminatory effect test to equal protection challenges in public employment cases, though wrong, "impressively demonstrate that there is another side to the issue."[214] A similar conclusion by Congress would surely be considered at least "rational."[215]

Similar arguments concerning the Fair Housing Act would support the constitutionality of the more rigorous effect standard in the housing discrimination field as well, assuming, of course, that the Supreme Court takes the initial step of holding that Congress intended Title VIII to be governed by such a standard. The legislative history of the Act clearly demonstrates the need for a strong mechanism to combat discrimination by local governments, particularly in a case like *Arlington Heights* where exclusionary zoning is involved.[216]

Indeed, the constitutional case for an effect standard under Title VIII may actually be stronger than it is for Title VII, because of the additional authorization for the housing statute in the enforcement clause of the Thirteenth Amendment.[217] When the Fair Housing Act was being considered, the congressional power to enact it was generally thought to be derived from the commerce clause and § 5 of the Fourteenth Amendment,[218] which were also the bases for Title VII. Shortly after Title VIII was passed, however, the Supreme Court decided *Jones v. Mayer Co.*,[219] which held that the Civil Rights Act of 1866 (42 U.S.C. § 1981 and § 1982) "bars *all* racial discrimination, public as well as private, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[220] Thereafter, lower courts faced with constitutional challenges to the Fair Housing Act relied on *Jones* to hold that Title VIII was also an appropriate exercise of congressional power under the enforcement clause of the Thirteenth as well as

212 The reference is to the principle of *Griggs* that Title VII prohibits discriminatory effects, not to the specific facts involved in that case. *Griggs*, itself, was concerned with a private defendant, and the constitutional basis for Title VII's application to private employers is the commerce clause, not the 14th Amendment. *Cf.*, Heart of Atlanta Motel v. McClung, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). Title VII, however, also applies to governmental employers. *See* note 165 *supra*.

213 *See* 384 U.S. at 653-56.

214 426 U.S. at 245.

215 *Cf.* 384 U.S. at 653-56.

216 See discussion of legislative history, text accompanying notes 86-93 *supra*.

217 U.S. CONST. amend. XIII, § 2. Section 2 provides: "Congress shall have power to enforce this article by appropriate legislation."

218 *See, e.g.*, Dubofsky, *supra* note 55, at 152 n.15.

219 392 U.S. 409 (1968).

220 *Id.* at 413. *See also id.* at 437-44.

the Fourteenth Amendment.[221] Thus, even if civil rights statutes passed pursuant to § 5 of the Fourteenth Amendment were thought to be limited to banning purposeful governmental discrimination that would itself violate that amendment, Title VIII might still constitutionally be held to bar public and private housing discrimination based on a more rigorous standard pursuant to the Thirteenth Amendment.

Jones, of course, involved intentional discrimination. The Supreme Court's opinion did not state whether a purpose or effect standard was appropriate under § 1982 (or for that matter under the substantive provisions of the Thirteenth Amendment), but at least the Court has not yet held that it is limited to purposeful discrimination as is the Equal Protection Clause after *Davis.* In light of *Katzenbach v. Morgan,* however, it seems unlikely that the Thirteenth Amendment's additional source of congressional power for Title VIII and § 1982 would be needed to sustain the double standard approach in a fair housing case, but it is available.

4. The Civil Rights Act of 1866: Is There a Third Standard?

Beginning with its decision in *Jones v. Mayer Co.,*[222] the Supreme Court has resurrected the Civil Rights Act of 1866 by holding that it provides a private right of action for victims of racial discrimination in employment[223] and in housing.[224] In both fields, the Court has made clear that the rights created by the 1866 law are independent of and not limited by the passage of the more detailed provisions of Title VII and Title VIII.[225]

The independence of § 1982 and Title VIII is particularly important when a housing discrimination case is covered by one statute, but not the other. This may happen in a number of different ways. For example, unlike Title VIII, § 1982 does not prohibit discrimination based on religion or national origin, nor does it specifically cover discriminatory advertising or financial arrangements.[226] On the other hand, § 1982 is broader than Title VIII in some respects, because it is not subject to the short 180-day statute of limitations[227] or to the exemp-

221 *See, e.g.,* Williams v. Matthews Co., 499 F.2d 819, 825 (8th Cir. 1974), *cert. denied,* 419 U.S. 1021 (1974); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 120-21 (5th Cir.), *cert. denied,* 414 U.S. 826 (1973); United States v. Hunter, 459 F.2d 205, 214-15 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972); Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

222 392 U.S. 409.

223 427 U.S. 273; Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

224 396 U.S. 229; 392 U.S. 409.

225 *See* 392 U.S. at 416-17 n.20 (citing a section of Title VIII that provides that "[n]othing in this title shall be construed to invalidate or limit any law of . . . any . . . jurisdiction in which this title shall be effective, that grants, guarantees, or protects the rights . . . granted by this title." 42 U.S.C. § 3615 (1970)); 421 U.S. at 459-60.

226 *See* 392 U.S. at 413. Nor does § 1982 provide for enforcement by the Attorney General, HUD, or any other federal agency. Its only means of enforcement is by private suits. *See id.* at 413-14.

227 Section 1982 does not provide for a particular statute of limitations. In these circumstances, the courts apply the statute of limitations of the most analogous state law. *See* Runyon v. McCrary, 427 U.S. 160, 180 (1976); 421 U.S. at 462. In fair housing cases, the applicable state statute has often been longer than Title VIII's 180-day limitation period (42 U.S.C. §§ 3610, 3612 (1970)). *See, e.g.,* Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3rd Cir. 1977); Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973).

tions[228] that were written into the Fair Housing Act. Furthermore, § 1982 covers all real and personal property, not just housing, and its guarantees include the right to "hold," "sell," and "convey" property as well as the right to purchase and lease it.[229] Even in housing discrimination cases under both Title VIII and § 1982, the independence of the two laws may be important with respect to relief, because punitive damages[230] and attorneys fees[231] are available through § 1982 without the limitations that apply to these remedies under Title VIII.[232]

These differences in Title VIII and § 1982 make it at least conceivable that the standard of proof under the two statutes could also vary. As in the case of Title VIII, there would seem to be three possible standards under § 1982: (1) discriminatory purpose, as required for equal protection claims by *Washington v. Davis;* (2) unjustified discriminatory effect, as applied to Title VII cases by *Griggs;* and (3) something else, perhaps an intermediate standard.

For its part, the Supreme Court has yet to declare whether a showing of discriminatory effect would be sufficient to establish a § 1982 violation. The Court's modern § 1982 cases have all dealt with intentional discrimination,[233] and it has not had occasion to comment on the proper standard in an effect case under the old law.[234] There is a clue, however, in *Washington v. Davis*.[235] There, the Court applied the *Griggs* standards to a § 1981 claim, albeit an unsuccessful one.[236] Since the Court has elsewhere indicated that § 1981 and § 1982 should be interpreted in a like manner,[237] *Davis* suggests that the proper standard under § 1982 should also be derived from *Griggs*.

Perhaps the strongest argument in favor of an effect test for § 1982 cases is that clarity and simplicity would best be served if the same standard applied in similar suits under Title VIII and § 1982. (This argument, of course, presup-

228 *See, e.g.,* Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974), holding that the "Mrs. Murphy" exemption in Title VIII (42 U.S.C. § 3603(b) (1970)) covering owner-occupied apartment buildings with less than four units is not available as a defense in a § 1982 suit. *See also* Johnson v. Zaremba, 381 F. Supp. 165, 167 (N.D. Ill. 1973) and cases cited therein.

229 *See* note 162 *supra. See, e.g.,* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1972); 396 U.S. 229.

230 *See, e.g.,* Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Wright v. Kaine Realty, 352 F. Supp. 222 (N.D. Ill. 1972).

231 In 1976, Congress amended 42 U.S.C. § 1988 (1970) to provide that in any action under § 1982 (and other enumerated civil rights acts), "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This amendment has been held to be retroactively applicable to a § 1982 case that was pending on the date of its enactment. *See* Gore v. Turner, 563 F.2d 159, 163 (5th Cir. 1977). *See also* Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977); Hughes v. Repko, 578 F.2d 483, 488 (3rd Cir. 1978).

232 Under Title VIII, a punitive damage award may not exceed $1,000 and a prevailing plaintiff may be awarded attorney's fees only if "the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 42 U.S.C. § 3612 (1970).

233 *See* 410 U.S. 431; 396 U.S. 229; 392 U.S. 409.

234 Justice Stewart's opinion in *Jones* did state that § 1982 "must encompass every racially motivated refusal to sell or rent" (392 U.S. at 421-22), but nothing was said about practices with discriminatory effects that were not racially motivated. *See* note 172 *supra.*

235 426 U.S. 229 (1976).

236 *Id.* at 248-52.

237 *See* 427 U.S. at 171-72; 410 U.S. at 439-40. *See also id.* at 190 (Stevens, J., concurring): "[I]t would be most incongruous to give these two sections a fundamentally different construction."

poses that *Griggs* is ultimately extended to Title VIII.) The overlapping relationship of the two statutes is confusing enough without having two different standards apply in a given type of housing discrimination case. Admittedly, the desire to avoid conflicting guidelines did not prevent the Supreme Court from developing a two-standard approach in *Davis,* but the rationale for that approach—that it is up to Congress to provide for a more rigorous standard than the constitutional one of purposeful discrimination—does not apply when the comparison is between two statutes. Here, the question simply becomes a matter of congressional intent.

Doubtless the Congress that passed the 1866 law was primarily concerned with the most egregious forms of intentional discrimination and never even considered the purpose-or-effect issue.[238] Nevertheless, it is clear that the Reconstruction Congress sought to establish "a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."[239] The Civil Rights Act of 1866 was intended to abolish the "badges and incidents of slavery."[240] In *Jones,* the Supreme Court held that private racial discrimination in housing is one of the badges and incidents of slavery intended to be eradicated by § 1982.[241] After *Jones,* it is not a big step to conclude that a housing practice that has the effect of discriminating against blacks "too is a relic of slavery."[242]

The Supreme Court has already held that the congressional concerns underlying § 1982 were similar to those that gave rise to the Fair Housing Act. For example, Title VIII was intended "to replace the ghettos by truly integrated and balanced living patterns,"[243] while § 1982 was concerned with "racial discrimination [that] herds men into ghettos and makes their ability to buy property turn on the color of their skin. . . ."[244] The Court has also noted that a "narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded" by it,[245] while describing the language of Title VIII as "broad and inclusive" and entitled to a "generous construction."[246]

An argument might be made that the Fair Housing Act should be governed by a more rigorous standard than § 1982, because exemptions and limitations in the newer law reflect a congressional desire to apply a more lenient test in those cases excluded from its coverage. There are two problems with this argument. First, its rationale would also justify reading the Title VIII limitations into § 1982, which the courts have already held to be inappropriate.[247] Second, an effect standard would probably not be of much practical significance unless Title

238 *See* Note, *Racially Disproportionate Impact of Racially Neutral Practices — What Approach Under 42 U.S.C. Sections 1981 and 1982?,* 1977 DUKE L. J. 1267, 1278-80 (1977).
239 427 U.S. at 296. *See also* Note, *supra* note 238, at 1278, 1284-87.
240 392 U.S. at 439-41; *see* Civil Rights Cases, 109 U.S. 3, 20-22 (1883).
241 392 U.S. at 439-41.
242 *Id.* at 443.
243 409 U.S. at 211 (quoting 114 CONG. REC. 2706, 3422 (1968)).
244 392 U.S. at 442-43.
245 396 U.S. at 238.
246 409 U.S. at 209, 212.
247 *See* notes 225, 227, 228, 230 & 231 *supra.*

VIII also applied. A § 1982 case against an individual homeowner or small landlord who is not covered by Title VIII[248] would almost surely have to be based on purposeful discrimination, not just effect, because proving discriminatory effect requires a large defendant who has made a sufficient number of decisions to establish a statistically significant pattern. Similarly, the greater availability of punitive damages under § 1982 would be relevant only in cases where racial intent is shown. Thus, it is unlikely that applying a discriminatory effect standard to § 1982 as well as to the Fair Housing Act would result in imposing liability on any defendant who would not also be held liable under Title VIII.

Before the Supreme Court decided *Davis,* the lower courts certainly made no attempt to devise or apply a different standard of proof under § 1982 than under Title VIII. No distinction was made between the two in suits brought under both statutes,[249] and where § 1982 alone was involved, it was held to proscribe more than just intentional discrimination.[250] After *Davis,* however, there have been a number of lower court decisions distinguishing between the Title VIII and § 1982 standards and indicating that proof of racial intent is required in a § 1982 case.[251] Most of these decisions simply assume that the old statute must be governed by *Davis'* interpretation of the equal protection standard, which is rather surprising since § 1982 was not enacted pursuant to the Fourteenth Amendment[252] and since *Davis* itself shows that suits against government defendants are to be judged by a more rigorous standard under § 1981 than under the Equal Protection Clause. These courts have also failed to analyze the legislative history or congressional purposes behind § 1982, which, as shown above, could well support an effect test in § 1982 cases.[253] Thus, their conclusion that purposeful discrimination is required under § 1982 is not based on a proper analysis of the statute and is therefore unlikely to be the final word on the matter.[254]

In any event, no one has suggested that the proper standard in a § 1982 case should be based on some third approach different from either *Griggs* or *Davis.*[255] Whatever standard is ultimately held to govern § 1982, it will almost certainly be one of these two. And as between these two, it would seem more appropriate to adopt the statutory rather than the equal protection test, and less confusing as well.

248 *See* 42 U.S.C. § 3603(b) (1970).

249 *See, e.g.,* 499 F.2d 819; Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973); Williamson v. Hampton Management Co., 339 F. Supp. 1146 (N.D. Ill. 1972).

250 *See, e.g.,* Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied,* 419 U.S. 1070 (1974). *But see* McCrary v. Runyon, 515 F.2d 1082, 1088 (4th Cir. 1975) (en banc), *aff'd,* 427 U.S. 160 (1976).

251 *E.g.,* 429 F. Supp. at 1385; 425 F. Supp. at 1024; *cf.* Ortega v. Merit Ins. Co., 433 F. Supp. 135, 143 n.4 (N.D. Ill. 1977); cases cited at Note, *supra* note 238, at 1280 n.76.

252 392 U.S. 409.

253 *See* Note, *supra* note 238, at 1278, 1282, 1285-87.

254 *See* Note, *supra* note 238, at 1269, 1280-84, 1288; *cf.* Note, *Section 1981 and the Thirteenth Amendment After* Runyon v. McCrary*—On the Doorsteps of Discriminatory Private Clubs,* 29 STAN. L. REV. 747, 772 (1977).

255 *But cf.* 426 U.S. at 255-56 (Stevens, J., concurring).

F. *Should the Employment Discrimination Analogy Apply to Fair Housing Cases?*

Much of this article thus far has been concerned with examining the similarities in the language and purposes of Title VII and Title VIII and in the relationship of these statutes to the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866 in order to determine if it would be appropriate to apply *Griggs* to fair housing cases. Before concluding that the Title VII standards do apply, however, it is necessary to ask whether the analogy of the employment discrimination cases is an apt one. Housing discrimination and employment discrimination are distinctly different fields, and the legal doctrines applicable in one are not necessarily appropriate to the other.

The nature of the employment relationship differs from the relationship of the parties to a housing transaction. First of all, employment always involves a continuing relationship between a company and its employee, while the parties to a house sale may have nothing to do with each other after the closing. Of course, where a seller or developer provides his own financing or where an apartment rather than a house is involved, the relationship of the housing provider to the housing consumer is ongoing. In these continuing relationships, the developer or landlord has an obvious legitimate interest in the ability and desire of the person he deals with to meet the financial and other obligations contracted for, but this interest is no greater than the employer's interest in the ability and motivation of his workers. If a company can be required to prove "business necessity" under Title VII whenever its employment practices have a discriminatory effect on blacks, there is no apparent reason why a landlord should not have the same burden under the Fair Housing Act. Indeed, as one commentator has pointed out, "the consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot."[256]

Another difference in housing and employment is that, although both are needed, employment may often be more difficult to secure: an employer "gives" someone a job, but a real estate agent has to "sell" his client on a home. Of course, employers as well as housing suppliers engage in substantial advertising, and in today's tight housing market, a person might be as grateful for a good home as a good job. The point is, however, that when a housing supplier refuses to deal with a minority prospect, he is refusing to take that person's money, an act that should create at least as much suspicion as an employer's refusal to hire and pay a minority jobseeker.[257]

256 Comment, *supra* note 119, at 174. The example, of course, is an extreme one, since it compares an average housing transaction to a terribly important employment decision. On the other hand, it might be argued that the consequences of admitting a destructive tenant to a luxury high rise apartment building could be more devastating than hiring an unqualified factory worker. But the point of the tenant-airline pilot example remains valid: the legitimate concerns of housing suppliers are not necessarily entitled to more consideration than are those of employers under the civil rights acts.

257 *See, e.g.*, Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832, 836 (7th Cir. 1976); United States v. Pelzer Realty Co., 484 F.2d 438, 442 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Allen v. Gifford, 368 F. Supp. 317 (E.D. Va. 1973); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 414-15 (S.D. Ohio 1968).

There is also a difference in the nature of the typical defendant in housing and employment discrimination cases. With few exceptions, housing is an essentially local business, with real estate firms and housing suppliers generally operating in only one geographic market. Most of the reported private fair housing cases have been brought against small landlords and homesellers, while the Title VII defendant is more often a large regional or even national company or union with a substantial number of employees. This difference could be relevant in terms of the initial fairness of adopting an effect standard in discrimination cases. One commentator has suggested that *Griggs* and the EEOC guidelines that supported that decision are appropriate in the labor field, because large companies and unions had previously learned to live with a system of detailed, federal interpretive regulations and to conform their practices to these regulations through their experience with the National Labor Relations Act.[258] Whatever the merit of this argument, however, it cannot serve to "protect" fair housing defendants from a *Griggs*-type interpretation of Title VIII now. First of all, the *Griggs* opinion itself did not rely on the "notice" given by the EEOC guidelines to justify its effect standard. Second, just as the EEOC guidelines forewarned Title VII defendants of the coming of *Griggs,* so should *Griggs*—now seven years old and often reaffirmed—be considered fair warning that effect, not purpose, may also govern housing discrimination cases. Finally, the small Title VIII defendant has little to fear from an effect standard anyway, since it will only be of practical importance in cases against large housing firms; discriminatory purpose will still govern the smaller cases.[259]

If the nature of the housing and employment relationships do not justify a different interpretation of Title VII and Title VIII, what of the differences in the statutes themselves? The most important difference is that a person aggrieved by a discriminatory employment practice under Title VII must file a complaint with the EEOC before he is permitted to sue in court, while a victim of housing discrimination is authorized by Title VIII to sue directly without pursuing any administrative remedies.[260] The decision in *Griggs* to apply an effect test in Title VII cases, however, had nothing to do with the statute's requirement of an agency complaint, and there is no reason why the difference in the enforcement schemes of Title VII and Title VIII should result in their substantive requirements being interpreted differently.

The Supreme Court has also noted that the languages of the respective statutes dealing with relief "contrast sharply."[261] Thus, a damage action under Title VIII "sounds basically in tort" and is essentially legal,[262] while even

258 Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 69-71, 74, 97-98 (1972).

259 *See* text accompanying notes 155 and 248 *supra.*

260 *Compare* 42 U.S.C. § 3612 (1970) (Title VIII) *with* 42 U.S.C. § 2000e-5 (1970) (Title VII). *See also* Note, *supra* note 47, at 836-39, 848-59, 862-63. A victim of racial discrimination in employment may, however, bypass the procedural requirements of Title VII and sue directly under 42 U.S.C. § 1981 (1970). *See* 421 U.S. at 457-60; Lopatka, *supra* note 100, at 114.

261 Curtis v. Loether, 415 U.S. 189, 197 (1974).

262 *Id.* at 195.

monetary relief under Title VII has been characterized as equitable.[263] This difference in how the two types of claims are characterized also seems unrelated to whether *Griggs* should apply to Title VIII. Indeed, to the extent it is considered relevant to this problem, it would actually seem to cut in favor of an even more rigorous standard under the Fair Housing Act than under Title VII, for, as the Supreme Court has pointed out, the defendant's intent may be relevant to a court of equity's decision concerning relief under Title VII,[264] but "[t]here is no comparable discretion [under Title VIII]; if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount."[265]

The issues that have emerged as important under Title VII and Title VIII also differ. Almost all of the fair housing cases have involved only racial discrimination, while Title VII has also presented difficult questions concerning its prohibitions against discrimination on the basis of sex[266] and religion.[267] In addition, a number of major Title VII cases have involved the terms, conditions, and privileges of employment,[268] not just the initial hiring decision, and although the Fair Housing Act contains a similar provision guaranteeing equal treatment after housing is secured,[269] this section has rarely been used.[270] Furthermore, issues concerning proper relief have been given a great deal more attention under Title VII, particularly the question of quotas and other preferential remedies, which have been highly controversial in the employment field,[271] but rarely discussed in Title VIII cases.[272]

The most remarkable difference, however, is that the Supreme Court has *yet to decide a Title VIII case on the merits,*[273] while it has turned out numerous opinions concerning what constitutes a Title VII violation. The result is that Title VII law has been substantially refined with respect to such matters as the elements of a prima facie case, the proper use of statistical evidence, and the proof necessary to establish discriminatory effect and the business necessity defense, whereas no comparable Supreme Court guidance exists concerning the substantive requirements of the Fair Housing Act.

The fact that different issues have become prominent under Title VII and Title VIII is, of course, not a reason to limit *Griggs* to the employment discrim-

263 *See id.* at 196-97 and authorities cited *id.* at n.13; 98 S.Ct. at 1381.
264 98 S.Ct. at 1381-83.
265 415 U.S. at 197.
266 *See generally* Lopatka, *supra* note 100, at 94-101. The Fair Housing Act did not originally ban sex discrimination. In 1974, Title VIII was amended to include sex along with race, color, religion, and national origin as prohibited bases for housing discrimination.
267 *See generally* Lopatka, *supra* note 100, at 101-13.
268 *E.g.,* 98 S.Ct. 1370; 429 U.S. 125.
269 42 U.S.C. § 3604(b) (1970). *See also* 42 U.S.C. § 3617 (1970).
270 *But see* 484 F.2d 438.
271 *See generally* Lopatka, *supra* note 100, at 134-54.
272 Relief issues in fair housing cases have generally been limited to the question of damages for the individual victim of housing discrimination (*see, e.g.,* Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974)) and the question of how far a court should go in ordering injunctive relief to correct a past pattern or practice of discrimination. *E.g.,* 437 F.2d 221.
273 *See* note 17 *supra.*

ination field. Rather, it simply demonstrates the greater concern the Supreme Court has shown for Title VII cases and, correspondingly, the growing need for a definitive statement by the Court concerning the meaning of the Fair Housing Act.

When that statement does come, the analogy of *Griggs* and Title VII should prove compelling: the "because of race" language is similar in both laws;[274] *Davis* and *Arlington Heights* suggest that a more rigorous standard than purposeful discrimination is appropriate under both the employment and housing discrimination statutes; the related provisions of the Civil Rights Act of 1866 are similarly construed in the employment and housing fields; the Fair Housing Act, like Title VII, is a remedial civil rights statute and as such is entitled to a "generous construction";[275] none of the differences between employment and housing justify a fundamental difference in the interpretation of the two statutes; and finally, and most importantly, the congressional desire to eradicate the *consequences* of discrimination, not simply the motivation behind it, is just as strong under Title VIII as it is under Title VII. Thus, the Fair Housing Act should also be held to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[276]

III. Discriminatory Effect in Fair Housing Cases: *Griggs* Applied

A. *The Discriminatory Effect Principle in Disparate Treatment Cases*

An examination of the reported fair housing cases reveals only a few decisions where application of the *Griggs* principle has been necessary to a holding of unlawful discrimination. A number of lower courts have mentioned that "[p]ractices with discriminatory consequences are prohibited, irrespective of the defendant's motivation,"[277] but even in these cases, substantial proof of racial intent was present. The lessons of *Griggs* have been helpful in some housing discrimination cases, but, until recently, its actual holding has not been of great significance, because most Title VIII suits have been based on purposeful discrimination.

Two early cases brought by the Attorney General are illustrative. In *United States v. Real Estate Development Corp.*,[278] there was overwhelming evidence of intentional discrimination in the operation of the defendant's two apartment complexes in Columbus, Mississippi. No black had ever lived in these apartments, even though blacks accounted for 37.6% of the town's population and a number of them had applied to live in the defendant's buildings.[279] The court found that the defendant had openly discriminated prior to the effective date of Title VIII,

274 Similar language in Title VII and Title VIII has elsewhere been relied on by the Supreme Court to give the two statutes a comparable interpretation. *See* 409 U.S. at 209.
275 409 U.S. at 212. *See generally* SUTHERLAND, STATUTORY CONSTRUCTION § 72.05 at 391 (4th ed. 1973).
276 401 U.S. at 431.
277 347 F. Supp. at 782. *See also* United States v. Hughes Memorial Homes, 396 F. Supp. 544, 548 (W.D. Va. 1975); 484 F.2d at 443; 348 F. Supp. at 1133-34.
278 347 F. Supp. 776 (N.D. Miss. 1972).
279 *Id.* at 779.

and that thereafter, according to his own office manager, all of the blacks who applied were turned away on the false ground that no vacancies were available.[280] The apartment owner did not even claim at trial that he would rent on a nondiscriminatory basis.[281] The court held that the evidence of the defendant's discriminatory policy was "compelling."[282] It also stated that proof of racial motivation was unnecessary under *Griggs*,[283] but this conclusion was obviously gratuitous.

The evidence of racial purpose may have been less compelling in *United States v. Grooms*,[284] but it was nevertheless sufficient to establish that the defendants intentionally refused to rent spaces in their mobile home park to blacks. Again, no black had ever been accepted as a tenant, and black applicants were required to obtain two references from current residents of the park, while whites were routinely admitted without any references.[285] The defendants denied that they followed a discriminatory policy, but their criteria for evaluating prospective tenants were admittedly subjective, and more extensive background checks were made of applicants who defendants felt might not be "congenial" tenants.[286] The court recognized that "the defendants have the right to formulate and implement reasonable, objective, and nonracial rental standards and procedures, and to inquire into the background and habits of prospective tenants and their ability to pay."[287] It held, however, that the defendants had not uniformly applied their rental standards and that they had rejected black applicants on racial grounds. As in *Real Estate Development*, the court's statement in *Grooms* that "[t]he Fair Housing Act, like other civil rights laws, prohibits conduct with discriminatory consequences as well as discriminatorily motivated practices"[288] was simply frosting on the cake.

Title VIII suits brought by private individuals, as well as enforcement actions by the Attorney General, have generally been based on discriminatory purpose. In most fair housing cases, the defendant's refusal to deal with a minority homeseeker is easily established, and the real dispute centers around why that refusal occurred. As the *Grooms* decision noted, if the defendant can convince the court that he was simply applying reasonable, nonracial standards, he is likely to prevail against a claim of discrimination.

There are two types of "legitimate excuses" that defendants in fair housing cases regularly offer for their refusal to deal: (1) the unit desired by the plaintiff was not available at the time he applied;[289] and (2) there is something in-

280 *Id.* at 779-80.
281 *Id.* at 781, 785.
282 *Id.* at 784.
283 *Id.* at 782.
284 348 F. Supp. 1130 (M.D. Fla. 1972).
285 *Id.* at 1132-34.
286 *Id.* at 1133.
287 *Id.* at 1134.
288 *Id.* at 1133-34.
289 *See, e.g.*, Smith v. Anchor Building Corp., 536 F.2d 231 (8th Cir. 1976); Dillon v. Bay City Construction, 512 F.2d 801 (5th Cir. 1975); 491 F.2d 634; 503 F.2d 735; 368 F. Supp. 317; Jones v. Sciacia, 297 F. Supp. 165 (E.D. Mo. 1969), *aff'd*, 422 F.2d 393 (8th Cir. 1970).

adequate or objectionable about the plaintiff (other than his race) as a prospective tenant.[290] A combination of these two may appear to be involved when the unit is rented to a third party that the landlord claims is better qualified than the plaintiff, but this is really just a variation on the second reason.

The first type of excuse should be fairly easy to prove. Either the unit was available when the plaintiff applied or it was not, and this fact can be shown through the defendant's own rental records, the use of white "testers,"[291] and other techniques. One caveat should be mentioned here. Proving nonavailability is not necessarily a complete defense in a fair housing case. If the defendant withdraws the unit from the market *because* a black has applied, he would violate Title VIII's prohibition against discriminatory refusals to negotiate.[292] This provision might also require that a defendant with a large number of units at his command not completely reject a minority homeseeker, even if a third party has already secured the specific home desired by the plaintiff.[293] After all, as noted above,[294] a landlord or housing developer in this position would ordinarily be expected to pursue any interested prospect, and his failure to do so might be evidence of a refusal to negotiate on the basis of race.

Judging the legitimacy of the second type of excuse is often more difficult, because there are so many reasons that a defendant might have to object to a prospective tenant. For example, defendants in fair housing cases have tried to justify their rejection of minority homeseekers on the ground that the plaintiffs were unmarried,[295] were unmarried women,[296] were divorced men,[297] were students,[298] were too young,[299] had children or had too many children,[300] were enlisted men in the military,[301] had failed to apply properly,[302] had lied or misrepresented themselves when applying,[303] had become angry or unruly when applying,[304] or were unable to meet the necessary financial obligations.[305] Defendants like the ones in *Grooms* have also claimed to base their rental decisions on subjective feelings about the applicant, and the requirement of approval or recommendation by the current residents of a condominium, trailer park, or planned development obviously injects further subjective criteria into the selection process.[306]

290 *See, e.g.*, cases cited in notes 295-306 *infra.*
291 *See* note 41 *supra.*
292 42 U.S.C. § 3604(a) (1970).
293 *See, e.g.*, 531 F.2d at 836.
294 *See* note 257 *supra.*
295 Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976).
296 339 F. Supp. 1146; Smith v. Sol D. Adler Realty Co., 436 F.2d 344 (7th Cir. 1970). *But see* note 266 *supra.*
297 562 F. 2d 550. *But see* note 266 *supra.*
298 Bishop v. Pecsok, 431 F. Supp. 34 (N.D. Ohio 1976).
299 Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969); Brown v. Lo Duca, 307 F. Supp. 102 (E.D. Wis. 1969).
300 Fred v. Kokinokos, 347 F. Supp. 942 (E.D.N.Y. 1972); 297 F. Supp. 151.
301 United States v. Henshaw Brothers, Inc., 401 F. Supp. 399 (E.D. Va. 1974).
302 531 F.2d 832; 525 F.2d 482.
303 Hall v. Freitas, 343 F. Supp. 1099 (N.D. Cal. 1972).
304 308 F. Supp. 407.
305 509 F. 2d 1110; 436 F.2d 344; 339 F. Supp. 1146; 343 F. Supp. 1099.
306 *See, e.g.*, 559 F.2d 894; 531 F.2d 832; Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055 (7th Cir. 1972); 348 F. Supp. 1130; 308 F. Supp. 407.

The defendant's nonracial excuse for not dealing with a black homeseeker may seem unwarranted or even silly, but if it was in fact the reason for the defendant's behavior and if he applied his standards in a nondiscriminatory manner, he is likely to win. Again, the use of white testers is a helpful, if not an indispensable, means of checking whether the defendant's standards were indeed applied evenly, and again, the burden of proof on this "excuse" issue should be on the defendant, because he has better access to the information and because it is easier for him to establish his excuse than for the plaintiff to "prove a negative" (*i.e.,* that no reason other than race was involved in the defendant's decision).[307] The main point, however, is that the focus of this "disparate treatment" type of case is the defendant's intent.[308]

Thus, the Title VII decision that is perhaps most relevant to the typical fair housing case is not *Griggs,* but *McDonnell Douglas Corp. v. Green,*[309] where the Supreme Court outlined the elements of a *prima facie* case in an individual employment discrimination suit based on a disparate treatment theory.[310] The gist of that decision is that if a qualified minority applicant is turned down for an available job, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[311] That reason may be a subjective one, but it must in fact have been the basis for the defendant's decision and not a pretext for racial discrimination.[312]

The same *"prima facie"* approach would be appropriate in evaluating the proof in a disparate treatment case under the Fair Housing Act, as the Eighth Circuit has held in *Williams v. Matthews Co.*[313] and *Smith v. Anchor Building Corp.*[314] In *Anchor Building,* for example, Mrs. Smith's application to live in the defendant's apartment building was repeatedly rejected, even though she was "qualified" to live there.[315] The court defined this as meeting the legitimate objective requirements of the landlord.[316] On the basis of this evidence, the Eighth Circuit decided that a prima facie case of housing discrimination had been established under the *McDonnell Douglas* standards,[317] and it went on to hold that the defendant's excuse of nonavailability was not credible and there-

307 *See* 558 F.2d at 1295 n.16; Comment *supra* note 119, at 157-58.

308 *See* text accompanying notes 94 to 102 *supra.* When the issue in a fair housing case is the defendant's intent, there has been some dispute over the question of how much of a role race must play in the defendant's decision before it can be held that sufficient racial intent has been established. Compare Burris v. Wilkins, 544 F.2d 891 (5th Cir. 1977); 436 F.2d 344; 297 F. Supp. 151. *See also* 431 F. Supp. at 37. *Cf.* Note, *supra* note 254, at 772-77.

310 *Id.* at 802; *see* text accompanying notes 94 to 102 *supra.*

311 411 U.S. at 802.

312 *Id.* at 803-04. With respect to this "pretext" issue, *McDonnell Douglas* indicates that particularly relevant evidence would be the employer's treatment of similarly situated white applicants. *Id.* at 804. This type of proof would correspond to the tester's experience in a fair housing case. Another "helpful" source of evidence on this point would be racial statistics concerning the defendant's work force to demonstrate its "general policy and practice with respect to minority employment" (*id.* at 804-05 & n.19), although the Court cautioned that such statistical evidence should not be "controlling as to an individual hiring decision." *Id.* at 805 n.19.

313 499 F.2d 819 (8th Cir.), *cert. denied,* 419 U.S. 1021 (1974).

314 536 F.2d 231 (8th Cir. 1976).

315 *Id.* at 234.

316 *Id.* at 233.

317 *Id.* at 234-35.

fore failed to rebut the inference of discrimination.[318] The court also cited that portion of the *McDonnell Douglas* opinion indicating that statistical proof should not control an individual discrimination case in concluding that the defendant's evidence of prior rentals to blacks did not rebut the plaintiff's prima facie case.[319]

Like *Grooms* and *Real Estate Development, Williams* and *Anchor Building* are disparate treatment cases where the court nevertheless felt compelled to announce that Title VIII proscribes practices which "result in racial discrimination" and the "[e]ffect, not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme."[320] The court in these two cases also relied on *Griggs* in rejecting the defendant's claims of "business necessity."[321] Ironically, the Eighth Circuit was giving the defendants more than their due here, because "business necessity" is simply not a defense in a disparate treatment case where racial intent is shown. What the Eighth Circuit has done is to mix together the effect and purpose theories of racial discrimination represented, respectively, by *Griggs* and *McDonnell Douglas*. Under the former, proof that a facially neutral practice has a disproportionate racial impact makes out a prima facie case that may be rebutted by a showing of business necessity; when the defendant's racial purpose is established, however, business necessity is not a defense.[322]

One source of the confusion is that the plaintiff may pursue both theories in the alternative in the same case. As *McDonnell Douglas* indicates, a statistical showing that the defendant's practices exclude substantially more blacks than whites not only establishes their disproportionate impact, but may also help to prove discriminatory intent as well.[323] In any given case, the plaintiff could, and no doubt should, argue that the evidence is sufficient to establish racial purpose, but failing this, that at least it makes out an effect case calling for a business necessity rebuttal. Indeed, perhaps the most important use of *Griggs* to date in fair housing cases has been as a "backup" position for a plaintiff who is really trying to establish discriminatory intent.[324]

The mandate of *Griggs* in a disparate treatment case of housing discrimination might also require that the "legitimate excuse" offered by the defendant for rejecting the plaintiff be tested by the standards of the business necessity defense; that is, the burden should be on the defendant to show that maintaining the requirement that excluded the plaintiff is in fact necessary to a successful business operation. This is the sense that the Eighth Circuit used *Griggs* in *Williams* and *Anchor Building*. The defendant in *Anchor Building* had argued that its high occupancy rate justified the rather disorganized and arbitrary selection procedures that resulted in rejecting a qualified applicant like Mrs. Smith. The court held this excuse inadequate, citing *Griggs* for the proposition that

318 *Id.* at 235-36.
319 *Id.* at 235 n.7. *Cf.* Madison v. Jeffers, 494 F.2d 114 (4th Cir. 1973).
320 536 F.2d. at 233; 499 F.2d at 826, 828.
321 536 F.2d at 235-36; 499 F.2d at 828.
322 *See* 431 F. Supp. at 37; Note, *supra* note 238, at 1272 n.26.
323 411 U.S. at 804-05 & n.19; *see* note 312 *supra*.
324 *See, e.g.*, cases cited at note 277 *supra*.

"an arbitrary and unnecessary housing practice must be removed where it operates to discriminate" against blacks.[325] Similarly, the *Williams* court rejected a developer's claim that its reason for not dealing with a prospective black home buyer was that it sold lots only to building companies, not to the general public.[326] There was strong evidence that this policy had not prevented sales to white buyers and was merely a pretext.[327] Even if the practice had been applied even-handedly, however, the court held that it could not overcome the plaintiff's prima facie case of racial discrimination, because the defendant had failed to demonstrate "the absence of any acceptable alternative that will accomplish the same business goal [of maintaining the quality of the homes in the development] with less discrimination."[328]

B. *Statistical Proof of Discriminatory Effect in Fair Housing Cases*

1. Minority Underrepresentation

Griggs may also be used in fair housing cases to help evaluate statistical evidence of racial discrimination. In some of the cases, like *Grooms, Real Estate Development,* and *Williams,* the defendants have never dealt with blacks, much as Duke Power had never permitted a black to have an operational job in *Griggs.* As courts in a number of Title VIII cases have remarked when presented with such statistical evidence, "nothing is as emphatic as zero."[329] Of course, just how "emphatic" the absence of any black residents is depends on whether there are any blacks in the area. No blacks in a small apartment building in Montana may prove nothing at all about the landlord's racial policies.[330] Where there are substantial numbers of blacks in the market, however, proof that none of them has ever lived in the defendant's building many constitute, as the court held in *Real Estate Development,* at least "a *prima facie* case of racial discrimination, casting a burden upon the defendant to come forward with evidence to the contrary."[331]

The courts that have noted the probative value of the absence of minorities from the defendant's building have in essence adopted the "minority underrepresentation" approach to statistical proof of racial discrimination, which the Supreme Court recently endorsed in Title VII cases.[332] The significance of this

325 536 F.2d at 235-36.

326 499 F.2d at 828.

327 *Id.* at 828 n.10.

328 *Id.* at 828. *See also* 431 F. Supp. at 37: "Objective criteria cannot have the effect of excluding blacks from housing unless the criteria are demonstrably a reasonable measure of the applicants' ability to be a 'successful tenant.'" The court in *Bishop* defined a "successful tenant" as "one who stays for the period of the lease, pays his rent timely, and complies with all other provisions of the lease." *Id.* at 37 n.5.

329 *E.g.,* 499 F.2d at 827; 347 F. Supp. 782 (quoting United States v. Hinds County School Bd., 417 F.2d 852, 858 (5th Cir. 1969), *cert. denied,* 396 U.S. 1032 (1970)).

330 *See* Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases,* 34 MD. L. REV. 59, 70 (1974).

331 347 F. Supp. at 782.

332 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

approach is that it permits the inference of discrimination not only in cases where minorities have been totally excluded, but also in those cases where minorities are simply underrepresented. Thus, in a fair housing suit, a showing that the percentage of blacks in the defendant's housing is substantially lower than the percentage of blacks in the local pool of applicants for such housing may be a "telltale sign" of discrimination.[333]

Defining the appropriate local market for purposes of this comparison may well involve some difficult problems. The plaintiff might suggest that the racial composition of the entire population of the area should be considered, while the defendant is likely to argue for a narrower pool made up of only actual applicants or at least limited to those in the area who are able to meet his financial standards. The employment discrimination cases provide some guidance. Under Title VII, the Supreme Court has suggested that the entire population may be used for purposes of comparison if no special skill is required for the job in question, but that if the job demands particular qualifications, the proper comparison is with only those in the local labor market who have these qualifications.[334] Since meeting the financial requirements for a particular apartment or housing development would seem to correspond to these special qualifications, the proper comparison in a fair housing case would be with the pool of economically qualified applicants in the local market. Since the racial makeup of this group might be difficult to establish, the issue of which party has the burden of proof on this matter is important. The employment cases suggest that the plaintiff should be able to make out a *prima facie* case of discrimination through a general population comparison and that the burden should then be on the defendant to show that the more appropriate comparison with the "qualified" segment of the population would rebut the inference of discrimination.[335]

Furthermore, the Title VII cases also suggest that the plaintiff in a fair housing case need not show that other blacks have actually applied to the defendant. The Supreme Court has held that because of the process of self-selection, a comparison using actual applicants might not be as accurate a measure of employment discrimination as one involving all of the qualified persons in the area. "The applicant process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory."[336] Ironically, the self-selection process has often been raised by defendants in Title VIII cases to claim that minority underrepresentation in their housing is not a matter of discrimination, but simply reflects personal preferences of blacks who would rather live near members of their own race. Whatever strength there may be in this argument[337] would seem to be counterbalanced by the Supreme Court's recognition that the self-selection

333 *See* 431 U.S. at 339 n.20.

334 *See* Shoben, *supra* note 96, at 12-13 (comparing 431 U.S. 324 and 433 U.S. 299).

335 *See* Shoben, *supra* note 96, at 19.

336 Dothard v. Rawlinson, 433 U.S. 321 (1977).

337 "The direct effects of housing discrimination appear to be a more significant cause of segregation than factors such as income and personal preferences." Comment, *supra* note 119, at 130-31. *See also id.* at 131 n.18.

process also may discourage blacks from applying because of the inhibiting factor of possible discrimination. However the self-selection process works, it is as true in housing as it is in employment that nondiscriminatory practices will ordinarily be expected to result in time in an apartment complex or housing development that is more or less representative of the racial composition of the local market of qualified potential applicants.[338]

A number of trial courts in fair housing cases, including the one whose decision was reversed by the Eighth Circuit in *Anchor Building,* have been unduly impressed with the fact that the defendant has dealt with other blacks in the past.[339] Apparently, these courts feel that this evidence shows that the defendant operates on a nondiscriminatory basis and therefore could not have discriminated against the plaintiff. As the Supreme Court's recent employment discrimination cases demonstrate, however, a defendant can be guilty of discrimination, even purposeful discrimination, without rejecting *all* minority applicants. Obviously it is possible for blacks to become tenants of a landlord who judges their applications by more rigid standards than he applies to white applicants. Presumably, there would have been even more blacks applying for and living in the apartment complex in *Anchor Building,* for example, if it weren't for the difficult application procedures the defendant required of blacks.[340] Some defendants may even rent to a few especially well-qualified minorities in order to avoid the appearance of discrimination. In addition, "racial steering," the practice of allowing blacks to secure housing in some areas but not in others, clearly violates Title VIII,[341] even though in such a case the defendant by definition has made some housing available to blacks.[342] In short, the fact that a defendant can show that he has rented or sold homes to some blacks other than the plaintiff should not be a defense to a Title VIII suit.

Of course, a showing by the defendant that blacks generally have not applied may be relevant,[343] and the defendant's building need not precisely mirror the racial make-up of the area.[344] The point is only that if a substantially higher proportion of blacks are in the potential applicant pool than are living in the defendant's building, an inference arises that some factor other than chance, such as racial discrimination, is at work in the selection process. Thus, even though

338 *Cf.* 433 U.S. at 326 (quoting 431 U.S. at 339 n.20).

339 *See, e.g.,* Johnson v. Albritton, 424 F. Supp. 456 (M.D. La. 1977); Drain v. Friedman, 422 F. Supp. 366 (N.D. Ohio 1976); 397 F. Supp. at 259; Stroessel v. Parkside Development Co., 358 F.Supp. 802 (S.D.N.Y. 1973). *See also* 494 F.2d 114; 509 F.2d 1110.

340 536 F.2d at 233-36

341 *E.g.,* Moore v. Townsend, 525 F.2d 482, 486 (7th Cir. 1975); United States v. Real Estate One, 433 F. Supp. 1140 (E.D. Mich. 1977); Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486 (E.D.N.Y. 1977); Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc., 422 F. Supp. 1071, 1074-76 (D.N.J. 1976); 401 F. Supp. 399; Zuch v. Hussey, 366 F. Supp. 553 (E.D. Mich. 1973), 394 F. Supp. 1028, *aff'd,* 547 F.2d 1168 (6th Cir. 1976). *See also* Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1977), *cert. granted,* 98 S.Ct. 3068 (1978).

342 *See, e.g.,* United States v. Pelzer Realty Co., 484 F.2d 438, 441 (5th Cir. 1973), *cert. denied,* 416 U.S. 936 (1974), where the defendant refused to allow blacks to buy in his new development but offered them homes in another area instead. *See also* 485 F.2d 528.

343 *Cf.* 433 U.S. at 237 n.13.

344 *Cf.* Shoben, *supra* note 96, at 39.

"nothing is as emphatic as zero," a *prima facie* case under Title VIII can also be made out against a defendant who has rented or sold to a disproportionately low number of minorities, thereby shifting the burden to him to show that his selection procedures are required by business necessity.

2. Disparate Impact

While a showing of minority underrepresentation has often helped to prove racial discrimination in fair housing cases, it is rare to find a Title VIII suit that is based on proof of the other type of discriminatory effect—that the defendant's selection standards have a disparate impact on blacks. Disparate impact was the basis of the Supreme Court's decision to strike down the diploma and testing requirements in *Griggs,* and it was used as a method of showing discriminatory effect in employment cases long before the Court endorsed the minority underrepresentation approach. In the housing field, however, the classic *Griggs* case of attacking a facially neutral practice solely on the ground that it disproportionately excludes blacks is unusual.

To date, the closest thing to a "pure" *Griggs* claim in a fair housing case has been *Boyd v. Lefrak Organization,*[345] where the Second Circuit in a 2-1 decision refused to apply *Griggs* to a Title VIII-§ 1982 suit. *Boyd* involved a challenge to the defendant's practice of requiring that applicants for its apartments have a weekly net income equal to at least 90% of the monthly rent of the unit desired.[346] For example, an apartment renting for $300 a month would not be leased to anyone whose net income (gross income minus taxes, fixed obligation, and debts) was below $270 per week, or about $14,000 annually.

The suit was a class action for injunctive relief brought on behalf of New York City welfare recipients, who claimed that the 90% Rule prevented them from renting any of Lefrak's 15,484 apartments in the city. The defendant's financial standard was not shown to be racially motivated. On the contrary, its origins could be traced to a consent decree obtained in an earlier housing discrimination case brought by the Attorney General against Lefrak,[347] with the 90% Rule apparently designed to insure that Lefrak would follow objective, economic, nonracial criteria in passing on its apartment applicants. Nor were minorities substantially underrepresented in Lefrak's apartments, since 19.8% of its tenants were black and the population of New York City was only 21% black.[348] Nevertheless, plaintiffs claimed that the impact of the defendant's 90% Rule was racially discriminatory in violation of Title VIII and § 1982, because it excluded practically all welfare recipients, at least 77% of whom were minorities, and because the percentage of blacks disqualified by the rule was substantially higher than the percentage of whites that failed to satisfy it.[349]

In rejecting this claim, the majority opinion in *Boyd* first decided that this

345 509 F.2d 1110 (2d Cir.), *cert. denied,* 423 U.S. 896 (1975).

346 Alternatively, an applicant could obtain a co-signer for the lease whose weekly net income was at least 110% of the monthly rent. *Id.* at 1111.

347 *See id.* at 1112. *See also* Boyd v. United States, 345 F. Supp. 790 (E.D.N.Y. 1972).

348 509 F.2d at 1113.

349 *Id.* at 1117-18 (Mansfield, J., dissenting).

was a case of economic, rather than racial, discrimination.[350] The court held that under the Supreme Court's decision in *James v. Valtierra*,[351] discrimination against the poor was not necessarily to be considered discrimination on the basis of race, even though minorities were disproportionately represented among low-income people.[352] This statement correctly reflects the Supreme Court's position in *Valtierra* and other equal protection cases,[353] but the Second Circuit's opinion in *Boyd* failed to realize that the analysis of these equal protection claims was based on a less rigorous standard than might be appropriate under a congressional statute, as *Davis* and *Arlington Heights* were to suggest later. Indeed, the *Boyd* opinion indicated that a disproportionate effect standard *was* applicable in an equal protection claim challenging government action,[354] a conclusion ultimately rejected by the Supreme Court in *Davis*, but it felt that "such an analysis is inappropriate in the context of a purely private action asserting racial discrimination" against a businessman.[355] Thus, *Boyd* drew a distinction between the proper standards for public and private defendants under Title VIII, a distinction that is not supported by anything in the language of the statute and that seems directly at odds with the rationale of *Griggs*. With respect to *Griggs*, the Second Circuit decided that its analysis should not be extended beyond the employment field[356] and held that neither Title VIII nor § 1982 prohibited a private landlord from discriminating against low-income tenants "absent evidence that his motivation is racial."[357]

As a precedent, *Boyd* is weakened substantially by its indiscriminate mixing of the equal protection and statutory standards, by its unsupported distinction between public and private defendants, and by its rather cavalier treatment of the argument that *Griggs* should apply to claims under the fair housing laws. The important question, however, is not whether *Boyd's* analysis is faulty, but whether the ultimate result reached by the court is correct. Surely, there is nothing wrong with the majority's conclusion that a landlord "may seek assurance that prospective tenants will be able to meet their rental responsibilities."[358] An applicant's financial background and ability to pay are obviously related to the legitimate business interests of a landlord, housing developer, or lending institution. Indeed, the legislative history of Title VIII affirmatively shows that it was not designed to guarantee housing to those unable to afford it.[359] The Fair Housing Act does not command that any person must be accepted simply because he is a member of a minority group.[360]

350 *Id.* at 1112-13.
351 402 U.S. 137 (1971).
352 509 F.2d at 1113.
353 *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); *see also* 429 U.S. at 259.
354 509 F.2d at 1113 (citing Hunter v. Erickson, 393 U.S. 385 (1969)).
355 *Id.*
356 *Id.* at 1114.
357 *Id.* at 1113; *see also id.* at 1115.
358 *Id.* at 1114. Judge Mansfield's dissent in *Boyd* agreed. *See id.* at 1116 (Mansfield, J., dissenting). *See also* notes 39 & 287 *supra*.
359 *See, e.g.*, 114 CONG. REC. 3421 (1968) (remarks of Sen. Mondale).
360 *Cf.* 401 U.S. at 430-31. Thus, a landlord is certainly free under Title VIII to pick a white applicant over a black applicant if the white is better qualified on the basis of legitimate rental criteria.

Important as ability to pay is in selecting a tenant, however, it is no more important than a job applicant's ability and intelligence would be to a prospective employer. *Griggs,* therefore, *is* instructive on this point. As the Chief Justice wrote there:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[361]

The same statement could be made about financial qualifications under the Fair Housing Act.

Under *Griggs,* a showing that an employment test has a disproportionate racial impact does not invalidate it, but only shifts the burden to the employer to show that the test is related to the job in question. Similarly, the defendant in *Boyd* should have been required to show that its 90% Rule was necessary to insure that its tenants would pay the rent. As a matter of fact, the evidence indicated rather clearly that many people who could not meet the 90% Rule were nevertheless successful tenants. As Judge Mansfield pointed out in dissent, more than half of all New York City households renting apartments in the Lefrak rental range had net incomes of less than 90% of their monthly rents, and there was no showing that landlords renting to these tenants had suffered financially.[362] Furthermore, the plaintiffs' ability to meet their rental obligations was perhaps better than that of other tenants with comparable incomes who were not on welfare, because welfare recipients also receive noncash benefits such as food stamps and because their rent might be paid by a government agency if they default.[363] In short, the plaintiffs' incomes did not properly measure their ability to pay rent to Lefrak.

By way of response, Lefrak might well have argued that the 90% Rule was at least rationally related to ability to pay in a general sense, since *most* people whose incomes satisfied the rule were better able to pay than *most* people whose incomes did not, and that the rule could be justified as being less costly than a system of evaluating each applicant's ability to pay on an individual basis. Reasonable as this argument may sound, similar defenses for discriminatory employment practices have been rejected under Title VII. For one thing, civil rights statutes require that an individual be judged on his own merits, not on the basis of group stereotypes. In a recent Title VII case, the Supreme Court

361 401 U.S. at 436.
362 509 F.2d at 1118 (Mansfield, J., dissenting).
363 *Id.*

stated that "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply."[364] Furthermore, the Court has made clear that Title VII requires more than a "rational basis" to defend an employment practice that disqualifies a substantially disproportionate numbers of blacks.[365] The courts have also held that the business necessity defense requires that there be no reasonable alternative to the challenged practice that would serve the same interests and result in less discrimination.[366] As noted previously, when the only relief sought is an injunction against the challenged practices, it does not seem unreasonable for Title VII to require a businessman to give up an unjustified practice that hurts racial minorities.

This is not to say that Lefrak necessarily should have lost in *Boyd*. For one thing, the fact that the defendant's 90% Rule apparently resulted from an agreement with the Attorney General in a prior fair housing suit suggests that the rule has some legitimacy as a nondiscriminatory standard, at least in the peculiar circumstances of this case. Secondly, the fact that Lefrak's overall rental practices resulted in accepting blacks in about the same proportion as they bore to the total population of New York City distinguishes *Boyd* from all other Title VIII cases in which statistical evidence has been used to prove discrimination. Indeed, even under Title VII, some courts have been reluctant to find discrimination on the basis of the disproportionate impact of one requirement when the defendant's overall selection process results in a work force with a large percentage of blacks.[367] Of course, the result of permitting a landlord to use even one unjustified discriminatory selection device is that he will rent to fewer minorities than he otherwise would have. This is true, as Judge Mansfield's dissent in *Boyd* pointed out,[368] whether the defendant has rented to other blacks or not. Still, the unique circumstances of *Boyd* make it impossible to say for certain that the Second Circuit erred in ruling for Lefrak.

What is clearly wrong about *Boyd,* however, is its facile determinations that *Griggs* has no application to fair housing cases and that a landlord need not justify his use of income-related or other facially neutral selection criteria, even when those criteria have the effect of discriminating against minorities. At least where the racial composition of the defendant's tenants compares unfavorably with the racial makeup of the surrounding community, Title VIII should require that any housing requirement that affects blacks more severely than whites must be justified by business necessity. When the evidence of business necessity is as weak as it was in *Boyd,* even income-related criteria should be enjoined. Such criteria may be useful, but Title VIII forbids "giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure" of one's ability to rent or purchase housing.[369]

364 98 S.Ct. at 1375.
365 *See* 426 U.S. at 246-47.
366 *See* note 148 *supra* and accompanying text.
367 *See, e.g.,* Smith v. Troyan, 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976). *But see* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1373 (5th Cir. 1974). *See generally* Shoben, *supra* note 96, at 25-32; Lopatka, *supra* note 100, at 79-81.
368 509 F.2d at 1118 (Mansfield, J., dissenting).
369 *See* 401 U.S. at 436.

C. *Discriminatory Effect in Exclusionary Zoning Cases Under the Fair Housing Act*

1. Evolving Standards in Exclusionary Zoning Cases

Boyd is one of the few cases in which a housing practice of a private defendant has been challenged under the fair housing laws simply on the basis of its disproportionate impact on blacks. On the other hand, the effect theory of housing discrimination has often been raised in suits against local governments in which the defendant's zoning or other land use decisions are alleged to have excluded racial minorities. These suits generally claim that both racial purpose and racial effect are involved in the defendant's decision, but since proving that a public body acted for illicit reasons is difficult, the "fall back" theory of discriminatory effect is commonly reached. Most of the courts of appeal have decided at least one of these cases under the Fair Housing Act, and their interpretations of the requirements of Title VIII in such cases have varied substantially. The different approaches are illustrated by five cases: *Kennedy Park Homes Ass'n v. City of Lackawanna;*[370] *United States v. City of Black Jack;*[371] *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights;*[372] *Joseph Skillken & Co. v. City of Toledo;*[373] and *Resident Advisory Bd. v. Rizzo.*[374]

Lackawanna is the earliest of these cases, and it reflects the attitude shared by many before *Washington v. Davis* that the equal protection and statutory standards for judging a claim of official racial discrimination were identical.[375] In *Lackawanna,* the city prevented development of a low income housing project in one of its white neighborhoods by rezoning the intended site for a park and recreation area. The district court found that "[t]he history of Lackawanna is that of a racially separate community,"[376] and it held that by blocking private efforts to integrate the area, the city had denied plaintiffs "equal housing opportunity" in violation of the Equal Protection Clause and Title VIII.[377]

The Second Circuit affirmed.[378] The court concluded that "racial motivation resulting in invidious discrimination guided the actions of the City,"[379] but it also stated that these actions should be assessed not only by their "immediate objective," but also by their "historical context and ultimate effect."[380] The

370 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).
371 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).
372 517 F.2d 409 (7th Cir. 1975), *rev'd,* 429 U.S. 252 (1977) and 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).
373 528 F.2d 867 (6th Cir. 1975), *vacated and remanded,* 429 U.S. 1068 (1977) and 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985 (1977).
374 564 F.2d 126 (3rd Cir. 1977), *cert. denied,* 435 U.S. 908 (1978). Other cases raising similar issues include United Farm Workers of Florida Housing Project v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); SASSO v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd,* 457 F.2d 788 (5th Cir. 1972).
375 *See* cases cited at 426 U.S. at 244-45 n.12; 558 F.2d at 1286 n.2, 1287; 564 F.2d at 146.
376 318 F. Supp. at 694.
377 *Id.* at 695.
378 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).
379 *Id.* at 109.
380 *Id.* at 112.

Second Circuit's opinion relied exclusively on equal protection precedents, and its analysis did not distinguish between the equal protection claim and the Title VIII claim. Having determined that "[t]he effect of Lackawanna's action was inescapably adverse" to the plaintiffs' right to use their property free from official discrimination, the court proceeded to judge Lackawanna's justification for its action by the equal protection standard of whether it served a compelling governmental interest.[381] The city's claims that it needed more park space and that the proposed development would worsen its sewer problems were considered neither convincing nor compelling.[382]

United States v. City of Black Jack[383] is unique among the early exclusionary zoning cases, because it was a Title VIII suit brought by the Attorney General, and, therefore, no claim under the Equal Protection Clause was involved. In *Black Jack,* the Eighth Circuit struck down a zoning ordinance that prevented construction of a subsidized, integrated housing development in an all-white community near St. Louis, despite a finding below that Black Jack had not acted out of racial motives. Although there was substantial evidence of discriminatory purpose, the court explicitly refused to base its holding on this evidence.[384] Rather, it cited a number of equal protection and Title VIII cases to support its conclusion that

> the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the touchstone. . . .[385]

The Eighth Circuit went on to determine that the city's action in blocking the development did have a discriminatory effect and that its claimed justifications for that action—controlling traffic, preventing overcrowded schools, and maintaining property values—were inadequate to meet its "compelling governmental interest" burden.

The fact that Title VIII was the only basis for relief in *Black Jack* became particularly important after the Supreme Court decided *Davis* and *Arlington Heights,* because *Black Jack* was not affected as a precedent by their holding that equal protection claims required proof of purposeful discrimination. Even though the Eighth Circuit relied on equal protection standards and precedents, including *Lackawanna,* in its analysis of the *Black Jack* case, its decision was based exclusively on Title VIII. It is, in fact, the first appellate decision to find a Title VIII violation on the basis of discriminatory effect alone.

In *Arlington Heights,*[386] which was reviewed above, the Seventh Circuit accepted the trial court's finding that the defendants were not motivated by racial considerations, but it held that the showing of discriminatory effect was

381 *Id.* at 114 (citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).
382 *Id.* at 111, 114.
383 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975).
384 *Id.* at 1185 n.3.
385 *Id.* at 1184-85 (citations omitted).
386 517 F.2d 409 (7th Cir. 1975), *rev'd,* 429 U.S. 252 (1977) and 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).

sufficient under the Equal Protection Clause to require the defendants to show a compelling governmental interest for their actions. After the Supreme Court "corrected" this view, the Seventh Circuit on remand was faced with the task of deciding whether Title VIII could prohibit conduct that did not violate the Equal Protection Clause. The court of appeals held that it could "at least under some circumstances"[387] and that it did "under the circumstances of this case."[388]

The Seventh Circuit recognized, as *Griggs* had, that not all practices with discriminatory effects are illegal.[389] Rather than following the *Griggs* approach of using discriminatory effect to shift the burden of justification to the defendant, however, the appellate court in *Arlington Heights* identified four "critical factors" that it considered relevant to a determination of liability under Title VIII. They were:

> (1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis;* (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who seek to provide such housing.[390]

Applying these factors, the court held that the strength of the plaintiff's showing of discriminatory effect depended on whether there were alternative sites available for the proposed development in Arlington Heights. A further hearing by the trial court was ordered on this question, with the defendants having the burden of proving that a suitable alternative parcel could be used.[391] The opinion did decide that if no other land were available, the Village's decision to block the development on the site proposed by the plaintiffs would foreclose the possibility of ending residential segregation in Arlington Heights.[392] This strong discriminatory effect would violate Title VIII, the Seventh Circuit held, because it outweighed the defendants' lack of discriminatory intent (factor 2) and the fact that the Village was acting pursuant to its legitimate zoning authority (factor 3).[393] In considering the fourth factor—the nature of the relief sought—the court took note of a line of Second Circuit cases that distinguished between actions such as *Lackawanna* that sought to prevent official interference with private efforts to build integrated developments and those

387 558 F.2d at 1290.
388 *Id.* at 1285.
389 *Id.* at 1290.
390 *Id.*
391 *Id.* at 1295. Chief Judge Fairchild dissented on this point only, arguing that the plaintiffs should have the burden of proof on this issue. *Id.* at 1295-96 (Fairchild, C. J., concurring in part and dissenting in part).
392 *Id.* at 1291.
393 *Id.* at 1293-94.

demanding that local governments themselves build such housing.[394] Since the *Arlington Heights* plaintiffs only sought to enjoin the Village from obstructing their own private development, the Seventh Circuit concluded that factor 4 favored the plaintiffs.[395]

Joseph Skillken & Co. v. City of Toledo[396] demonstrates that not all of the courts of appeals are receptive to exclusionary zoning suits. Indeed, the Sixth Circuit's opinion, which upheld Toledo's decision to block a subsidized development in an affluent, all-white neighborhood, often sounds more exclusionary than the most conservative suburban zoning official. It states that low cost public housing does "not belong" in exclusive neighborhoods, "where the property owners, relying on the zoning laws, have spent large sums of money to build fine homes for the enjoyment of their families."[397] This emphasis on the economic interests of the local residents also led the Sixth Circuit to conclude that granting the injunction sought by the plaintiffs would mean that "[i]nnocent people who labored hard all of their lives and saved their money to purchase homes in nice residential neighborhoods, and who never discriminated against anyone, would be faced with a total change in their neighborhoods, with the values of their properties slashed."[398]

As in *Lackawanna* and *Arlington Heights,* the plaintiffs' claim in *Skillken* was based on the Equal Protection Clause and the fair housing laws. Another similarity with those cases was that *Skillken* was decided by the trial court and the Sixth Circuit before *Washington v. Davis* was handed down, and neither court made any distinction between the constitutional and statutory standards for judging this type of claim. The district court, which ruled for the plaintiffs, had initially decided that Toledo's refusal to permit the development was racially motivated, but ultimately it based its decision not on the defendants' motivation, but on the fact that their action would have a racially discriminatory effect and would perpetuate residential segregation in Toledo.[399] The Sixth Circuit concluded that the court below erred in finding official discrimination,[400] but its opinion does not make clear whether it also disagreed with the trial court's finding of discriminatory effect. In any event, the court of appeals held that a neutral policy was not invalid just because it had a greater impact on minorities, and it refused to subject Toledo's justifications for its zoning decision to the compelling interest test.[401]

The plaintiffs then petitioned the Supreme Court for a writ of *certiorari.* The Court, after deciding *Arlington Heights,* vacated the Sixth Circuit's decision in *Skillken* and remanded the case for consideration in light of its *Arlington*

394 *Id.* at 1293. "The Fair Housing Act does not impose any duty upon a governmental body to construct or to 'plan for, approve or promote' any housing." Acevedo v. Nassau County, 500 F.2d 1078, 1082 (2d Cir. 1974).
395 558 F.2d at 1293.
396 528 F.2d 867 (6th Cir. 1975), *vacated and remanded,* 429 U.S. 1068 (1977) and 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985 (1978).
397 528 F.2d at 881.
398 *Id.*
399 *See id.* at 872.
400 *Id.* at 879.
401 *Id.*

Heights opinion.[402] In a brief *per curiam* opinion,[403] the Sixth Circuit on remand adhered to its previous decision, which it felt was supported by *Arlington Heights*. The remand opinion, like the earlier appellate decision, did not discuss Title VIII at all. Nevertheless, *Skillken* must be considered as a statement of the Sixth Circuit's belief that the Fair Housing Act is to be construed according to the same purposeful discrimination standard that now governs equal protection claims.[404]

Resident Advisory Bd. v. Rizzo[405] is the first new exclusionary zoning case to reach a federal appellate court since the Supreme Court decided *Arlington Heights*. Once again, this litigation involved an effort by local municipal officials, this time in Philadelphia, to prevent construction of a low income housing project in a virtually all-white neighborhood. The Third Circuit held that the City's housing and redevelopment authorities, though not shown to have purposefully discriminated, nevertheless violated Title VIII, because their "acts had a discriminatory effect and . . . the agencies have failed to justify the discriminatory results of their actions."[406] In addition, the court determined that the City of Philadelphia, which was also a defendant, had engaged in purposeful discrimination in violation of the plaintiffs' constitutional rights. The court of appeals concluded by affirming the district court's order and thereby mandating the construction of the project and enjoining the governmental defendants from interfering with it.

The *Rizzo* opinion not only applied a more rigorous standard under Title VIII than it did with respect to the constitutional claim, it also explained why Title VIII had been given relatively little attention in exclusionary zoning cases:

> Until relatively recently, federal courts were not often called upon to adjudicate Title VIII claims. We attribute this circumstance to our impression that, at least with respect to alleged discrimination in housing by governmental agencies, the inquiry into claimed equal protection violations has made unnecessary a separate consideration of the "coextensive" rights and remedies afforded by Title VIII. However, given the increased burden of proof which *Washington v. Davis* and *Arlington Heights* now place upon equal protection claimants, we suspect that Title VIII will undoubtedly appear as a more attractive route to nondiscriminatory housing, as litigants become increasingly aware that Title VIII rights may be enforced even without direct evidence of discriminatory intent. We conclude that, in Title VIII cases, by analogy to Title VII cases, unrebutted proof of discriminatory effect alone may justify a federal equitable response.[407]

Thus, the Third Circuit interpreted Title VIII in a manner similar to the Eighth Circuit's interpretation in *Black Jack* and to the Seventh Circuit's decision on remand in *Arlington Heights,* but in conflict with the remand decision of the Sixth Circuit in *Skillken.*

402 429 U.S. 1068.
403 558 F.2d 350 (6th Cir. 1977), *cert. denied,* 434 U.S. 985 (1978).
404 *But see* 429 F. Supp. 1379.
405 564 F.2d 126 (3rd Cir. 1977), *cert. denied,* 435 U.S. 908 (1978).
406 *Id.* at 146.
407 *Id.*

2. Proving Discriminatory Effect in Exclusionary Zoning Cases

The evidence used to prove discriminatory effect in these exclusionary zoning cases differs somewhat from the evidence relied on in Title VIII effect cases against private defendants. Since the municipal defendant in an exclusionary zoning suit is generally not a housing provider, the focus is not on whether minorities are underrepresented in the buildings it operates. Instead, the key element in these cases is minority underrepresentation in the housing in the vicinity of the proposed development as compared with the racial makeup of the overall metropolitan area. In *Arlington Heights,* for example, the Seventh Circuit observed that "Arlington Heights remains almost totally white in a metropolitan area with a significant percentage of black people."[408] Indeed, the defendants' community was the most residentially segregated of all Chicago-area municipalities with over 50,000 residents.[409] The other exclusionary zoning cases also involved sites in virtually all-white communities that were located in metropolitan areas with substantial minority populations.

The municipal defendants in these cases often argued that this type of minority underrepresentation could not be used to establish their discrimination, because they had no control over who resided in their communities.[410] It is one thing to claim that the absence of minorities in a landlord's building indicates that he has discriminated, but quite another to contend that an all white town means that its officials have violated Title VIII. Since these defendants were not responsible for choosing which people lived within their jurisdiction, they claimed that comparing the percentage of minorities in the area of the proposed development to the percentage of minorities in the overall metropolitan region proved nothing at all about whether their reaction to the particular development under consideration was discriminatory.

This argument, however, misses the point of these suits. Apart from whether local governments can fairly claim that they have no influence on the racial composition of their community's residents,[411] the issue in exclusionary zoning cases is not so much who caused segregated housing patterns to develop, but rather what is to be done about them now. The legislative history of Title VIII shows that Congress intended for the law to promote "open, integrated residential patterns and to prevent the increase of segregation. . . ."[412] Thus, when a municipality blocks construction of an integrated development in an all-white area and its action has the effect of perpetuating residential segregation, a prima facie violation of the Fair Housing Act is established.

No Title VII precedent authorizes the type of minority underrepresentation

408 558 F.2d at 1288. According to the 1970 census, blacks made up less than 1% of Arlington Heights' population (517 F.2d at 413-14), while they constituted 18% of the population of the greater metropolitan Chicago area (429 U.S. at 269). In an earlier, unrelated case, the Supreme Court had determined that the relevant geographic area for purposes of public housing in that market is the greater metropolitan Chicago area. *See* Hills v. Gautreaux, 425 U.S. 284, 299-300 (1976).

409 517 F.2d at 414 n.1.

410 *See, e.g.,* 517 F.2d at 414; 528 F.2d at 879; *cf.* 564 F.2d at 130-33.

411 *See* 564 F.2d at 130-33.

412 Otero v. New York City Housing Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).

comparison used in exclusionary zoning cases, but then, these suits are not really analogous to employment discrimination cases. Title VII does cover governmental defendants, but they are sued in their role as employers, not because they prevented private companies from providing integrated job opportunities. The special concerns of the Fair Housing Act, however, mean that it covers not only discrimination in public housing, but also governmental interference with private desegregation efforts, regardless of whether the segregation was originally caused by the defendant or not.

In addition to this special showing of minority underrepresentation, all of the successful exclusionary zoning suits also include proof that the municipality's decision had a disparate impact on minorities. Since the challenged action usually prevents construction of a subsidized housing development, the group adversely affected by that decision is made up of low-income people who are eligible for such housing, and blacks generally account for a disproportionate number of this group.[413] The minority percentage of eligible low-income tenants differs from case to case, but it is invariably higher than the percentage of minorities in the overall metropolitan population.[414] The impact of the action under review therefore falls disproportionately on those protected by Title VIII.

Thus, discriminatory effect in exclusionary zoning cases has been shown by disproportionate impact as well as by minority underrepresentation. Of the two, however, minority underrepresentation is the more significant factor. As long as blacks make up a substantial proportion of those eligible for the proposed housing, its development will significantly reduce segregation in an all-white area. This is true even if more whites than blacks live in the development. As the Seventh Circuit noted in *Arlington Heights,* the fact that nonwhites accounted for 40% of eligible group of tenants for the 190 subsidized townhouses proposed to be built by the plaintiffs meant that the project "might well result in increasing Arlington Heights' minority population by over one thousand percent."[415] In an exclusionary zoning suit, the goal of the Fair Housing Act is to promote integrated housing, not just housing for minorities.

This is not to say that every predominantly white town in America must accommodate low income housing. For one thing, developers are unlikely to propose projects in affluent areas where the lack of jobs and other market factors reduce the effective demand for subsidized housing. Even where a low income development is proposed and then rejected by a local municipality, the discriminatory effect of that decision is not *per se* illegal under the Fair Housing Act. If the defendant's action is necessary to advance legitimate zoning or other municipal interests (*i.e.,* if the business necessity defense is established), the discriminatory effect alone of that action will not violate Title VIII.

3. The Defendant's Burden of Justification

Although *Black Jack, Arlington Heights,* and *Rizzo* agree that a showing of

413 *See, e.g.,* 564 F.2d at 142 (minorities account for 95% of those eligible for the proposed housing); 558 F.2d at 1291 (40%); *cf.* 528 F.2d at 878.

414 *But see* 528 F.2d at 878.

415 517 F.2d at 414.

discriminatory effect may make out a prima facie case under Title VIII, they differ among themselves in the standards they would apply to the defendant's burden of justification. *Black Jack* had equated this burden with the compelling state interest test that is triggered by a showing of purposeful discrimination under the Equal Protection Clause. The Eighth Circuit's analysis is understandable in terms of pre-*Davis* equal protection law, but it seems inappropriate today. If the correct analogy to a discriminatory effect case under the Fair Housing Act is *Griggs* rather than the Equal Protection Clause, then the defendant's burden should be something more akin to business necessity than the more severe compelling interest test.

The analysis in *Rizzo* does employ the two-step *Griggs* approach of first evaluating the racial effect of the defendants' practices and then considering their justification. This analysis contrasts with the Seventh Circuit's approach in *Arlington Heights* of identifying and weighing a variety of "critical factors" in determining whether Title VIII has been violated. The difference in these two methods of analyzing an effect case under Title VIII may not be particularly significant in terms of producing different results. Indeed, the *Rizzo* opinion sought to moderate whatever conflict there appeared to be by suggesting that the two approaches required essentially the same type of showing to establish a prima facie case of discriminatory effect.[416] The Third Circuit also noted that its decision for the plaintiffs would have been the same even if it had applied the four factors identified in *Arlington Heights,* and it expressed the belief that the Seventh Circuit's approach simply set forth "a standard upon which ultimate Title VIII relief may be predicated, rather than indicating the point at which the evidentiary burden of justifying a discriminatory effect will shift to the defendant."[417]

To the extent that there is a real difference between *Rizzo* and *Arlington Heights,* however, the Third Circuit's approach is preferable. The two-step analysis adopted in *Rizzo* has *Griggs* to recommend it and the seven years of judicial experience under *Griggs* to guide it. Even if the Seventh Circuit's analysis accurately identifies the relevant factors to be weighed,[418] it fails to explain *how* they are to be weighed, and it thus fails to provide adequate guidance to the trial judges, litigants, and future decision-makers who will have to apply it. The proper structure for balancing these factors and for identifying where the burden of proof lies has already been worked out under Title VII by

416 564 F.2d at 148 n.32.

417 *Id.*

418 There is some doubt on this score. For example, *Arlington Heights'* factor 2—whether there is some evidence of discriminatory intent—is not relevant in a discriminatory effect case under *Griggs.* There, the Supreme Court held that Title VII was violated even though "there was no showing of a discriminatory purpose in the adoption of the diploma and test requirements." 401 U.S. at 428; *see also id.* at 432. It is true, as the *Arlington Heights* opinion points out (558 F.2d at 1292), that some evidence of discriminatory intent was present in *Lackawanna, Black Jack,* and many other Title VIII decisions that announced that the Fair Housing Act was to be governed by an effect standard, but the fact that this element is "discernible from previous cases" (558 F.2d at 1290) does not mean that it should be a necessary part of a *prima facie* case under Title VIII. *See* note 96 *supra. See also* Comment, *A Last Stand on Arlington Heights: Title VIII and the Requirement of Discriminatory Intent,* 53 N.Y.U.L. REV. 150 (1978).

Griggs and its progeny, and *Rizzo* wisely decided to follow their lead.

The *Rizzo* opinion did recognize that the task of evaluating the defendant's justifications in a fair housing case is not completely analogous to reviewing a Title VII defendant's claim of business necessity. For example, the court noted that "the job-related qualities which might legitimately bar a Title VII-protected employee from employment will be much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII."[419] Thus, the commands of the Fair Housing Act in discriminatory effect cases may be destined to be less predictable than they are under Title VII. *Rizzo* indicates that Title VIII criteria must emerge "on a case-by-case basis,"[420] echoing the Seventh Circuit's statements in *Arlington Heights* that its decision there was based on the particular circumstances of that case.[421]

Nevertheless, these cases do provide some guidelines. In evaluating the defendant's justifications, *Rizzo* accepted the relevance of the factors identified in *Arlington Heights*[422] and also concluded that "a justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."[423] This statement incorporates two elements of the Title VII business necessity defense: (1) that the challenged practice must actually serve the legitimate purpose claimed for it; and (2) that no alternative exists that would accomplish the same purpose with a lesser racial impact.[424]

The *Rizzo* statement of the defendant's burden of justification under Title VIII differs from its Title VII counterpart in that it does not speak in terms of "business necessity." This may simply reflect the fact that *Rizzo* and other exclusionary zoning cases involve governmental defendants, whose legitimate interests may not be limited to the business concerns of a private employer. The Seventh Circuit's remand opinion in *Arlington Heights* even suggested that courts might be more "solicitous" of governmental interests under the Fair Housing Act compared with those of private defendants whose practices have discriminatory effects.[425] In any event, the actions of even public defendants that cause discriminatory effects should be justifiable under Title VIII only if they are necessary to accomplish the defendant's legitimate interests, whatever those might be. "The defendant's burden in these instances should be to prove that the challenged practice is reasonably necessary for the achievement of a legitimate, nondiscriminatory purpose."[426]

419 564 F.2d at 148.

420 *Id.* at 149.

421 558 F.2d at 1285, 1290. *See also* 114 CONG. REC. 5216 (1968) (remarks of Sen. Baker) (courts should decide what constitutes sufficient evidence on a case-by-case basis).

422 564 F.2d at 149 n.36. *But see* note 418 *supra.*

423 *Id.* at 149. "If the defendant does introduce evidence that no such alternative course of action can be adopted, the burden will once again shift to the plaintiff to demonstrate that other practices are available." *Id.* at 149 n.37.

424 *See* note 148 *supra* and accompanying text.

425 558 F.2d at 1293; *cf.* 509 F.2d at 1113; note 92 *supra.*

426 Note, *supra* note 238, at 1287.

This standard would be appropriate for both public and private defendants in discriminatory effect cases under the Fair Housing Act. As the exclusionary zoning decisions demonstrate, municipal defendants can certainly be as creative as private landlords in advancing "legitimate" justifications for their actions. In *Arlington Heights,* for example, the Village attempted to justify its refusal to grant the plaintiff's rezoning petition on the ground that the proposed development would undermine neighborhood property values and would be inconsistent with the Village's plan to permit multiple-family housing only as a buffer between single-family and commercial areas.[427] The evidence established, however, that the defendants had ignored this buffer policy in approving a number of other rezoning petitions for developers of private, commercial apartment complexes.[428] In addition, the development proposed by the plaintiffs called for two-story townhouses that were more similar to the neighboring single-family homes than to apartments. As the Seventh Circuit noted in its first decision, "[t]he planning rationale behind the buffer zone policy has only minimal applicability to this type of low-rise, open-space development."[429] These considerations also meant that the Village's fears that the development would greatly reduce neighboring property values was not substantiated.

In short, Arlington Heights did not show that its decision was reasonably necessary to advance its legitimate zoning interests. Obviously, a different conclusion might result if the proposed development had been inappropriate for the site chosen (*e.g.,* a 40-story high-rise located in the middle of a residential area of $200,000 houses). As the Seventh Circuit noted in its remand opinion, not every action that produces discriminatory effects is prohibited by the Fair Housing Act.[430] The two-step analysis created by *Griggs* and adopted in *Rizzo* is flexible enough to avoid serious hardships to Title VIII defendants and to accommodate their legitimate interests, but the burden of proving that these interests are truly in jeopardy must first be carried by the defendant before the Fair Housing Act can sanction practices with discriminatory effects.

The exclusionary zoning cases also suggest that the nature of the relief sought may be relevant to the question of liability under Title VIII. Certainly the defendant's burden of justification is easier to satisfy in a case where "the plaintiff seeks to compel the defendant to construct integrated housing or take affirmative steps to ensure that integrated housing is built than when the plaintiff is attempting to build integrated housing on his own land and merely seeks to enjoin the defendant from interfering with that construction."[431] In the former case, the defendant is being asked to commit money, land, manpower, and other limited resources to a project that it has decided is not justified. If this decision is reasonably necessary to achieve the legitimate, nonracial purposes for which it was allegedly made, Title VIII would not be violated regardless of the discriminatory effect it might cause. On the other hand, if the defendant is merely

427 *See* 517 F.2d at 415.
428 *Id.* at 412.
429 *Id.* at 415.
430 558 F.2d at 1290.
431 *Id.* at 1293; *see* note 394 *supra.*

being asked to stop interfering with private efforts to help desegregate a community, its actions would be more difficult to justify, and properly so.

Even though the relief requested may be considered in determining whether the Fair Housing Act has been violated, it is important to distinguish the issue of liability under Title VIII from the issue of what relief is appropriate once liability has been established. After a court determines that the defendant's conduct amounts to a substantive violation of the law, it must then deal with the separate question of what relief it should award. If the relief sought is equitable, as it generally has been in the exclusionary zoning cases and in enforcement actions brought by the Attorney General, the trial judge enjoys a certain amount of discretion in granting or refusing relief.[432] This traditional discretion of the chancellor is explicitly recognized in the language of the private enforcement section of Title VIII, which provides that "[t]he court *may* grant as relief, *as it deems appropriate,* any permanent or temporary injunction, temporary restraining order, or other order. . . ."[433] Of course, withholding relief may amount to an abuse of discretion in a particular case.[434] As a general matter, however, the court in an equity case under Title VIII has discretion in shaping the relief it orders. This discretion may well include the power to deny any relief if the defendant's good faith is clearly established.[435] Thus, a trial judge has discretion under Title VIII to consider the relief requested in determining its award as well as in deciding the merits of the claim.[436] This fact reinforces the notion that an effect test for fair housing cases need not be unduly rigid, nor ignore the defendant's legitimate interests or lack of discriminatory intent.[437]

It is not clear that the exclusionary zoning decisions have always recognized the distinction between the merits of a Title VIII claim and the relief to be awarded after a violation has been proved.[438] Once again, however, the *Rizzo* opinion correctly demonstrates how this should be done. Having determined

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432 *See, e.g.,* Tennessee Valley Authority v. Hill, 98 S.Ct. 2279 (1978):

> It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law. This Court made plain in *Hecht Co. v. Bowles,* that "[a] grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances." As a general matter it may be said that "[s]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." Dobbs, Remedies 52 (1973).

Id. at 2301 (citations omitted).

433 42 U.S.C. § 3612(c) (1970) (emphasis supplied).

434 *See, e.g.,* United States v. Jamestown Center-in-the-Grove Apartments, 557 F.2d 1079 (5th Cir. 1977); 437 F.2d 221.

435 *Cf.* 98 S.Ct. at 1380-83. *But see* 422 U.S. at 421-23.

436 564 F.2d at 149; 558 F.2d at 1290.

437 The problem is more complicated if the relief sought is money damages. For one thing, the Supreme Court has held that the discretion that exists regarding a back pay award under Title VII is not available to the court under the Fair Housing Act. *See* 415 U.S. at 195, 197. Even in the case of back pay under Title VII, the award should generally be made, regardless of intent. *See* 422 U.S. at 421-23. Thus, a discriminatory effect case under the Fair Housing Act should result in an award of money damages if they are proved. *See* 415 U.S. at 197. Of course, the defendant's justification is still relevant to the question of whether Title VIII has been violated, but once a violation has been established and actual damages have been shown, the plaintiff is entitled to them regardless of the defendant's lack of discriminatory motive.

438 *See* 558 F.2d at 1293.

that the defendants' action in refusing to build the proposed development had a racially discriminatory effect that was not shown to be justified, the Third Circuit held that that action violated the Fair Housing Act.[439] Next, it considered the question of relief. The court of appeals upheld the trial judge's order requiring the defendants to build the disputed project, but it decided that the record did not support the lower court's additional requirement that the defendants promptly submit a plan to integrate all of their public housing projects.[440] Thus, *Rizzo* demonstrates that Title VIII can result in a court order requiring the defendant to build integrated housing,[441] while at the same time showing that the relief in such a case should be tailored to correcting the particular violation proved.

Conclusion

The Supreme Court has yet to decide a case on the merits under the Fair Housing Act. In the decade since the law was passed, the lower courts have struggled with a number of important housing discrimination issues, with a notable lack of uniformity resulting from their decisions. While there is general agreement among the courts of appeals about the elements of a fair housing case when the defendant's racial intent is at issue, the circuits have split concerning the proper treatment of a Title VIII case based solely on discriminatory effect. The confusion has been compounded in suits against government defendants by the recent changes in the standards governing equal protection claims and the corresponding changes in the relationship between federal civil rights statutes and the Equal Protection Clause.

In the absence of any definitive Supreme Court interpretation of the Fair Housing Act, many lower courts have sought guidance from *Griggs v. Duke Power Co.* and other employment discrimination cases holding that practices with discriminatory effects violate Title VII unless they are required by business necessity. In many respects, the analogy seems apt. The language of the two statutes contains similar operative provisions, and the congressional concerns underlying both extend beyond eradicating only purposeful discrimination. The differences that do exist between housing and employment are not of a kind to justify a fundamentally different interpretation of the substantive requirements of Title VIII than *Griggs* gave to Title VII. Both laws are directed against the consequences of racial discrimination, not merely its motivation. Experience in the lower courts, however, has shown that the decision to apply *Griggs* to the fair housing field is not a simple matter, and the confusion engendered by the various approaches adopted by the circuit courts makes the question ripe for consideration by the Supreme Court.

Most of the appellate decisions that have dealt with the purpose-or-effect issue under Title VIII have done so in the context of exclusionary zoning suits against local governments. The concept of discriminatory effect in these cases

439 564 F.2d at 149-50.
440 *Id.* at 150-53.
441 *Cf.* 558 F.2d at 1293.

involves different considerations than it does in suits against private defendants, but the exclusionary zoning decisions are still instructive of the lower courts' attitude toward the more general issue of Title VIII's proper interpretation and coverage. The most recent of these decisions, and the most sophisticated, is *Resident Advisory Bd. v. Rizzo,* where the Third Circuit relied on *Griggs* in an exclusionary zoning suit, but noted that the special problems of fair housing litigation, particularly those concerning relief and the defendant's justification, required a delicate case-by-case approach in using an effect standard under Title VIII.

Perhaps the most important result of applying *Griggs* to the fair housing field would be in cases where the defendant's motive *is* at issue. To date, most private suits under Title VIII and § 1982 have been disparate treatment cases in which the key question is why the defendant refused to deal with a minority homeseeker. *Griggs* would reduce the chances that a discriminating defendant could escape liability by requiring that he prove that his excuse for not renting or selling to the plaintiff was in fact reasonably necessary for business purposes. Income-related requirements' recommendations from current residents, and other screening standards that appear legitimate and racially neutral, but are discriminatory in operation, should be prohibited unless they are shown to accurately measure an individual's qualifications as a housing consumer.

Applying the lessons of *Griggs* and other Title VII decisions to issues such as the burden of proof and the value of statistical evidence in Title VIII cases will help the Fair Housing Act combat sophisticated as well as blatant discrimination. Beyond the benefits of an effect standard in proving disparate treatment cases, however, is the question of whether a facially neutral housing practice that was really instituted for nonracial reasons should ever be held to violate Title VIII. The cases in which such a claim has been made are rare. The "big" private housing case, unlike the big employment case, has yet to become common, but the success of the discriminatory effect theory in a number of exclusionary zoning cases may mean that it will occur more often now. When it does, the Fair Housing Act, like Title VII, should be held to condemn arbitrary and unnecessary practices that operate to limit housing opportunities for minorities. Once these barriers are down, the congressional goal of an open, integrated society will be available to homeseekers of all races, and it will be up to them to achieve it.