FAIR HOUSING—PRIVATE LANDLORD MAY EXCLUDE POTENTIAL TENANTS ON THE BASIS OF ECONOMIC CRITERIA WHICH HAVE RACIALLY DISCRIMINATORY EFFECT—*Boyd v. Lefrak Organization*, 509 F.2d 1110 (2d Cir. 1975).

In April of 1968, the highly controversial Fair Housing Act (Title VIII of the Civil Rights Act of 1968)[1] was enacted. Title VIII prohibits discrimination based on race, color, religion, national origin, or sex in various transactions involving real property, regardless of whether state action is found.[2] Two months later, the United States Supreme Court, in *Jones v. Alfred H. Mayer Co.*,[3] revived the use of a provision of the 1866 Civil Rights Act,[4] which was enacted pursuant to the thirteenth amendment.[5] The Court in *Jones* prohibited racial discrimination in private transactions concerning the sale or rental of real or personal property.[6] While Title VIII and the *Jones* decision

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[1] Act of April 11, 1968, Pub. L. No. 90–284, tit. VIII, 82 Stat. 81 (codified at 42 U.S.C. § 3601 *et seq.* (1970)). The Fair Housing Act was an amendment made by the Senate to a civil rights bill which had originated in the House. 113 CONG. REC. 22777–78 (1967); 114 CONG. REC. 2225, 2270–72, 5992, 5995–97, 9553–621 (1968). For an interesting and informative account of the legislative history of the Fair Housing Act see Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969). For a comprehensive overview of the Fair Housing Act see Chandler, *Fair Housing Laws: A Critique*, 24 HASTINGS L.J. 159 (1973); Friedman, *Federal Fair Housing Practice*, 20 PRAC. LAW., Dec. 1974, at 15; Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 748–71; Comment, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289, 298–314 (1973).

[2] 42 U.S.C. § 3601 *et seq.* (1970). In 1974 the Fair Housing Act was amended so as to include sex as one of the proscribed classifications. Act of Aug. 22, 1974, Pub. L. No. 93–383 § 527(b)(1) to (4), 88 Stat. 729.

[3] 392 U.S. 409 (1968).

[4] Act of April 9, 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (1970)). *See* 392 U.S. at 422–37.

[5] U.S. CONST. amend. XIII. *See* 392 U.S. 437–38. The Supreme Court determined that "§ 1982 operates upon the unofficial acts of private individuals" because it was enacted by Congress pursuant to the power given it by the thirteenth amendment which contains no state action limitations. *Id.* at 438–39.

[6] 392 U.S. at 413. The district court had initially determined that section 1982 only applied when state action was involved. Jones v. Alfred H. Mayer Co., 255 F. Supp. 115, 119 (E.D. Mo. 1966). This decision was subsequently affirmed by the circuit court. Jones v. Alfred H. Mayer Co., 379 F.2d 33, 45–46 (8th Cir. 1967). The Supreme Court, reversing the circuit court decision, held

> that § 1982 bars *all* racial discrimination, private as well as public, 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.

392 U.S. at 413 (emphasis in original) (footnote omitted).

The *Jones* decision was very controversial, and has evoked extensive comment. *See, e.g.*, Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89;

have been called the "twin pillars" of "the freedom to seek and to acquire decent housing on equal terms,"[7] the effectiveness of Title VIII has been seriously questioned,[8] due to the lack of enforcement powers given to the Department of Housing and Urban Development.[9] Thus, the courts must assume an important and substantial role in both private actions and suits brought by the Attorney General in order to insure the effective implementation of the provisions of Title VIII.[10]

The Supreme Court has confronted a variety of tangential issues

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Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 455, 485 (1969); Kinoy, *Jones v. Alfred H. Mayer Co.: An Historic Step Forward*, 22 VAND. L. REV. 455, 475 (1969).

[7] Brooke, *Introduction to Symposium—Non-Discrimination in the Sale or Rental of Real Property: Comments on Jones v. Alfred H. Mayer Co. and Title VIII of the Civil Rights Act of 1968*, 22 VAND. L. REV. 455, 457 (1969). Senator Edward W. Brooke was one of the co-sponsors of the fair housing amendment to the Civil Rights Act of 1968. 114 CONG. REC. 2272 (1968).

There are a variety of distinctions between the scope, coverage, enforcement mechanism, limitation period, and remedies of section 1982 and the Fair Housing Act. For a discussion of the interrelationship of these two statutory provisions see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413–17 (1968); Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 455, 459 (1969); Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 COLUM. L. REV. 1019, 1027–54 (1969). It should be noted that the thirteenth amendment and the Civil Rights Act of 1866 only prohibit racial discrimination and thus are much more limited in scope than the fair housing provisions. It is still open to question whether Puerto Ricans or other ethnic minorities would be considered racial minorities within the scope of section 1982. *See* Fred v. Kokinokos, 347 F. Supp. 942, 943–44 (E.D.N.Y. 1972); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 411–12 (S.D. Ohio 1968); Chandler, *supra* note 1, at 175 & n.114; Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1315–18 (1969).

[8] *See generally Hearings on Federal Government's Role in the Achievement of Equal Opportunity in Housing Before the Civil Rights Oversight Subcomm. (Subcomm. No. 4) of the House Comm. on the Judiciary*, 92d Cong., 1st & 2d Sess. (1971–72) [hereinafter cited as *1971–72 Hearings*]; *Hearings on De Facto Segregation and Housing Discrimination Before the Senate Select Comm. on Equal Educational Opportunity*, 91st Cong., 2d Sess., pt. 5 (1970) [hereinafter cited as *1970 Hearings*]; Chandler, *supra* note 1; Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 762–65.

[9] *See* 42 U.S.C. §§ 3608–11, 3616 (1970). The Supreme Court has noted that

> most of the fair housing litigation conducted by the Attorney General is handled by the Housing Section of the Civil Rights Division, which has less than two dozen lawyers. Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits . . . .

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

[10] As the housing administrative process has not been entirely successful, Chandler, *supra* note 1, at 192, it would appear that the alternative courses open are private suits, or suits brought by the Attorney General, thus causing the final decisional burden to fall on the courts.

in the housing area.[11] However, some important questions concerning the legal standards, evidentiary burdens, and presumptions to be applied, have not yet been resolved.[12] The Court of Appeals for the Second Circuit, in *Boyd v. Lefrak Organization*,[13] has attempted to deal with some of these problems.

On August 6, 1970 the Attorney General of the United States brought an action against The Lefrak Organization and Life Realty, Inc.[14] based on an alleged pattern and practice[15] of noncompliance

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[11] *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 192 (1974) (a person bringing an action for damages under the Fair Housing Act has a right to demand a jury trial); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 208, 212 (1972) (the standing provision under the Fair Housing Act is "broad" and includes "all in the same housing unit who are injured by racial discrimination," including white tenants); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237–40 (1969) (damages may be awarded to a successful litigant bringing an action under section 1982. A white person may be accorded standing to bring an action under section 1982 in order to vindicate the rights of the injured person); Hunter v. Erickson, 393 U.S. 385, 388 & n.1 (1969) (the Fair Housing Act and the Civil Rights Act of 1866 do not preempt state and local housing legislation which gives equivalent rights).

[12] The legislative history of the Act does not appear to have concerned itself with the problems the judiciary would encounter in applying the Act. For an interesting commentary on these problems, which, when presented during the Senate floor debate evoked little response, see 114 CONG. REC. 3241–42 (1968).

The Fair Housing Act does provide that "[i]n any proceeding brought pursuant to this section, the burden of proof shall be on the complainant." 42 U.S.C. § 3610(e) (1970). Section 3610 is concerned with federal administrative enforcement, deference to state and local agencies, and eventual federal court action if the other avenues of relief fail. *See* note 27 *infra*. In Marr v. Rife, 503 F.2d 735, 739 (6th Cir. 1974), the court held that the same burden of proof will apply in a section 3612 proceeding which involves enforcement by private persons. The initial burden of proof is normally placed upon the plaintiff as he is the party "who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof." C. MCCORMICK, LAW OF EVIDENCE 786 (2d ed. 1972).

[13] 509 F.2d 1110, *rehearing denied*, 517 F.2d 918 (2d Cir.), *cert. denied*, 96 S. Ct. 197 (1975). A petition for rehearing and a suggestion for a rehearing en banc was denied in the court of appeals. Although the vote was 4 to 3 in favor of the rehearing, it was denied as this did not constitute a majority of the judges in regular active service.

[14] Within New York City, Lefrak operates 119 apartment buildings containing 15,484 apartments, with price ranges from $140 to $400 per month. 509 F.2d at 1111. Life Realty, Inc. is the rental agent for some Lefrak apartment buildings which are located in Brooklyn and Queens. Brief for Defendants-Appellants at 2, Boyd v. Lefrak Organization, 509 F.2d 1110 (2d Cir. 1975) [hereinafter cited as Brief for Appellants].

[15] The Fair Housing Act gives the Attorney General authority to bring a civil action against any person whom he "has reasonable cause to believe . . . is engaged in a pattern or practice of resistance to the" provisions of the Fair Housing Act or when a person's rights under the Act have been denied "and such denial raises an issue of general public importance." 42 U.S.C. § 3613 (1970). The Supreme Court has acknowledged that the "phrase 'a pattern or practice' " does limit the Attorney General's authority. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210–11 (1972). At the very least, "pattern and practice" demands more than one isolated act of discrimination. *See* United States v.

with the Fair Housing Act.[16] Although the defendants to that action denied the allegations of the complaint, they agreed to a consent order which remained in effect for two years.[17] As part of the order, Lefrak and Life Realty agreed to apply an objective financial criterion to all prospective tenants.[18] In order to be eligible for housing, the prospective tenant's net weekly income, including the income of a spouse, must equal at least 90% of the month's rent.[19] In applying this " '90% rule,' " an applicant's debts, taxes, and fixed obligations were deducted from gross income in order to calculate net income.[20] Although not included in the consent order, the defendants also employed a financial criterion, called the " 'co-signer requirement,' " whereby an applicant would be eligible to rent an apartment if he could obtain a person to co-sign the lease.[21] It was necessary for the weekly net income of the co-signer to equal at least 110% of the month's rent.[22] To determine the net income of the co-signer, in addition to the deduction of fixed payments and taxes,[23] a spouse's income was not taken into account and the rent of said co-signer was deducted as a fixed obligation.[24]

On July 7, 1971, Dorothy Boyd, a separated, black welfare recipient with five children, attempted to rent a Lefrak apartment.[25]

Hunter, 459 F.2d 205, 217 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971); United States v. Gilman, 341 F. Supp. 891, 905 (S.D.N.Y. 1972).

[16] 509 F.2d at 1112. The Government's action was based on allegations that discrimination had taken place because of

> (1) defendants' false representations made to blacks and Puerto Ricans that they had no apartments available when, in fact, they did but were unwilling to rent them to non-whites; (2) discrimination against persons in terms, conditions and privileges in rental because of race, color or national origin; and (3) deliberately channeling black applicants to selected apartment buildings while channeling white persons only to other buildings, both under defendants' management.

Order Amending the Findings of Fact and Conclusions of Law at 846, Boyd v. Lefrak Organization, Civ. No. 71-C-1433 (E.D.N.Y., filed April 22, 1974) [hereinafter cited as Amending Order].

[17] 509 F.2d at 1112.

[18] *Id.* Also included in the order were agreements to adhere to the provisions of the Fair Housing Act, to accept applicants regardless of race, and to maintain records as to racial characteristics. *Id.*

[19] *Id.* at 1111. Lefrak had previously used a standard whereby one month's rent should equal one week's gross income. Brief for Appellants, *supra* note 14, at 6.

[20] 509 F.2d at 1111 & n.1.

[21] *Id.* at 1111–12.

[22] *Id.* at 1111.

[23] Amending Order, *supra* note 16, at 844.

[24] 509 F.2d at 1111 n.2.

[25] *Id.* at 1111–12; Amending Order, *supra* note 16, at 846–48.

Upon being refused an apartment, allegedly because she was a public welfare recipient,[26] Mrs. Boyd filed a complaint at the Department of Justice.[27] When no results were forthcoming from this action, Mrs. Boyd moved to intervene in the original action of the Department of Justice.[28] This motion was denied, but Judge Weinstein of the district court treated the motion as the commencement of a separate action.[29] Mrs. Boyd then filed an amended complaint[30] seeking injunctive and

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[26] 509 F.2d at 1112 n.4. On appeal, Lefrak and Life Realty alleged that Mrs. Boyd was denied an apartment because she wanted a two-bedroom apartment, which due to the building's occupancy standards was too small for six occupants. Brief for Appellants, *supra* note 14, at 4, 40–41.

[27] Amending Order, *supra* note 16, at 847. An adminstrative complaint is filed with the Secretary of Housing and Urban Development by an aggrieved person. 42 U.S.C. § 3610(a) (1970). The complaint must be filed within 180 days after the alleged discrimination has occurred. *Id.* § 3610(b). If the state or locality has fair housing laws which provide substantially equivalent rights and remedies, the Secretary must notify and turn over the case to the appropriate agency. The Secretary cannot proceed unless the local agency fails to take any action. *Id.* § 3610(c). If after 30 days, there is a failure to obtain a voluntary compliance or judicial remedy under local housing laws, the complainant has 30 more days to file a civil suit in the district court for appropriate relief. *Id.* § 3610(d).

[28] 509 F.2d at 1112.

[29] *Id.* The consent decree was subsequently amended on December 22, 1971, over Mrs. Boyd's objections. Amending Order, *supra* note 16, at 847. In the amended order, Lefrak and Life Realty agreed to (1) treat non-recipients and recipients of public assistance in the same manner; (2) to distribute to recipients of public assistance a " 'Notice to Welfare Recipients' " informing them of the ways in which they might be able to qualify as a tenant; (3) to accept a governmental-agency rent guarantee on behalf of public assistance recipients unable to comply with the 90% rule or the co-signer requirement. 509 F.2d at 1112 n.3. The program concerning government guarantees was never implemented. *Id.*

[30] 509 F.2d at 1112. In addition to Lefrak and Life Realty, Mrs. Boyd had originally named the United States, the Department of Justice and the Attorney General as defendants. Boyd v. United States, 345 F. Supp. 790, 791 (E.D.N.Y. 1972). Among other allegations, it was contended that the Attorney General had approved and participated in the allegedly discriminatory practices of Lefrak and Life Realty through the promulgation of the original and amended consent orders. *Id.* at 792. The court dismissed the action as to the three governmental defendants. *Id.* at 795.

The plaintiff originally pleaded two additional grounds for relief, one of which was based on the due process clause of the fifth amendment. Amending Order, *supra* note 16, at 845. The court found it unnecessary to pass upon this contention. *Id.* at 862. On appeal the issue was not raised by either party. The other claim was based on the allegation "that governmental action is present through a consent order heretofore secured by the Government." *Id.* at 845. This contention was never discussed by the trial court, but the court of appeals noted that "[t]here is concededly no state action in this case." 509 F.2d at 1114 n.6. The Second Circuit has held that a classification based on welfare recipiency is not rationally related to the ability to pay rent, and therefore violates the equal protection clause of the fourteenth amendment. Male v. Crossroads Associates, 469 F.2d 616, 622–23 (2d Cir. 1972). *Accord*, Battle v. Municipal Housing Auth., 53 F.R.D. 423, 427–28 (S.D.N.Y. 1971); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 138–39 (S.D.N.Y. 1968). Thus, if state action had been present and the action had been brought

declaratory relief based upon the fact that Lefrak's financial criteria (the 90% rule and the co-signer requirement) violated the fair housing provisions of the Civil Rights Act of 1968 and the Civil Rights Act of 1866.[31] Subsequently, Mrs. Boyd's motion to have her suit declared a class action was granted.[32] On March 2, 1973, the district court granted the motion of Lefrak and Life Realty, unopposed by the Government, to dissolve the consent decree and dismiss the Government's action with prejudice.[33]

The case was tried, without a jury, before Justice Tom C. Clark, who found that the 90% rule excluded all recipients of public assistance as a class.[34] The court noted that 77% of those persons on public assistance in New York City were black or Puerto Rican, causing the 90% rule to operate so as to exclude blacks and Puerto Ricans in greater percentages than whites.[35] The court also noted that the co-signer requirement had a discriminatory effect on blacks and Puerto Ricans.[36] In addition, it was inferred that both of the financial criteria

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under the fourteenth amendment, the plaintiffs in *Boyd*, in all probability, would have succeeded without any allegation of racially discriminatory effect.

[31] 509 F.2d at 1111.

[32] *Id.* at 1112. The class was defined as

> "all public assistance recipients within the New York Metropolitan Area who have sought or may seek to rent accommodations in the residential buildings owned or operated by the Lefrak interests."

Id. at 1111.

[33] *Id.* at 1112. It should be noted, however, that the dismissal order "explicitly stated that the dissolution was without prejudice to the instant action." Brief for Plaintiffs-Appellees at 4, Boyd v. Lefrak Organization, 509 F.2d 1110 (2d Cir. 1975) (footnote omitted) [hereinafter cited as Brief for Appellees].

[34] Amending Order, *supra* note 16, at 859. This finding of fact was derived from testimony of an expert produced by the plaintiffs who testified that to qualify under the 90% rule one would have to earn no less than $10,500 per year. *Id.* at 853. This minimum income requirement would automatically disqualify anyone eligible for public assistance. 509 F.2d at 1114.

[35] Amending Order, *supra* note 16, at 845, 859. The court found that in 1970, 72% of the people who received public assistance in the New York City Community were black and Puerto Rican while only 23% were white. *Id.* at 851. While only 3% of the white population received assistance, 29% of the Puerto Rican and black residents received welfare benefits. *Id.* By 1973, one-third of the black population and one-half of the Puerto Rican population were on public assistance as compared with only 5% of the white population. *Id.*

[36] *Id.* at 859–60. In discussing the co-signer requirements the court had previously noted:

> It is difficult, if not impossible, for the average black or Puerto Rican applicant to secure a white guarantor or co-signor, and a very small percentage of these races themselves can qualify. As a result, most blacks and Puerto Ricans cannot meet either of defendants' requirements.

Id. at 851.

had been applied in a discriminatory manner,[37] in that "even among the recipient-applicants with co-signers and completed applications, the [proportion of] whites accepted [ran] three to one over the blacks."[38] Although the court did not explicitly state whether it was relying on the general discriminatory impact of the application of the 90% rule or the effective discriminatory impact due to the high proportion of minority welfare recipients, it held that the 90% rule did not accurately measure the ability of public assistance recipients to pay rent.[39] The court also found that

> there is no business necessity requiring the use of the defendants' 90 percent financial rule since a policy with less discriminatory impact would be quite sufficient to fully protect the defendants in collecting their rent.[40]

The district court granted the requested injunctive relief, finding that the defendants had violated the Fair Housing Act and the Civil Rights Act of 1866.[41]

The Court of Appeals for the Second Circuit, in a two-to-one holding, reversed the decision of the district court.[42] Judge Hays, writing for the majority, stated that the issue was simply "whether or not the financial criteria applied by defendants are violative of the Fair Housing Act and the Civil Rights Act."[43] The court held that

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[37] *See id.* at 852–56.

[38] *Id.* at 854. The court found that the black rejection rate was from two to four times greater than that of whites, *id.* at 855, and that

> [o]ver all we find 34.7 percent of the whites qualifying while only 10.7 percent of the black [*sic*] and 5.6 percent of the Puerto Ricans are able to do so.

Id. at 852–53.

[39] *Id.* at 845, 860. The court found that the usual allocation made for various necessary living expenses did not apply to a recipient of public assistance because he pays no taxes or medical expenses and is able to obtain food stamps and a variety of other benefits. *Id.* at 857–58. The court also pointed out that there are no upper limits on the rent allowance received by a recipient, the only condition being approval from the New York City Department of Social Services. *Id.* at 858–59. *See* N.Y. SOC. SERV. LAW § 131-a (McKinney Supp. 1974–75). The defendants argued on appeal that this was a worthless safeguard, as there was no guarantee the money received by the recipient would be applied to their rent and that, although a "two-party check" sometimes was issued, this did not occur until the rent was already in arrears. Brief for Appellants, *supra* note 14, at 7–8.

[40] Amending Order, *supra* note 16, at 860.

[41] *Id.* at 846, 861–62. It was not clear whether the district court also invalidated the co-signer requirement, as the court's conclusions of law only discussed the invalidity of the 90% rule. *Id.* at 860–62. But the Second Circuit reviewed the case as though both of the financial criteria had been declared in violation of the Fair Housing Act and the Civil Rights Act of 1866. 509 F.2d at 1111–12.

[42] 509 F.2d at 1115.

[43] *Id.* at 1112 n.4.

they were not.[44]

The court of appeals found that the underlying basis of plaintiffs' argument stemmed from their contention "that '[w]elfare recipiency . . . must be seen as the "functional equivalent" of race,' "[45] a premise which the court stated had been rejected by the Supreme Court.[46] The majority opinion noted that the class was composed of all welfare recipients, and thus viewed the plaintiffs' allegations only in that context.[47] It then went on to hold that there was no evidence of racially motivated discrimination in the implementation of the financial criteria.[48] The court found that (1) the percentage of blacks in the apartment was 19.8% as compared with a 21% black population;[49] (2) there was no claim that black welfare recipients were treated any differently than white recipients;[50] and (3) there was no evidence that

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[44] *Id.* at 1114–15.

[45] *Id.* at 1112 (quoting from Brief for Appellees, *supra* note 33, at 36). In response to the court's quotation from their brief, the plaintiffs-appellees, in their petition for rehearing, stated that "[t]he majority was under a misapprehension by the basic nature of petitioners' claims." Petition for Rehearing and Suggestion for Rehearing en banc of Plaintiffs-Appellees at 12, Boyd v. Lefrak Organization, 509 F.2d 1110 (2d Cir. 1975). It was pointed out that the majority never considered their argument concerning the discriminatory effect of the financial criteria on the black and Puerto Rican population in general. *Id.*

[46] 509 F.2d at 1112 (citing James v. Valtierra, 402 U.S. 137 (1971)). In *James*, the Supreme Court upheld an amendment to the California constitution which provided that a local referendum be held before a low-rent housing project could be acquired, developed, or constructed by the state in that locality. 402 U.S. at 142–43. The Court found that the amendment did not rest on racial distinctions and that the traditional and common use of referendums in California negated "any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." *Id.* at 141.

[47] 509 F.2d at 1111. Although the class was composed of welfare recipients, the plaintiffs did allege an overall racially discriminatory effect. *See* note 45 *supra*. *Cf.* Amending Order, *supra* note 16, at 852–53.

[48] 509 F.2d at 1113.

[49] *Id.* Commenting upon this finding, Judge Mansfield, in his dissent, stated:

> The majority's statement that 19.8% of appellants' apartments are rented to Blacks is open to question. It assumes that once an apartment was rented to a Black family the occupancy did not thereafter change to a white family. The figure was also based only on appellants' Brooklyn buildings.

Id. at 1118 n.4 (Mansfield, J., dissenting).

[50] *Id.* at 1113 (majority opinion). This finding was contrary to the facts as accepted by Judge Mansfield. He stated that

> the evidence before the trial judge further disclosed that of the public assistance recipients who applied to appellants for apartments the percentage of non-minority appellants [*sic*] who were accepted was approximately twice the percentage of Black applicants accepted.

Id. at 1118 (Mansfield, J., dissenting). It should be noted that the sample from which Judge Mansfield derived those statistics was very small, *i.e.*, six blacks of whom two were accepted, and eight whites of whom six were accepted. Amending Order, *supra* note 16, at 853–54.

the exclusion of recipients of public assistance was for any reason other than economics.[51] Thus, the fact that blacks were excluded from the Lefrak apartments in a higher proportion than whites was seen simply as a matter of economics, rather than racially motivated discrimination.[52] The court stated that a private landlord could discriminate in the choice of his tenants in any manner as long as the criteria used were not based on one of the statutorily condemned classifications.[53] The court noted that a landlord could seek assurances to ascertain to his satisfaction the prospective tenant's ability to pay the rent.[54]

The crucial question involved in this case was the legal standard the court of appeals was to apply. The court employed a subjective or purpose standard which requires proof by the plaintiff that the allegedly discriminatory conduct is racially motivated.[55] The use of this standard appears to be supported by language employed by the Supreme Court in *Jones*, wherein the Court stated that section 1982, which is derived from the 1866 Civil Rights Act, "was meant to prohibit *all* racially motivated deprivations" in the sale or rental of property.[56]

Due to the fact that direct evidence of racially motivated discrimination is so difficult to obtain,[57] the courts have had to develop objective criteria to aid them in determining a person's subjective motivation.[58] Although this type of approach is couched in objective terms, it is still a method by which one may inferentially impute racial motivation.

Objective criteria were developed and applied in *Bush v. Kaim*,[59]

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[51] 509 F.2d at 1113.

[52] *Id.*

[53] *Id.* at 1114.

[54] *Id.*

[55] *Id.* at 1113. The court stated that only in actions arising under the equal protection clause, where a preliminary finding of state action is necessary, will "a showing of a disproportionate effect" on a racial minority be sufficient to invoke the compelling state interest test. *Id.*

[56] 392 U.S. at 426 (emphasis in original).

[57] In Dailey v. City of Lawton, 296 F. Supp. 266, 268 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970), the court noted "that most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro Race or other minority races."

[58] *See* discussion of Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969), notes 59–65 *infra* and accompanying text, and United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972), notes 75–78 *infra* and accompanying text.

[59] 297 F. Supp. 151 (N.D. Ohio 1969). *See also* Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 417 (S.D. Ohio 1968); Comment, *Racial Discrimination in the Private Housing Sector: Five Years After*, 33 MD. L. REV. 289, 293–94 (1973).

a case brought under section 1982 alone.[60] The black plaintiffs had attempted to rent a single family dwelling which had been advertised in the newspaper.[61] The court held that for a plaintiff to sustain his burden of proof he must establish

> (1) that the owner (or responsible party) placed the property on the open market for sale or rental, (2) that the plaintiff was willing to rent or purchase the property on the terms specified by the owner, (3) the plaintiff communicated this willingness to the owner at a time when the property was available for sale or rent, (4) that the owner refused to rent or sell the property to the plaintiff on the terms which the owner indicated would otherwise be satisfactory, and (5) that there is no apparent reason for the refusal of the defendant to rent the property to the plaintiff other than the plaintiff's race.[62]

When evidence is presented which supports these elements, the defendant is permitted to come forward to rebut the evidence.[63] In the event that the defendant is unable to overcome his burden of disproving the evidence which establishes the objective criteria, he may nevertheless present evidence that he, in fact, based his refusal to sell or rent on other legitimate considerations.[64] The court stated that one could refuse to rent for any reason, even if totally subjective, as long as the refusal was actually based on the subjective justifications and not on the racial characteristics of the person involved.[65]

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[60] 297 F. Supp. at 154.

[61] *Id.* at 154–55. Single family dwellings sold through newspaper advertisements were not covered by the Fair Housing Act until after December 31, 1969. *See* 42 U.S.C. § 3603(b)(1) (1970).

[62] 297 F. Supp. at 162. *Accord*, Fred v. Kokinokos, 347 F. Supp. 942, 944 (E.D.N.Y. 1972).

[63] 297 F. Supp. at 162.

[64] *Id.* at 163. The court stated that a person may consider such factors as credit standing, assets, reputation, age, number of children and their ages, financial stability, size of family, and length of time wanted for occupancy, but noted that this was by no means an exclusive list. *Id.* at 162–63.

In Madison v. Jeffers, 494 F.2d 114, 115 (4th Cir. 1974), a suit arising under § 1982 and the Fair Housing Act, the defendant established that his refusal to sell was based on tax reasons and not race. But in Hall v. Freitas, 343 F. Supp. 1099, 1100 (N.D. Cal. 1972), the court rejected defendant's claim that his refusal to rent was based on plaintiff's misrepresentation concerning the length of his employment.

[65] 297 F. Supp. at 162–63. The court took note of such subjective factors as appearance, demeanor, and a first-impression opinion as to trustworthiness. *Id. See also* Hamilton v. Miller, 477 F.2d 908, 910 (10th Cir. 1973).

This approach appears to be supported by a statement made during hearings on the Fair Housing Act by then Attorney General Ramsey Clark wherein he remarked that the legislation

> would prohibit no one from selling or renting to a relative or to a friend. There is

The court in *Bush* did not make it clear whether racial motivation must be the sole reason or whether it only has to be one of the considerations in order to constitute a violation of the prohibition against racial discrimination. This question was clarified in *Smith v. Sol D. Adler Realty Co.*,[66] a suit in which the action was based on an alleged violation of section 1982 and the Fair Housing Act.[67] Plaintiff, a separated black woman with a child, attempted to sublet an apartment.[68] Although the tenant was willing to sublet the apartment to the plaintiff, the president of the corporation that managed the apartment building refused, stating that the company had a policy of not renting to single employed mothers with young children.[69] The court held

> that race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination.[70]

Recognizing that discrimination is often practiced in subtle forms,[71] the courts have also made use of statistical data in establishing a prima facie case under the subjective approach.[72] This tech-

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> nothing in this bill to prevent personal choice where personal choice, not discrimination, is the real reason for action.

Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 6 (1967). But in Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055 (7th Cir. 1972), the court, although recognizing that one has a right to refuse to rent "on any honest basis unrelated to . . . race," noted that when an

> asserted justification is itself somewhat arbitrary, it is *particularly important* that the trier of fact consider all admissible evidence that may *illuminate the real motivation* of the defendants.

Id. at 1056 (emphasis added). *Accord*, Stevens v. Dobs, Inc., 483 F.2d 82, 83–84 (4th Cir. 1973).

[66] 436 F.2d 344 (7th Cir. 1970).

[67] *Id.* at 345.

[68] *Id.* at 346.

[69] *Id.* at 346–47.

[70] *Id.* at 349–50 (emphasis in original). *Accord*, Steele v. Title Realty Co., 478 F.2d 380, 383 (10th Cir. 1973); Haythe v. Decker Realty Co., 468 F.2d 336, 338 (7th Cir. 1972); Hampton v. Roberts, 386 F. Supp. 609, 611 (W.D. Va. 1974).

[71] United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 782 (N.D. Miss. 1972).

[72] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 426 (8th Cir. 1970), a case arising under Title VII, is often cited as an authority in housing cases when statistics are used. *See, e.g.*, Weathers v. Peters Realty Corp., 499 F.2d 1197, 1202 (6th Cir. 1974); United States v. Youritan Constr. Co., 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd and modified*, 509 F.2d 623 (9th Cir. 1975); United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 782 (N.D. Miss. 1972). *See generally* Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974).

nique has been used frequently in the area of employment discrimination.[73] The courts will look to the percentage of minority buyers or tenants who have bought or rented from a defendant and compare it with the percentage of minority persons in the surrounding geographical area.[74] For example, in *United States v. Real Estate Development Corp.*,[75] the court found that the fact that the defendants had never had a black tenant while the population in the area was 37.6% black, "constitutes, at least, a *prima facie* case of racial discrimination."[76] Once this case had been established, the burden was placed upon the defendant to show that his actions were not racially motivated.[77] As the defendant failed to sustain his burden of rebutting the case, the court granted the requested relief.[78]

Since the plaintiffs in *Boyd* could not meet the objective renting standards (the 90% rule or the co-signer requirement) employed by Lefrak,[79] they did not meet the requirements of the test set out in the *Bush* case.[80] Similarly, the plaintiffs did not meet the requirements of the statistical data analysis because there was not a large enough discrepancy between the percentage of minority persons in the Lefrak buildings in Brooklyn and that in the surrounding geographical area.[81] Thus, under either approach, the evidence was insufficient to establish a prima facie case of racially motivated discrimination so as to shift the burden of proof to the defendant. Perhaps this is why the majority opinion did not directly discuss their application. In effect, the court was compelled to look to direct evidence of ra-

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[73] *See, e.g.*, Reed v. Arlington Hotel Co., 476 F.2d 721, 723–24 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *See also* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 268–73 (1971).

[74] *See, e.g.*, United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 779 (N.D. Miss. 1972). It has been suggested that, to be totally accurate in determining the relevant percentages, one must take into consideration the percentage of persons able to afford the housing and their associational preferences. *See* Bogen & Falcon, *supra* note 72, at 70–73.

[75] 347 F. Supp. 776 (N.D. Miss. 1972).

[76] *Id.* at 779, 782. *See also* United States v. Reddoch, 467 F.2d 897, 899 (5th Cir. 1972); United States v. Youritan Constr. Co., 370 F. Supp. 643, 649–50 (N.D. Cal. 1973), *aff'd and modified*, 509 F.2d 623 (9th Cir. 1975).

In other cases, the statistical data has been looked at as one factor in conjunction with the other evidence presented. *See, e.g.*, Weathers v. Peters Realty Corp., 499 F.2d 1197, 1201–02 (6th Cir. 1974); Stevens v. Dobs, Inc., 483 F.2d 82, 83 (4th Cir. 1973); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 417 (S.D. Ohio 1968).

[77] 347 F. Supp. at 782.

[78] *Id.* at 782, 785.

[79] 509 F.2d at 1111–12.

[80] *See* text accompanying note 62 *supra*.

[81] *See* 509 F.2d at 1113.

cially motivated discrimination, which was found not to exist.[82]

Plaintiffs' primary contention, which had been the basis of Justice Clark's decision[83] and the dissenting opinion of Judge Mansfield of the court of appeals,[84] was that the business necessity test, developed in *Griggs v. Duke Power Co.*,[85] was applicable.[86] This test requires that employment practices be related to job performance.[87] The majority opinion of the court of appeals in *Boyd* rejected this contention, commenting that the business necessity test "has never been applied in any Fair Housing Act case, either public or private, and we find it to be inapposite here."[88]

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[82] *Id.* at 1113–15.

[83] Amending Order, *supra* note 16, at 845–46, 861.

[84] 509 F.2d at 1115.

[85] 401 U.S. 424 (1971). For a discussion of the *Griggs* case see Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Wilson, *A Second Look at* Griggs v. Duke Power Company: *Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972).

[86] 509 F.2d at 1114. *See* Brief for Appellees, *supra* note 33, at 31–43.

The four judges who dissented in the denial of the petition for rehearing in *Boyd* agreed that the issue of the applicability of the principles enunciated in *Griggs* to the Fair Housing Act is one of extreme importance. 517 F.2d at 919.

[87] 401 U.S. at 436.

[88] 509 F.2d at 1114. In finding *Griggs* "inapposite," the majority indicated that support for its reasoning could be found in Jefferson v. Hackney, 406 U.S. 535 (1972), wherein the Texas system of allocating welfare payments was challenged. *Id.* at 536–38. In holding against the plaintiffs, the Court in *Jefferson* discussed whether the actions of the state violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970), which prohibits discrimination in federally financed programs, 406 U.S. at 549–50 n.19, and remarked that

> [i]n *Griggs*, the employment tests having racially discriminatory effects were found not to be job-related . . . . Since the Texas procedure challenged here *is* related to the purposes of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs.

Id. at 550 n.19 (emphasis in original).

It is interesting to note that the Second Circuit did apply the *Griggs* standard in Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974), a case arising under the Civil Rights Act of 1964, 42 U.S.C. § 2000a (1970) and 42 U.S.C. §§ 1981, 1982 (1970). Plaintiffs challenged the guest regulation of a swim club, alleging that it was racially discriminatory. 495 F.2d at 1335. The court found that the club was not a private club as defined in 42 U.S.C. § 2000a(e) (1970) and thus was not exempted from the application of the Civil Rights Act. 495 F.2d at 1336. In vacating the summary judgment for the defendants, the court stated:

> As in *Griggs* . . . such a rule or rule change is facially neutral. If, however, we look to its effect, then it may no longer be neutral. In *Griggs* it was shown that such a requirement weeded out blacks disproportionately to the population at large. This shifts the burden of justifying the requirement onto the employer. Here it might be shown that the rule change had the effect of discriminating against blacks, because apparently none of the relatives and few of the friends of

The issue in *Griggs* centered around the standard to be applied in determining whether the requirement of a high school diploma or passing a general intelligence test as a condition of employment violated the Equal Employment Opportunity Act (Title VII of the Civil Rights Act of 1964)[89] when these seemingly neutral criteria operated to disproportionately exclude black applicants.[90] The Supreme Court stated that the court of appeals had "concluded that a subjective test of the employer's intent should govern."[91] Rejecting the use of this test, the Court stated:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[92]

The Court decided that an objective standard should be implemented whereby racially motivated intent would not be determinative.[93] In applying an objective standard, the Court resolved the conflict in the lower federal courts concerning the subjective versus the objective approach in the judicial application of Title VII.[94] It was decided that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[95] Once

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> members were black. . . . This would presumably shift the burden of justifying the change by showing that the rule was actually adopted for a reasonable purpose and not for discriminatory purposes.

Id. at 1341 (citations omitted). Judge Oakes, in his dissent from the denial of the petition for rehearing in *Boyd*, stated that one of his reasons for believing a rehearing should be granted was the "direct conflict" between the decisions in *Olzman* and *Boyd*. 517 F.2d at 919.

[89] 42 U.S.C. § 2000e (1970), *as amended*, (Supp. III 1974).

[90] 401 U.S. at 425–26.

[91] *Id.* at 428.

[92] *Id.* at 431.

[93] *Id.* at 432.

[94] *Compare* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) *and* Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971), *with* United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972) *and* Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See* Comment, *The Validity of Employment Testing*, 1972 U. ILL. L.F. 388, 397–98; Recent Decisions, 10 DUQ. L. REV. 270, 272 (1972); Case Comment, 47 NOTRE DAME LAW. 381, 388 (1971). As one commentator aptly stated:

> *Griggs* redefines discrimination in terms of consequence rather than motive, effect rather than purpose. This definition is new to the field of employment discrimination, in which a subjective test had previously been used.

Blumrosen, *supra* note 85, at 62.

[95] 401 U.S. at 432 (emphasis in original).

it is shown that the employment practice operates in a manner which excludes blacks in a higher proportion than non-minority groups, the burden shifts to the employer to produce evidence that the employment practice is job related and a business necessity.[96] In the application of the business necessity standard, the Court looked primarily at the exclusionary effect on the minority population, not simply the percentage of minority persons employed in the defendants' work force.[97] Although employment testing and a high school diploma requirement were the immediate employment practices under review, the Supreme Court's holding is couched in very broad language,[98] and has been interpreted to apply to other types of employment practices.[99]

In *McDonnell Douglas Corp. v. Green*,[100] the Supreme Court clarified its position on the standards to be applied in cases involving allegations of employment discrimination.[101] *McDonnell* did not involve an employer's implementation of a facially neutral employment procedure, but rather, was an action brought by a single former employee who alleged that the defendant's refusal to rehire him was ra-

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[96] *Id.* at 431.

[97] *Id.* at 430–31 & n.6. *See* Blumrosen, *supra* note 85, at 91–93. Blumrosen notes that there are two types of statistical evidence which may cause the burden to be shifted to the defendant:

> (1) proof that particular employment standards will exclude a higher proportion of minorities than of the majority group, and (2) proof that the composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.

Id. at 92. It was noted that the *Griggs* Court utilized the first type of statistical evidence. *Id. See* 401 U.S. at 431. The second type of statistical evidence is generally considered in establishing a prima facie case in cases employing a subjective standard of racial motivation. *See* notes 72–76 *supra* and accompanying text. A court employing the subjective approach, and thus being unconcerned with "effect," would consider the exclusion of minorities irrelevant. In fact, the majority in *Boyd* did find such statistical evidence inapposite. 509 F.2d at 1113. *See generally* Comment, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900, 909–12 (1972).

[98] The Court utilized such phraseology as "practices, procedures, or tests" and "employment procedures or testing mechanisms." 401 U.S. at 430, 432.

[99] *See* Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 45, 53, 56–57 (5th Cir. 1974) (seniority rules and a policy whereby one was required to resign from one job before being allowed to apply for another); Wallace v. Debron Corp., 494 F.2d 674, 676–77 (8th Cir. 1974) (rule establishing that employee cannot have his wages garnished more than once in one year); Head v. Timken Roller Bearing Co., 486 F.2d 870, 873, 879 (6th Cir. 1973) (seniority and transfer policy). *See also* Wilson, *supra* note 85, at 849–51; Note, *Employment Discrimination: The Burden Is On Business*, 31 MD. L. REV. 255, 267–68 (1971).

[100] 411 U.S. 792 (1973). For a discussion of the *McDonnell* case see *1973–74 Annual Survey of Labor Relations Law*, 15 B.C. IND. & COM. L. REV. 1105, 1211–18 (1974); Note, 15 B.C. IND. & COM. L. REV. 654 (1974).

[101] 411 U.S. at 800–06.

cially motivated.[102] The "critical issue" was seen as "the order and allocation of proof in a private, non-class action challenging employment discrimination."[103]

The Court held that the plaintiff must initially carry the burden of proof.[104] Although declining to adopt an absolute rule,[105] the Court noted that a plaintiff could establish "a prima facie case of racial discrimination" by proving

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[106]

The Court also noted that a relevant factor would be the racial composition of the defendant's work force.[107] Once the prima facie case was established, the employer would have the burden "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[108] The Court went on to explain that the business necessity test of *Griggs* was not the proper standard to apply in *McDonnell*, since the latter did not involve a facially neutral testing device whose effect was to exclude blacks.[109]

Griggs and *McDonnell* appear to stand for the proposition that, in the employment area, two different legal standards are to be applied. Broadly speaking, in a situation where a facially neutral practice is being challenged, the standards set forth in *Griggs* would be appropriate,[110] while in an individual suit challenging one particular allegedly discriminatory act, *McDonnell* would apply.[111]

The standard articulated in *McDonnell* is almost identical to the

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[102] *Id.* at 794.

[103] *Id.* at 800.

[104] *Id.* at 802.

[105] *Id.* at 802 n.13.

[106] *Id.* at 802 (footnote omitted).

[107] *Id.* at 805 & n.19. *Compare id. with Griggs*, wherein the crucial factor was the racial composition of the excluded work force. *See* note 97 *supra*. *See generally* Fiss, *supra* note 73, at 270–73.

[108] 411 U.S. at 802.

[109] *Id.* at 802 n.14, 805–06.

[110] *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir.), *cert. granted*, 421 U.S. 987 (1975); Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975), *vacated mem.*, 96 S. Ct. 19 (1975).

[111] *See, e.g.*, Franklin v. Troxel Mfg. Co., 501 F.2d 1013 (6th Cir. 1974); Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974).

subjective tests applied in previously discussed housing cases such as *Bush*[112] and *Real Estate Development Corp.*[113] This line of housing cases, like *McDonnell*, places the initial burden on the plaintiff. Certain factors, which may include the racial composition of the defendant's work force or of the tenants residing in his apartment building, establish a prima facie case. Once established, the defendant must rebut the inference by satisfactorily denying racial motivation.[114] A logical progression of this correlation would seem to be that when the plaintiffs in a housing case challenge a facially neutral policy or practice that the legal standards enunciated in *Griggs* should apply.

Judge Mansfield, in his dissent in *Boyd*, took issue with the majority's application of the subjective racial motivation test as applied in an action challenging a facially neutral rule.[115] He favored the use of the objective "effect" approach articulated in *Griggs*, stating:

> This case should be governed by the principle, firmly established by the Supreme Court in its interpretation and enforcement of analogous civil rights legislation, to the effect that, where a facially neutral practice has a serious and substantial *de facto* discriminatory impact, it prima facie violates a statutory prohibition against racial discrimination unless the alleged violator can show that the practice is necessary for non-racial reasons.[116]

Judge Mansfield reasoned that the purpose of the Fair Housing Act was identical to that of Title VII "to eliminate artificial and arbitrary barriers."[117] He did not question the landlord's right to "adopt reasonably appropriate economic standards,"[118] just as the Supreme Court in *Griggs* did not question the fact that "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications."[119] As the business necessity test focuses on effect, the relevant statistical data is drawn from the population excluded,[120] thereby causing the statistical data on the racial composition within the apartment buildings to lose its significance. In applying this test to the fact situation in *Boyd*, Judge Mansfield found that the 90% rule

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[112] 297 F. Supp. 151 (N.D. Ohio 1969). *See* notes 59–65 *supra* and accompanying text.

[113] 347 F. Supp. 776 (N.D. Miss. 1972). *See* notes 75–78 *supra* and accompanying text.

[114] *Compare* notes 59–65 *and* 75–78 *supra* and accompanying text *with* notes 100–08 *supra* and accompanying text.

[115] 509 F.2d at 1115.

[116] *Id.* (emphasis in original).

[117] *Id.* at 1116.

[118] *Id.*

[119] 401 U.S. at 430.

[120] *See* note 97 *supra*.

operated so as to have a disproportionately high exclusionary impact on minorities,[121] that the rule was not reasonably related to one's ability to pay rent[122] and that it was not a business necessity.[123]

Although the majority opinion stated that no case arising under the Fair Housing Act had ever applied the business necessity test of *Griggs*,[124] it should be noted that the Court of Appeals for the Eighth Circuit, in *Williams v. Matthews Co.*,[125] did apply the standards enunciated in *Griggs* to a private housing case.[126] In *Williams*, an

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[121] 509 F.2d at 1117. Judge Mansfield noted that all but a few welfare recipients were excluded by the implementation of the 90% rule. *Id.* He agreed with the appellees that "[t]o exclude public assistance recipients in New York City is the equivalent of excluding minority persons." *Id.* Judge Mansfield, as did Justice Clark, went beyond the class of welfare recipients and noted the discriminatory impact of the 90% rule on the population at large. *Id.* at 1117–18.

[122] *Id.* at 1118. Judge Mansfield noted that a welfare recipient's rent allowance "is not fixed at a specific figure but is equal to the recipient's actual rent when approved." *Id.* He acknowledged that a recipient may receive various other welfare benefits and concluded by stating:

> The ability of welfare recipients to pay Lefrak rents is also attested to by the existence, unknown to Lefrak, of some 461 welfare-recipient households in its apartments in 1972 and the fact that, out of 15,484 Lefrak apartments, only 108 dispossess notices were issued in 1972 and 43 in 1973.

Id.

[123] *Id.* at 1118. Judge Mansfield stated that "business necessity" had not been established, as

> [t]here was no showing . . . that experience in the rental of apartments of the type here under consideration had demonstrated that the 90% Rule was reasonably necessary to insure tenants' payment of rent and that there had been losses, substantial defaults, or failure to collect back rental payments under less stringent rules. Nor was there proof that welfare recipients as tenants have a greater incidence of rent failures or defaults than other tenants.

Id.

It should be noted that, in addition to the elements of racially discriminatory effect and the absence of job relatedness and business necessity, the Supreme Court in *Griggs* considered a third element—that "the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." 401 U.S. at 426 (footnote omitted). On appeal, Lefrak and Life Realty argued that there was no evidence of past discrimination. Brief for Appellants, *supra* note 14, at 17–18. However, both Judge Mansfield and Justice Clark took into consideration the implication of the fact that previously the Government had instituted suit against the defendants for an alleged pattern and practice of racial discrimination. 509 F.2d at 1117 n.3; Amending Order, *supra* note 16, at 846.

[124] 509 F.2d at 1114.

[125] 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974).

[126] 499 F.2d at 828. *See also* Madison v. Jeffers, 494 F.2d 114, 117–20 (4th Cir. 1974) (Butzner, J., dissenting). It is interesting to note that the Court of Appeals for the Eighth Circuit applied a variation of the *Griggs* test in United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 95 S. Ct. 2656 (1975), a case involving a governmental defendant. In *Black Jack*, an action was brought pursuant to the Fair Housing Act challenging the city's zoning ordinance. 508 F.2d at 1181. Relying on *Griggs* and *Williams*, the court held that a prima facie case would be established by demonstrating a

action was brought against the Matthews Company alleging violations of sections 1981 and 1982 and the Fair Housing Act.[127] The plaintiffs, who had attempted to buy a lot from the defendant, had been told that it was a company rule to sell only to approved builders. It was contended at trial that the justification for this policy was to insure a regulated development of the subdivision.[128] The plaintiffs attempted to engage an approved builder, but were unsuccessful because the builder believed that he would suffer business losses if he constructed a house in that subdivision for black people.[129] The plaintiffs finally found a black builder willing to do the job, only to learn that he was unacceptable to the company because he had not been approved.[130] At the trial level the court held that race had not been a factor in the defendant's refusal to sell the property to the plaintiff "and that plaintiff was afforded the same opportunity as others to purchase from an approved builder."[131] It was additionally held that the approved builder requirement was justified by legitimate business reasons.[132]

In reversing the holding of the district court, the court of appeals discussed the principles of a prima facie case as applied in *McDonnell* and various housing cases.[133] The court stated that when a prospective black purchaser meets the objective requirements of a seller, and no lots in a subdivision have been sold to a black person, a prima facie case of racial discrimination will arise as a matter of law.[134] This shifts the burden onto the defendant to establish a legitimate reason for his action.[135]

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racially discriminatory effect. *Id.* at 1184–85. But rather than requiring the defendant to rebut the prima facie case by proving business necessity the court stated:

> Even though this case is based on a federal statute, rather than on the Fourteenth Amendment, we believe that, once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases.

Id. at 1185 n.4. *Accord*, Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228, 232–34 (N.D. Ohio 1974).

[127] 499 F.2d at 822.

[128] *Id.* at 824. The action was originally brought as both an individual and a class action, but the class action was dismissed due to the lack of evidence establishing that other black persons attempted to buy property from the defendant. *Id.* at 829.

[129] *Id.* at 824.

[130] *Id.*

[131] *Id.* at 825. The Williamses also tried to engage a second white builder who refused to build for them. *Id.* at 824. Apparently there was a conflict as to whether the board of directors or the president of the company approved or disapproved the builders, but it was established that there was no set procedure by which a builder could gain approval. *Id.*

[132] *See id.* at 825.

[133] *Id.* at 826.

[134] *Id.*

[135] *Id.* at 827.

The court could have ended the discussion at this point, as it was apparent that it did not believe the defendant's evidence established a legitimate nondiscriminatory reason for its refusal to sell to the plaintiffs.[136] Yet, the court went further and noted that the courts must take notice of the actual results of a facially neutral practice, regardless of motivation.[137] The court applied the *Griggs* test by stating that "such a policy, even though neutral on its face, cannot stand if it in its operation serves to discriminate on the basis of race."[138] The trial court's suggestion, that the approved builder requirement was justified by business reasons, was rejected.[139] The court of appeals held that

> [i]n order to rely upon a "business necessity" justification for a business policy which, though fair in form, is discriminatory in operation, a defendant must demonstrate the absence of any acceptable alternative that will accomplish the same business goal with less discrimination.[140]

After pointing out various alternatives available to the defendant,[141] the court concluded that the business justification advanced by the defendant was "pure chimera."[142]

Although the *Williams* case involved a facially neutral rule, unlike *Boyd* it was not based upon economic distinctions.[143] Section

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[136] *Id.* at 828.

[137] *Id.*

[138] *Id.* There have been other housing cases where the courts have looked to the effect of the challenged actions, rather than to the motivation. *See, e.g.*, United States v. Grooms, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972). Some cases have cited *Griggs* as authority for looking at the effect rather than the purpose, but have not applied the business necessity test. *See, e.g.*, United States v. Hughes Memorial Home, 396 F. Supp. 544, 548 (W.D. Va. 1975); United States v. Long, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 13,361 (C.D.S.C. 1974); United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 782 (N.D. Miss. 1972).

[139] 499 F.2d at 828.

[140] *Id.*

[141] *Id.* The court suggested that the "Company could sell building lots directly to black persons who indicate a willingness to hire an available competent contractor" or in the alternative that the company "direct that its approved builders make the building lots they buy from Matthews available without discrimination." *Id.*

[142] *Id.* (footnote omitted).

[143] It should be noted that there is another distinction between *Boyd* and *Williams*. In *Williams*, the suit was brought individually and as a class action composed of black persons. *Id.* at 822. The class action was dismissed due to the failure to establish a class. *Id.* at 829. In *Boyd*, although racial discrimination was a basis of the action, the class was composed of welfare recipients. 509 F.2d at 1111. *See* note 33 *supra*. Due to the fact that welfare recipiency is not a classification which is proscribed by section 1982 or the Fair Housing Act, it is possible that the majority opinion in *Boyd* took a more circumscribed view of the action than it would have if the suit had been brought as a class action composed of black persons. *See* 509 F.2d at 1112.

1982 and the Fair Housing Act were not meant to prohibit economic inequality in housing.[144] Nevertheless, acceptable economic standards and business policies have been criticized as nothing more than "a subterfuge for racial discrimination."[145] In cases where a general business or economic policy is challenged as being racially discriminatory, the problems of proof become far more difficult since the justifications for such policies are so readily accepted as being legitimate.[146] The use of an objective test would alleviate this problem of proof as the focus of the inquiry is directed toward the effect of the action rather than the purpose. Once a business practice is challenged, and a racially discriminatory effect is proven by the plaintiff, the defendant would simply have to prove that the challenged practice is necessarily related to the realization of the expected return on his investment. Although to place this burden on the businessman is certainly more onerous than the usual evidentiary burdens placed upon a defendant, in this particular situation the defendant would more typically be an organization capable of implementing and applying general business and economic policies as contrasted with the small businessman who, as a practical matter, does not institute and carry out such broad-based policies. In cases involving smaller businessmen, whose actions, rather than their business practices, were challenged, the proof would continue to be directed toward ultimately proving, perhaps inferentially, racial motivation. To place the burden of establishing bus-

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[144] The Supreme Court in *Jones v. Alfred H. Mayer Co.* stated that

> [a]t the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.

392 U.S. at 443. Similarly, with regard to the Fair Housing Act, Senator Brooke, a cosponsor of the fair housing amendment to the Civil Rights Act of 1968, during the floor debate, stated:

> I emphasize that the basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice.

114 CONG. REC. 3421 (1968).

[145] *1971-72 Hearings*, *supra* note 9, at 119. It has been said that

> [c]ertain new and more subtle forms of discrimination in housing have been devised: some apartments are not rented to persons whose wages are based on an hourly scale; credit and other criteria are arbitrarily applied; false waiting lists are maintained . . . . These new types of discrimination, while defying detection by unsophisticated buyers or renters, continue to perpetuate a segregated living pattern and dual housing markets.

Chandler, *supra* note 1, at 169 (footnote omitted). *See generally 1971-72 Hearings*, *supra* note 9, at 118–22, 211–12; *1970 Hearings*, *supra* note 9, at 2947–48.

[146] *See* Recent Cases, 88 HARV. L. REV. 1631, 1633–35 (1975).

iness necessity on the "entrepreneur" is to place it on the shoulders of the person in the best position to be aware of, and able to establish, the policies and practices of the marketplace.[147]

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[147] In 1971, President Nixon, commenting upon the Fair Housing Act, noted that although the Act was not meant to effectuate " 'economic integration,' " economic measures would not be tolerated as a disguise for racial discrimination. Statement by the President on Federal Policies Relative to Equal Housing Opportunity, June 11, 1971, P-H EQUAL OPPORTUNITY IN HOUSING ¶ 5121, at 5127. He went on to state:

> When such an action is called into question, we will study its *effect*. If the effect of the action is to exclude Americans from equal housing opportunity on the basis of their race, religion or ethnic background, we will vigorously oppose it by whatever means are most appropriate—regardless of the rationale which may have cloaked the discriminatory act.

Id. at 5128 (emphasis added).