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Discriminatory Intent Necessary to Establish Violation of Fair Housing Act (Boyd v. Lefrak Organization)

Jonathan Oster

POVERTY LAW

DISCRIMINATORY INTENT NECESSARY TO ESTABLISH VIOLATION OF FAIR HOUSING ACT

Boyd v. Lefrak Organization

In an effort to eliminate discrimination in public and private housing Congress has enacted extensive remedial legislation.[1] The Civil Rights Act of 1866 guarantees to all citizens an equal right "to inherit, purchase, lease, sell, hold, and convey real and personal property."[2] Similarly, the Fair Housing Act of 1968 provides that it is unlawful for any individual "to refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, or national origin."[3] In cases where a landlord has established minimum financial criteria to determine a lessee's suitability, it has been alleged that such requirements constitute prohibited discrimination. In *Boyd v. Lefrak Organization*[4] the Second Circuit held that absent a racially discriminatory intent, the use of economic criteria by private lessors is not prohibited by these Acts despite the fact that the effect of such use is to exclude a disproportionate number of minorities from a lessor's apartment buildings.

At the time the action was commenced,[5] defendant Lefrak

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[1] *See, e.g.*, Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970); Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (1970), *as amended*, (Supp. IV, 1974).

[2] 42 U.S.C. § 1982 (1970). The Civil Rights Act of 1866 is based upon the thirteenth amendment, which bans slavery within the United States and applies to both private as well as governmental action. Accordingly, the Supreme Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968), held that the Act bars all racial discrimination in private and public real property transactions.

[3] 42 U.S.C. § 3604(a) (1970), *as amended*, (Supp. IV, 1974). The effectiveness of the Fair Housing Act in carrying out its intended policy "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601 (1970), is illustrated by a number of cases in which violations of § 3604(a) were established. For example, in Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974), a real estate agent, who had initially refused to negotiate the sale of a house to a black couple and was discouraging and uncooperative when he finally agreed to show them the house, was held to have violated § 3604(a). In Johnson v. Jerry Pals Real Estate, 485 F.2d 528 (7th Cir. 1973) (per curiam), a violation was also established where the defendant refused to show listings to a black couple while the same listings were continually being shown to white buyers. Similarly, in United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974), a realtor who actively discouraged blacks from buying in a white community, but offered to build elsewhere, was held to be in violation of § 3604(a). Finally, in Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973), the failure of a landlord to sign a rental agreement upon learning that the prospective tenants were black was held to be a violation of the section.

[4] 509 F.2d 1110 (2d Cir.), *cert. denied*, 96 S. Ct. 197 (1975).

[5] Even before plaintiff Boyd was denied an apartment, the Attorney General of the United States had commenced an action against the defendant pursuant to § 3613 of the Fair Housing Act, 42 U.S.C. § 3613 (1970). This action was maintained to prevent Lefrak from continuing an alleged "pattern and practice of resistance" to the Fair Housing Act. Under § 3613:

operated 119 buildings within New York City.[6] As a prerequisite to obtaining an apartment, each applicant had to meet established economic criteria. Under defendants' standards, an applicant was ineligible unless he and/or his spouse had a weekly net income equal to at least 90 percent of the monthly rent (the 90 percent rule). Alternatively, an applicant could qualify by obtaining a cosigner to the lease whose weekly net income was equal to or greater than 110 percent of the monthly rent.[7] Plaintiff Boyd, a black welfare recipient, attempted to rent an apartment in July 1971, but her application was refused allegedly because no apartments were available at that time.[8] One year later, coplaintiff Stoney, also a black welfare recipient, attempted to rent an apartment, but was rejected because she could neither satisfy the 90 percent rule nor obtain a guarantor with the requisite weekly income.[9]

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that 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, he may bring a civil action in any appropriate United States district court . . . requesting such preventive relief . . . as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

Consequently, Ms. Boyd moved to intervene in the Government's pending action. The motion was denied, but the court directed that the application for intervention be treated as a commencement of a separate action. 509 F.2d at 1112.

The Government's suit ended without an adjudication on the merits by a consent decree whereby defendants agreed to comply with the Fair Housing Act, to maintain records of applicants indicating their race, and to utilize economic criteria established by the Government. The criteria developed by the Government included the 90% rule. *See* note 7 and accompanying text *infra*. United States v. Life Realty, Inc., Civil No. 70-964 (E.D.N.Y., Jan. 28, 1971). In 1973, on defendants' motion the court dissolved the decree with prejudice, with no objection voiced by the Government. 509 F.2d at 1112.

[6] 509 F.2d at 1111. The rentals for Lefrak's apartments ranged from $140 to $400 per month. *Id.*

[7] *Id.* Net income is determined by deducting all taxes, fixed obligations, and debts from an applicant's gross income. *Id.* n.1. The industrywide standard, applied by landlords throughout New York City, requires that the amount paid for rent not exceed 25% of the applicant's gross income. Telephone interview with Edward Brodsky, attorney for defendants-appellants, Feb. 10, 1976. It is interesting to note that this is the same formula utilized under federal statutes to determine the economic qualifications of tenants in federally subsidized low-rent housing. *See* Brief for Appellants at 9, Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir. 1975), *citing* 12 U.S.C. § 1715z-1(f) (1970), *as amended*, (Supp. IV, 1974) *and* 42 U.S.C. § 1402(1) (1970), *as amended*, (Supp. IV, 1974). Expert testimony for the defendants, admitted as correct by plaintiffs' witnesses, revealed, through mathematical conversion, that Lefrak's economic standard, when applied to welfare recipients, was equivalent to an allotment of 25.65% of their income for rent. As applied to taxpayers, on the other hand, the economic criterion was approximately 22% of their gross weekly salary. Thus, Lefrak's financial requirements are roughly equivalent to the industrywide standard. Brief for Appellants at 9-10.

[8] 509 F.2d at 1112 n.4. Ms. Boyd claimed that she was denied the apartment because she was a welfare recipient. The Second Circuit, however, found it unnecessary to resolve this issue since it was not raised on appeal. *Id.*

[9] *Id.* at 1112.

Plaintiffs commenced a class action against the Lefrak Organization and its rental office, Life Realty, Inc., alleging violations of the Civil Rights Act of 1866 and the Fair Housing Act.[10] In New York City, the plaintiffs pointed out, minority groups constitute the majority of public assistance recipients. Since the 90 percent rule would exclude all but a small proportion of welfare recipients, plaintiffs reasoned that the defendants' economic standard was racially discriminatory and in violation of the two Acts.[11] The district court, agreeing that Lefrak's actions amounted to prohibited discrimination, enjoined the defendant from further application of its minimum economic requirements.[12]

On appeal, the Second Circuit reversed,[13] with Judge Hays speaking for a divided court.[14] Concerning itself with "whether or not the financial criteria applied by defendants are violative of the [Acts],"[15] the majority viewed the plaintiffs' argument as premised upon the contention that welfare recipiency must be regarded as the "functional equivalent" of race. Based on the Supreme Court's decision in *James v. Valtierra*,[16] the court refused to adopt this equation.

Acknowledging that welfare recipients have less of an opportunity to rent Lefrak apartments than do those not requiring public assistance, the majority pointed out that the Fair Housing Act does not require a lessor to rent to any prospective tenant. He may refuse any applicant he wishes providing he does not discriminate on one of the statutorily condemned bases and may certainly seek

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[10] 42 U.S.C. § 1982 (1970); 42 U.S.C. §§ 3601 *et seq.* (1970), *as amended*, (Supp. IV, 1974). Under both Acts, any citizen may commence a civil action in federal court without regard to the amount in controversy. Section 3612(c) of the Fair Housing Act empowers the court to grant as it deems appropriate injunctive relief as well as actual and punitive damages amounting to as much as $1,000. *See, e.g.*, Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973), where the court awarded compensatory damages and attorneys' fees, but reversed the granting of injunctive relief as inappropriate.

[11] 509 F.2d at 1112. Plaintiffs also contended that the economic criteria established by Lefrak were inappropriate for welfare recipients since increased shelter allowances may be granted by the Department of Social Services, *see* N.Y. Soc. Serv. Law § 131-a (McKinney Supp. 1975), when the recipient receives assurances from the landlord that he will rent the apartment. 509 F.2d at 1114. The court, however, rejected this contention for two reasons: First, a private landlord may use any criteria he desires in determining eligibility so long as no discriminatory purpose is shown; and second, a landlord's choice of tenants is not restricted by any obligation to a "special class of low income applicants." *Id.*

[12] A nonjury trial was held in the Eastern District of New York before the Honorable Tom C. Clark, Associate Justice of the United States Supreme Court, retired, sitting by designation. *See* 509 F.2d at 1111-12.

[13] *Id.* at 1115.

[14] The majority consisted of Judges Hays and Anderson. Judge Mansfield authored a dissenting opinion.

[15] 509 F.2d at 1112 n.4.

[16] 402 U.S. 137 (1971).

assurances that the lessee will be able to pay the rent.[17] So long as this is the purpose of defendants' economic requirements they are proper. The mere fact that the application of the standards disqualifies a higher percentage of minority groups, according to the court, proves only that minorities tend to be poorer than the general population.[18] Thus, the court held that absent a showing that defendants' motivation is racial rather than economic, there is no violation of either the Fair Housing[19] or Civil Rights Acts.[20]

Judge Mansfield, dissenting, rejected the majority's interpretation that direct evidence of a racially discriminatory motive is necessary. He maintained 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.[21]

Judge Mansfield, relying on principles applied to analogous civil rights legislation, looked primarily to the "business necessity" test formulated in *Griggs v. Duke Power Co.*[22] There, the Supreme Court addressed the issue of whether an employer's use of standardized

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[17] 509 F.2d at 1114, *quoting* Male v. Crossroads Associates, 469 F.2d 616, 622 (2d Cir. 1972). In *Male*, the court held that although a landlord may not arbitrarily refuse rentals to welfare recipients without permitting the recipients the opportunity to demonstrate their ability to pay — especially since increased shelter allowances were readily obtainable — he may seek assurances that a prospective tenant will be able to maintain his obligation. 469 F.2d at 622. Although *Male* involved a fourteenth amendment equal protection violation, there is no reason to conclude that the principle that a landlord may seek assurances should not be equally applicable to private lessors.

If, absent a tenant's ability to pay, there is no affirmative obligation imposed on the state to provide apartments, no obligation should be imposed upon a private landlord. Consequently, the *Boyd* court stated: "[W]e will not impose an affirmative duty on the private landlord to accept low income tenants absent evidence that his motivation is racial rather than economic in origin." 509 F.2d at 1113.

[18] 509 F.2d at 1113. *See also* Goodwin v. Wyman, 330 F. Supp. 1038 (S.D.N.Y. 1971), *aff'd per curiam*, 406 U.S. 964 (1972) (minorities, comprising greater proportion of welfare recipients, usually occupy lower income levels).

[19] 509 F.2d at 1113.

[20] *Id.* at 1115, *citing* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968), Madison v. Jeffers, 494 F.2d 114, 116-17 (4th Cir. 1974), *and* Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1056 (7th Cir. 1972). Although the court cites *Jones* for support, it is debatable whether the decision therein actually aids the majority's position. There, the Supreme Court said that the Civil Rights Act of 1866 "must encompass every racially motivated refusal to sell or rent . . . ." 392 U.S. at 421-22. The issue in *Jones* was whether the Act applied to private as well as governmental discrimination, not the requirement of discriminatory intent as an essential element of a violation. The fact that the Act applies to all acts of racial discrimination in housing does not necessarily mean that it does not encompass more. *Cf.* Clark v. Universal Builders, Inc., 501 F.2d 324, 330 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Williams v. Matthews Co., 499 F.2d 819, 826-29 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974).

[21] 509 F.2d at 1115 (Mansfield, J., dissenting), *citing* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[22] 401 U.S. 424 (1971).

ability and intelligence tests was in violation of Title VII of the Civil Rights Act of 1964[23] where such testing had the effect of excluding a disproportionate number of blacks from employment and job promotions. The Court held that under such circumstances the use of testing procedures must have a "manifest relationship to the employment in question."[24] Upon a showing that the effect of the tests is to exclude racial minorities, the burden shifts to the defendant to demonstrate that the tests are related to job performance.[25] The Court explicitly noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[26]

Espousing a "generous construction" of the Fair Housing Act,[27] the dissent sought to replace the majority's subjective intent test with the easier and more efficacious approach of looking at the objective results of the lessor's standards. Then, if a discriminatory effect were shown, the lessor, like an employer, would be put to the burden of demonstrating a nonracial justification. Judge Mansfield also criticized the majority's reliance on *James v. Valtierra*,[28] contending that since *James* involved an equal protection claim, it is inappo-

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[23] 42 U.S.C. §§ 2000(e) *et seq.* (1970), *as amended*, (Supp. IV, 1974). The general purpose of Title VII of the Civil Rights Act of 1964, as stated by Congress, is

> to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin. . . .
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> . . . [A]ll persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination.

H.R. REP. No. 914, 88th Cong., 1st Sess. 26 (1963).

[24] 401 U.S. at 432. The defendants in *Griggs* contended that when private employers determine that educational and aptitude tests are necessary to maintain and increase the proficiency of the work force and thereby improve business operations, the tests and requirements become job related. Without proof of an intent to discriminate, they claimed, the tests should not be condemned as violative of Title VII. Brief for Appellee, in 28 L. Ed. 2d 925, 926 (1972). The Supreme Court rejected this argument, stating that the purpose of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. at 429-30. The Court reasoned that the use of aptitude tests and educational requirements create arbitrary and artificial barriers to equal employment. Thus, it was held that the utilization of these criteria would only be sustained upon a showing of "business necessity." Since the appellee in *Griggs* failed to prove a demonstrable relationship between the use of the tests and increased job performance, the tests were invalidated. *Id.* at 431-32.

[25] 401 U.S. at 432.

[26] *Id.* For a further analysis of the business necessity test see Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974), and Note, *Employment Discrimination: The Burden is on Business*, 31 MD. L. REV. 255 (1971).

[27] 509 F.2d at 1116 (Mansfield, J., dissenting), *quoting* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 212 (1972). *See also* United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 781 (N.D. Miss. 1972) (Fair Housing Act to be given broad construction in accordance with its purpose).

[28] 402 U.S. 137 (1971).

site in a case of statutory interpretation.[29] This argument appears to have little validity, however, because it relies on a misinterpretation of Judge Hays' use of *James*. The majority cites that case for the narrow proposition that poverty and race are not functionally equivalent.[30] It is unclear why this principle should be any less true in a case construing a congressional statute.

In *James*, the Supreme Court appears to have rejected the contention that race and low income are functionally equivalent. There, plaintiffs challenged, as a violation of equal protection, an article of the California constitution which provided that no low-rent public housing project could be constructed without prior approval by a majority of the community in a mandatory referendum.[31] When a state creates classifications based on *race*, courts will strictly scrutinize the state's actions to determine if there is a compelling state interest justifying the disparate treatment.[32] Although distinctions drawn on *wealth* are traditionally disfavored,[33] justification for such a grouping demands only that the state demonstrate a rational basis for the distinction.[34] Thus, when in *James* the Su-

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[29] 509 F.2d at 1116 (Mansfield, J., dissenting). Judge Mansfield argued that the principles applied in *James* are totally different from those applicable to a case interpreting a congressional statute. The *James* Court, he noted, was not concerned with statutory interpretation, but with the constitutionality of a presumptively valid state statute. *Id.* at 1116-17.

[30] *Id.* at 1112.

[31] 402 U.S. at 139 n.2.

[32] If a case is one involving a "suspect classification," *viz*, one based on race, alienage, or lineage, courts will strictly scrutinize the state's action, imposing a far heavier burden of justification than they require for classifications based on other factors. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (state statute denying aliens welfare benefits scrutinized by "heightened judicial solicitude"); Loving v. Virginia, 388 U.S. 1, 11 (1967) (state action creating racial classifications constitutionally suspect); Korematsu v. United States, 323 U.S. 214, 216 (1944) (federal government's internment of persons of Japanese descent subject to the "most rigid scrutiny"). For detailed discussions of the impact of *James v. Valtierra* on the equal protection clause see Comment, *California's Low-Income Housing Referendum: Equal Protection and the Problem of Economic Discrimination*, 8 COLUM. J.L. & SOC. PROB. 135 (1972) [hereinafter cited as *Economic Discrimination*], Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971) [hereinafter cited as *Low-Income Housing*], and 40 FORDHAM L. REV. 379 (1971).

[33] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966), where the Court stated that "[l]ines drawn on the basis of wealth or property, like those of race, . . . are traditionally disfavored." (citation omitted).

[34] Classifications based on wealth alone are insufficient to require application of a strict scrutiny standard. Instead, the state need only demonstrate a rational relationship between the classification and the objective sought. Wealth classifications receive strict scrutiny only when a fundamental right is inextricably intertwined with the classification. For discussions of the treatment of wealth classifications under the equal protection clause, see 40 FORDHAM L. REV. 379, 380-81 (1971), *Economic Discrimination*, *supra* note 32, at 141-45, and *Low-Income Housing*, *supra* note 32, at 344-45. *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel involved with wealth classification); Douglas v. California, 372 U.S. 353 (1963) (fundamental right to appeal criminal conviction affected by a wealth classification).

Housing has yet to be expressly recognized as a fundamental right although several decisions had indicated a trend in this direction. In Shelley v. Kraemer, 334 U.S. 1 (1948),

preme Court refused to apply the strict scrutiny standard, it strongly implied that income alone is not a suspect classification and will not be equated with classifications based on race.[35]

Even assuming that the majority's reliance on *James* is appropriate, it is submitted that the dissent's proposed adoption of the business necessity test would better effectuate the intent and purpose of the housing legislation.[36] Notably, the Supreme Court in *Griggs* did not find it necessary to equate race with inferior intelligence. Instead, the Court focused primarily on the fact that blacks performed more poorly than whites on the tests designed to mea-

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for example, the Court stated in dictum that the right to acquire, hold, enjoy, and convey property is among the civil rights protected from discriminatory state action. *Id.* at 10. Similarly, the Supreme Court, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1969), though dealing with the thirteenth amendment, stated that "the badges and incidents of slavery . . . included restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.'" *Id.* at 441, *quoting* Civil Rights Cases, 109 U.S. 3, 22 (1883).

Fundamental rights are not permanently established, but evolve as courts recognize additional interests as basic to our society. This proposition was implied by the Supreme Court in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), where the Court stated:

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.

Id. at 669 (citation omitted) (emphasis in original).

[35] 402 U.S. at 141. The *James* Court said that the constitutional provision in question requires "referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." *Id.*

[36] Other than to say that the *Griggs* test has never been applied in a Fair Housing Act case, 509 F.2d at 1114, the *Boyd* majority made little attempt to rebut the proposal that utilization of the business necessity test would more effectively foster the spirit of the housing legislation. In support of its view regarding application of the *Griggs* test, the majority cited Jefferson v. Hackney, 406 U.S. 535, 549 n.19 (1972). 509 F.2d at 1114. *Jefferson*, however, dealt with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (1970), which proscribes discrimination in federally financed projects. The *Jefferson* Court did not say that *Griggs* was inapplicable. Instead, it based its decision on a finding that the classification disproportionately affecting blacks and Mexicans was rationally related to the purposes of the welfare program in dispute. 406 U.S. at 549 n.19.

While no court has expressly applied the business necessity test to Fair Housing Act cases, at least one circuit court may be said to have effectively adopted this approach. In Williams v. Matthews Co., 499 F.2d 819, 828 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974), *citing* Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Eighth Circuit stated that defendant's procedure, "even though neutral on its face, cannot stand if it in its operation serves to discriminate on the basis of race." Moreover, the court said that "[w]hen a plaintiff makes a prima facie case of discrimination . . . the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection." 499 F.2d at 827. *See also* United States v. Pelzer Realty Co., 484 F.2d 438, 443 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (effect of defendant's acts of significance while intention only of minor importance); Hamilton v. Miller, 477 F.2d 908, 910 (10th Cir. 1973) (defendant successfully disproved inference of discrimination after prima facie case established); United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd in part & remanded in part per curiam*, 509 F.2d 623 (9th Cir. 1975) (presence of good faith alone not sufficient to destroy prima facie inference of discrimination against defendant); Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 417 (S.D. Ohio 1968) (prima facie inference of discrimination is determinative when defendant offers no explanation).

sure general intelligence.[37] Because the tests had the objective result of excluding a disproportionate number of blacks from job opportunities, the employer was required to show that the tests were related to measuring job capacity.[38] Moreover, it was not necessary for the plaintiff in *Griggs* to prove that the employer's use of the tests was prompted by an improper motive. As that Court observed, "Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation."[39] The circumstances in *Boyd* parallel those in *Griggs* in that Lefrak's economic standards result in the exclusion of a high proportion of minorities. In addition, the Fair Housing Act, like Title VII, is designed to remove the effects of racial and other types of discrimination.[40] An objective showing of discrimination should therefore be sufficient to establish a prima facie case and shift to the defendant the burden of coming forward.

The decision in *Boyd* appears to strangle effective implementation of the Fair Housing Act. To establish racial discrimination in a private housing case when a defendant is not overtly using one of the statutorily condemned criteria to discriminate, the plaintiff will be faced with the arduous, if not impossible, task of proving that the defendant's subjective intent is to discriminate.[41] Unless the defendant publicly divulges his discriminatory purpose — a totally unrealistic expectation — any cause of action of this nature would be futile.

By adopting Judge Mansfield's approach courts would not be forced to search the subconscious motives of a defendant to find a discriminatory intent, but could look to the end result of the defendant's acts. Under such an objective test, to make out a prima facie case, a plaintiff must establish only that the use of the defendant's criteria, be they personal, social, or economic in nature, has a

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[37] The *Griggs* Court did discuss the fact that blacks in the South generally received inferior education. 401 U.S. at 430. This was not, however, essential to the Court's holding.

[38] *Id.* at 436.

[39] *Id.* at 432.

[40] *See* notes 3 & 23 *supra*.

[41] The Second Circuit, in discussing when economic criteria would be violative of the Fair Housing Act, stated:

> A businessman's differential treatment of different economic groups is not necessarily racial discrimination and is not made so because minorities are statistically overrepresented in the poorer economic groups. . . . In order to utilize this correlation to establish a violation of the Fair Housing Act on the part of a private landlord, plaintiffs would have to show that there existed some demonstrable prejudicial treatment of minorities over and above that which is the inevitable result of disparity in income.

509 F.2d at 1113.

disproportionate effect on minority groups.[42] The burden of going forward would then shift to the defendant to prove a nondiscriminatory justification for his acts.[43] This procedure requires the court to look only to the results brought about by employment of the defendant's standards. It does not, as the majority suggests, require the judiciary to equate race with income.

The approach of looking to the effect of a facially neutral practice has recently been utilized by the Second Circuit in the area of school segregation. In *Hart v. Community School Board*,[44] the court held that racial motivation is not necessary to establish unlawful de jure segregation. Rather, when a school board's actions or inactions have the foreseeable consequence of fostering segregation, de jure segregation may be found.[45] It may be argued that *Boyd* and *Hart* are distinguishable in that *Hart* involved state action while *Boyd* dealt only with private conduct allegedly in violation of federal statutes. The Eighth, Fifth, and Tenth Circuits,[46] however, have

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[42] For discussions of the benefits which can be derived from use of the objective test in housing cases, see Bogen & Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 MD. L. REV. 59 (1974) [hereinafter cited as *Racial Statistics*], and Comment, James v. Valtierra: *Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115, 135 (1971).

[43] As the dissent in *Boyd* stated:

> [I]t should be sufficient to show that the challenged practice excludes a disproportionately high percentage of minority persons as compared with non-minority. The burden of going forward with a non-racial justification should then shift to the person using the practice.

509 F.2d at 1116 (Mansfield, J., dissenting).

There are several methods suggested for implementing this objective approach in housing actions. Among the most common are the use of statistics and "testers." Utilizing statistics to show that a landlord had actively kept minorities out of his apartments is probably the easiest method. Here, for example, if a plaintiff shows that out of 15,000 apartments only 2% were rented to blacks, a prima facie inference of discrimination would arise. For an analysis of the advantages of the use of statistics, see *Racial Statistics*, *supra* note 42, at 70-80. *See also* United States v. Reddoch, 467 F.2d 897, 899 (5th Cir. 1972). A second procedure would require plaintiff to show that after he was rejected, white "testers" applied and received the apartment sought. It would then be the defendant's burden to prove he did not discriminate on a statutorily condemned basis. *See, e.g.*, Hamilton v. Miller, 477 F.2d 908, 909-10 (10th Cir. 1973).

[44] 512 F.2d 37 (2d Cir. 1975).

[45] In *Hart*, local zoning pattern changes and the addition of new schools had the effect of removing white students from one junior high school to several others, thereby causing a segregative result. The court also found that the school board's inaction was a contributing factor. The Second Circuit stated that a finding of de jure segregation may be based upon acts or omissions of governmental authorities which have school segregation as their natural and foreseeable consequence. The court recognized that in a state action context, racial motivation is too hard to prove and therefore prima facie intent should be presumed from objective facts. Under a fourteenth amendment equal protection claim, the Second Circuit stated, "the nature of the 'state action' takes its quality from its foreseeable effect." *Id.* at 50.

[46] Williams v. Matthews Co., 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974); United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973).

Additionally, the Seventh Circuit now appears to be leaning towards the dissent's position in *Boyd*. *See* Clark v. Universal Builders, Inc., 501 F.2d 324, 334-39 (7th Cir.), *cert.*

concluded that even in Fair Housing Act cases courts should look to the end result of the disputed practice rather than search for the defendant's subjective intent. The Fourth Circuit,[47] on the other hand, has agreed with the view espoused by the *Boyd* majority, holding that absent evidence of a discriminatory motive, a lessor may promulgate any criteria he chooses so long as the practice is not statutorily condemned.[48]

The civil rights statutes are remedial in nature and as such deserve to be given a broad and generous construction.[49] Although the actual result in *Boyd,* at least insofar as the particular facts there involved, is probably of little consequence,[50] the court's position on the procedure to be followed in fair housing cases is of great significance. Since proving a racially discriminatory motive is most often impossible, the Second Circuit's decision will hinder the obvious intent of Congress to prevent discrimination in private housing. Had the Second Circuit adopted the business necessity standard effectively utilized in the employment area,[51] the lessor or vendor would at least be put to the test of justifying his practices. This procedure would act to chill the efforts of lessors or vendors who attempt to implement covert discriminatory practices, thereby promoting the goals of both the Fair Housing Act and the Civil Rights Act of 1866.

Jonathan Oster

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denied, 419 U.S. 1070 (1974). In *Clark,* an action brought under the Civil Rights Act of 1866, the court stated that where: (1) the plaintiffs introduce statistical evidence and expert testimony to show that there exists a dual housing market which is the result of racial segregation in housing; (2) there is an unreasonable price differential between houses offered by defendants to blacks as compared with similar housing offered to whites; and, (3) there is a difference in the sale terms of comparable homes to blacks even though the economic status of the blacks is equivalent to that of the whites, a prima facie case is established. The burden, according to the court, would then shift to the defendant to demonstrate some legitimate, nondiscriminatory reason for its actions.

[47] Madison v. Jeffers, 494 F.2d 114, 116-17 (4th Cir. 1974). The plaintiff in this case sought to buy land from the defendant. Defendant, unaware that the plaintiff was black, withdrew the land in question from the market for tax reasons. Plaintiff believed that the defendant would not sell the land because of the plaintiff's race and therefore commenced an action alleging violations of the Fair Housing Act and the Civil Rights Act of 1866. The court refused to apply the objective standard of liability.

[48] *Id.* at 117, *quoting* Pughsley v. 3750 Lake Shore Drive Cooperative Bldg., 463 F.2d 1055, 1056 (7th Cir. 1972).

[49] *E.g.,* Clark v. Universal Builders, Inc., 501 F.2d 324, 333 (7th Cir.), *cert. denied,* 419 U.S. 1070 (1974) (Civil Rights Act of 1866); United States v. Real Estate Dev. Corp., 347 F. Supp. 776, 781 (N.D. Miss. 1972) (Fair Housing Act).

[50] The standards used by Lefrak were established after consultation with the Government in conjunction with the original consent decree. *See* note 5 *supra.* Although this factor is not controlling, it would seem to deserve great weight in determining the validity of defendants' criteria. In addition, the majority and dissent disagreed on whether the statistical analysis of the effect of the 90% rule actually showed a disproportionate exclusion of blacks.

[51] *See generally* Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach,* 84 YALE L.J. 98 (1974); Note, *Employment Discrimination: The Burden is on Business,* 31 MD. L. REV. 255 (1971).