MAKING AND MEETING THE PRIMA FACIE CASE UNDER THE FAIR HOUSING ACT

by

FREDERIC S. SCHWARTZ*

I. INTRODUCTION

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968,[1] prohibits racial and other discrimination in the sale or rental of housing. The Act provides that it shall be unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.[2]

The simplicity of the statutory language has not prevented (and has probably contributed to) a substantial amount of confusion in the courts in dealing with Fair Housing Act cases. It is hoped that the analysis suggested here will contribute to a more reasoned analysis of those cases.

The housing discrimination cases generally fall into two categories:

1. Individual Discrimination Cases: Cases where a defendant (usually an individual) has refused to rent or sell to prospective tenants or buyers.
2. Group Discrimination Cases: Cases where the defendant (usually a local government or governmental agency) has made housing "unavailable," not by rejecting individual applicants, but by preventing a developer from building housing (usually a multi-family dwelling for low-income persons) in a particular place.

This article will deal almost exclusively with cases in the Individual Discrimination category.

Analysis of the housing discrimination cases requires that the fundamental *substantive* issue and the fundamental *procedural* issue be carefully distinguished. The substantive issue is simply whether the Act has been violated." That issue will be ultimately decided by the jury (or the judge in a trial to the court). The fundamental procedural issue with which we shall be concerned is whether the plaintiff has established his "prima facie case."

Part II of this paper will deal with the substantive issue and Part III with the procedural one. In Part IV the defendant's case will be discussed, and in

---

*Assistant Professor, Marquette University Law School.

[1]Civil Rights Act of 1968, §§ 801-901, 42 U.S.C. §§ 3601-3631 (1982).

[2]42 U.S.C. 3604(a). Also prohibited is discrimination in "terms, conditions, or privileges of sale or rental," "provision of services or facilities" (subsection (b)), and a number of other practices.

Part V the analysis will be applied to several "individual discrimination" cases.

II. THE SUBSTANTIVE ISSUE: WHAT CONSTITUTES A VIOLATION OF THE ACT?

The cases recognize that a violation of the Act consists of two elements: (1) a racial[3] effect; and (2) the absence of an acceptable justification for that effect.

A. *Effect*

The Act prohibits denying a dwelling to any person "because of race."[4] The "because of" language can be completely understood only in the context of the policy which is the basis of the statute. The Act begins by stating that "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[5] The "because of" language, then, should be interpreted broadly, not technically, to reflect this basic purpose of achieving fairness in housing opportunity.

Perhaps the meaning of the "because of" language can best be understood in the following way. Suppose that a certain number of individuals are selected at random from the group of all persons belonging to race X, and an equal number of individuals are selected at random from the group of all persons belonging to race Y. The selected individuals are then subjected to the defendant's procedure for evaluating prospective tenants or buyers. ("Procedure" is used here in the widest possible sense; it includes the subjective evaluation which a defendant gives to the applicants as well as whatever standard procedures and criteria are applied.) If the number of persons of race X who are accepted exceeds the number of persons in race Y who are accepted, and if the difference is statistically significant, then it can be said that race has an effect on a person's chances for rejection or acceptance — the procedure has a "racial effect." Stating that result in a slightly different way, the defendant's procedure has a racial effect if person *x*, chosen at random from the group of all persons in race X, has a greater chance of being accepted than person *y*, similarly chosen from race Y. Such a result is fundamentally "unfair." Furthermore, we can say, without stretching the meaning of the "because of" language too much, that person *x* was denied housing "because" of his race.[6]

The procedure just discussed is intended as a definition of a Fair Housing

[3]The Act prohibits discrimination on the basis of color, religion, sex, and national origin as well as race. Because the great majority of cases concern racial discrimination, the discussion here will be in terms of race. In most cases the analysis applies equally to the other impermissible criteria.

[4]42 U.S.C. § 3604(a).

[5]42 U.S.C. § 3601.

[6]Some of the "group discrimination" cases recognize a distinctly different kind of racial effect: racial segregation. *See, e.g.*, Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, ("Arlington II"), 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). Since this article deals primarily with the "individual discrimination" cases, segregative effect as a violation of the Fair Housing Act will not be discussed.

Act violation, not as a method of actually proving a violation. A showing of racial effect (and therefore a violation) can be made by inspecting the "process" of the defendant's conduct or its "product."

1. Racial Effect as Process

A racial effect will occur if the defendant uses either of two kinds of criteria in evaluating housing applicants, here called a "racial criterion" and a "racially correlated criterion."

A property owner's decision whether to reject or accept a housing applicant might be based directly on that applicant's race, a "racial criterion." Obviously this will create a racial effect and is prohibited. Alternatively, the property owner, in evaluating an applicant, might use a criterion such as income which is facially neutral, but which is correlated with race, a "racially correlated criterion." Here too, by definition, a racial effect and a violation will result.

The proposition that the use of a racially correlated criterion is a violation of the statute is consistent with the "because of" language. The denial took place *because* the defendant denied the plaintiff housing based on a certain criterion and *because* that criterion is correlated with race.

2. Racial Effect as Product

But the defendant may use a criterion whose correlation with race is unknown. That will be so if the defendant's evaluation of applicants is purely subjective. In that case, a racial effect can be proved by inspecting the results of the defendant's procedure rather than the criteria he used. If the plaintiff can show that the racial makeup of the population accepted[7] for housing is significantly different from the racial makeup of the general population, then by definition the defendant has created a racial effect.[8] There are a number of housing discrimination cases which take this approach.[9] In order for a racial effect to be established, however, the group accepted or rejected must be large enough to produce statistically significant results.[10]

B. *The Absence of Justification*

According to the cases, however, a racial effect does not, by itself, con-

---

[7]Or the population rejected.

[8]There is a serious problem which is mostly ignored in the individual discrimination cases and which will be ignored here. If the racial makeup of the population of *applicants* differs from the makeup of the general population, one must decide whether to use the applicant population or the general population as the "reference" population for measuring racial disproportion in the results. This problem has received considerable attention in the employment discrimination cases.

[9]*See* cases cited in J. KUSHNER, FAIR HOUSING 110, n.407 (1983).

[10]*See, e.g.*, Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis under Title VII*, 56 TEX. L. REV. 1, 34 (1977).

stitute a violation of the Act. The defendant will escape liability if his actions promote some interest which justifies the racial effect.[11]

In cases of employment discrimination, there could be a justification for a racial criterion as well as for a racially correlated one. In the simplest case, applying a racial criterion to persons applying for a role as a black character in a movie would be justified. In cases of housing discrimination, however, no justification for a racial criterion would seem possible. It is only when the defendant uses a *racially correlated* criterion that there is opportunity for defending its use by justification.

The Act does not explicitly contain a "justification exception," and the cases do not make clear the source of this element of the case. Nevertheless, it too, can probably be reconciled with the Act's stated purpose of ensuring "fair housing." If using a racially correlated criterion has the effect of promoting some interest in addition to its effect of operating unevenly on the basis of race, then at *some* sufficiently high level of importance of that interest, the beneficial effects might be thought to outweigh its harmful racial effect. Perhaps the use of the criterion cannot then be called unfair. In addition, if the non-racial interest is indeed sufficiently important to outweigh the racial effect, then perhaps it can be said that the denial of housing is no longer "because" of the applicant's race, but rather "because" of the non-racial interest which is promoted.

C. *The Relevance of Motive*

The discussion in Part A implies that racial motive is not an element of a violation of the Fair Housing Act. That is, although the presence of racial motive may be helpful in proving the existence of a racial effect and therefore a violation, racial motive itself is not part of the definition of a violation.[12] If two defendants each engage in courses of action which have exactly the same racial effect, there is no apparent reason to treat them differently simply because one had a racial motive for pursuing that conduct and the other did not.[13] If the deleterious effect is the same, why should the liability be different? Furthermore, motive is very difficult to prove.[14]

The courts which have considered the issue are now almost unanimous in holding that no racial motive need be shown to establish a violation of the Act.[15]

---

[11]*See generally* J. KUSHNER, *supra* note 9, at 90.

[12]When the defendant's discriminatory conduct is alleged to be a violation of the 14th Amendment equal protection guarantee, racial motive is required. Washington v. Davis, 426 U.S. 229 (1976).

[13]*See* D. MANDELKER ET AL., HOUSING AND COMMUNITY DEVELOPMENT: CASES AND MATERIALS 659 (1981).

[14]Boyd v. Lefrak Org., 509 F.2d 1110, 1117 (2d Cir.) (Mansfield, J., dissenting), *rehearing denied,* 517 F.2d 918 (2d Cir.), *cert. denied,* 423 U.S. 896 (1975).

[15]*E.g.,* Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976) ("Effect, and not motivation, is the touchstone because a thoughtless housing practice can be as unfair to minority rights as a willful scheme.");

To say that motive is not an element of a housing act violation is not to say, however, that motive is irrelevant. It may play an important role in the establishment of a prima facie case.

III. THE PRIMA FACIE CASE

The fundamental procedural issue addressed in the housing discrimination cases is that of the plaintiff's "prima facie case." The prima facie case and the plaintiff's "burden of production" are intimately related; both will be discussed in subpart A. In subpart B the prima facie housing discrimination case will be discussed in more detail.

A. *The Burden of Production and The Prima Facie Case*

To say that a party has the burden of production on an issue means that he will suffer an adverse finding by the court or a directed verdict on that issue if he does not produce sufficient evidence on it.[16] The amount of evidence sufficient to satisfy the burden is more than a "scintilla," but it need only be such that "a reasonable [person] could draw from it the inference of the existence of the particular fact to be proved."[17]

In a housing discrimination case, the burden of production with respect to racial effect will be placed on the plaintiff, simply because it is the plaintiff who brings the suit and who seeks to change the present state of affairs.[18] The defendant, on the other hand, has the burden with respect to the second element, that of justification. Clearly it is more efficient to require the defendant to show the presence of a particular justification than to require the plaintiff to show the absence of all possible justifications.[19]

In the context of the housing case, then, to say that the plaintiff has made out a prima facie case means that the order of proof shifts to the defendant so that the latter may have the opportunity to rebut the plaintiff's evidence or to introduce evidence probative of the second element of the case (justification), or both.

B. *Establishing the Prima Facie Case*

Because a racial criterion, racially correlated criterion, or racially disproportionate result constitutes a racial effect, and therefore a violation of the Act in the absence of justification, proof of any of those three facts would

---

United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

[16]E. CLEARY, MCCORMICK ON EVIDENCE 947 (3d ed. 1984).

[17]*Id.* at 953.

[18]*Id.* at 949.

[19]*See* Lamber, *The Relevance of Statistics to Prove Discrimination: a Typology*, 34 HASTINGS L.J. 553, 583 (1983).

establish a plaintiff's prima facie case.

This section will attempt to answer two questions. First, what other facts probative of racial effect might the plaintiff attempt to introduce? The cases emphasize three such facts: racial motive, absence of any apparent objective reason for rejection of the plaintiff, and the plaintiff's membership in a minority group. Second, which of those facts, if proven, permit a sufficiently strong inference[20] of racial effect to satisfy the plaintiff's prima facie case?

1. Racial Motive

Racial motive on the part of the defendant is probative of a Fair Housing Act violation simply because the jury can infer that a defendant who dislikes members of a racial group is likely to have adopted a racial criterion or racially correlated criterion in evaluating housing applicants. Although proof of racial motive is not necessary for a housing act violation, it is a fact which is probative of a violation.[21]

But should proof of racial motive establish a prima facie case? If it did, then the defendant would be required to rebut the showing of racial motive or show that it did not induce him to use a racial criterion. He could, for example, attempt to show that an admitted racial prejudice did not affect his evaluation of housing applicants because, for example, he knew the requirements of the law and did not want to be liable in damages.[22] If the prima facie case was not established by a showing of racial motive, on the other hand, then the plaintiff would be required to introduce proof that the defendant acted in accordance with the racial motive and actually adopted a racial criterion.

Clearly the fact of racial motive should relieve the plaintiff of any further burden of proof, simply because the defendant should be presumed to act in accordance with his prejudices, and it should be the defendant's burden to prove that he did not. Moreover, the reasons for the defendant's actions are peculiarly within his knowledge.[23]

The courts agree that racial motive is sufficient to establish a prima facie case.[24] In many — perhaps most — cases, the racial motive is shown by suspicious treatment of the applicant, including uneven application of the defendant's supposedly uniform standards, treatment of the applicant which differs

[20]Some courts use the term "presumption," but "inference" is the preferred term. E. CLEARY, *supra* note 16, at 965.

[21]*See* Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36, 98-99, 103 (1977).

[22]In U.S. v. George F. Mueller & Sons, 2 Eq. Opp. Hous (P-H) ¶ 15,196 (N.D. Ill. 1976), the court denied the plaintiff's motion for summary judgment apparently in order to give the defendant the opportunity to make such an argument.

[23]E. CLEARY, *supra* note 16, at 950.

[24]*E.g.*, Betsey v. Turtle Creek Assocs., 736 F.2d 983, 986 (4th Cir. 1984). *See generally* J. KUSHNER, *supra* note 9, at § 3.19.

in some other way from the treatment given to others, or other acts of subterfuge.[25]

2. The Absence of any Apparent Objective Reason for Rejection

As long as a property owner does not use a racial or racially correlated criterion as the basis for evaluating housing applicants, he can refuse to rent or sell for any reason, or for no reason at all. Therefore, a housing applicant can lawfully be rejected for a wholly "subjective" reason, such as a disagreeable personality, as well as for an "objective" one, such as, the inability to pay the rent or purchase price.

Suppose, then, that the plaintiff introduces evidence that he was rejected for housing despite the absence of any apparent objective reason for that rejection. Does that kind of evidence so strongly imply that the defendant used a racial criterion that the plaintiff's burden of production should be held satisfied? It must be conceded that the plaintiff's evidence is as consistent with the defendant's use of a *non-racial* subjective reason (or an objective reason which was not apparent until the defendant stated it at trial) as it is with his use of a racial criterion.[26]

There are a number of reasons in favor of holding that the plaintiff's burden of production is discharged upon his showing that there was no apparent objective reason for rejection. It is more efficient to require the defendant to come forward with the subjective or hidden objective reason for rejection, than to require the plaintiff to produce an inventory of all his traits and show that none could have been objectionable to the defendant, even if that procedure were possible.[27]

On the other hand, allowing a plaintiff to establish a prima facie case simply by showing the absence of any apparent objective reason for his rejection would be a serious intrusion into one's privilege to refuse to rent or sell for any lawful reason. The property owner would risk a lawsuit every time he rejects a housing applicant and, once in court, find it difficult to convince a jury of the genuineness of a non-racial subjective reason for his actions.

3. The Plaintiff's Membership in a Protected Group

Members of racial and national minorities have historically been the targets of discrimination. The fact that the plaintiff is a member of such a "protect-

[25] J. KUSHNER, *supra* note 9, at 110-111. Indeed, "disparate treatment" seems to be used sometimes as a synonym for racial motive. *See, e.g., Id.* at § 3.03.

[26] Because a subjective reason can easily serve to conceal a racial standard, a defendant who claims that the applicant was rejected for a subjective reason will obviously find it more difficult to convince a jury of his assertion than if an objective standard were claimed. But the question under consideration is not whether the lack of an objective standard will make the defendant's case more difficult once it is submitted to the jury, but whether the plaintiff's prima facie case is thereby established.

[27] *See* Lamber, *supra* note 19, at 583.

ed group" will probably be taken into account by the jury when they decide the issue of racial motive. But the question of interest here is different: Should the plaintiff's minority status aid the plaintiff in establishing his prima facie case?

We may concede that a defendant is more likely to have adopted a racial criterion that is adverse to minority groups than one that is adverse to majority groups. But that does not imply that a defendant is more likely to have adopted a racial criterion than not.

If the plaintiff's minority status by itself were sufficient to establish a prima facie case, then the defendant would be required to justify every rejection of a housing applicant when that applicant was a minority member but not when he was a majority member. That comes very close to an affirmative duty to provide housing to minority group members but not to others, a purpose which is not at all clear from the Act.

However, it would not be unreasonable to conclude that the *concurrence* of the two factors — the absence of an objective reason and the plaintiff's minority status — should establish a prima facie case. This is indeed the rule adopted by many courts in the individual housing discrimination case, as will be seen in Part V below.

IV. THE DEFENDANT'S CASE

Once the prima facie case has been established, how may the defendant respond? The defendant may attempt to rebut the plaintiff's evidence or he may attempt to introduce evidence bearing on the second element of the case, that of justification. The defendant's choice of strategy will depend on the plaintiff's evidence. The important point is that the standards applied to the defendant's evidence should be different according to whether it is used as rebuttal or justification.[28]

A. *Defense by Rebuttal*

The only standards that should be applied to evidence intended as rebuttal are *procedural* standards dealing with the *sufficiency* of the defendant's evidence, not *substantive* ones dealing with its *content.* The distinction can be made clear by considering the typical situation of defense by rebuttal: the racial motive case.

In a pure racial motive case, there is no direct evidence that the defendant used an impermissible criterion. Instead, the plaintiff produces evidence of racial motive. As we have seen, an alleged racial motive is probative of a Fair

[28] An analysis similar to the one that follows has been made with respect to the employment discrimination cases. *See* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine,* 23 B.C.L. REV. 419, 437-438, 440-441 (1982).

Housing Act violation because it is likely that the defendant acted in accordance with it. We have said also that evidence of the racial motive should satisfy the plaintiff's prima facie case. Assuming that there is no other evidence of racial effect, the defendant will usually attempt in such a case to rebut the showing of motive.[29]

The defendant will rebut such evidence usually by explaining that the plaintiff was rejected, not because of his race, but for some other reason, a "non-racial interest." In order for the defendant to win the case, then, the fact-finder must determine that the defendant acted to promote this non-racial interest rather than because of a racial motive. The only standard that should be applied to that interest then, is that the defendant sincerely believed in it. Moreover, it is irrelevant that the defendant's actions might not have actually promoted that interest, as long as the defendant believed that they would.[30] Therefore, no substantive, content-based standards, such as "business necessity," should be imposed on the defendant's non-racial interest.

The defendant's motive is purely a question of fact. As long as a person could reasonably find that the defendant's alleged reason for rejecting the plaintiff was sincerely held, the jury's verdict or trial judge's finding in favor of the defendant on this issue should be upheld by the appellate court.[31]

B. *Defense by Justification*

Instead of rebutting the plaintiff's evidence, the defendant may attempt to show that a racial effect was justified.[32] Typically this occurs when there is proof that the defendant used a racially correlated criterion in evaluating applicants. If there is ample evidence that the defendant used a certain criterion, such as income, in evaluating housing applicants, and if the correlation between that criterion and race is proved, then the defendant will attempt to show that the use of the criterion was justified because the non-racial interest justified the racial effect.

The standards to be applied to the defendant's evidence here are different from those used in a rebuttal case. It must *actually be true,* not merely the defendant's honest belief, that the non-racial interest is promoted by the defendant's actions. More importantly, that non-racial interest should be subject to substantive standards. As we discussed previously, a defendant should escape liability for a racial effect only if that effect is outweighed by the interest given

[29] As we have seen, the defendant could also try to show that even if he did have a racial motive, it did not affect his actions.

[30] Of couse, if the non-racial interest would *actually* be promoted by the defendant's actions, then the fact-finder will find it easier to conclude that the defendant had that interest in mind when he rejected the plaintiff.

[31] F. JAMES & G. HAZARD, CIVIL PROCEDURE 679 (2d ed. 1977).

[32] If the evidence of a racially correlated criterion is very strong, then the defendant may have no choice but to proceed by justification.

as a justification. It is the very essence of a justification, then, that it must meet certain substantive standards which measure its "weight" or "importance." What ought those standards to be?

The housing cases have borrowed heavily from the Title VII cases in requiring that the defendant's criterion meet a substantive standard. In *Griggs v. Duke Power Co.*,[33] the Supreme Court required a showing of business necessity: the defendant's criteria must be "related to job performance."[34] Some of the housing cases have adopted a standard of business necessity, many of them citing *Griggs*.[35] In one "group discrimination" case,[36] however, the court explicitly declined to use the "business necessity" test, stating that the tests to be applied "must emerge . . . on a case-by-case basis."[37] In addition, what may be called a "least discriminatory alternative" test has been applied. The defendant's actions are not excused if he could accomplish his purpose in some other way with less racial effect.[38]

Whether these standards are met by defendant's alleged non-racial interest is a mixed question of law and fact. Therefore the appellate court need not give as much deference to the fact-finder in evaluating the defendant's justification as it does when reviewing a "rebuttal" case.

V. SELECTED "INDIVIDUAL DISCRIMINATION" CASES

In Part IV, we saw that when the defendant claims a non-racial reason for rejecting the plaintiff, that reason must be evaluated differently depending on the kind of case the defendant is making. If the defendant is attempting to *rebut* the showing of racial motivation, the non-racial reason need only be sincerely held. If the non-racial reason is offered as a justification of a racial effect, then that reason must be of sufficient importance to outweigh the racial effect. We shall see in this section that the courts do not always observe this distinction. Furthermore, some courts insist on finding racial effect when there

---

[33]401 U.S. 424 (1971).

[34]*Id.* at 431. A particularly clear statement of the "business necessity" test in an employment discrimination case appears in Williams v. Colorado Springs, Colo. Sch. Dist., 641 F.2d 835 (10th Cir. 1981).

[35]*E.g.*, Bishop v. Pecsok, 431 F.Supp. 34, 37 (N.D. Ohio 1976). "Objective criteria cannot have the effect of excluding blacks from housing unless the criteria are demonstrably a reasonable measure of the applicants' ability to be a 'successful tenant'" (citing *Griggs*). The court defined "successful tenant" as "one who stays for the period of the lease, pays his rent timely, and complies with all other provisions of the lease." *Id.* at 37, n.5. *See also* Williams v. Matthews Co., 499 F.2d 819, 828 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021, 1027 (1974).

One commentator has suggested that the standard used in the housing discrimination cases should not be as strict as that used in the Title VII cases, because, for example, there is greater risk in hiring an unqualified airline pilot than in renting to an "unqualified" tenant. Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L.L. REV. 128, 174 (1976).

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

[37]*Id.* at 148-149.

[38]Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021, 1027 (1974); Resident Advisory Board v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). *See also* cases cited in J. KUSHNER, *supra* note 9, at 90 (1983).

is none, thereby ensuring that the defendant will be wrongly held to the "justification" standard in future cases.

A. *McDonnell Douglas Corp. v. Green*

Our discussion starts with a Title VII case because of its influence on subsequent housing discrimination cases. In *McDonnell Douglas Corp. v. Green,*[39] the plaintiff was a mechanic employed by the defendant and was active in the civil rights movement. After the plaintiff had been laid off as part of a general reduction in the defendant employer's work force, he was arrested for blocking traffic to the defendant's plant during the morning rush hour as part of a protest of the defendant's hiring practices. When the defendant later advertised for mechanics, the plaintiff's application for rehiring was rejected because of his participation in the unlawful protest. The plaintiff brought an action against the employer under Title VII of the Civil Rights Act of 1964,[40] claiming that he was denied employment because of his race and because of his involvement in civil rights activities.[41] The Supreme Court stated:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (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."[42]

The first item given by the court, membership in a racial minority, has been mentioned here as a factor which should contribute to a prima facie case. The second and third items in *McDonnell Douglas* state the "no apparent objective reason" element.

The fourth element describes one of the non-racial interests which the defendant might allege: the plaintiff was rejected because the defendant was hiring no one for the position. Obviously the defendant should escape liability if that is the case, but it is questionable whether this should be made part of the plaintiff's prima facie case rather than an element for the defendant to establish.

---

[39]411 U.S. 792 (1973).

[40]42 U.S.C. § 2000e *et seq.* (1982).

[41]Section 703 (a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ."

Section 704(a), 42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

[42]411 U.S. at 802. In a footnote, the Court noted that because the facts in Title VII cases will vary, the requirements for a prima facie which it set forth are "not necessarily applicable in every respect to differing factual situations." *Id.* at 802, n. 13.

Once a prima facie case is established, "[t]he burden then must shift to the employer to *articulate* some legitimate, nondiscriminatory reason for the employee's rejection. . . . Here [defendant] has assigned [plaintiff's] participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge [defendant's] burden of proof at this stage and to meet [plaintiff's] prima facie case of discrimination."[43] In speaking of a requirement of "articulation," the court is apparently describing what the defendant must do in order to survive a motion for a directed verdict. The defendant is not required to give any evidence that he was *actually* motivated by that reason. Instead, the plaintiff then has the burden of producing evidence that the stated reason was *not* what actually motivated the defendant. In the words of the Court, the plaintiff has the opportunity to show that the defendant's stated reason was "pretext," that it was "in fact a coverup for a racially discriminatory decision."[44] But should it not be the defendant's burden to show that the stated reason was genuine, not the plaintiff's burden to show that it was not?

The Court found fault with the apparent reliance by the court of appeals on *Griggs v. Duke Power Co.*,[45] in which the Court had held that an employer who uses a hiring practice that has a racial effect can defend with a non-racial interest only if it is related to job performance.[46] The Court distinguished *Griggs* on the basis of a number of factors, none of which is particularly convincing.[47] But it should have been a simple matter to distinguish *Griggs.* In *Griggs,* the defendant required that job applicants have a high school diploma or pass a standardized general intelligence test. Both of those criteria were found to be racially correlated. As a result, the defendant was forced to defend by justification. The Court properly imposed a substantive requirement on the non-racial criterion proposed as justification. In *McDonnell Douglas,* the plaintiff argued that the defendant refused to hire him because of his race. Although the line is not very sharp in this case, the defendant's response was more one of rebuttal than of justification. The defendant's reason for refusing to rehire the plaintiff, his participation in the protest, was offered less as a justification for a race-based rehiring procedure than as proof of its argument that its rehiring procedure was not race-based in the first place. Thus, the standard properly imposed was one of sincere (non-pretextual) belief.

B. *Williams v. Matthews*

In *Williams v. Matthews Co.*,[48] the defendants, a development company,

---

[43] *Id.* at 802-803 (emphasis added).

[44] *Id.* at 804-805.

[45] 401 U.S. 424 (1971).

[46] *Id.* at 431.

[47] *See id.* at 806.

[48] 499 F.2d 819 (8th Cir. (1974)), *cert. denied,* 419 U.S. 1021, 1027 (1974).

its president, and its chairman of the board, refused to sell a vacant lot in a residential subdivision to the black plaintiff and his wife, who wished to build a house there. The defendants claimed that they refused to sell to the plaintiff because they had a policy of selling lots to "approved building contractors" only. Apparently the "approval" came from the defendants themselves.[49] There was evidence, however, that no "approved" building contractor was willing to build a house for a black person in that subdivision. If that was true, then the "approved builder" rule was a racially correlated criterion. In addition, one of the defendants allegedly feared that the plaintiff's attorney was seeking to invalidate some of the restrictive covenants relating to size and cost of houses in the subdivision if the lot had been sold to the plaintiff. The district court held for the defendants because their policy of selling only to builders was "free of racial considerations" and their fear of a challenge to the building restrictions was "sincerely but perhaps mistakenly held."[50]

How should the court of appeals have analyzed the case? The plaintiff established a prima facie case in two ways, by showing the use of a racially correlated criterion, the approved builder rule, and by producing evidence of racial motive.[51] An inference of motive arose because there was no apparent objective reason, other than the approved builder rule, for rejecting the plaintiff's offer and the plaintiff was a member of a minority group. In addition, there was evidence of subterfuge in the defendants' dealings with the plaintiff.[52] There was evidence, too, that the defendants had once discriminated on the basis of race. The burden of production should be on the defendants to show that their practice had changed rather than on the plaintiffs to show that the practice had continued.

Because of the dual nature of the plaintiff's prima facie case, the defendants' case requires two responses. First, the defendants must rebut the evidence implying a racial motive. Second, because the evidence of the racially correlated criterion (the approved builder rule) was too strong for the defendants to rely on a successful denial of it, the defendants must justify that criterion.

The defendants attempted to rebut the evidence implying racial motive in

[49]However, there was conflicting evidence as to whether the defendants had a standard procedure for approving builders. *Id.* at 824, 828, n.10.

[50]*Id.* at 825.

[51]Analysis of the case is complicated by the fact that if the defendants knew that no approved builder could be retained by a black person, then the approved builder rule might have been adopted because of a racial motive. The trial court had found, however, that the defendants' policy of selling only to builders was not racially motivated. *Id.* at 825.

[52]The court of appeals recited evidence that the plaintiffs were given a "runaround" in their efforts to purchase the lot from the defendant. When the plaintiffs first met with a representative of the defendant company, he (the president of the company) did not mention the alleged policy of selling only to approved builders; it was only after he conferred with the chairman of the board that the plaintiffs were told of this policy. When a black builder retained by the plaintiffs met with the president and stated that he wished to purchase a lot, the builder was told that lots were sold only to "approved builders."

two ways. First, they produced a letter in which one of the defendants expressed a desire that blacks live in the subdivision. Second, the defendants alleged a non-racial reason for the plaintiff's rejection: his attorney's intention to challenge the restrictive covenants.[53] That reason is subject only to the requirement of sincere belief.[54] According to the court below, that standard was met: the trial judge found that the defendants' belief was "sincerely but perhaps mistakenly held."[55]

The defendants attempted to justify the racially correlated criterion, the approved-builder policy, by claiming that it ensured "an orderly development of the subdivision since approved contractors would undertake prompt construction on those building lots which were made available to them for purchase."[56] The defendants should have prevailed only if (1) the approved builder policy actually promoted the orderly development of the subdivision, and (2) such "orderly development" meets the substantive standards, such as business necessity. The trial court determined that the practice had "a demonstrated business reason."[57] As we have argued, however, the appellate court need not give great deference to the trial court's determination on that issue, and it would certainly be reasonable to decide that the justification fails a "business necessity" test.

The appellate court's actual analysis is different from that just given. The court first explained the prima facie case:

> Thus, where a Negro buyer meets the objective requirements of a real estate developer so that a sale would in all likelihood have been consummated were he white and where statistics show that all of [sic[58]] a substantial number of lots in the development have been sold only to whites, a prima facie inference of discrimination arises as a matter of law if his offer to purchase is refused. If the inference is not satisfactorily explained away, the fact of discrimination becomes established.[59]

The court recited the kind of evidence that should establish a prima facie case: the satisfaction of all objective standards and membership in a minority group.[60] In addition, the court's reference to sales only to whites states a

---

[53]Of course this argument somewhat undercuts the argument that an approved builder rule was used. It implies that the approved builder rule was not applied uniformly, but only to people whom the defendants wanted to exclude for other reasons.

[54]It need not be justified because there is no correlation between a buyer's propensity for challenging restrictive covenants and his race.

[55]499 F.2d at 825 (8th Cir. 1974), *cert. denied,* 419 U.S. 1021 (1974).

[56]*Id.* at 825.

[57]*Id.* at 828.

[58]"All of a substantial number" is redundant. Did the court mean "all or a substantial number"?

[59]*Id.* at 826.

[60]Presumably the reference to a black buyer reflects the facts of the case and does not reflect an intent to limit the "protected group" concept only to blacks.

disparate result, which by definition establishes racial effect.[61] But either of those should be sufficient to establish a prima facie case, and it is a mystery why the court apparently requires *both.*

The court then addresses the "approved builder" policy and finds fault with it for two reasons.[62] First, it has "racial overtones." Although the meaning of the phrase is not clear, the court seems to be saying that there was a racial motivation in the adoption of the policy. But the trial court had decided that there was no racial motive behind the adoption of that policy. The court gives little deference to the trial court's determination of fact. If, on the other hand, "racial overtones" is intended to refer to the racial effect of the approved builder policy, the court's ensuing discussion is sensible. The court rejected that policy because it failed the "least discriminatory alternative" test. The court believed that the defendants' reasons for adopting the policy could be promoted in some other way with less racial effect.[63]

But the court erred in discussing the second reason for rejecting the plaintiff's offer, his alleged intent to challenge the restrictive covenants. The defendants made that argument in an attempt, not to justify a racial effect, but to rebut the inference of a racial reason for the plaintiff's rejection. No standard other than sincere belief should have been applied to it. But in rejecting that argument the court apparently applied a stricter standard. In a footnote, the court stated:

> The sincere belief on the part of [defendant] John Matthews, as found by the trial court, that applicant Williams would likely seek to upset certain covenants and assurances . . . cannot serve as a basis to overturn the prima facie case of race discrimination otherwise apparent in the record. We think it clear that Matthews' belief rested upon subjective assumption, not upon evidence, for the record is bare of any showing that Williams intended to cause trouble to the developer. . . . Even assuming, *arguendo,* that it would be legitimate to refuse to sell property to an individual who planned to challenge a developer's restrictive covenant or bills of assurance, far more evidence than appears in this record would be required to establish Williams as a 'troublemaker' and thus an ineligible land purchaser in the eyes of a reasonable real estate developer.[64]

The passage appears to be saying two things. To the extent the court is saying that there is insufficient evidence to support the trial court's determination, then the court is stating the rule for overturning a factual determination

---

[61]The court ignored the problem of choosing the appropriate reference population for measuring this effect. *See supra* note 8.

[62]The court evaluated the policy despite the doubt that there was a formal procedure for approval of builders.

[63]*Id.* at 828.

[64]*Id.*

by the trial court. But the court seems also to be saying that evidence of the defendant's alleged reason must meet a substantive, objective standard. Why is evidence of a belief that rests upon a "subjective assumption" *ipso facto* insufficient? Why should it be necessary to establish the plaintiff as ineligible "in the eyes of a *reasonable* real estate developer"? If, indeed, a reasonable real estate developer would not have rejected the plaintiff for the reason given by the defendants, should not that fact be for the fact-finder to take into account in deciding whether that reason was actually the motive for defendants' actions? In short, the court appears to be wrongly applying a substantive standard to a non-racial reason given as rebuttal, not justification.

C. *Madison v. Jeffers*

The majority opinion in *Madison v. Jeffers,*[65] decided in the same year as *Williams,* illustrates the proper evaluation of a non-racial interest used as rebuttal. Coincidentally, the dissenting opinion sets forth explicitly the kind of substantive test which is rejected in this paper.

The defendant owned a large parcel of land from which he sold off a number of lots for several years preceding the challenged action. However, he refused to sell a lot to the black plaintiffs. The district court found that the defendant rejected the plaintiffs' offer because he believed that he would suffer adverse tax consequences if another lot were sold in that year.

The court of appeals affirmed, explaining briefly that the evidence supported the trial court's determination that the defendant had refused to sell for tax, not racial, reasons. The court noted that a seller of real estate has "a right to refuse approval on any honest basis unrelated to the race of the prospective purchaser."[66] Thus the appellate court applied no standard of necessity or the like to the defendant's non-racial reason, which was offered to rebut the inference of racial motive.

The dissenting judge disagreed with the majority's interpretation of the Fair Housing Act. The dissent would construe the Act

> to afford relief to a black person whose offer to purchase property is rejected when the owner, having actual or imputed[67] knowledge of the race of the prospective purchaser, withdraws the property from the market without a business or other rational purpose before the transaction can be completed in the ordinary course of trading. . . .
>
> When a person announces withdrawal of property from the market after

---

[65]494 F.2d 114 (4th Cir. 1974).

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

[67]The defendant had first refused to sell to the plaintiff when he did not yet know the plaintiff's race, although that was known to the defendant's broker. The dissent would impute to the defendant the knowledge of his agent.

> he, or his agent, learns that the prospective purchaser is black, I would require him to prove that withdrawal served a business or other rational purpose. Objective facts, not subjective intent, must be proved to establish business necessity under Title VII of the Civil Rights Act of 1964 [*Griggs*]. Similarly, in housing discrimination cases brought under . . . the Fair Housing Act of 1968, objective facts should be required to sustain the owner's claim of a business or other rational purpose for withdrawing the property from the market. . . . By relying on the owner's subjective intent to minimize his taxes, instead of requiring objective facts, the district court used an erroneous legal standard to undergird its finding that the owner withdrew the lots from the market because of legitimate tax reasons."[68]

The dissent then pointed out that although "tax avoidance may qualify as a business purpose,"[69] the fact of adverse tax consequences (not the defendant's belief therein) had not been established at trial. In fact, testimony at the trial showed that the defendant had been misinformed about the tax consequences of a sale to the plaintiffs. Therefore, according to the dissent, the business necessity test was not met.

Because evidence of a non-racial interest, avoiding adverse tax consequences, was introduced for the purpose of rebutting the evidence of racial animus and not for the purpose of justifying a racially correlated criterion, the only relevant inquiry is whether the defendant sincerely believed that his refusal to sell promoted that interest; the district court found that he did. It is inappropriate to require, as the dissent would, that the non-racial interest meet a certain content-based standard, "business necessity," nor even that the non-racial interest be *actually* promoted by the defendant's actions. We have already seen that *Griggs,*[70] cited by the dissent, is not good authority for the business necessity test. In *Griggs,* the Supreme Court's requirement of "a business necessity" for the defendant's criteria was in the context of the defendant's *justification* of the criteria used.

D. *Robinson v. 12 Lofts Realty, Inc.*

In *Robinson v. 12 Lofts Realty,*[71] the Second Circuit confused motive and racial effect, apparently finding effect where there was none. Moreover, the court's reasoning implies that it is motive which is the essence of a Fair Housing Act violation.

The defendant corporation owned a cooperative apartment building in

---

[68] *Id.* at 117-118 (Butzner, J., dissenting).

[69] *Id.* at 118.

[70] 401 U.S. 424 (1971).

[71] 610 F.2d 1032 (2d Cir. 1979).

which each of the ten residents occupied an entire floor. The plaintiff executed a contract with one of the shareholder-residents for purchase of two-thirds of the latter's shares and the two-thirds of his floor which the shares represented. When the shareholders learned of the plaintiff's contract, they amended the corporation's bylaws to establish a committee for screening prospective buyers and to require that sales be approved by a two-thirds vote of the shareholders instead of the existing 51% requirement. Although the new procedures were applied to the plaintiff, they were not applied to a white buyer who purchased an apartment at about the same time. Despite a favorable report from the screening committee, the shareholders failed to approve the sale to the plaintiff by the required margin, and he brought suit under the Act.

At the trial the shareholders testified that they rejected the plaintiff because of his disagreeable personality[72] and because of various "rumors" about the plaintiff, including that he planned to use his apartment for an after-hours club and that he would be running a waste water line along the ceiling of the apartment below his. According to the defense testimony, the procedures for approval of sales were changed because the transaction with the plaintiff would have been the first *re*-sale of an apartment. The opinion of the court of appeals did not, however, mention any testimony explaining the shareholders' failure to apply the new procedures to the white buyer.

The trial court found that the plaintiff had established a prima facie case, but that the defendant had produced evidence of "legitimate, non-racial motivations for its change in voting procedures . . . and its subsequent denial of plaintiff's application,"[73] and that therefore the plaintiff had been rejected for reasons other than his race.[74]

Because the two applicants here do not make a statistically significant population, there was no probative evidence of a racial effect. However, the fact that a supposedly standard procedure was used only against the black applicant is strong evidence of a racial motive.[75] That evidence and the fact that the minority plaintiff met all apparent objective qualifications for purchase should have established a prima facie case. The defendant's alleged non-racial reasons for rejecting the plaintiff were introduced, then, for the purpose of rebutting the implication of a racial motive, not for the purpose of justifying a

[72]The corporation's president stated that the plaintiff was acceptable with respect to the objective questions considered by the screening committee, but that nevertheless the shareholders had questions about the plaintiff that had to do with "questions of personality exchanges" between the shareholders and the plaintiff. Another shareholder testified that "most of the people who had had any contact with him indicated to the rest of us that he had a personality that generally seemed counter to the personality that we were looking for. He was argumentative, he was caustic, he was sarcastic. In general, he did not get along with most of the people. It was as if he was demanding that space rather than asking, as everyone else had. . . . [E]veryone that had met with him indicated that there was an acerbic quality to his personality that came out in every conversation with every member of the group thus far." *Id.* at 1034-1035.

[73]*Id.* at 1035 (quoting the district court).

[74]*Id.* at 1036.

[75]*See generally* J. KUSHNER, *supra* note 9, at 111, n.408.

racially correlated criterion (because there was no significant evidence of one).

Nevertheless, the court of appeals characterized the case explicitly as one of discriminatory *effect.* The court noted that previous cases had held that a prima facie case under the Fair Housing Act is established by showing a racially discriminatory effect; no showing of racially discriminatory motivation need be made.[76] Although most of those cases involved "actions that affect a large group of people," nevertheless, according to the court, the effects test has been adopted "in suits brought to redress discrimination against individual plaintiffs."[77]

The court then stated that a plaintiff can establish a prima facie case by proving:

(1) that he is black[78]
(2) that he applied for and was qualified to rent or purchase the housing;
(3) that he was rejected; and
(4) that the housing opportunity remained available.[79]

The court continued:

> Consistent with the above authorities, the district court in the present case adopted the effects test as the proper standard. Finding that Robinson had established that he was a member of a minority, that he could afford to purchsae the space sought, and that his application was denied, the court held that Robinson had made out a prima facie case.[80]

The four factors listed by the court are a paraphrase of the four factors used in *McDonnell Douglas.* But they do not establish racial effect, and the Supreme Court in *McDonnell Douglas* did not analyze it as an effects case.

Once a prima facie case is established, according to the court, "[t]he burden shifts to the defendant to come forward with evidence to show that his actions *were not motivated by considerations of race.*"[81] The court remanded the case to the trial court for a finding on the defendant's motivation.

Motive *was* relevant, and the defendant had to show that he had no racial motive, simply because the plaintiff's case primarily involved evidence of racial motive which the defendant was required to rebut. But since the court labeled this an effects case, it is puzzling that the court thought that the defendant must rebut evidence of motive. The lack of a racial motive will not save the defendant if there is indeed a racial effect. The court's statement implies that it is *motive* which is a violation of the Act, and racial effect is important because

---

[76] 610 F.2d at 1036.

[77] *Id.* at 1038.

[78] Presumably members of other minority groups would satisfy this requirement as well.

[79] *Id.* at 1038.

[80] *Id.*

[81] *Id.* at 1039 (emphasis added).

it implies motive, not the reverse.

The result in *Robinson* is correct, but the analysis is faulty. The plaintiff's evidence of racial motive implied the use of a racial criterion, a violation of the Act. The defendant can defeat that implication by rebutting the showing of racial motive. The Second Circuit reached the same result, but apparently by saying that a (nonexistent) racial effect implied racial motive, supposedly a violation of the Act, and the defendant must rebut the motive. The danger is that finding a racial effect where none exists may cause a court to wrongly apply the "justification" standard to the defendant's alleged non-racial interest.

E. *Phillips v. Hunter Trails Community Ass'n*

Phillips v. Hunter Trails Community Ass'n[82] is a case similar to *Robinson.* The court, however, conveniently ignored the *Robinson* analysis and analyzed the case as one of "intent," even while using the *Robinson* four-factors test.

The black plaintiff entered into a contract for the purchase of a house in a residential subdivision. A covenant in the subdivision gave the defendant homeowners' association the right of first refusal on any proposed sale. After the plaintiff's contract became known to the association, it sold its right of first refusal to the plaintiff's lot to a Mrs. Butler. When Mrs. Butler attempted to exercise the right, the sellers refused because Mrs. Butler would not indemnify them from possible liability to the plaintiffs. At the trial, evidence of racial animus was produced. The defendant countered with various non-racial reasons for which the homeowners felt that a purchase by Mrs. Butler would be preferable to a purchase by the plaintiff.

The case is very similar to *Robinson* and should have received the same analysis that we have suggested for that case. As in *Robinson,* the fact that there was no apparent objective factor which the plaintiff failed to meet (along with other evidence of racial motivation) should establish a prima facie case. There was no reliable evidence of a racially disproportionate result nor of a racially correlated standard; the defendant's evidence was introduced for the purpose of rebutting the evidence of racial motivation.

The court made a clear distinction between an "effect" or "impact" case and an "intent" case. In an effect case, "a facially neutral policy or action has an unequal impact on different subgroups in the housing market."[83] In such a case, the court said the factors listed in *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*[84] *(Arlington II)* should be applied.[85] But this case, the court explained, is not an effect case; the plaintiffs "complained of

[82] 685 F.2d 184 (7th Cir. 1982).

[83] *Id.* at 189.

[84] 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978).

[85] *Arlington II* was a "group" discrimination case; it applied its own unique set of factors in evaluating a housing discrimination case.

discriminatory intent, not of facially neutral actions that harmed blacks more than whites."[86] Therefore, the factors in *Arlington II* do not apply. Instead, to make out a prima facie case, the four-factor test of *Robinson* applies. Because the plaintiffs met that test, the burden shifted to the defendant to "articulate nonracial reasons for its actions."[87] The court upheld the trial court's determination that the defendant had acted out of a racial motive.

Thus the court in *Phillips* correctly characterized *Robinson* as an "intent" case, that is, one in which the plaintiff's evidence is primarily that of racial motive, despite *Robinson's* own characterization of itself as an "effect" case. Consistent with this being an "intent" or "motive" case, the court apparently would not impose any substantive requirements on the defendant's nonracial reasons. However, the opinion offered no explanation why the test should be different depending on whether the case is one of "effect" or "intent."

F. *Murphy v. 253 Garth Tenants Corp.*

In *Murphy v. 253 Garth Tenants Corp.*[88], the court's evaluation of the defendant's alleged non-racial interest under both the Act and a non-statutory standard serves to emphasize the correct approach under the Act. The board of directors of the defendant cooperative refused to approve the sale of shares to the plaintiff, a woman born in Ireland. The plaintiff's suit cited the Fair Housing Act and a provision of the cooperative's by-laws that consent to a transfer of shares "shall not unreasonably be withheld."[89] Members of the cooperative's board testified that she was rejected in part because the unresponsive and vague answers given by her during an interview reflected poorly on her ability to be "a good neighbor"[90] and not because of her sex or national origin. The court concluded that in rejecting the plaintiff, the board "relied on the subjective judgment of its [interviewing] committee without requiring an articulated, objective basis for the rejection."[91]

The court held for the plaintiff on the basis of the by-laws provision. That provision required "something more than [a] subjective explanation . . . since by its very language the 'unreasonable' term invokes an objective, third-party standard."[92] Such a standard must relate to a tenant's "acceptability from the viewpoint of any landlord," such as "financial responsibility."[93] "By contrast, reasons based on 'the landlord's supposed needs, dislikes, personal taste, sen-

[86] 685 F.2d at 190.

[87] *Id.*

[88] 579 F.Supp. 1150 (S.D.N.Y. 1983).

[89] *Id.* at 1155. Although the plaintiff buyer could not, of course, claim rights under the by-laws, the sellers were also plaintiffs.

[90] *Id.* at 1154.

[91] *Id.*

[92] *Id.* at 1156.

[93] *Id.*

sibility or convenience . . generally result in judicial disapproval.'"[94] The reasons given by the Board "fail to rise to the standard of objectively [sic; "objectivity"?] established in these [previous] cases. . . . [T]he explanation the Board members gave for the denial — [the plaintiff's] 'vagueness' and 'unresponsiveness' — is subjective and unreasonable . . . ."[95]

But the subjectivity and unreasonableness of the defendant's reasons for rejecting the plaintiff should not put the defendant in violation of the Fair Housing Act, as long as those reasons were sincerely held and not based on criteria, like national origin, which the Act prohibits. Indeed, the court found that there was *no* violation of the Act. In analyzing the case under the Fair Housing Act, "the starting point . . . is *Robinson v. 12 Lofts Realty, Inc.*"[96] *Robinson*[97] had cautioned that "the courts must be alert to recognize means that are subtle and explanations that are synthetic."[98] But the explanation given by the defendants in *Murphy* is "neither subtle nor synthetic."[99] Although the reason for rejection is "subjective discomfort" with the plaintiff, "it is not related to a discriminatory purpose."[100] Since the court believed that the Board had rejected the plaintiff for sincere, non-racial reasons (albeit subjective ones), there was no violation of the Act.

In *Murphy,* the juxtaposition of the analysis under the Act and the analysis under the cooperative's by-laws emphasizes the difference between the two. Under the Act, there should be no *substantive* standard, even one of "reasonableness," applied to a defendant's non-racial reasons for rejecting the plaintiff when there is no racially correlated criterion to justify.

G. *Betsey v. Turtle Creek Associates*

In *Betsey v. Turtle Creek Associates,*[101] the court drew a sharp distinction between the defendant's proof necessary in an "effects" case and that necessary in an "intent" case without, however, giving an explanation of the reasons for that distinction.

In *Betsey,* the defendants were the owners and managers of a three-building apartment complex. Eviction notices were issued to all families with children in one building of the complex, allegedly to implement a policy of restricting that building to adults. The tenants brought an action under the Fair Housing Act, alleging a racially discriminatory intent and a disparate

[94] *Id., quoting* from Kruger v. Page Management Co., Inc., 105 Misc.2d 14, 432 N.Y.S.2d 295, 302 (Supr. Ct. 1980).

[95] 579 F.Supp. at 1156.

[96] *Id.* at 1154.

[97] 610 F.2d 1032 (2d Cir. 1979).

[98] *Id.* at 1043.

[99] 579 F.Supp. at 1155.

[100] *Id.* at 1155.

[101] 736 F.2d 983 (4th Cir. 1984).

racial impact. The district court held that: (1) the plaintiffs had established a prima facie case of "discriminatory intent," but the defendants had rebutted it by showing that they were motivated by economic considerations and not by race; (2) the plaintiffs did not establish a prima facie case of "disparate impact."[102] The plaintiffs appealed only the second part of the holding.

The appellate court said:

> The burden confronting defendants faced with a *prima facie* showing of discriminatory impact is different and more difficult than what they face when confronted with a showing of discriminatory intent. Defendants may overcome a *prima facie* showing of discriminatory intent by articulating some 'legitimate non-discriminatory reason for the challenged practice' [citing *McDonnell Douglas*]. However, when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice.[103]

The case was remanded for a determination of whether there was a business necessity justifying the discriminatory impact.[104]

The quoted language seems to be making two distinctions: (1) "articulating" versus "proving" a non-discriminatory reason and (2) a "legitimate non-discriminatory reason" versus a "business necessity" which is "compelling."

The first distinction is only an apparent one. It results from a careless confusion of a procedural issue and a substantive one. When describing the defendant's burden in an intent case, the *Betsey* court describes what the defendant must show in order to survive a directed verdict, but when the court describes the defendant's burden in an impact case, it is setting forth what the defendant must show in order to prevail. The "articulation" burden which the court imposes on an "intent" defendant is derived from *McDonnell Douglas.* As we have seen, that term was used to describe the minimum evidence necessary to send the case to the jury for their determination of the defendant's motives. That burden of production is the same in "intent" and "impact" cases. But in order for the defendant to *prevail* in an "intent" case, it is not enough merely to "articulate" the non-discriminatory reason; the trier of fact must be convinced that it was sincerely held.

But the court's contrast between a "legitimate non-discriminatory reason" and "business necessity sufficiently compelling to justify the challenged practice"[105] is an important one and represents the distinction which this article has

---

[102] *Id.* at 985.

[103] *Id.* at 988 (emphasis supplied; footnote omitted).

[104] The court declined to use the test announced in Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights (Arlington II), 558 F.2d 1283 (7th Cir. 1977), *cert. denied,* 434 U.S. 1025 (1978) and also used in Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1972). That test, it explained, applied only where a "public body" is the defendant. *Betsey,* 736 F.2d at 988, n.5.

[105] That *this* is the important distinction is made clear in a footnote: "The inquiry is whether either discriminatory intent or impact can be proved and, if either or both is proved, whether there is a legitimate

proposed. By "intent" case the court seems to be referring to a case where the evidence is primarily of racial motive; "impact" case refers to one in which there is evidence of a racially correlated criterion, as the reference to *Griggs* shows.

The only standard the court would place on the defendant's non-racial reason in an intent case is that it be "legitimate." The court does not explain what "legitimate" means in this context. Its probable meaning is that the reason be real, not manufactured for the purpose of the lawsuit, which is equivalent to the "sincerely believed" formula proposed here. On the other hand, there *is* a substantive standard applied to the defense in an "impact" case, namely, "business necessity." The court in *Betsey* thus appears to state the dichotomy which this article suggests. Unfortunately, the court offers no explanation why the tests for an "intent" case and an "impact" one should differ. We have seen, however, that they differ because of the fundamental difference between a defense by rebuttal in an intent/racial motive case and a defense by justification in an impact/racially correlated standard case.

VI. CONCLUSION

It is unfortunate that the Fair Housing Act does not more explicitly define what is an unlawful housing practice. The Congress left that question to the courts, which have not always responded with clarity. This article has suggested that it is racial effect alone which constitutes a violation; that racial motive (and a number of other facts) are probative of that effect; and that a defense based on rebuttal of racial motivation must be evaluated differently from a defense based on justification of a racial effect created by the use of a racially correlated standard. That analysis has been adopted by the courts in varying degrees and with varying clarity, but it is suggested that a more rigorous adherence to it will make for a more reasoned analysis of future housing discrimination cases.

non-discriminatory reason sufficient to overcome the showing of intent, or whether a compelling business necessity exists, sufficient to overcome the showing of disparate impact. *Betsey*, 736 F.2d at 988, n.5.