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**NORTH CAROLINA'S RETREAT FROM FAIR HOUSING:
A CRITICAL EXAMINATION OF NORTH CAROLINA
HUMAN RELATIONS COUNCIL V. WEAVER
REALTY CO.**

JOHN O. CALMORE*

I. INTRODUCTION

This article concerns the necessary and proper proof in housing discrimination litigation.¹ On November 12, 1985 I appeared before the United States Commission on Civil Rights, in Washington, D.C., to address the issue whether intent or effect is the proper standard of proof in housing discrimination cases. I now extend the debate and my argument here, as there, supports the effect standard.² The principal coverage of title VIII of the Civil Rights Act of 1968 prohibits discriminatory conduct undertaken "because of," "based on" or "on account of" race (or some other protected status such as color, religion, national origin or sex).³ The quoted phrases are undefined in the statute and although some would argue that the "because of" language suggests that subjective intent is required to render conduct in violation of title VIII, the substantial majority of federal court decisions has held that a Fair Housing Act violation can be demonstrated if the action of complaint had a racially discriminatory effect.⁴

This topic is of particular interest to fair housing advocates in the state

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1. See generally, Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981). As Professor Kushner states: "The most difficult concept in civil rights litigation, and housing discrimination litigation in particular, is the question of proof: what evidence is required to prove a violation and which party carries the burden of proof." J. KUSHNER, *FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION* 53 (1983).

2. Calmore, *Proving Housing Discrimination: Intent vs. Effect and the Continuing Search for the Proper Touchstone*, in 1 UNITED STATES COMMISSION ON CIVIL RIGHTS, *ISSUES IN HOUSING DISCRIMINATION* 77 (1985); see also Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 NOTRE DAME LAW. (1978).

3. 42 U.S.C. §§ 3604-3606 (1982).

4. See cases cited in R. SCHWEMM, *HOUSING DISCRIMINATION LAW* 59 n.63 (1983 & Supp. 1986). Indeed, Professor Schwemm's own view is that the federal courts of appeal "now universally accept the proposition that Title VIII may be violated by practices with a discriminatory effect." Letter from Robert Schwemm to the author, July 31, 1986; on file with the North Carolina Central Law Journal.

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of North Carolina in light of the recent decision by the state court of appeals in *North Carolina Human Relations Council v. Weaver Realty Co.*⁵ The court in *Weaver* rejected a substantial body of federal fair housing law in interpreting the 1984 state fair housing act⁶ to require intentional discrimination⁷ and to require also that race constitute more than a mere factor in a defendant's discriminatory decisions.⁸

This article will focus on *Weaver* and its implications. It will demonstrate that the federal case law interpreting title VIII has established that an effect standard is justified as being judicially manageable and fair to all parties involved in housing discrimination litigation. Moreover, the *Weaver* decision will be cited as having reduced the state fair housing act to an inadequate remedy when compared to that of the federal statute. The article concludes therefore that the *Weaver* decision should be overturned by the North Carolina Legislature.

II. NORTH CAROLINA HUMAN RELATIONS COUNCIL V. WEAVER REALTY COMPANY

On March 18, 1986, the Court of Appeals of North Carolina issued its opinion in *North Carolina Human Relations Council v. Weaver Realty Co.* The case is the first one brought under North Carolina's state fair housing act to reach the appellate level. The state act's key provisions are modeled after provisions of the federal Fair Housing Act, and the United States Department of Housing and Urban Development (HUD) has recognized the state statute as "substantially equivalent" with respect to the rights and remedies it provides to redress certain aspects of housing discrimination.⁹

As interpreted by the court in *Weaver*, however, the two statutes are no longer substantially equivalent, but, rather, are in stark conflict. Even absent evidence of racially discriminatory motive, the federal courts have recognized a title VIII violation upon a showing that policies and practices have produced a racially discriminatory effect.¹⁰ Federal courts also have consistently held that when title VIII violations were demon-

5. 79 N.C. App. 710, 340 S.E.2d 766 (1986).

6. N.C. GEN. STAT. § 41A-10 (1984).

7. The Fourth Circuit has ruled to the contrary of *Weaver* in both the private transaction context and the governmental action context. See *Betsey v. Turtle Creek Assoc.*, 736 F.2d 983, 986-88 (4th Cir. 1984)(a prima facie case under title VIII of the federal Fair Housing Act may be established where an all-adult housing policy had a disparate adverse impact on nonwhites); *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982)(a prima facie case established by town's prevention of a low-income housing development which produced disproportionate adverse impact on nonwhites).

8. In contrast to *Weaver*, see, e.g., *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970); *Payne v. Bracher*, 582 F.2d 17 (5th Cir. 1978).

9. See 24 C.F.R. § 115.1 (1986); 42 U.S.C. § 3610(c) (1982); and Part III, *infra*.

10. R. SCHWEMM, *supra* note 4, at 54.

strated by citing housing policies and practices motivated by racial discrimination, it has been sufficient to show that race was one motivating factor among many.¹¹

Writing for the court in *Weaver*, Chief Judge Hedrick declared that if a particular housing practice or policy is not motivated by discriminatory considerations of race (color, religion, sex, or national origin), then there is no violation of the state fair housing act regardless of how "disparate" the impact of the practice or policy.¹² Moreover, the *Weaver* decision legitimated partial racial discrimination by holding that racial considerations must be more than merely a factor in defendant's decision to reject a plaintiff alleging violation of the state fair housing act.¹³ Thus, important aspects of housing discrimination law were interpreted differently under the state statute than under federal law.

The *Weaver* case arose when the state Human Relations Council acted on behalf of Patty Leach, a black woman who was the single parent of two minor children, a boy and a girl, both of whom were over six-years-old. She claimed that the defendants refused to rent a two- or three-bedroom apartment to her because of her race.¹⁴ The realty company had two special family composition rules regarding the leasing of its two- and three-bedroom apartments. The apartments were financed by the Farmers Home Administration (FmHA). A FmHA regulation provided that families with fewer than four members could not rent a three-bedroom apartment without FmHA permission. Thus, defendants claimed they could not rent a three-bedroom apartment to plaintiff.¹⁵ The realty company also had its own policy preventing single parents who had children of opposite sexes, at least one of whom was over six, from qualifying for a two-bedroom apartment.¹⁶ The realty company further claimed that the family composition rules could not be waived by its resident manager and that no exception to the family composition rules had ever been granted to any apartment applicant regardless of race.¹⁷

Ms. Leach presented evidence showing both intentional discriminatory treatment and discriminatory effect. Her supporting affidavits declared that the resident manager admitted there was a quota on selecting blacks, that she did everything she could to keep blacks out, and a white applicant with familial and financial attributes similar to Ms. Leach testified she was told that the resident manager would seek permission to waive

11. *Id.* at 58; see also Mandelker, *Combatting Housing Discrimination in the 1980's*, 20 HARV. C.R.-C.L. L. REV. 537, 540 (1985).

12. 79 N.C. App. at 715, 340 S.E.2d at 769.

13. *Id.*

14. *Id.*

15. *Id.* at 712, 340 S.E.2d at 767.

16. *Id.*

17. *Id.*

the family composition rules and that the rules were really a "weapon" for keeping out undesirable blacks. Finally, Ms. Leach produced evidence showing that only six percent of black applicants but sixty-four percent of white applicants had been accepted at the apartment as of March 30, 1984. During the same time, fifteen percent of the black applicants and ten percent of white applicants had been denied leases explicitly due to the family composition rules.¹⁸

In spite of the conflicting evidence, Superior Court Judge James H. Pou Bailly entered summary judgment for the realty company and Ms. Leach appealed. Although the appellate court's interpretation of the state fair housing act was extraordinarily restrictive, it reversed and remanded Judge Bailly's decision because Ms. Leach presented evidence sufficient to raise a genuine issue of material fact as to whether defendants discriminated against her in the leasing of an apartment because she was black.¹⁹ The appellate decision held that on remand Ms. Leach could prove discrimination by showing that the facially neutral family composition rules were designed to discriminate against blacks, were applied in a discriminatory manner through the waiver policy, or by otherwise showing that she could have leased the apartment if she were not black.²⁰

Because of the "favorable" remand, the Human Relations Council attorney representing Ms. Leach has stated that the case would not be appealed to the North Carolina Supreme Court.²¹ Thus, a case clearly inappropriate for summary judgment and rightfully appealed has nonetheless made very bad law regarding the elimination of the fair housing discriminatory effect claim and the imposition of a strict standard of causation requiring race to be more than a mere factor in mixed-motive cases of intentional discrimination. Ironically, the appellate decision should not hurt Ms. Leach who has a strong case of intentional discrimination.²²

III. TITLE VIII AND THE NORTH CAROLINA FAIR HOUSING LAW ARE NO LONGER "SUBSTANTIALLY EQUIVALENT"

There are three separate and independent means of enforcing title VIII: (1) a private civil action brought directly without a prior adminis-

18. *Id.* at 713, 340 S.E.2d at 768.

19. *Id.* at 715, 340 S.E.2d at 769.

20. *Id.* at 716, 340 S.E.2d at 769.

21. Interview with Daniel D. Addison, Attorney for the North Carolina Human Relations Council (July 17, 1986).

22. See, e.g., *Harper v. Hutton*, 594 F.2d 1091, 1093 (6th Cir. 1979) (landlord's too-poor-to-rent policy reflected an unequal application of selection criteria and served merely as a pretext for racial discrimination: "[W]e are convinced that the defendant refused to rent to plaintiffs because they were both poor and black. Had they been white, he would not have refused").

trative complaint or resolution as authorized by 42 U.S.C. § 3612; (2) a civil action brought under section 3613 by the Justice Department in "pattern or practice" and "general public importance" cases; and (3) an administrative complaint filed with HUD as authorized by section 3610.

A direct suit brought under 42 U.S.C. § 3612 is preferable in many ways to one brought under Section 3610 in that there is less delay in getting a judicial resolution and there is clearer availability of damages and attorney fees (whereas Section 3610 appears to authorize injunctive relief only). There are cases, however, where a direct suit is not the most feasible alternative as, for instance, when a complainant lacks the necessary funds to initiate and sustain litigation. As Professor Schwemm notes, "Whatever the reason, thousands of complainants initiate Section 3610(a) proceedings with HUD every year, far more than the number who file court suits under Section 3612."²³

Under 42 U.S.C. § 3610(c) of the Fair Housing Act, HUD refers complaints to the appropriate state or local agency wherever a state or local fair housing law provides rights and remedies for alleged housing discrimination which are "substantially equivalent" to the rights and remedies provided by title VIII.²⁴ As of April 4, 1986, HUD recognized such laws in 34 states, including North Carolina, and 65 localities.²⁵

In evaluating the adequacy of state or local law to meet the standard of substantial equivalence, the HUD regulations suggest that the *Weaver* decision could justifiably prompt HUD to withdraw its recognition of North Carolina's statute. Withdrawal can be based on a consideration not only of the law on its face, but also on, taken as a whole, the jurisdic-

23. R. SCHWEMM, *supra* note 4, at 230-31. In short, a § 3610 administrative complaint may offer the housing discrimination victim a "simple, inexpensive, informal conciliation procedure" that will "provide a . . . less burdensome method of resolving housing complaints." Gladstone, *Realtors v. Village of Bellwood*, 441 U.S. 91, 104-05 (1979).

24. The regulations promulgated to implement this provision are at 24 C.F.R. §§ 115.1-11 (1986).

25. The states are:

| | | |
|-------------|---------------|----------------|
| Alaska | Maine | North Carolina |
| California | Maryland | Oregon |
| Colorado | Massachusetts | Pennsylvania |
| Connecticut | Michigan | Rhode Island |
| Delaware | Minnesota | South Dakota |
| Florida | Montana | Tennessee |
| Hawaii | Nebraska | Virginia |
| Illinois | Nevada | Washington |
| Indiana | New Hampshire | West Virginia |
| Iowa | New Jersey | Wisconsin |
| Kansas | New Mexico | |
| Kentucky | New York | |

51 Fed. Reg. 11577 (April 4, 1986). See also the listing in Fair Housing-Fair Lending (P-H) ¶ 4251.11 (Apr. 14, 1986). The number of complaints referred to state or local agencies increased from 7% in 1979 to 67% in 1984. Waldrop, *Enforcement of the Fair Housing Act: What Role Should the Federal Government Play?*, 74 Ky. L.J. 201, 225 (1985-86).

tion's administration of its fair housing law.²⁶ The North Carolina fair housing act as interpreted in *Weaver* now fails to meet at least two HUD criteria for assessing its adequacy: (1) it places excessive burdens on complainants that might discourage filing of complaints and (2) it is no longer sufficiently comprehensive in its prohibitions to be an effective means of carrying out and achieving the intent and purposes of the federal act.²⁷

Although the regulations' recognition of a state or local law is not a determination that the judicial protection and enforcement of the law's rights are substantially equivalent to those found in title VIII,²⁸ interpretations of the state law can be appropriate in HUD's analysis of the state law's adequacy.²⁹ Thus, federal-state differences regarding such issues as standing, damages, or attorney fees probably would not jeopardize the state law's substantial equivalence characterization. But *Weaver* has eliminated a complete cause of action, that of suing for non-intentional, discriminatory acts which nonetheless produce discriminatory effect. Moreover, *Weaver* has rejected the federal standard of causation. The substantive reach of plaintiff's or complainant's cause of action has been greatly cutback. Accordingly, it is difficult to accept the recognition that the North Carolina law continues to be substantially equivalent to the federal Fair Housing Act with respect to the rights and remedies provided. The simple truth is that now many plaintiffs proceeding under title VIII, as interpreted by the Fourth Circuit (and every other circuit), will have no claim at all under the North Carolina law.³⁰

IV. MIXED MOTIVES AND CAUSATION IN INTENTIONAL DISCRIMINATION

It is clear that the "because of race. . ." requirement is met when plaintiff can show that the defendant's conduct was motivated solely by race.³¹ In many cases, however, motives are mixed or multiple and race is merely one factor among several that a defendant might consider in his or her decision not to deal with plaintiff.³² In these instances, title VIII's applicability turns, in part, on the standard of causation adopted: Must race be shown to constitute the *sole* or *decisive* reason for defendant's rejection of a prospective tenant or homebuyer or may liability attach if

26. 24 C.F.R. § 115.8 (1986).

27. *Id.* §§ 115.3(a)(3),(5).

28. *Id.* § 115.3(b); see also *Denny v. Hutcheson Sales Corp.*, 649 F.2d 816, 819 (10th Cir. 1981).

29. *Id.* § 115.3(c).

30. See sources cited *supra* notes 7-8.

31. See R. SCHWEMM, *supra* note 4, at 53-54.

32. Calmore, *Fair Housing and the Black Poor: An Advocacy Guide*, 18 CLEARINGHOUSE REV. 609, 625-26 (1984).

race is shown to be only *one* of the contributing factors?³³ The federal courts find a title VIII violation if race is merely one of the factors that motivated the defendant even though the defendant may also cite valid, non-racial excuses for plaintiff's rejection.³⁴ As the Court of Appeals for the Seventh Circuit aptly stated: "[R]ace is an impermissible factor in. . . [defendant's] decision and. . . it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination."³⁵

In *Weaver*, Judge Hedrick characterized this standard of causation applied by federal courts in title VIII cases as "peculiar."³⁶ Claiming to adopt the "traditional proximate cause standard" with which state courts have extensive experience in applying, the judge declared that race, color, religion, sex or national origin must therefore constitute "more than a mere factor in a defendant's decision not to engage in a real estate transaction."³⁷ While it is clear that Judge Hedrick has rejected the federal standard, it is not clear, beyond labels, what is really being proposed in its place.

Although the *Weaver* decision refers to "proximate cause," the court seems to adopt a "but-for" cause-in-fact standard similar to the "same decision" test articulated by the United States Supreme Court in its analysis of equal protection cases.³⁸ According to the Supreme Court, assuming that plaintiff demonstrates discriminatory purpose as among defendant's multiple motives, violation of the equal protection clause is not necessarily established.³⁹ This proof, rather, shifts to the defendant "the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered."⁴⁰ If the discriminator meets this burden, he or she would prevail because the plaintiff "no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose."⁴¹

Relying on the Supreme Court's stricter causation standard in constitutional cases to support a similar standard in fair housing cases is inap-

33. R. SCHWEMM, *supra* note 4, at 54-55.

34. *Id.*

35. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970) (emphasis in original).

36. *Weaver*, 79 N.C. App. at 715, 340 S.E.2d at 769.

37. *Id.*

38. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270-71 (1977) (*Arlington Heights I*); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-87 (1977) ("same decision" test applied).

39. *Arlington Heights I*, 429 U.S. at 270-71 n.21.

40. *Id.*

41. *Id.* The test is criticized in Gates, *The Supreme Court and the Debate over Discriminatory Purpose and Disproportion-Impact*, 26 LOY. L. REV. 567, 613-16 (1980); Note, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1678 (1978).

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propriate. The Supreme Court has recognized that a statutory standard can be more generous and title VIII cases addressing the issue after the 1977 "same decision test" was articulated "have kept unbroken the line of cases holding that Title VIII is violated if race plays any role in the defendant's intent decisions."⁴² Indeed, in light of the legislative intent governing the Fair Housing Act, one such case held that given any racial motive in discriminating against plaintiff, "the presence of other factors also motivating the refusal to rent cannot under any statutory provision justify racial discrimination."⁴³ In interpreting a state fair housing law that is supposed to be "substantially equivalent" to the rights and remedies provided by the federal statute, the North Carolina Court of Appeals has in effect translated the state law into something that contradicts the very intent of the federal law, rendering the state law substantially less adequate rather than equivalent.

By recognizing—indeed legitimating—partial racial discrimination, the *Weaver* decision invites discriminating defendants to indulge in after-the-fact rationalizations that will amount to no more than pretext.⁴⁴ For example, in *Lamb v. Sallee*,⁴⁵ the defendant attempted to justify her refusal to rent to an interracial couple because they were living together, but unmarried. Defendant, however, knew of this before she approved of renting to the couple and only raised this point after learning that the woman was black.⁴⁶ In this case, the female plaintiff was black, but appeared white. Her relatives who helped her move in were more obviously black, however. Upon learning the identity of the blacks helping with the move, defendant cancelled the rental agreement. Under these circumstances, the court did not believe that defendant's refusal to deal with plaintiff was based on her unmarried status.⁴⁷

Pretext has also been found when plaintiff misrepresented the length of time he had been employed and the landlord used this as a justification for denying him an apartment.⁴⁸ The court recognized that normally a landlord has a right to refuse to rent to a person believed by the landlord to be unreliable due to misrepresentation. In this case, however, the court deemed the refusal to be based on an "afterthought" and a "departure" from the informal, rather casual manner in which defendant had previously accepted white tenants, most of whom had been admitted on the basis of reference from other tenants.⁴⁹

42. R. SCHWEMM, *supra* note 4, at 57.

43. *Payne v. Bracher*, 582 F.2d 17, 17-18 (5th Cir. 1978).

44. See Calmore, *supra* note 32, at 634-36.

45. 417 F. Supp. 282 (E.D. Ky. 1976).

46. *Id.* at 286.

47. *Id.* For a consideration of after-thought pretext in the context of governmental exclusionary practice, see *Atkins v. Robinson*, 545 F. Supp. 852, 877 (E.D. Va. 1982).

48. *Hall v. Freitas*, 343 F. Supp. 1099 (N.D. Cal. 1972).

49. *Id.* at 1101.

V. THE CASE LAW OF TITLE VIII ESTABLISHES THE JUSTIFICATION OF AN EFFECT STANDARD

Most court decisions applying the discriminatory effect standard have involved 42 U.S.C. § 3604(a) of the Fair Housing Act, a key provision of the statute under which it is unlawful: (1) to refuse to sell or rent after a bona fide offer is made; (2) to refuse to negotiate for sale or rental; or (3) to otherwise make unavailable or deny a dwelling to any person because of race, color, religion, sex or national origin. When the alleged discriminatory conduct is not easily characterized as either a refusal to deal or to negotiate, plaintiffs have relied on the general provision, "to otherwise make unavailable or deny." This "omnibus provision" prohibits racial steering, redlining and exclusionary zoning practices.⁵⁰ The basic subsection (a) prohibits "grudging" or passive acceptance of nonwhites as contrasted with enthusiastic service to whites;⁵¹ solicitation of potential buyers in white areas but not in black areas;⁵² racially discriminatory appraisal of dwellings;⁵³ landlord interference with interracial associations;⁵⁴ and the deliberate maintenance of an all-white, discriminatory image.⁵⁵

While the most elaborate analysis of plaintiffs' prima facie case based on discriminatory effect is seen in lawsuits challenging local government exclusionary practices or other action affecting a large number of people,⁵⁶ the effect standard has also been upheld in suits brought to redress discrimination victimizing plaintiffs in private transactions. For instance, in *Smith v. Anchor Building Corp.*⁵⁷ the Eighth Circuit Court of Appeals stated that a prima facie inference of discrimination arises as a matter of law where (1) a black rental applicant meets the objective requirements of a landlord, and (2) the rental would likely have been consummated were he or she a white applicant. If this inference is not satisfactorily explained by the defendant, discrimination is established and plaintiff prevails.⁵⁸

50. See Calmore, *supra* note 32, at 612.

51. *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973).

52. *United States v. Treasure Lakes, Inc.*, EQUAL HOUS. OPP. REP. (P-H) ¶ 13,600 (W.D. PA. 1973).

53. *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977).

54. *Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982).

55. *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980).

56. See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (*Arlington Heights II*); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977).

57. 536 F.2d 231 (8th Cir. 1976).

58. *Id.* at 233.

A. *Griggs v. Duke Power: The Employment Discrimination Analysis and Analogy to Housing Discrimination*

The Supreme Court has not ruled explicitly on whether title VIII permits an effect standard of proof. It has, however, ruled that such a standard is permitted under title VII, the employment statutory analogue to title VIII. In *Griggs v. Duke Power Co.*,⁵⁹ decided in 1971, the Court interpreted "because of race" and unanimously established the principle that a facially neutral job selection criterion which is unrelated to measuring job capacity cannot be utilized by the employer when the selection practice or policy has a "disparate impact," excluding blacks at a substantially higher rate than whites even if the selection criteria were established without any discriminatory intent.⁶⁰

At the crux of proving racial discrimination in this context is the presentation of percentage differentials that are sufficiently substantial to infer bias. The disparate impact prima facie case raises a presumption that a substantial statistical disparity could only arise as a result of actual discrimination. Borrowing from employment law, the courts have characterized three kinds of statistical analysis available to plaintiffs for use in showing a significant disparity. "Applicant flow statistics" compare the percentage of actual or potential black applicants who have been disqualified by a landlord's selection policy with the percentage of their white counterparts who have been similarly disqualified. The conclusion here could evidence "disproportionate impact." "Relevant tenant pool" statistics compare the percentage of blacks in the geographic area's pool of qualified tenants. Finally, "population statistics" compare the percentage of blacks in the landlord's tenant body with the percentage of blacks in the general population of the geographic area. These second and third statistical comparisons can evidence nonwhite underrepresentation as a form of "discriminatory effect."⁶¹ The *Griggs* rule has correctly been rationalized in terms of the improbability of alternative, nondiscriminatory explanations.⁶² Thus, under *Griggs* "the inequality itself raises an inference that a specific discriminatory process is functioning to cause the observed disparity."⁶³

As an illustration, consider *United States v. Real Estate Development*

59. 401 U.S. 424 (1971).

60. *Id.* at 432 where the Court declared, "Good intent or absence of discriminatory intent does not redeem employment procedures that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation" (emphasis in original). The Act is codified at 42 U.S.C. § 2000e (1982). See generally, Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 HARV. C.R.-C.L. L. REV. 138 (1976).

61. Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387, 393 (1975).

62. *Id.* at 391-92.

63. Note, *Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of*

Corp.⁶⁴ where a prima facie case of housing discrimination was established by facts showing that (1) blacks lived within a four-or-five block radius of defendant's apartments; (2) the city where the apartments were located had a population including thirty-seven point six percent blacks; (3) over a six-year period none of defendant's apartments had ever been rented to blacks even though a number of them had applied to rent units in the apartments.⁶⁵

The probative value of this statistical evidence was reinforced by the landlord's failure to apply objective criteria similarly to all rental applicants. This indicated to the court that race was the only identifiable factor that could explain the lack of black tenants. Finally, the court dismissed the possibility that the absence of black tenants, under the circumstances, was an indication of their lack of interest. Instead, as viewed by the court, it indicated "a sense of the futility of such an effort in the face of the notorious discriminatory policy" of the landlord.⁶⁶ Under the facts described above, it is difficult to imagine principled objection to the court's finding of discrimination even in the absence of any proof of illicit motive or intent.⁶⁷

B. *Title VIII Proof Standards: A Comparison Between a Factors Analysis And a Prima Facie Case Analysis*

In 1977 the Supreme Court decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁶⁸ popularly known as *Arlington Heights I*. The Court followed its decision in *Washington v. Davis*⁶⁹ and held that even though the "ultimate effect" of a town's zoning decision might be racially discriminatory this was inadequate to establish a

Less Restrictive Alternatives, 1981 U. ILL. L. REV. 181, 190-91; see also Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Company*, 72 COLUM. L. REV. 900, 910 (1972).

64. 347 F. Supp. 776 (N.D. Miss. 1972).

65. *Id.* at 779.

66. *Id.*

67. See generally Note, *Business Necessity in Title VIII: Importing an Employment Discrimination Doctrine into the Fair Housing Act*, 54 FORDHAM L. REV. 563 (1986).

68. 429 U.S. 252 (1977).

69. 426 U.S. 229, 242 (1976). In *Washington v. Davis* the Supreme Court held that under the equal protection clause the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.

Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule. . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

See also Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. REV. 961, 990; Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 HARV. C.R.-C.L. L. REV. 725, 738-39 (1977); Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376, 1397-98 (1979).

constitutional equal protection claim in the absence of discriminatory purpose. The Court, however, remanded the case for a consideration of whether the effect standard should apply to title VIII.⁷⁰

Establishing a title VIII violation on the basis of discriminatory effect is approached differently in two principal ways: (1) focusing on critical factors as articulated in *Arlington Heights II*,⁷¹ the Seventh Circuit Court of Appeals remand decision or (2) applying the prima facie concept as articulated in the Third Circuit Court of Appeals decision of *Resident Advisory Board v. Rizzo*.⁷² Both decisions were decided within months of each other in 1977 and their approaches, separately or in combination, have been followed in subsequent federal decisions at both the trial court and appellate levels. While these later decisions have elaborated on the approaches and illustrated the varying factual contexts in which they apply, the conceptual framework of *Arlington Heights II* and *Rizzo* remain largely unqualified.

While the Seventh Circuit's *Arlington Heights II* decision held that at least under some circumstances a violation of 42 U.S.C. § 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent, the court refused to conclude that every action which produced discriminatory effect is illegal. The court advised that the courts must use their discretion in determining whether, in light of the particular circumstances of each case, relief should be granted under title VIII.⁷³

Rejecting the *Griggs* method of having the evidence of discriminatory effect shift the burden of justification to the defendant village, the court utilized "four critical factors" to be considered in deciding whether discriminatory impact would establish a title VIII violation. Those factors are: (1) the strength of plaintiff's showing of discriminatory effect; (2) the presence of evidence of discriminatory intent; though not enough to satisfy the constitutional standard of *Washington v. Davis*; (3) the defendant's interest in taking the action complained of; and (4) whether plaintiff seeks to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.⁷⁴ The court identified two kinds of discriminatory effect: (1) when a decision or conduct causes a greater "adverse impact" on blacks than on whites, or (2) when a decision or conduct "perpetuates segregation" thereby blocking interracial association. Note that the court considered the second effect as invidious under title VIII regardless of the extent to

70. 429 U.S. 252 (1977).

71. *Arlington Heights II*, 558 F.2d at 1290.

72. 564 F.2d 126 (3d Cir. 1977).

73. *Arlington Heights II*, 558 F.2d at 1290.

74. *Id.*

which it might cause a disparate effect on blacks.⁷⁵

The *Rizzo* litigation arose out of the city of Philadelphia's attempts to prevent construction of a public housing project in a nearly all-white area of the city. The trial court ruled that because ninety-five percent of those on the housing's waiting list were nonwhite, the failure to build such housing had a discriminatory effect on nonwhites.⁷⁶ In affirming that a showing of discriminatory effect alone will establish a title VIII prima facie case, the Third Circuit set forth the following standard for determining whether the defendant has carried its burden of justification for the acts resulting in the discriminatory effect: "A justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."⁷⁷ The court explained that should defendant introduce evidence that no less discriminatory alternative course existed, then the burden would shift back to plaintiff to demonstrate that such a course was available.⁷⁸

In concluding that the *Rizzo* approach is preferable to that of *Arlington Heights*, Professor Schwemm has observed that the Seventh Circuit decision fails to explain how the relevant factors are to be weighed, "and it thus fails to provide adequate guidance to the trial judges, litigants, and future decision makers who will have to apply it. The proper structure for balancing these factors and for identifying where the burden of proof lies has already been established under title VII by *Griggs* and its progeny. *Rizzo* wisely decided to follow this lead."⁷⁹

Recently, in the significant case of *Betsey v. Turtle Creek Associates*,⁸⁰ the Court of Appeals for the Fourth Circuit elaborated on the *Rizzo* approach, applying it in the context of a suit not brought against a local government exclusionary practice but, rather, in the context of a private landlord-tenant transaction. Plaintiffs challenged the apartment owners'

75. *Id.*

76. 425 F. Supp. 987 (E.D. Pa. 1976).

77. *Rizzo*, 564 F.2d at 149 n.37; see also *United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980) (same standard applied to a segregative effect case).

78. *Rizzo*, 564 F.2d at 149 n.37.

79. Schwemm, *supra* note 2, at 257-58.

80. 736 F.2d 983 (4th Cir. 1984). This case is significant not only as a Fourth Circuit contrast to the state court decision in *Weaver*, but also because

Betsey is the first circuit court case to directly apply the Title VII prima facie case doctrine using disparate impact analysis in the case of a private nongovernmental defendant charged with housing discrimination. *Betsey* is particularly noteworthy because it clarifies the standard of proof to be applied in housing discrimination cases involving private defendants. *Betsey* is the first circuit court case to expressly find a prima facie case of racially disparate impact as a result of an all-adult housing policy. Landlords and policymakers must carefully consider the far-reaching implications of *Betsey* when formulating or administering housing policy.

McGuinness, *Betsey v. Turtle Creek Associates: All-Adult Housing Policy May Violate the Fair Housing Act*, 8 CAMPBELL L. REV. 47, 50-51 (1985); see also Note, *supra* note 67, at 580.

decision to convert one of their buildings from one which housed families with children to one for adults only. In order to institute the all-adult rental policy, the owners issued eviction notices to the plaintiff families with children. Plaintiffs sought injunctive relief, claiming that defendants acted with a racially discriminatory intent in seeking to evict them and that the evictions would have a disparate impact, both constituting a violation of title VIII.⁸¹

At trial, the district court ruled discriminatory intent was established but that the defendant had rebutted this evidence by proving that they were motivated by economic considerations and not race.⁸² The trial court further ruled that plaintiffs had failed to prove a prima facie case of disparate racial impact and, therefore, entered judgment for defendant on all claims.⁸³ Plaintiffs appealed the discriminatory effect ruling.

The trial court had rejected "clear proof of discriminatory impact" because (1) there was no continuing disproportionate impact; (2) there was a high percentage of blacks in the overall complex of other buildings; and (3) the policy on blacks residing in the local community was insignificant.⁸⁴ But the court of appeals found these three factors irrelevant to a prima facie showing of racially discriminatory impact. The court held that a discriminatory impact case under title VIII is established if plaintiffs, members of a discrete minority, prove only that a given policy had a discriminatory impact on them as *individuals*.⁸⁵ The plain language of the statute makes it unlawful "to discriminate against *any person*."⁸⁶ According to the court:

The correct inquiry is whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied. In this case, the all-adult conversion policy was applied to the residents in Building Three. "Bottom line" considerations of the number and percentage of minorities in the rest of the complex or the community are "of little comfort" to those minority families evicted from Building Three.⁸⁷

In addressing the defendants' justification burden, the court stated that defendants would have to show more than mere economic considerations that is, when a discriminatory effect is involved the owners had to do more than merely articulate some "legitimate non-discriminatory impact." Instead, "defendants must prove a business necessity sufficiently compelling to justify the challenged practice."⁸⁸

81. *Betsey*, 736 F.2d at 985.

82. *Id.*

83. *Id.*

84. *Id.* at 987.

85. *Id.* (quoting 42 U.S.C. § 3604(b) (1982)).

86. *Id.* (footnote omitted) (citing *Connecticut v. Teal*, 457 U.S. 440, 454-55 (1982)).

87. *Id.*

88. *Id.* at 988.

VI. THE EFFECT STANDARD IS WORKABLE AND FAIR

The discriminatory effect standard is not only judicially manageable, but it also provides clear guidance for fair housing lawyers and claimants.⁸⁹ Moreover, most fair housing cases involving private transactions have turned on whether there was purposeful discrimination and not discriminatory effect.⁹⁰ Furthermore, even in those cases finding disparate impact, there was usually also evidence of intentional disparate treatment, and this is true in both private transaction cases and those involving discrimination resulting from land use and other exclusionary practices by municipal governments.⁹¹

In the disparate treatment case, the defendant's burden is relatively light in rebutting the plaintiff's *prima facie* case. Defendant simply must demonstrate that there were reasons other than plaintiff's race underlying the refusal to deal with plaintiff and these countervailing justifications will usually relate to the shelter seeker's applicant characteristics.⁹²

As suggested in *Bush v. Kaim*,⁹³ some of the factors to consider in determining whether defendant's reasons for not accepting a shelter seeker were racially motivated or not include: (1) whether the owner requested information regarding these subjects from plaintiff; (2) whether the owner requested this information from other applicants; (3) whether he obtained this information from other sources; (4) whether he sought this information from the plaintiff and/or other applicants over the time in which he was selecting a tenant; (5) whether the owner attempted to follow up on this information or to validate its accuracy; (6) whether he performed this follow-up or validation process during the time in which he was deciding on whom to select; and (7) whether other applicants existed with better or more desirable ratings.⁹⁴ Often a negative answer to any of these questions will support plaintiff's burden of showing pretext.⁹⁵

Hence, in evaluating discrimination involving an applicant's characteristics, it is important to scrutinize the circumstances under which the denial was made, by considering such factors as (1) whether normal pro-

89. Calmore, *supra* note 2, at 86.

90. *Id.*

91. *Id.*

92. See, e.g., *Betsey*, 736 F.2d at 985. Moreover, as stated by Professor Schwemm: A landlord is certainly free under Title VIII to pick a white applicant over a black applicant if his sole reason for doing so is that the white applicant is better qualified on the basis of legitimate rental criteria. . . On the other hand, if the evidence shows that the defendant did not rely on these nonracial reasons (e.g., the new white tenant is actually less qualified than the plaintiff), then the plaintiff is likely to prevail, because it now appears that the actual and only reason for the defendant's refusal was the plaintiff's race.

R. SCHWEMM, *supra* note 4, at 54.

93. 297 F. Supp. 151 (N.D. Ohio 1969).

94. *Id.* at 162.

95. See Calmore, *supra* note 32, at 633.

cedures were followed in checking applicant's background; (2) whether normal criteria were applied equally to similarly situated blacks and whites; (3) whether defendant's subjective criteria were colored by racial prejudice or stereotype; and (4) whether objective selection criteria were reasonable measures of an applicant's suitability as a tenant or buyer.⁹⁶

Generalizing about the evaluation of the legitimacy of a defendant's excuse based on applicant characteristics is difficult because there is such a variety of reasons upon which a defendant may rely and because the issue is primarily one of the defendant's credibility under quite varied circumstances. Reasons offered unsuccessfully by defendants include that plaintiffs were unmarried persons, single women, divorced men, military personnel below the rank of major, noncitizens with diplomatic immunity, students, without children or with too many children, too young, or had failed to follow proper application procedure, became angry or "uppity" when applying, misrepresented employment history, failed to demonstrate ability to meet necessary financial obligations.⁹⁷

Many who want to impose intent as the only standard of proof simply fail to consider that in most cases it is already the predominant standard and any legitimate reasons for the challenged conduct will defeat the housing discrimination claim. These critics fail further to recognize that discrimination in present day America is often subtle and so "artfully cloaked and concealed in sophisticated language that its true nature does not become obvious."⁹⁸

CONCLUSION

Permitting liability in cases of discriminatory effect recognizes two policy judgments. First, in many cases requiring proof of subjective intent is so difficult that to require it would defeat the purpose of fair housing legislation. Second, non-intentional discrimination can be as invidious and as damaging as intentional discrimination.⁹⁹ For these reasons, effect and not intent must remain the proper touchstone for proving housing discrimination.¹⁰⁰ The state of North Carolina appellate decision in

96. *Id.* at 634; see also Note, *supra* note 67, at 584.

97. See sources cited in Calmore, *supra* note 32, at 634.

98. Haythe v. Decker Realty Co., 468 F.2d 336, 338 (7th Cir. 1972); see generally Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

99. Note, *supra* note 67, at 567.

100. As one commentator states:

Segregation in shelter results largely from intentional discrimination. Empirical evidence persuasively suggests that residential segregation is not exclusively attributable to black poverty or inability to pay for housing. *It is also clear, however, that racially neutral practices of business and governmental actors in the housing sphere disproportionately limit the housing opportunities of members of protected groups.* Liability based on disparate impact and business necessity analysis are appropriate tools for achieving the goals of Title VIII.

Id. at 578-79 (emphasis added).

Weaver should be overcome by state legislation amending the fair housing act and clearly providing that (1) a violation of the state fair housing act may be established upon the basis of discriminatory effect and (2) that race (color, religion, national origin, or sex) is an impermissible factor in a discriminating decision not to engage in a real estate transaction even if it is not the sole reason or total factor in that decision. If the legislature was originally motivated in passing the state fair housing act to fully address invidious discrimination it must act forthwith to set right the state court's decision in *Weaver* derailing that attempt.¹⁰¹

101. See Duncan, Hood & Neet, *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 URB. LAW. 510, 530 (1975):

This [disparate impact liability] rationale seems particularly appropriate to Title VIII since its stated purpose of providing fair housing within the United States clearly would be unobtainable unless the Act were construed to prohibit not only open, direct discrimination, but also those practices which have the effect of discriminating along racial lines.

The state legislature should follow the lead of Congress in an analogous case. In 1980, the Supreme Court held that § 2 of the Voting Rights Act of 1965 did not permit judicial relief in vote dilution instances, such as at-large elections, in the absence of proof that the alleged discrimination was intentional. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In 1982, however, Congress approved amendments providing that violations of § 2 can be established without proving discriminatory intent. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973(b) (1982)). The Report of the Senate Committee on the Judiciary points out:

In *Bolden*, a plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose. The Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs. It diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.

S. REP. NO. 417, 97th Cong., 2d Sess. at 16, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 193; see also McKenzie & Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155 (1984); Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203 (1985).