The Fair Housing Act and “Discriminatory Effect”: A New Perspective

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Abstract

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KEYWORDS: housing, discriminatory, civil rights
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I. Introduction

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, prohibits discrimination in 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.

In one type of case, the defendant is a landlord or seller of property who has refused to rent or sell to the plaintiff. In another type of case (referred to as the "project cases" in this Article), the defendant is a municipality which has, in one way or another, prevented the construction of a housing development — usually a low-income project — within its borders. This article will be concerned primarily with the cases in the second category. A housing developer's inability to build his project can result from either an act or a failure to act by the municipality. Most commonly, a municipality changes its zoning to exclude the type of housing proposed or refuses to change its zoning to permit the housing. In other cases the municipality withdraws funds or support for a publicly-funded project. (For the sake of convenience, in all such cases the municipality will be said to have "rejected" the project.)

One way of establishing a violation of the Act is by showing a "discriminatory effect." This paper will discuss the meaning and appli-


2. 42 U.S.C. 3604(a) (1982). Also prohibited is discrimination in "terms, conditions, or privileges or sale or rental," "provision of services or facilities" and a number of other practices. 42 U.S.C. 3604(b) (1982).
II. Establishing a Violation of the Fair Housing Act

Most obviously, the Act is violated by what is usually called discriminatory "intent" or "motive." If the defendant refuses to rent to the black plaintiff because the defendant dislikes blacks, clearly the plaintiff is denied housing "because of his race" and the statute is violated. Although liability based upon discriminatory motive has occurred most often in the cases involving discrimination by individual, private defendants, it has been recognized in the project cases as well.3

However, the courts have given the Fair Housing Act an interpretation that goes beyond racial motive: the Act is violated by "discriminatory effect" even if there is no discriminatory intent.4 Two forms of "discriminatory effect" have been recognized. First, the defendant's action may have "a greater adverse impact on one racial group than on another."5 Second, an action is said to have a discriminatory effect "if it perpetuates segregation and thereby prevents interracial association," even if it does not produce "a disparate effect on different racial groups."6

The "greater adverse impact" analysis had its genesis in cases brought under the employment discrimination statute, Title VII of the Civil Rights Act of 1964.7 Title VII, like the Fair Housing Act, prohib-

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6. Id.
its discrimination "because of race."\textsuperscript{8} In \textit{Griggs v. Duke Power Co.},\textsuperscript{9} the Supreme Court held that Title VII is violated by effect as well as by intent. In \textit{Griggs}, the defendant employer required job applicants and present employees who applied for job transfers to possess a high school diploma or pass a standardized general intelligence test. Although the employer had no intent to discriminate against blacks, the tests had a discriminatory effect because they "operate[d] to disqualify Negroes at a substantially higher rate than white applicants."\textsuperscript{10} That effect constituted a violation of Title VII, which "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."\textsuperscript{11} The defendant could avoid liability, however, by demonstrating a "business necessity" for the challenged tests.\textsuperscript{12}

The courts in several housing cases reasoned that the objectives of Title VII and Title VIII are similar. These cases held, on the basis of \textit{Griggs}, that the Fair Housing Act is violated by a discriminatory effect even in the absence of any intent to discriminate on the basis of race.\textsuperscript{13} Like the Title VII cases, the housing cases found that interpretation to be consistent with the "because of race" language\textsuperscript{14} and with the legis-

8. Title VII states in Section 703(a):

\begin{quote}
It shall be an unlawful employment practice for an employer —
\end{quote}

\begin{itemize}
\item (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
\end{itemize}

9. \textit{Id.} at 426.

10. \textit{Id.} at 431.


12. \textit{Id.} at 425 (1975), the Court said that an employer can justify the use of a job requirement that imposes a disparate impact by showing that it serves "the employer's legitimate interest in 'efficient and trustworthy workmanship'" (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).


14. \textit{E.g.}, Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1289-90. In United States v. Housing Auth. of Chickasaw, 504 F. Supp. 716, 726-27 (S.D. Ala. 1980), the court stated that the language prohibiting practices that "make unavailable or deny" housing to any person because of race "is as broad as Congress could have made it and it reaches every private and public practice that makes housing more difficult to obtain on prohibited grounds."
Thus, the Fair Housing Act is broader in its proscription than the fourteenth amendment. The Supreme Court had held that a denial of housing does not constitute a violation of equal protection under the fourteenth amendment unless there was an intent to discriminate on the basis of race. "Discriminatory effect" is not enough. 18

There has been some difference of opinion on the exact role played by discriminatory effect. In Metropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II), 19 the Seventh Circuit Court of Appeal said that "at least under some circumstances" discriminatory effect is sufficient to establish a violation of the Act even though discriminatory intent is absent. 18 To determine whether in a particular case the discriminatory effect is sufficient to show a violation, the court must consider four "critical factors." 19 Those factors are:

1. how strong is the plaintiff's showing of discriminatory effect;
2. is there some evidence of discriminatory intent . . . ;
3. what is the defendant's interest in taking the action complained of; and
4. does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. 20

15. An amendment to the Act which would have required proof of discriminatory intent was rejected by the Senate. 114 Cong. Rec. 5221-22, 5216 (1968).
17. 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).
18. Id. at 1290 (emphasis added). In a subsequent case, the Seventh Circuit characterized Arlington Heights II as saying that "statistical disproportion [discriminatory effect] alone was not enough, but neither did a plaintiff have to prove discriminatory intent" to establish a violation. Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184, 189 (7th Cir. 1982).

By contrast, in United States v. Mitchell, 580 F.2d 789, 791-92 (5th Cir. 1978), Arlington Heights II was cited for the proposition that "a significant discriminatory effect flowing from the rental decisions is sufficient to demonstrate a violation of the Fair Housing Act." 20

20. Id. The court seemed to interpret the third factor to mean, in cases where the defendant is a governmental body, merely that the act be lawful: if such a defendant acts "outside the scope of its authority or abuses its power, it is not entitled to the deference which courts must pay to legitimate governmental action," but if it acts "within the ambit of legitimately derived authority, we will less readily find that its action violates the Act." Id. at 1293.

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In other cases, however, a showing of discriminatory effect is said to establish only a "prima facie case." The defendant will still be able to escape liability if he can show that the effect is justified by some other interest which his action promoted. There is no agreement on how strong an interest must be in order to justify a discriminatory effect. For example, in one case of private discrimination, the court required that the defendant show "a business necessity sufficiently compelling to justify the challenged practice," 22 a test borrowed from Griggs. 23 On the other hand, the Eighth Circuit Court of Appeals has stated that a governmental defendant can justify a discriminatory effect only by a "compelling governmental interest." 24 To determine whether an interest is compelling, the Eighth Circuit looks to several factors:

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first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interest may be attained.\textsuperscript{25}

The “compelling governmental interest” test is the same as the test under equal protection analysis where a fundamental right or a suspect classification is involved and will be very difficult to meet.\textsuperscript{26}

But the Third Circuit, also in a case which involved a government defendant, rejected both the “business necessity” test and the “compelling governmental interest” test.\textsuperscript{27} Instead, in its view “[a] justification must serve, in theory and practice, a legitimate, bona fide interest in the Title VIII defendant, and must show that no alternative course of action could be adopted that would enable that interest to be served

\textsuperscript{21} E.g., Smith, 682 F.2d at 1065; United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981).
\textsuperscript{22} Betsy v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984).
\textsuperscript{23} See supra text accompanying notes 9-12.
\textsuperscript{24} United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975).
\textsuperscript{25} Id. at 1186-87 (footnotes omitted).
\textsuperscript{26} One commentator described the test as “‘strict’ in theory and fatal in fact.” Gunther, Foreword: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection, 86 Har. L. Rev. 1, 8 (1972).
\textsuperscript{27} Rizzo, 564 F.2d at 148.
with less discriminatory impact." 28 "[T]he test for Title VIII liability . . . involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed." 29 This test, too, may be difficult to satisfy; the "no alternative course of action" test "may prove difficult for many defendants to satisfy unless they have actively engaged in politics to achieve integration." 30

III. The Meaning of Discriminatory Effect

While it may be clear that "greater adverse impact" on one race constitutes a violation of the Act, what that means is not so clear. In Part A of this section, the meaning given to discriminatory effect in Griggs will be summarized. In Part B, the varying meaning of discriminatory effect in the housing cases will be discussed. The particularly confused treatment of discriminatory effect in a recent district court case, In re Malone, 31 will be the subject of Part C.

A. Discriminatory Effect in Griggs

In the employment discrimination cases, the "effects" analysis is clear and consistent: it is disproportionate impact along racial lines that violates Title VII. Thus, in Griggs, the employer's requirement that applicants have a high school diploma or pass an intelligence test had an unlawful disproportionate effect, because the percentage of blacks in the general population who could not meet that requirement was larger than the percentage of whites who could not meet it. 32 The disproportionate effect in Griggs could also have been described by

28. Id. at 149.
32. The Court noted that blacks were disqualified at "a substantially higher rate than white applicants." 401 U.S. at 426. The Court quoted statistics showing that in North Carolina, the defendant's place of business, 34% of white males and 12% of black males had completed high school. Id. at 430 n.6. Similarly, of the whites who took a battery of standardized intelligence tests, including the tests administered by the defendant, 58% passed, but only 6% of the blacks taking the test passed. Id.
looking at the group it produced. Under this method, a comparison would be made of the racial composition of the group who could not meet the employer’s requirement with the racial composition of the general population; blacks would make up a larger proportion of the former than of the latter.\textsuperscript{33}

The first comparison has been said to show “disproportionate adverse effect” and the second, “disproportional representation.”\textsuperscript{34} But it should be emphasized that these two comparisons are two ways of saying the same thing: a case of disproportional representation can only be produced by disproportionate adverse effect, and disproportionate adverse effect will always result in disproportional representation.\textsuperscript{35}

Three points should be made about the meaning of “discriminatory effect.” First, it must be emphasized that the proper comparison is not of the absolute numbers of persons of each race affected. A comparison of that kind would falsely indicate that a neutral decision produced a “disparate impact” on the majority group.

Second, the “discriminatory effect” need not actually be produced in order to conclude that the plaintiff’s rejection was a violation of the statutes prohibiting discrimination in employment or housing. It should be enough to show that the reason for which the plaintiff was rejected would have produced disproportional representation if it had been applied to a large number of applicants. Thus, for example, if the plaintiff is denied an apartment because he did not meet the landlord’s minimum income requirement, and if income is correlated with race, a violation should be found. This should be the case even if the plaintiff was the only person who applied for an apartment.

Third, lack of evidence, of the reason for the plaintiff’s rejection, should not prevent him from establishing a violation. In that situation, the plaintiff should prevail simply by showing that the defendant’s evaluation of a large number of applicants produced disproportional representation. That evidence should raise a presumption that the method of evaluation which produced that result was the reason for the plaintiff’s

\textsuperscript{33} In Griggs the court said that a “disproportionate number” of blacks were ineligible, but the meaning of this disproportion was not made clear. Id. at 429.


\textsuperscript{35} The two comparisons may indicate different apparent magnitudes of disproportion, however. See supra text accompanying note 34.
B. Discriminatory Effect in the Housing Cases

The treatment of discriminatory effect in the housing cases has been very confusing. Some of the housing cases have followed Griggs in viewing a prohibited discriminatory effect as a disproportionate adverse effect. That is, the group analogous to the non-graduates in the Griggs courts are those persons who were injured by the loss of the proposed housing: the low-income persons who would have been eligible to reside there. Thus, disproportionate adverse effect can be shown if a larger percentage of blacks meet the low-income qualifications for residency than do whites.37

For example, in Smith v. Town of Clarkton,38 the Fourth Circuit Court of Appeals found a discriminatory effect from the municipality's action in preventing the construction of low-income housing. The court noted that "69.2% of all black families in Bladen County are presumptively eligible for low income housing, while only 26% of the white population is so qualified."39 The district court had found that the loss of the low income housing "fell 2.65 [apparently 69 divided by 26] times more harshly [on] the black population than on the white."40 The appellate court similarly found a discriminatory effect from these figures, stating that "the black population of Bladen County was adversely affected by the termination of the housing project, as it is that population [which is] most in need of new construction to replace substandard housing, and it is the one with the highest percentage of presumptively eligible applicants."41 Thus, the court's figures show a disproportionate adverse effect.

In United States v. City of Black Jack,42 a district court referred to the plaintiff's statistics showing that 32% of the black population (in the standard metropolitan statistical area) and 29% of the white population fell within the income guidelines for the rejected project. Therefore, the court concluded, "the percentage of each race that Park View Heights is designed to serve is very close to the same, and the effect of excluding this class is not racially discriminatory."43 The Eighth Circuit reversed, however, finding a violation based (apparently) on motive and aggregative effect.44

The Second Circuit in Citizens Committee for Faraday Wood v. Lindsey45 similarly held that there was no discriminatory effect because there was no disproportionate effect.46 The court found that most of the project was reserved for middle-income persons and that blacks were not disproportionately represented in this group. Thus "the assumption used in the typical public housing case is not valid here."47 The court distinguished Kennedy Park Homes Association v. City of Lakewann48 and similar cases. In Kennedy Park, "the housing projects were designed only for low-income persons. In such cases it was possible to say that nonwhites were disproportionately affected since only low-income persons were involved and since a disproportionate number of nonwhites are low-income persons."49

36. Interestingly, under this view of discriminatory effect it is possible to view the intent or motive theory as simply one subcategory of the discriminatory effect theory. A defendant's racial animus can be presumed to affect his evaluation of applicants for employment or housing. The racial animus or motive is, therefore, a "criterion" which is correlated with race and which will therefore produce a discriminatory effect, exactly as the high school diploma criterion in Griggs did. The effect in the motive case, if there are many applicants, is indistinguishable, for purposes of the Act, from the effect in a Griggs-type case. Analysis would be simpler and more logical if the case of racial motive were viewed as one special kind of discriminatory effect case.

37. If the racial proportion of the population on the waiting list for the housing of this type is different from those eligible, then the former should be used.

38. 682 F.2d 1055 (4th Cir. 1982).
39. Id. at 1061.
40. Id. at 1064 (quoting the district court).
41. Id. at 1065 (emphasis added).
43. 372 F. Supp. at 330.
44. City of Black Jack, 508 F.2d at 1188.
46. Faraday Wood involved an equal protection claim, not a claim under the Fair Housing Act. The case was decided before the Supreme Court held in Washington v. Davis, 426 U.S. 229 (1976), that racial intent is necessary to prove a 14th amendment violation; discriminatory effect in Faraday Wood would be relevant to a Fair Housing Act claim as well.
47. 507 F.2d at 1069.
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other housing cases have determined discriminatory effect on an entirely different (and erroneous) basis. In those cases, the courts compare the absolute numbers of blacks and whites in the disadvantaged groups. Since the number of blacks in the general population is less than the number of whites, there can be a disproportionate effect on blacks even though the absolute number of blacks adversely affected is less than the number of whites so affected. Whatever the merits of looking at the proportion in the project population — and that approach is criticized below — there is even less justification for a measure based on a comparison of absolute numbers. As we have seen, the proper comparison is between the proportion of blacks (or whites) in the disadvantaged group and the proportion of blacks (or whites) in the general population. Of course, the smaller number of blacks in the general population means that there will be a disproportionate effect whenever the absolute number of blacks adversely affected exceeds the number of whites adversely affected. But some courts have indicated that it is the difference in absolute numbers, rather than the proportion, which constitutes discriminatory effect.

Mettropolitan Housing Development Corp. v. Village of Arlington Heights (Arlington Heights II) is the leading example of the view that a comparison of numbers is the more significant of the two measures of discriminatory effect. The Seventh Circuit Court of Appeals stated that one kind of "racially discriminatory effect" occurs when there is "a greater adverse impact on one racial group than on another." The court first conceded that there was a disproportionate adverse effect: "It is true that the Village's refusal to rezone had an adverse impact on a significantly greater percentage of the nonwhite people in the Chicago area than of the white people in that area." Then the court switched to discussing disparate representation:

But it is also true that the class disadvantaged by the Village's action was not predominantly nonwhite, because sixty percent of the people in the Chicago area eligible for federal housing subvention in 1970 were white. The argument for racial discrimination is therefore not as strong as it would be if all or most of the group adversely affected was nonwhite.

The court ascribed significance to the fact that there are more whites in the class of rejectees than blacks. But the comparison should have been between the 60% white proportion of the disadvantaged group and the white proportion of the Chicago-area population.

Apparently to emphasize the importance of the absolute-number comparison, the Arlington Heights II court distinguished the case of Resident Advisory Board v. Rizzo. "Since ninety-five percent of the individuals on the waiting list for public housing in Philadelphia [in Rizzo] were members of minority groups, the failure to build public housing had a much greater adverse effect on nonwhite people than on white people." But the relevant comparison in Rizzo should have been between the 95% representation of black people in the disadvantaged group with their representation in the general population.

Several cases have followed Arlington Heights II by finding discriminatory effect in a comparison of absolute numbers of blacks and whites affected. Thus, in Keith v. Volpe, the municipality prevented the construction of low-income housing for persons displaced by the construction of a freeway. Because two-thirds of the persons who would have occupied the housing were members of an ethnic minority, the court concluded that the municipality's action affected minority displaced "twice as hard" as it affected white displaced and, therefore a racially discriminatory effect was shown. Presumably, if the population displaced by the freeway had been composed of equal numbers of whites and minority members, then the failure to build the housing would have affected the races "equally as hard, and no racially dis-
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56. Id. at 1291.
57. Id. (emphasis in original).
59. 558 F.2d at 1291.
61. Id. at 1150.
criminatory effect would have been established. There was no harm in the erroneous comparison, because a 66\% black representation in the disadvantaged group exceeded the black representation in the population. But the statement that the disparate impact was "twice as hard" on minority displaced is an invitation to other courts to make the same kind of mistake.

Similarly, in *Arthur v. City of Toledo,* the district court twice used the wrong measure to find an absence of disparate impact. Since 84\% of the households eligible for the rejected housing were white and 16\% were minorities, the court found that there was a greater impact on whites by a five to one ratio (84\% divided by 16\%). The plaintiffs, on the other hand, argued in favor of comparison of households actually on the waiting list for rejected housing, of which 50\% were white and 50\% minorities. Even if that were the correct comparison, the district court said, then whites and minorities were affected equally. The court of appeal generally agreed with the district court's analysis. The proper inquiry, of course, is something quite different: if the general population was less than 16\% black (using eligible households) or less than 50\% black (using the households on the waiting list), then an unlawful disproportionate impact should have been found.

Another example is *Joseph Skilken & Co. v. City of Toledo,* where the Sixth Circuit noted the fact, without clearly explaining its importance, that "there are more than three times as many whites who need public housing than there are blacks needing housing." However, according to the court's figures, the white population in the region was more than six times the black population. Thus the percentage of blacks needing public housing, and affected by the municipality's refusal to permit it, exceeded the percentage of whites in the same position. The court failed to find a disparate impact, apparently giving greater importance to the numerical comparison than to the percentage comparison.

C. *In re Malone*

Confusion regarding the meaning of discriminatory effect reached new heights in *In re Malone.* The defendant municipality had refused to rent the plaintiff's property for multifamily housing, thereby preventing the construction of an apartment complex which would have included low-income residents under the "Section 8" program. The evidence given by the plaintiff showed that "the percentage of all black persons in the St. Louis area who qualify for § 8 housing is higher than the percentage of all white persons in the St. Louis area who qualify for § 8 housing." As we have seen, this is the disproportionate adverse effect which most of the housing cases (and *Greggs*) used. Therefore, a finding of discriminatory effect should have been made. But the court did not do so.

The judge in *Malone* began by discussing *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (*Arlington Heights,* II). As in *Malone,* the defendant in *Arlington Heights* I was a municipality which had refused to rent the plaintiff's land to a multifamily classification. The reasoning would have been similar construction of housing for low and moderate-income persons. The United States Supreme Court stated that the impact of the defendant's action "was arguably more invidious on racial grounds because..."

62. 782 F.2d 565 (6th Cir. 1986).
63. The district court's unreported opinion is quoted in the opinion of the court of appeals.
64. 782 F.2d 565, 576 (6th Cir. 1986).
65. "Although the district court should have focused on the waiting list for the Turnkey II projects, rather than on the general population, we conclude that plaintiffs-appellant presented at best, only relatively weak evidence of discrimination..." Id.
66. The counting of households rather than persons is an error as well. Although the number of white households on the waiting list exceeded the number of black households, it appears that the number of black individuals exceeded the number of white individuals. Id. There is no apparent reason to base effect on households rather than persons, however, and the district court thus underestimated the effect on blacks.
68. Id. at 878.
70. Housing and Community Development Act of 1980, 96 Stat. 187 (1982). Under the Section 8 program, the Secretary of Housing and Urban Development must, among other things, examine the low-income areas of the proposing jurisdiction and determine the extent to which all racial groups are served. See *McIntosh v. H. McNair & R. W. Jones,* 551 F. Supp. at 1125-1126.
72. The court's discussion was in the context of the *Greggs* case, in the *Arlington Heights* II case, and the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1982). In *Greggs,* the court adopted the same analysis of discriminatory effect...
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Confusion regarding the meaning of discriminatory effect reached new heights in *In re Malone.*\(^6^9\) The defendant municipality had refused to rezone the plaintiff's property for multifamily housing, thereby preventing the construction of an apartment complex which would have included low-income residents under the “Section 8” program.\(^7^0\) The evidence given by the plaintiff showed that “the percentage of all black persons in the St. Louis area who qualify for § 8 housing is higher than the percentage of all white persons in the St. Louis area who qualify for § 8 housing.”\(^7^1\) As we have seen, this is the disproportionate adverse effect which most of the housing cases (and *Griggs*) used. Therefore, a finding of discriminatory effect should have been made. But the court did not do so.\(^7^2\)

The judge in *Malone* began by discussing *Village of Arlington Heights v. Metropolitan Housing Development Corp. (Arlington Heights I).*\(^7^3\) As in *Malone*, the defendant in *Arlington Heights I* was a municipality which had refused to rezone the plaintiff's land to a multiple-family classification. The rezoning would have permitted the construction of housing for low and moderate-income persons. The United States Supreme Court stated that the impact of the defendant's decision “does arguably bear more heavily on racial minorities. Minorities

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72. The court's discussion was in the context of claims under the fourteenth amendment and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1983 (1982); but later in the opinion the court adopted the same analysis of discriminatory effect for purposes of the Fair Housing Act. 592 F. Supp. at 1166.

constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible" for the new housing. 74 Thus, the 40% figure is the ratio between the number of blacks eligible for the housing that was rejected and the number of persons of all races so eligible, i.e., the ratio of the number of blacks adversely affected by the municipality's decision to the number of all persons so affected. This is simply the "disproportional representation" measure discussed above. Although the finding of disparate impact in Arlington Heights I was based on disproportional representation, and the evidence produced in Malone showed disproportionate adverse effect, those two measures of disparate impact are equivalent. 75 The discussion and holding in Arlington Heights I, then, are entirely consistent (and are precedent for) a finding of disparate impact in Malone.

But the court in Malone misstated the meaning of the numbers in Arlington Heights I. According to Malone, the Supreme Court in Arlington Heights I "compared the percentage of blacks in the Chicago area population (18%) to the percentage of blacks who qualified for the type of housing that was excluded (40%)." 76 The court's characterization of the 40% figure was in error. That figure was the ratio of the number of blacks eligible for the rejected housing in Arlington Heights I to the number of persons of all races so eligible, but the court in Malone seemed to characterize the 40% figure as the ratio of the number of blacks qualifying for the housing to the number of blacks in the Chicago-area population.

Given the Malone court's characterization of the 40% figure, the comparison made in Arlington Heights I is meaningless. Yet the Malone court persisted. It stated that, under the Arlington Heights analysis, there is no discriminatory effect if the percentage of the population that is non-white (18% in Arlington Heights I) is the same as the percentage of the non-white population that is eligible for the housing project (according to Malone, 40% in Arlington Heights I). Although the court had information on the first ratio ("12.5% of the St. Louis area population is non-white") it did not have any figures for the second ratio, which it assumed had been considered in Arlington Heights I ("there is no evidence of what the precise percentage of non-whites who qualify for § 8 housing is"). 77 "Thus, based on the evidence in this case, this Court is unable to make the statistical comparison that the Arlington Heights Court found relevant." 78 But the comparison which the court tried unsuccessfully to make is meaningless, and it was not the comparison that Arlington Heights found relevant.

Finally, the Malone court concluded that absolute numbers were more important anyway. There was no discriminatory effect because in terms of numbers there are more whites than blacks in the St. Louis area who qualify for § 8 housing. It follows from this fact that the percentage of persons qualifying for § 8 housing who are white is greater than the percentage of persons qualifying for § 8 housing who are black. 79

The Court added that in its opinion, this evidence was the "most probative" on the question of whether the defendant's action bears more heavily on one race than another. 80

IV. Problems with the Current View of Discriminatory Effect

The Malone case and the other cases considered above illustrate the difficulty that some courts have had in applying a Griggs-type analysis of discriminatory effect to the housing project cases. But there are other problems in making that analogy. Those problems are discussed below.

A. The Distinction between Initiation and Abandonment of Public Projects

The first problem is that, with respect to public housing, the courts' view of discriminatory effect requires a distinction between a municipality's failure to initiate steps to create such housing and a municipality's abandonment of efforts that have once begun. That distinction, however, lacks a theoretical basis. The discriminatory effect is the same in either case.

Where public housing projects are involved, the consequence of focusing on the discriminatory effect of a municipality's rejection of a single proposed project is to ignore the effect of municipal actions which are not tied to a particular project. If the municipality never

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74. Id. at 269.
75. See supra part III(A).
77. Id.
78. Id.
79. Id. at 1161.
80. Id.
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Where public housing projects are involved, the consequence of focusing on the discriminatory effect of a municipality’s rejection of a single proposed project is to ignore the effect of municipal actions which are not tied to a particular project. If the municipality never

78. Id.
79. Id. at 1161.
80. Id.
even considers building any public housing, or if the municipality's consideration of a project never passes a certain point of definitiveness, no discriminatory effect will be found. Thus, there is an arbitrary limitation on the kinds of municipal actions that "count" in the calculus of discriminatory effect. But clearly the loss of a potential housing project that was rejected at the very first stages of consideration produces just as much a discriminatory effect as rejecting that project once it has been formally proposed. The result of the distinction is that a municipality whose liberal attitude towards low-income projects leads it to consider them seriously will more likely be found in violation of the Act than a municipality whose illiberal attitude prevents even the slightest consideration of a project.

It is true that the Act is said not to impose any affirmative duty on municipalities to provide housing. But that principle does not solve the problem. The "no affirmative duty" reasoning seems to be grounded, not on any theoretical basis demonstrating the absence of a discriminatory effect, but on a court's unwillingness to order a municipality to spend its funds. A municipality will nevertheless incur costs for projects which it does not directly finance, in the form of increased public services and lower property tax revenues compared to other developments that might have located on the site instead. Moreover, the court's unwillingness to order the municipality to spend its own money would not support a distinction between a municipality which seeks public funds elsewhere (e.g., from the federal government) and then abandons its efforts and a municipality which makes no such efforts in the first place. In Smith v. Town of Clarkson, the town formed a joint housing authority with two neighboring municipalities to seek funds from the Department of Housing and Urban Development (HUD) for the construction of public housing. HUD approved their application and appropriated $85,000 which was used to purchase a site. An architect was employed, who "substantially completed preliminary pre-construction sketches and site layouts." When opposition to the project was voiced, the town withdrew from the joint housing authority and thereby ended the project. The Fourth Circuit Court of Appeal found that the town's conduct had a discriminatory effect and was a violation of the Act, even though there was no affirmative duty to provide housing. Although it was improper for the district court to have ordered the town to construct public housing from its own funds, it was proper to fashion an order which would "place the project at the point of realization achieved prior to the [town's] violations . . . (and to require the town) to reestablish the procedures and plans in place prior to the time of their termination due to the proven violations and require[e] it to aggressively and in good faith pursue those plans." This remedy was "aimed at placing the parties in the positions they occupied before the
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violations occurred.\textsuperscript{111} The court's decision means that a municipality has a duty not to backtrack from whatever steps it has once taken along the path to creating housing. But does not a municipality which fails even to start along the path create a discriminatory effect as well? The courts' understandable reluctance to order a city to spend public funds does not provide a \textit{theoretical} explanation, based on the absence of discriminatory effect, for this distinction.

\textbf{B. The Self-Selection Problem}

A similar problem arises with respect to projects that are privately initiated and privately funded. Private developers will be less likely to attempt to build in a municipality which has a reputation for refusing to rezone land to accommodate them than in a more liberal municipality. But the effect of a municipality's housing practices in discouraging developers from proposing projects at all is simply not taken into account. This "self-selection" problem has been acknowledged in the context of employment discrimination. In \textit{Dothard v. Rawlinson},\textsuperscript{117} the United States Supreme Court noted that an inspection of the percentages of applicants of different sexes who were offered jobs will understate discriminatory effect if those who know of the defendant's discriminatory hiring policies were discouraged from applying. No housing case, however, has applied this analysis.

Thus, the consequence of focusing on the single project which is the subject of litigation has the result of overestimating the discriminatory effect caused by a municipality which has made \textit{some} efforts to provide housing and to ignore the discriminatory effect of discouraging project proposals in the first place. This narrow view of effect gives municipalities an incentive to do as little as possible to provide for low-income housing. It is the municipalities that make some effort to do so and then fall short of their original goals that are most open to liability.

\textbf{C. The "Weeding Out" Problem}

Even for projects which do reach the proposal stage, there is another kind of "self-selection" that takes place. If a municipality rejects a project whose population is not disproportionately black, no discriminatory effect is shown. But the absence of disproportion may simply be

\begin{itemize}
  \item 86. Id. at 1065 n.9.
\end{itemize}
the result of the developer (or the municipality itself in the case of
courts-initiated projects) reducing the number of blacks at some ear-
erlier time in order to increase the project’s chances of acceptance. If this
weeding-out process takes place before the project reaches the stage at
which the court evaluates discriminatory effect, the loss of those resi-
dents is not taken into account in the calculation of disproportion.

An example of this phenomenon is seen in *Citizens Committee for
Faraday Wood v. Lindsay.* 88 The case concerned a claim under the
fourteenth amendment, but the Second Circuit’s discussion of the dis-
criminatory effect claim is relevant for cases brought under the Fair
Housing Act. 89 New York City had begun plans for a publicly financed
housing project. The initial plans called for half of the housing units in
the project to be for low-income families and half for middle-income
families. After public hearings, however, the project was changed to
accommodate 80% middle-income and 20% low-income residents. Finally
the city abandoned the project completely. The court found that the
abandonment of the project did not produce a discriminatory effect
because for the most part only middle-income persons were affected and
that group was not racially disproportionate. The court explained:

Since plaintiffs had no complaint with the city’s actions until Au-
gust, 1969, the project under consideration then — the 80%-20%
project — is the proper measure against which the effect of the
termination should be measured. The 50%-50% plan was never
more than a tentative suggestion of how the site might be used. 90

Thus, the persons who were “denied” housing before the project
reached the court’s arbitrary dividing line were left out of the court’s
calculation of discriminatory effect. The anomalous result is that a mu-
icipality which produces its discriminatory effect in stages will more
likely escape liability than a municipality which produces its effect all
at once. 91

*Faraday Wood* involved publicly financed housing, but the diffi-
culty would also arise where a private developer decreased the low-in-

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89. The case was decided before the Supreme Court held in Washington v. Da-
vis, 426 U.S. 229 (1976), that a showing of discriminatory effect is insufficient to estab-
lish a violation of equal protection.
90. *Faraday Wood*, 507 F.2d at 1068 n.6.
91. Indeed, the dissenting judge in *Faraday Wood* called attention to this prob-
lem. *Id.* at 1076 (Oakes, J., dissenting).
come component to satisfy a perceived (but unspoken and unproven) discriminatory motive on the part of municipal officials. It follows that the more discriminatory a municipality is (or the more discriminatory it is perceived to be by a private developer), the more likely a developer (or the municipality itself) will reduce the black population at an early stage in order to make it more acceptable. It will therefore be the more literal municipalities which are most open to liability for rejecting a project with a disproportionately black population.

W. The Two Models of Discriminatory Effect

What the courts have not realized is that application of the discriminatory effect theory to the project cases is possible under two different models, called here the "intrinsic" and "extrinsic" models. It is the intrinsic model which has been applied by the cases discussed so far in this Article. But the Author believes that analysis of the project cases under the extrinsic model is more appropriate and would avoid the problems previously discussed.

A. The Intrinsic Model

In the cases discussed above (at least in those cases that compared percentages and not absolute numbers), the rejection of the housing project was viewed as analogous to the employer's adoption and use of the diploma requirement in Griggs. In the project cases, the courts view the municipality's action as imposing a disadvantage on potential residents of the project (persons who have sufficiently low income) in the same way that persons without diplomas were disadvantaged in Griggs. If the percentage of blacks who qualify for residence in the project is greater than the corresponding percentage of whites, the effect in the project cases is similar to that in Griggs.

This way of looking at the municipality's action is called the "intrinsic" model here because the discriminatory effect is "proved" by inspection of the racial proportions of the one project at issue. The effect is, in a sense, "inside" the one project (or, intrinsic to the project's potential population). This means, of course, that actions of the municipality other than the rejection of the one project at issue are irrelevant to a showing of discriminatory effect.

B. The Extrinsic Model

There is another view, however. The Author believes that the rejection of one project is conceptually closer to the rejection of one applicant for employment by the employer in a Griggs-type case (or the rejection of one applicant for an apartment in a similar housing case). Thus, the discriminatory effect is "external" or extrinsic to the population of the particular rejected project. Under the extrinsic model, the racial composition of that population is simply one datum which, together with other actions of the municipality, may show a disparate impact viewed from the level of the entire municipality.

The difference between the two models is made clearer by a closer look at a typical housing discrimination case where a private individual is the defendant. If on a particular day a landlord rejected one black applicant for an apartment, we do not conclude that there is "discriminatory effect." It is true that the landlord's conduct adversely affected proportionately more blacks than whites. But it would be inappropriate to base a finding of discriminatory effect on the landlord's rejection of this one applicant, simply because the "sample" is too small to make an accurate finding of disproportionate adverse effect or disproportional representation. If discriminatory effect were found in the rejection of a single black applicant, then discriminatory effect would be found whenever any person of any race were rejected, and a landlord who rejected blacks and whites in equal proportions would be liable for a series of discriminatory effects following one upon the other. As discussed earlier, however, a violation can be proved either (1) by showing that the reason for which the plaintiff was rejected is correlated with race (i.e., it would produce a disproportionate adverse effect/disproportional representation if applied to many people) or (2) by showing that the plaintiff evaluated a large number of applicants, producing a disproportional representation, and then presuming that the same rule was applied to the plaintiff.

Under the extrinsic model, a violation of the Act cannot be established solely from the rejection of a housing project and the racial disproportion among the persons eligible for residence there, any more than a case of discriminatory effect can be established from the rejection of one applicant for a job or an apartment. Rather, the municipality's action is viewed as one of a number of actions which affect the types of housing which locate within its borders: rezonings, refusals to rezone, construction of public housing, requests for federal funds for public housing, and even the informal production of a "reputation" that
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discourages private developers from proposing a project. Thus, the municipality's action affecting the one housing development at issue is analogous to the landlord's acceptance or rejection of one applicant. If the municipality rejected a particular project for a racially correlated reason, a violation is established. It is usually difficult to prove what the reason was. But, as in the individual discrimination case, the municipality's use of a racially correlated reason can be proved (or at least presumed) from the "results" of the municipality's housing practices. If the municipality's previous actions with respect to housing have produced racially disproportionate results, and if a presumption is made that the municipality has applied the same kind of criteria to the project at issue as it applied in its previous housing decisions, then a violation should be established. Here, "disproportionate results" means that the present population in the municipality is a racially disproportionate group, when compared with the (larger) area from which the municipality would be expected to draw its residents.

In short, the present racial mix of the municipality's population is perhaps the most important factor when assessing the lawfulness of the municipality's rejection of the particular project at issue. In this way, the effect of the municipality's actions beyond the rejection of the particular project are taken indirectly into account: the lack of affirmative action in creating low-income housing and the phenomena of "self-segregation" and "weeding out" (the problems discussed above**) will be reflected in the present housing mix.

Of course, a municipality has nowhere near the control over who lives within its borders that a landlord has over who becomes a tenant. A racial disproportion among a municipality's residents would be much less probative of a violation than a racial disproportion among a landlord's tenants.** Nevertheless, a disparity between the percentage of minorities in a municipality and their percentage in the metropolitan region should strongly favor the finding of a violation.

The two models are not mutually exclusive methods of proving a violation: a violation of the Act should be established if either model shows a discriminatory effect. The problems with the intrinsic model have not been fully recognized. As a result, the courts have put more emphasis on it — and less on the extrinsic model — than the accuracy of the former in measuring discriminatory effect would justify.

93. See supra part IV.
94. In addition, in both cases the present racial mix may be the result of past discrimination and not reflective of present practices.
C. Segregative Effect and Its Incorporation of the Extrinsic Model

The interesting thing about the theory of “segregative effect” endorsed by the courts is that it comes very close to adopting the analysis just suggested. The legislative history of the Act indicates that one of its purposes is to promote integration in housing. Accordingly, it is said that a violation of the Act is shown when a municipality’s action in excluding a housing project interferes with that integration.

The segregative effect theory appears to be an application of the extrinsic model. In the first place, the segregative effect of the loss of a project does not depend on a racially disproportionate project population. If the project was expected to include as residents a substantial number of blacks, their exclusion from a predominantly white municipality should be seen as promoting segregation. The theory of segregative effect thus represents a rejection of the intrinsic model. Second, a finding of segregative effect depends on the present population of the defendant municipality being disproportionately white.

The theory of segregative effect, then, “automatically” takes into account previous housing actions by the municipality, as reflected in

95. “The reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns.’” Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (quoting Senator Mondale, 114 CONG. REC. 3422 (1968)).
98. City of Black Jack, 508 F.2d at 1186 (“There was ample proof that many blacks would live in the development, and that the exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white.”); Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1291 (the village “remains overwhelmingly white at the present time.”). In Arlington II, the court noted that in both City of Black Jack and Kennedy Park Homes Ass’n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971), there was a strong argument supporting racially discriminatory impact in the second sense [segregative effect]. In each case the municipality or section of the municipality in which the proposed project was to be built was overwhelmingly white. . . . Thus, the effect of the municipal action in both cases was to foreclose the possibility of ending racial segregation in housing within those municipalities.

Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1291 (footnote omitted).
the present racial mix. The segregative effect theory is thus an example of looking at the "results" of a municipality’s actions with respect to a number of housing decisions in order to infer that the project at issue was evaluated on the basis of impermissible criteria. This is the extrinsic effect analysis.

VI. Conclusion

The intrinsic model — measuring discriminatory effect by the disproportionate population expected in a housing project — is unsatisfactory for a number of reasons. There are two main alternatives to the intrinsic model.

First, an increased attention can be given to the theory of discriminatory intent or racial motive. Racial motive on the part of municipal officials or the electorate has been a factor in a number of project cases. Moreover, in the individual discrimination cases, the plaintiff has been able to satisfy his burden of production with respect to racial motivation merely by showing that he is a member of a minority group and that there were no objective reasons for his rejection. If a similar rule were applied to the project cases, then the plaintiff should be able to discharge his burden of production by showing that the project was expected to contain a significant black population, not necessarily a disproportionately black population.

Second, the extrinsic model is suggested as an alternative. Because it does not confine the inquiry to the particular project at issue, it avoids some of the shortcomings of the intrinsic model. The courts have adopted the essence of the extrinsic model in their use of the theory of segregative effect.

99. It was suggested earlier that racial motive itself is a racially correlated criterion. Viewed in this way, cases of racial motive are instances of the extrinsic theory.

100. E.g., Metropolitan Hous. Dev. Corp. (Arlington Heights II), 558 F.2d at 1283.


102. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (Title VII); Robinson v. 12 Lofis Realty, 610 F.2d 1032 (2d Cir. 1979) (Title VIII). It is said that the plaintiff must show, in addition, that the employer or housing provider continued to seek applicants of the plaintiff’s qualification. See McDonnell Douglas Corp., 411 U.S. at 802.

103. In addition, because income and race are correlated, motive against the poor by municipal officials should be sufficient to show discriminatory effect.
Granted, even under the extrinsic model, no suit can be brought unless there is a particular project which has been excluded; a general claim of exclusionary practices would be insufficient to satisfy the federal standing rules. If a municipality is successful in discouraging any projects from being proposed, then it will escape liability, even under a theory of segregative effect or other variations on the extrinsic model.

The ultimate solution to the problems raised in this article would be a “fair share” theory like that adopted in New Jersey. In *Southern Burlington County NAACP v. Mount Laurel* (Mt. Laurel I), the New Jersey Supreme Court held that municipalities have a duty to provide an opportunity for building lower income housing “at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.” As the court explained in a subsequent case, that duty is created by the New Jersey Constitution:

The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare — in this case the housing needs — of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations . . . that do not provide the requisite opportunity for a fair share of the region’s need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection.


106. *Id.* at 174, 336 A.2d at 736.


In *Mt. Laurel II*, a detailed judicial system for the adjudication of *Mt. Laurel* claims was created. At the same time, the court rather pointedly invited the New Jersey legislature to produce a statutory solution, and in 1985 New Jersey’s Fair Hous-
New Jersey's approach to low-income housing thus avoids the problems previously discussed in this article. It does so by stating a municipality's housing obligation in terms of ends rather than means. A municipality is judged, not by reference to norms of proper behavior towards housing projects or proposals, but by reference to whether it has actually met its share of an equitably apportioned need for low-income housing.

It would be extremely difficult, to say the least, to extract a "fair share" theory from the federal Fair Housing Act. Barraging a drastic reinterpretation of the Act or an equally drastic expansion of federal constitutional guarantees, the extrinsic model is proposed here as the fairest way to measure the extent to which a municipality has helped to achieve the congressionally declared policy of providing for fair housing throughout the United States. 108

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The Medium is the Message: Standards of Review in Criminal Constitutional Cases in Florida

James T. Miller

I. Introduction: The Scope of This Article

When a court considers constitutional challenges to a criminal law, it should logically begin its task with the selection of the appropriate standard of review. A standard of review is a set of rules of construction, presumptions, and a balancing mechanism designed to interpret the Constitution and the challenged law. 1 Which standard of review will be applied in a given situation depends on the nature of the constitutional problem and the challenged law.

A review of criminal cases in Florida reveals a lack of consistency or uniformity. Courts seem to reach a decision and then search for a particular standard to fit it. Sometimes a court will even announce a decision without using a particular standard of review. The correct standard of review should inexorably lead to a particular result and not be merely the post hoc justification for a desired result. 2 Attorneys, relying on the arguments described in the case law, have also selectively used standards of review.

Florida courts have unconsciously implemented one of Marshall McLuhan's axioms — "The Medium is the Message." 3 McLuhan's theory was that the presentation of an idea may be as important as the idea itself and that the method of presentation can have significant im-


2. See McLuhan and Reeves, The Medium is the Messagew, The Medium is the Message (1964).