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# BUSINESS NECESSITY IN TITLE VIII: IMPORTING AN EMPLOYMENT DISCRIMINATION DOCTRINE INTO THE FAIR HOUSING ACT

## INTRODUCTION

During the 1960's, Congress enacted two analogous statutes to remedy discrimination in areas of pervasive significance. The first, Title VII of the 1964 Civil Rights Act,<sup>1</sup> was addressed to discrimination in employment. It was followed four years later by the Fair Housing Act, Title VIII of the Civil Rights Act of 1968,<sup>2</sup> a comparable prohibition of discrimination in housing.

These statutes represent a congressional determination that certain immutable personal characteristics are not proper factors for decisions in employment or housing.<sup>3</sup> Under each, conduct is always unlawful if a designated personal characteristic is any factor in the transaction—that is, if any taint of intentional discrimination appears.<sup>4</sup> But each statute has also been interpreted to prohibit facially neutral policies or practices

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (1982)) (hereinafter referred to as "Title VII").

The critical prohibitory section is codified as amended at 42 U.S.C. § 2000e-2(a) (1982). Title VII forbids employment practices that discriminate on the basis of race, color, religion, sex, or national origin. *Id.*

2. Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (1982)) (hereinafter referred to as "Title VIII" or "Fair Housing Act").

The critical prohibitory section is codified as amended at 42 U.S.C. § 3604 (1982):

[I]t shall be unlawful—

(a) 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.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

*Id.*

Discriminatory conduct not easily characterized as either a refusal to rent or sell or to negotiate may be reached under the "otherwise make unavailable or deny" language of § 3604(a), an omnibus provision. Calmore, *Fair Housing and the Black Poor: An Advocacy Guide*, 18 Clearinghouse Rev. 609, 612 (1984); see Schwemm, *Discriminatory Effect and the Fair Housing Act*, 54 Notre Dame Law. 199, 203 (1978) (language reflects intent to reach "almost every housing practice imaginable").

3. See Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 Ga. L. Rev. 376, 377 & n.7 (1981) (Title VII circumscribed employers' unfettered right at common law to hire and fire) [hereinafter cited as *Judicial Dualism*]. Representative Steiger expressed a similar view about Title VIII during the House debate on the bill. See *infra* note 140 and accompanying text.

4. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII proscribes overt discrimination); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.) (under Title VIII, race is an impermissible factor in real estate transactions, even if it is not the sole reason or total factor in discrimination), *cert. denied*, 419 U.S. 1021 (1974); see also Calmore, *supra* note 2, at 625 (discriminatory acts violate Title VIII if race is but one of the factors involved); *Judicial Dualism, supra* note 3, at 385 (intentionally discriminatory practices cannot be justified as business necessity).

that, in operation, have the *effect* of disproportionately excluding individuals within any protected class, regardless of the defendant's lack of subjective intent.<sup>5</sup> This "disparate impact" (or "disparate effect") standard is necessary because the substantial difficulty of proving discriminatory intent would otherwise frustrate statutory objectives.<sup>6</sup> It can be a powerful weapon for the plaintiff challenging discriminatory practices.<sup>7</sup>

Courts and commentators also recognize structural affinities between the two laws.<sup>8</sup> Interpretation of the Fair Housing Act has therefore developed through analogy to Title VII doctrine.<sup>9</sup> Title VIII has, most importantly, incorporated the Title VII *prima facie* case structure<sup>10</sup> that governs burdens of proof, persuasion and production in litigation under both statutes.<sup>11</sup> This structure consists of the plaintiff's *prima facie* case based either on a showing of discriminatory effect (impact), as above, or of discriminatory treatment.<sup>12</sup> A successful *prima facie* showing shifts the burden to the defendant to justify the practice by presenting legitimate countervailing business considerations. In a disparate treatment case, a low threshold of "business purpose" can rebut the inference of

5. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (under Title VII, defendant's lack of intent does not redeem practices that discriminate in operation); R. Schwemm, *Housing Discrimination Law* 59 (1983) (same, Title VIII). For a discussion of this point in the context of Title VII, see *infra* Part I.A. For a similar discussion in the context of Title VIII, see *infra* note 115 and accompanying text. Thus, statistical underrepresentation alone may suffice to make out a *prima facie* case. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 & n.20 (1977); see also Comment, *Statistics and Title VII Proof: Prima Facie Case and Rebuttal*, 15 Hous. L. Rev. 1030, 1036 (1978) [hereinafter cited as *Statistics and Title VII Proof*].

6. See *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1117 (2d Cir.) (Mansfield, J., dissenting), *reh'g denied*, 517 F.2d 918 (2d Cir.), *cert. denied*, 423 U.S. 896 (1975); Schwemm, *supra* note 2, at 204-05; *Judicial Dualism*, *supra* note 3, at 379.

7. See *Judicial Dualism*, *supra* note 3, at 381 (disparate impact liability has the potential to eliminate subtle forms of discrimination).

8. See Calmore, *supra* note 2, at 621 ("employment discrimination is important because Title VII provides the primary statutory development and analysis of substantive theory of discrimination cases"); Schwemm, *supra* note 2, at 261 ("In many respects, the analogy seems apt."). Numerous Title VIII cases have relied on Title VII authority. See *infra* note 118 and accompanying text.

9. Calmore, *supra* note 2, at 625.

10. The concept of a *prima facie* case is not unfamiliar in other areas, for example in jury discrimination suits, which also involve a shifting of burden. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Statistics and Title VII Proof*, *supra* note 5, at 1031. This Note distinguishes the *prima facie case* from the *structure* of which it forms a part in Titles VII and VIII. This structure includes two distinct branches, disparate treatment and disparate effect, each with its own mode of analysis, in addition to the *prima facie case*. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 & n.5, 253 (1981) (Supreme Court has recognized different analysis for disparate treatment and disparate impact cases). See *infra* notes 12-15 and accompanying text.

11. Calmore, *supra* note 2, at 620.

12. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

intentional discrimination.<sup>13</sup> In a disparate impact case, a more stringent threshold is imposed: the challenged practice must be a matter of "business necessity."<sup>14</sup> The principle of burden shifting forms a critical component of the structure by relieving the plaintiff of the need to make the difficult showing of intent.<sup>15</sup>

Although the two acts share broad purposes and structure, they differ in important respects. For Title VIII, the limits of the analogy with Title VII are becoming more important as employers' discretion receives greater deference in Title VII doctrine.<sup>16</sup> These limits become critical in disparate effect analysis because fewer business considerations will suffice to support the defense of business necessity in housing than in employment.<sup>17</sup> Consideration of business necessity therefore brings into sharper focus the distinctions between employment and housing, and suggests that the useful analogy to Title VII doctrine should, in some respects, give way to independent doctrine and analysis under the Fair Housing Act.

Express statutory exemptions for certain activities or practices suggest

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13. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (defendant must articulate legitimate, nondiscriminatory reason for treating plaintiff differently). The essence of the disparate treatment case is the defendant's intent. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (plaintiff's "ultimate burden" is to prove that defendant intentionally discriminated); see also Note, *Rebutting the Griggs Prima Facie Case under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. Ill. L. Rev. 181, 184-85 (1981) (point of inquiry is to determine whether employer's actions were motivated by discriminatory animus) [hereinafter cited as *Rebutting the Griggs Prima Facie Case*]. In rebuttal to the prima facie case, the defendant "need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. However, the articulation must be made by admissible evidence, not by answer or argument of counsel. *Id.* at 255 & n.9. The plaintiff may then come forward with proof that the offered reason is a mere pretext for discriminatory motive. *Id.* at 255-56. The *McDonnell Douglas* four part prima facie case checklist, see *McDonnell Douglas*, 411 U.S. at 802, allows the plaintiff to begin the case without making the difficult showing of intent. Only if the defendant rebuts the prima facie showing must the plaintiff prove intent—in the pretext stage. See *id.* at 804-05.

14. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (Title VII requires the removal of artificial, arbitrary, unnecessary barriers to employment when they have discriminatory effect); *Calmore*, *supra* note 2, at 624 (Title VIII). See *infra* notes 38-83 and accompanying text.

The plaintiff in a disparate impact case also may offer evidence that the defendant's proffered business necessity is a pretext for intentional discrimination. This option originated in disparate treatment analysis, see *supra* note 13, but it seems to have become part of disparate effect analysis. See *Connecticut v. Teal*, 457 U.S. 440, 447 (1982).

15. See Note, *Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 Yale L.J. 98, 100 (1974) (mere "business purpose" justification, not subject to further scrutiny, would make it too easy for employer to mask discriminatory motive) [hereinafter cited as *No-Alternative Approach*]. See *infra* notes 30-32 and accompanying text. Although the need to relieve the plaintiff of the burden of proving intent is particularly acute in the disparate effect branch, it is implicit in the rationale for disparate treatment analysis as well. See *supra* note 13.

16. See *infra* notes 94-108 and accompanying text.

17. See *infra* Parts II.B. and II.C. This narrower factual scope requires the adjustments to business necessity analysis that are proposed by this Note.

how notions of business necessity differ in housing and employment. Title VII exempts bona fide occupational qualifications (bfoq),<sup>18</sup> the operation of legitimate seniority systems<sup>19</sup> and the results of job-related tests.<sup>20</sup> These exemptions reflect congressional concern with minimizing interference with business efficiency and productivity.<sup>21</sup> Title VIII, in comparison, provides for exemptions based, not on the character of the activity in question, but on the scope of the defendant's activities in the housing "business."<sup>22</sup>

The absence of functional exemptions from Title VIII reflects fundamental differences<sup>23</sup> between housing and employment. The employer has broad areas of legitimate concern; a decision to hire creates a relationship in which highly diverse considerations of safety, efficiency and the worker's skill can be important.<sup>24</sup> In contrast, the variety of situations in the housing context is more limited and relationships are correspondingly more stereotyped. The lessor or seller is principally inter-

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18. 42 U.S.C. § 2000e-2(e)(1) (1982). The bfoq exception allows express classification by religion, sex, or national origin only when such characteristics are literally "occupational qualification[s] reasonably necessary to the normal operation of [the] particular business or enterprise." *Id.* Race is not within this exception, however, and is thus never a proper basis for classification. The bfoq is interpreted narrowly. See *Dothard v. Rawlinson*, 433 U.S. 321, 332-34 (1977) (classification by sex). See *infra* notes 41-42 and accompanying text.

19. 42 U.S.C. § 2000e-2(h) (1982).

20. *Id.*

21. See *A No-Alternative Approach*, *supra* note 15, at 104. Equality of opportunity is important, but not absolute. *Id.* at 104-05 (Congress did not intend to promote minority employment at the expense of business efficiency).

22. See 42 U.S.C. § 3603(b)(1) (1982) (single family house sold or rented by owner). The exemption is very limited. It does not apply if the owner owns more than three such houses at one time. Nor does it cover more than one such sale in a 24-month period if the owner is not resident in the house. *Id.* The statute further provides that, after Dec. 31, 1969, the exemption applies only if the owner sells without the assistance of a broker or other real estate professional, *id.* § 3603(b)(1)(A), and does not use certain prohibited forms of advertising, *id.* § 3603(b)(1)(B).

A second exemption covers small rental units (up to four independent families) in which one of the living quarters is the owner's residence. *Id.* § 3603(b)(2). This is known as the "Mrs. Murphy Exemption." See Schwemm, *supra* note 2, at 232 n.228.

Religious organizations and private clubs are also exempt under 42 U.S.C. § 3607 (1982).

The small employer falls within an analogous exemption under Title VII. See 42 U.S.C. § 2000e(b) (1982) ("employer" defined as a person who has 15 or more employees for each working day in each of 20 or more calendar weeks). Title VII, unlike Title VIII, further provides for the functional exemptions already discussed. See *supra* notes 18-20 and accompanying text.

Transactions involving housing defendants within the Title VIII exemptions might still be subject to challenge under 42 U.S.C. § 1982 (1982), which forbids discrimination in the sale or rental of real estate—but only racial discrimination, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968), and probably only if intentional, see Schwemm, *supra* note 2, at 234.

23. See Schwemm, *supra* note 2, at 235 (nature of employment relationship differs from relationship of parties to housing transaction).

24. See *infra* Part I.B.

ested in the applicant's ability to pay.<sup>25</sup> Although a lease creates a relationship,<sup>26</sup> fine points of skill, education and the like are not critical, if important at all.

Judicial treatment of public entity defendants under Title VIII further reflects these fundamental differences.<sup>27</sup> Title VII applies without differentiation to public and private defendants,<sup>28</sup> whose interests as employers are analytically indistinguishable. In Title VIII cases, however, courts have developed separate, more severe standards for public entities.<sup>29</sup> This different treatment evidences awareness that the role of the public entity in housing, although analogous to the function of the private party, is limited by factors that have no counterpart in employment.

These essential distinctions help clarify the proper role of the concept of business necessity in housing. This Note will survey the origin and application of the analysis in Title VII and the recent emergence of greater judicial deference to employer discretion. It will then consider some business matters common in housing. The Note concludes that business necessity has a place in the Fair Housing Act, both as a defense and as an analytical approach, but that it should have a narrower meaning and application than it has in employment.

## I. BUSINESS NECESSITY: TITLE VII BACKGROUND

### A. *Origins: Liability Without Intent*

Neutral employment policies<sup>30</sup> that are apparently job-related and pursued without discriminatory animus can violate Title VII. Liability based on effect reflects two policy judgments. First, proof of subjective intent is so difficult that to require it would defeat the purpose of the legislation.<sup>31</sup> Second, unintended discrimination is as invidious and as harmful as intentional discrimination.<sup>32</sup>

25. See *infra* notes 139-41, 151-53 and accompanying text.

26. See *infra* notes 152-57 and accompanying text.

27. See *infra* Part II.C.

28. See Note, *Fair Employment Practices: The Concept of Business Necessity*, 3 Memphis St. L. Rev. 76, 86 (1972) [hereinafter cited as *Concept of Business Necessity*]. See *infra* note 273 and accompanying text.

29. See *infra* notes 278-79 and accompanying text.

30. "Neutral" in this context means classifications that do not expressly categorize individuals according to the prohibited personal characteristics of race, color, religion, sex, or national origin. Any *express* classification on these bases is unlawful. See *supra* notes 1-2, *infra* note 89 and accompanying text.

31. See *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) ("[e]ffect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations"), *cert. denied*, 422 U.S. 1042 (1975); Schwemm, *supra* note 2, at 216 (defendant less likely to escape liability for disguised intentional conduct because objective effects are easier to prove than subjective intent). See *supra* note 6 and accompanying text.

32. See *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976) ("a thoughtless housing practice can be as unfair to minority rights as a willful scheme"); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) (arbitrary thoughtlessness as disastrous to prive rights as willful scheme), *cert. denied*, 422 U.S. 1042 (1975); *cf.*

The Supreme Court recognized effect-based liability and its corollary defense of business necessity in *Griggs v. Duke Power Co.*<sup>33</sup> The plaintiff challenged the defendant employer's requirement that its employees meet certain educational criteria.<sup>34</sup> The Supreme Court held that conduct free of subjective intent to discriminate could violate Title VII,<sup>35</sup> and that disproportionate effect on members of a protected class was sufficient to make out a violation.<sup>36</sup> This represents an abrogation of traditional common law notions of intent and suggests a strict liability approach.<sup>37</sup>

The Court also left room for the employer to justify its practices, however.<sup>38</sup> The standard enunciated is that a job requirement that has a discriminatory effect may stand only if it has a manifest relation to the employment, the touchstone of which is business necessity.<sup>39</sup> In *Griggs*, the defendant's mere presumption of the requirement's usefulness, without meaningful study, precluded such a finding.<sup>40</sup>

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*Judicial Dualism*, *supra* note 3, at 376-77 (high minority unemployment attributable to existence of unintentionally discriminatory practices that unnecessarily exclude minorities).

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

34. The employer required that employees have a high school education, *id.* at 425-26, or pass a standardized general intelligence test, *id.* at 427-29.

35. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . . . Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original).

36. *See id.* at 431 (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). This approach is based less in the language of Title VII than in the broad purposes underlying the statute. *See Schwemm*, *supra* note 2, at 215.

37. *See Judicial Dualism*, *supra* note 3, at 379, 386. The effect is to enable the remedial force of the statute to reach unnecessary discriminatory practices. *Id.* at 379-80.

38. Title VII does not require disregard of qualifications. *See Griggs*, 401 U.S. at 430. But they must not be "artificial, arbitrary, and unnecessary." *Id.* at 431.

39. *Id.* at 431.

40. The requirements were imposed on the basis of the defendant's judgment that they generally would improve the quality of its work force. But the Court observed that neither requirement bore "a demonstrable relationship to successful performance of the jobs for which it was used." *Id.* The record showed, on the contrary, that employees who did not meet the requirements had performed satisfactorily. *Id.* at 431-32.

In both Title VII and Title VIII, impermissible disparate effect often flows from policies adopted and enforced without thorough analysis of their utility to the business. Business necessity analysis demands that presumptions be expunged and some documentation offered. Although this protects the civil rights of the plaintiff, the defendant's interests are often furthered too. The following comments on Title VII apply as well to most housing defendants:

[T]he interests of the employer in non-job-related standards often are minimal. Businesses are generally meant to make money. The employer's chief interest is to be as productive as possible. Discrimination on grounds other than ability is costly to the employer. To the extent his decisions ignore considerations of productivity, and are informed by irrational tastes and sentiments, he bears real costs. When he restricts the pool that he considers for employment, he pays higher wages for the privilege. Thus, requiring some showing of job relatedness is, on an economic analysis, actually beneficial to the employer, even if it imposes some psychic costs. These psychic non-job-related interests of an em-

Effect-based liability and the business necessity defense together constitute a judicially-developed counterpart to statutory liability for intentional discrimination and its "bona fide occupational qualification" exception.<sup>41</sup> Because the bfoq is a narrow and specific exception that has been given a limited interpretation,<sup>42</sup> however, the business necessity defense is a necessary element of the overall structure: a business should not be required to compromise its viability if its policies have a discriminatory effect.<sup>43</sup> The defendant's burden is not light, however:<sup>44</sup> many legitimate profit-maximizing devices are vulnerable to Title VII attack because of discriminatory effect.<sup>45</sup>

### B. *After Griggs: Articulating and Applying Business Necessity Analysis*

The *Griggs* articulation of disparate impact liability and business necessity analysis provided only minimal guidance,<sup>46</sup> but the Court created a structured analytical approach flexible enough to serve an essentially fact-specific inquiry.<sup>47</sup> The doctrine has proven adaptable to highly diverse situations.

Most courts have construed the defense narrowly, imposing a significant burden on the defendant.<sup>48</sup> An early Fourth Circuit formulation<sup>49</sup> posited three factors to guide the analysis. First, the defendant must

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ployer are not strong enough . . . to justify any significant differential racial impact.

*Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1117-18 (1971).

41. See *Judicial Dualism*, *supra* note 3, at 383-84.

42. See 29 C.F.R. §§ 1604.2(a), 1606.4 (1985); *Judicial Dualism*, *supra* note 3, at 383 n.34 (applies only to express classification on basis of sex, religion, national origin; very narrowly construed). See *supra* note 18.

43. See *Judicial Dualism*, *supra* note 3, at 382-84.

44. See *infra* notes 48-59 and accompanying text.

45. Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. Chi. L. Rev. 911, 912 (1979) [hereinafter cited as *Business Necessity Defense*]; see also *Rebutting the Griggs Prima Facie Case*, *supra* note 13, at 200-01 (standard may extend to practices that select the best qualified applicant if dire economic consequences do not result from failure to use the practices). Mere inconvenience is not enough. *Johnson v. Pike Corp.*, 332 F. Supp. 490, 496 (C.D. Cal. 1971).

46. See *Judicial Dualism*, *supra* note 3, at 386; see also *Business Necessity Defense*, *supra* note 45, at 911-12 (Court enunciated disparate impact standard but did not define scope of business necessity).

47. See *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1275-76 (9th Cir. 1981) (fact-specific nature of inquiry evidenced by failure of courts to agree on formulation of defendant's rebuttal burden), *cert. denied*, 455 U.S. 1021 (1982); see also *Judicial Dualism*, *supra* note 3, at 389; Senatore, *Minimizing employer litigation exposure to disparate impact discrimination claims in the hiring process*, 55 Fla. B.J. 489, 493 (1981).

48. See *Constitutional Law—Business Necessity Standard of Title VII Discriminatory Impact Cases Jeopardized by Newman v. Crews*, 651 F.2d 222 (4th Cir. 1981), 55 Temple L.Q. 435, 446 & n.20 (1982) [hereinafter cited as *Business Necessity Standard*]; *Business Necessity Defense*, *supra* note 45, at 920.

49. *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).



have an overriding business purpose. Second, the challenged practice must be necessary to business operation and sufficiently compelling to override any racial impact. Third, there must be no available alternative that would further the business purpose with less discriminatory effect.<sup>50</sup> This approach has had wide influence<sup>51</sup> and exemplifies the rigor most courts have brought to the analysis.<sup>52</sup> Only essential practices survive,<sup>53</sup> and dire economic consequences have been required in order to overcome disparate impact.<sup>54</sup> Inconvenience by itself is not sufficient,<sup>55</sup> but where the disparate impact is slight, the employer's burden is correspondingly lower.<sup>56</sup> The availability-of-alternatives component is especially important because it removes the analysis from the realm of simple balancing.<sup>57</sup> A finding of less-discriminatory alternatives almost certainly means that the defendant's practices will be held unlawful.<sup>58</sup> The defendant's failure even to consider such alternatives has been held violative of Title VII even if the plaintiff does not offer evidence of alternatives.<sup>59</sup>

With general agreement about the outlines of the business necessity analysis, its application was extended beyond the *Griggs* context of edu-

50. *Id.* at 798.

The practice at issue should actually (i.e. successfully) serve the business interest asserted, and be urgent or essential to the business. *See Schwemm, supra* note 2, at 220-21, 258.

51. *See Judicial Dualism, supra* note 3, at 398 & n.103; *Business Necessity Standard, supra* note 48, at 448-49; *Business Necessity Defense, supra* note 45, at 920.

52. *See Judicial Dualism, supra* note 3, at 398; *Business Necessity Defense, supra* note 45, at 920.

53. *See Business Necessity Defense, supra* note 45, at 920.

54. *See Rebutting the Griggs Prima Facie Case, supra* note 13, at 200. The *Lorillard* court expressed willingness to impose some costs on the employer. *See Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 n.8 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *But see New York City Transit Auth. v. Beazer*, 440 U.S. 568, 590 & n.33 (1979) (suggesting that cost to the employer is a relevant factor). What will be too great a cost for an employer to bear will, of course, vary from case to case.

55. *See Statistics and Title VII Proof, supra* note 5, at 1045 n.150; *see also Johnson v. Pike Corp.*, 332 F. Supp. 490, 496 (C.D. Cal. 1971) (to allow employers to escape liability by showing mere inconvenience would be contrary to congressional purposes).

56. *See Judicial Dualism, supra* note 3, at 396.

57. *See id.* at 397; *cf. Concept of Business Necessity, supra* note 28, at 83 (characterizing *Robinson v. Lorillard* approach as a balancing test); *A No-Alternative Approach, supra* note 15, at 101 (same).

The availability-of-alternatives component can be useful to the employer: although it sets a stringent threshold, he may escape liability if in fact there are no alternatives to the challenged action. This possibility provides incentive to examine practices and eliminate unintended discrimination.

The Supreme Court seems to have embraced the availability-of-alternatives analysis in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (plaintiff may show less-discriminatory alternatives to defendant's proffered job-related tests). The current view places the burden of proof of alternatives on the plaintiff, not the defendant. Detailed discussion of this evidentiary issue is beyond the scope of this Note.

58. *See Rebutting the Griggs Prima Facie Case, supra* note 13, at 205.

59. *See Allen v. City of Mobile*, 464 F. Supp. 433, 440 (S.D. Ala. 1978) (failure to consider alternative procedures fatally defective).

cational requirements. Employment testing was early recognized as a fertile area for job-relatedness challenge under Title VII.<sup>60</sup> The Equal Employment Opportunity Commission (EEOC) promulgated guidelines defining a statistical validation process for evaluating the success of a criterion or test in predicting job performance.<sup>61</sup> The standard broadly governs selection procedures used as a basis for any employment decision.<sup>62</sup>

Job requirements other than testing and testing analogues demand a different analytical focus because empirical proof of job relatedness is difficult.<sup>63</sup> When disparate impact is alleged, business necessity analysis must proceed more nearly as a balancing of the employer's interests against the magnitude of the disparate effect. The employer's legitimate concerns may be expressed as a matter of the needed degree of skill as against the economic and human risks of hiring an unqualified applicant.<sup>64</sup>

The diverse considerations that employers have urged as matters of business necessity illustrate the considerable utility of the doctrine. For

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60. The leading example is *Griggs* itself. See also *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (tests for police officers); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972) (tests for school supervisors).

61. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1985). The core of the process requires that the criterion be a valid predictor of job performance, as measured by a prescribed statistical correlation between test and job performance. The guidelines also incorporate the availability-of-alternatives component. *Id.* They have generally been accorded considerable deference by the courts. See *Rebutting the Griggs Prima Facie Case*, *supra* note 13, at 201. Still, they do not have the force of administrative regulations. See *Judicial Dualism*, *supra* note 3, at 393.

These guidelines preceded, and indeed were at issue in, *Griggs*, 401 U.S. at 433-34. The Court noted that they were supported by legislative history and Title VII itself, and were entitled to great deference. *Id.*; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975). "The message of these Guidelines is the same as that of the *Griggs* case." *Id.* at 431.

62. 29 C.F.R. § 1607.2(B), (C) (1985). "Employment decisions include but are *not limited to* hiring, promotion, demotion, membership (for example, in a labor organization), referral, [and] retention . . ." *Id.* § 1607.2(B) (emphasis added). Generally, the guidelines require a relation between the selection device and some quantifiable aspect of job performance. See *id.* § 1607.16(D), (E), (F) (defining content, construct and criterion-related validity). Subjective oral interviews, for example, are vulnerable to Title VII challenge on analogous terms. See *Hamilton v. General Motors Corp.*, 606 F.2d 576, 580 (5th Cir. 1979) (subjective oral interview not per se violative of Title VII where guided by "meaningful, known objective standards"), *cert. denied*, 447 U.S. 907 (1980). Subjective selection criteria are problematic because they do not fit neatly under the disparate impact (neutral criterion with discriminatory operation) or disparate treatment (different conduct toward particular group) branch of the structure. See *Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984) (noting difficulty of applying pure disparate treatment or impact analysis to subjective criteria). See generally *Rigler, Title VII and the Applicability of Disparate Impact Analysis to Subjective Selection Criteria*, 88 W. Va. L. Rev. 25, 33-40 (1985). Professor Rigler argues that disparate impact analysis is broad enough to embrace facially neutral subjective selection criteria. *Id.* at 45-46.

63. See *Judicial Dualism*, *supra* note 3, at 388-89, 394; see also *id.* at 394-95 (challenge to broadly based business policy requires scrutiny of the entire business operation and the necessity of the practice in question).

64. See *Rebutting the Griggs Prima Facie Case*, *supra* note 13, at 197.

instance, physical attributes such as height or weight are sometimes used as cutoff factors in hiring<sup>65</sup> and may tend to exclude female jobseekers. Disparate impact analysis has been held appropriate in such cases, and sufficient to render the requirement unlawful when not job-related.<sup>66</sup>

A prospective employee will often be asked to reveal a criminal record. An affirmative response typically is ground for rejection.<sup>67</sup> Although courts generally disapprove of the practice,<sup>68</sup> it remains common.<sup>69</sup> But its proven racially disproportionate impact<sup>70</sup> brings business necessity analysis into play. Such treatment is more often predicated on instinct than on rational analysis,<sup>71</sup> and courts have accordingly required that the

65. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 323-24 (1977) (claim that height and weight requirements disproportionately excluded women); *Boyd v. Ozark Air Lines*, 568 F.2d 50, 52 (8th Cir. 1977) (similar challenge to minimum height requirement).

66. See *Dothard v. Rawlinson*, 433 U.S. 321, 330-32 (1977); see also *Meadows v. Ford Motor Co.*, 62 F.R.D. 98, 99-100 (W.D. Ky. 1973) (weight requirement, female plaintiff), *aff'd in relevant part*, 510 F.2d 939 (6th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). The *Meadows* court did not rely on business necessity analysis as such, but did observe that the defendant had imposed the requirement without studying its relation to job performance, *id.* at 99. This amounts to a failure to consider alternatives, which may by itself support a finding of liability under business necessity analysis. See *supra* note 59 and accompanying text. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (criteria adopted without meaningful study). The result in *Meadows* comports with business necessity analysis.

One court has held blanket exclusion of females unlawful because Title VII requires individualized assessment of ability to perform physically arduous tasks. See *Rosenfeld v. Southern Pac. R.R.*, 444 F.2d 1219, 1225 (9th Cir. 1971). The *Rosenfeld* court's concern with individualized assessment is echoed in EEOC regulations. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(b)(1) (1985).

67. Comment, *Employers' Use of Criminal Records Under Title VII*, 29 Cath. U.L. Rev. 597, 599-602 (1980) [hereinafter cited as *Criminal Records*]. Multiple convictions are more likely to result in rejection than, for instance, a single offense by a youthful first offender. But any criminal record is a substantial handicap. *Id.* at 601. Discovery of an undisclosed criminal record after hiring has been used as grounds for discharge. *Id.* at 615; see *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 520-21 (E.D. La. 1971) (reasonable requirement when employee has access to guests' rooms and property), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

68. See, e.g., *McBride v. Delta Air Lines*, 551 F.2d 113, 114-15 (6th Cir.) (per curiam), *cert. denied*, 434 U.S. 927 (1977); *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975); *Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

69. See *Criminal Records*, *supra* note 67, at 598.

70. Although some disagreement surrounds the proper statistical approach, a persuasive argument can be made that reliance on criminal records in the hiring process disproportionately affects blacks, at least with respect to the general population. *Id.* at 602-03; see *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1294-95 (8th Cir. 1975) (blacks convicted of crimes at significantly higher rates than whites; blanket exclusion of applicants with criminal records therefore disproportionately disqualifies blacks). For example, the black population of the United States in 1982 was 27.6 million, or 11.9% of the total population of 231.5 million. See Statistical Abstract of the United States 1984, at 33 (104th ed. 1983). Yet blacks composed over 29% of those arrested in 1982. *Id.* at 183 (whites = 70.7%).

71. Criminal records often have little bearing on the applicant's ability to perform job tasks. Employers' wariness notwithstanding, there is little evidence that employees with records are poor workers or safety risks. See *Criminal Records*, *supra* note 67, at 602.

conviction bear some relation to the employment in question.<sup>72</sup> Public policy in encouraging convict reform also militates against affording employers absolute discretion in this area.<sup>73</sup> Reliance on arrest records properly merits even greater suspicion.<sup>74</sup> This largely undeveloped area<sup>75</sup> illustrates the potential of disparate impact business necessity analysis for rationalizing employment criteria and employers' real needs where discriminatory effect results.

Employers also routinely inquire into prior employment history.<sup>76</sup> When the inquiry addresses experience and is used as a condition of hiring or promotion, it is subject to scrutiny for high utility.<sup>77</sup> Rejection may not be based on lack of skills that could reasonably be learned on the job.<sup>78</sup>

Safety and efficiency are sometimes invoked as matters of business necessity.<sup>79</sup> The argument is strongest when the factor giving rise to the disparate effect is clearly related to safety.<sup>80</sup> Courts hesitate to accept

72. See *Green v. Missouri Pac. R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (defendant's sweeping policy unlawful, although record could be a relevant consideration in individual hiring decisions); see also *Senatore*, *supra* note 47, at 490 (business necessity claim best supported by showing that inquiry correlates applicant's record with job requirements; inquiries should therefore be tailored as precisely as possible to a legitimately desirable employee characteristic); *Concept of Business Necessity*, *supra* note 28, at 86-87 & n.67 (record might support business necessity justification if adequately related to job performance); cf. *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (security-sensitive position made policy a business necessity), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972).

73. See *Criminal Records*, *supra* note 67, at 597-98 (employment policies of barring applicants with criminal records frustrate policy goal of reducing recidivism). Any marginal benefit to the employer should therefore be balanced against the policy of encouraging reform, frustration of which may have substantial social costs. The disparate effect on minorities should support a requirement that the employer at least look into the circumstances of the crime, not rely merely on the fact of conviction. For a suggested approach, see *id.* at 611.

74. *Id.* at 614. The fact of arrest alone has minimal probative value on the question of the person's actual participation in misconduct. *Id.*; see *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957); *Gregory v. Litton Sys.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972); see also *Senatore*, *supra* note 47, at 489-90 (use of arrest records uniformly held prejudicial to minorities).

75. See *Criminal Records*, *supra* note 67, at 622 (potential of Title VII for restricting and rationalizing employer use of applicants' criminal records largely unrealized).

76. See *Senatore*, *supra* note 47, at 491. The employer may legitimately base a rejection on a poor reference from a prior employer. *Id.*

77. See *id.* (author suggests that inquiry is subject to *Griggs* job-relatedness scrutiny).

78. 29 C.F.R. § 1607.5(F) (1985) (skills that can be learned in a brief orientation period).

79. See *Concept of Business Necessity*, *supra* note 28, at 88-89.

80. See, e.g., *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984) (no-facial-hair policy outweighed religious convictions of plaintiff where workers had to wear mask respirators); *Boyd v. Ozark Air Lines*, 568 F.2d 50, 53-54 (8th Cir. 1977) (height requirement for airline pilots essential to safe operation of airplane); *Spurlock v. United Airlines*, 475 F.2d 216, 218-19 (10th Cir. 1972) (education and experience requirements held business necessity for airline, which imposed them on pilot candidates; "risks involved in hiring an unqualified applicant are staggering").

arguments based on merely conceivable safety and efficiency problems.<sup>81</sup> When efficiency is invoked, the employer argues that the adverse effect on his business will outweigh the reduction of disparate impact that would be achieved by discontinuing the challenged practice.<sup>82</sup> In this situation, the balancing test proceeds in its most fact-specific form.<sup>83</sup>

### C. *Subsequent Uncertainty and the Future of Business Necessity*

Despite the success of the doctrine developed from *Griggs*, business necessity analysis in Title VII has not achieved stability.<sup>84</sup> More recent Supreme Court cases send conflicting signals: while some treat disparate impact justifications stringently,<sup>85</sup> others seem to reflect greater deference to employer discretion.<sup>86</sup> At the same time, lower courts have manifested indecision about the defense<sup>87</sup> and scholarly criticism of disparate impact liability has increased.<sup>88</sup> Its future is therefore uncertain.

Several recent cases illustrate the Supreme Court's stringent approach to some justifications under Title VII. It is clear that *any* express classification by a prohibited characteristic is unlawful even if supported by sound, convincing actuarial data.<sup>89</sup> This underscores the principle that discriminatory animus is not needed for liability. Comparable strictness

81. See *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.) (evidence did not support defendant's argument that efficiency would be compromised), *cert. dismissed*, 404 U.S. 1006 (1971); *cf.* *Williams v. American St. Gobain Corp.*, 447 F.2d 561, 564 (10th Cir. 1971) (showing of customer dissatisfaction resulting in economic loss supported claim of adverse effect on business).

82. See *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.) (defendant claimed that change of practice would adversely affect efficiency, economy and morale), *cert. dismissed*, 404 U.S. 1006 (1971).

83. When a defendant raises safety and efficiency considerations, the court looks to "all relevant factors" in evaluating the claim. *Judicial Dualism*, *supra* note 3, at 395; *cf.* *Concept of Business Necessity*, *supra* note 28, at 89 (same employment practice may have a substantial disparate effect in one area, none in another, and be sustainable as a business necessity in latter but not former situation).

84. See *Judicial Dualism*, *supra* note 3, at 400.

85. See *infra* notes 89-93 and accompanying text.

86. See *infra* notes 94-102 and accompanying text.

87. See *infra* notes 104, 106-08 and accompanying text.

88. See Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 Am. U.L. Rev. 799, 802-03 (1985) (although business necessity analysis is needed to limit what would otherwise be "impossible" pure disparate-impact liability, it is an uncertain limit); *Business Necessity Defense*, *supra* note 45, at 912-13 (doctrine "has been called unsound as a matter of social policy"); Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L. J. 429, 587 (1985) (disparate-impact analysis unworkable because employers' inability to formulate alternative selection procedures forces use of quotas).

89. See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709-10, 716-17 (1978) (differential by sex in contributions to pension plan unlawful under Title VII); see also *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1074-75 (1983) (*per curiam*) (differential by sex in benefits from pension plan unlawful under Title VII).

is evident in an employment testing case<sup>90</sup> in which a single component of the testing process had a disparate effect on a protected group, but the overall process did not.<sup>91</sup> Despite this nondiscriminatory "bottom line," the Court held the entire process invalid<sup>92</sup>—manifesting clear unwillingness to tolerate any disparate effect.<sup>93</sup>

Other decisions point toward greater deference to employer judgment about "necessary" employment criteria. The leading case, *New York City Transit Authority v. Beazer*,<sup>94</sup> was a disparate-effect challenge to a blanket policy of excluding methadone-maintenance patients from any employment with the defendant Transit Authority.<sup>95</sup> The Court characterized the statistical evidence of disparate impact as "weak,"<sup>96</sup> but reached beyond this evidentiary point to consider the merits of the employment criterion. Even if a prima facie case had been made out, the Court said, the defendant's broad rule would have been adequately justified by business considerations.<sup>97</sup> The Court declined to limit the rule's application to safety-related positions,<sup>98</sup> an alternative that would seem to better rationalize the defendant's interests and its employment criteria.

90. See *Connecticut v. Teal*, 457 U.S. 440 (1982).

91. See *id.* at 443-44. In fact, the actual promotion rate of blacks was *higher* than that among whites. *Id.* at 444 n.6.

92. See *id.* at 456.

93. See *id.* at 455 ("Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group."). The Court emphasized that individuals adversely affected by neutral policies are protected by Title VII even if the "bottom line"—i.e., the effect on the individual's class—is nondiscriminatory. See *id.* at 455-56.

94. 440 U.S. 568 (1979).

95. See *id.* at 571-72. The Court noted that the case before it involved only present methadone-maintenance patients, *id.* at 572 & n.3. One of the dissenters pointed out that the Transit Authority itself admitted that the policy extended to former patients up to five years after completion of treatment. See *id.* at 602-03 & n.8 (White, J., dissenting).

96. See *id.* at 585-86.

97. See *id.* at 587 & n.31. Recalling the *Griggs* standard of manifest relationship to the employment, see *id.* at n.31, the Court repeated the district court's finding that the blanket exclusion served the defendant's legitimate interests in safety and efficiency, even if those interests did not require such a rule. See *id.* The Court said that the plaintiff's weak showing of disparate impact was inadequate to make out a Title VII violation in these circumstances. *Id.*

This highly deferential analysis has been criticized. See, e.g., *Judicial Dualism*, *supra* note 3, at 413 & n.192; Note, *The Employment Interest and an Irrational Application of the Rationality Test: New York City Transit Authority v. Beazer*, 51 U. Colo. L. Rev. 641, 654-55 (1980) (characterizing the analysis in *Beazer* as low-level "rational relation" scrutiny). See *infra* note 100. The *Beazer* opinion also considered and rejected an equal protection claim, 440 U.S. at 588-594, the "rational relation" standard of which might have influenced the Title VII analysis. But the Court has elsewhere observed that Title VII "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." *Washington v. Davis*, 426 U.S. 229, 247 (1976) (emphasis added).

98. This was the approach taken by the district court. See *Beazer*, 440 U.S. at 578. It is difficult to draw broad conclusions from *Beazer* because of its unique facts; arguably, a less sympathetic employer action might elicit less deference. Nevertheless, the Court's attitude is unmistakably deferential. See *id.* at 587 n.31 (sufficient that employer's goals are *significantly served* by rule, even if they do not *require* it).

While *Beazer* may arguably be limited to the narrow evidentiary question of statistical proof,<sup>99</sup> its implications for business necessity analysis are significant. The broad deference to employer discretion in choice of criteria is redolent of the lesser "business purpose" standard of disparate treatment analysis.<sup>100</sup> Moreover, the Court's unwillingness to consider an obvious alternative casts doubt on the availability-of-alternatives component of the analysis.<sup>101</sup> In combination with recent decisions stressing the minimal nature of the employer's burden in disparate treatment cases,<sup>102</sup> *Beazer* suggests that, in the proper circumstances, the burden of business necessity justification should be lighter for the defendant employer.

If there is a doctrinal shift in the offing, however, its influence has not been the only source of ambiguity. Lower courts have not always applied the analytical tools consistently. Misapplication is occasionally the result of confusing the disparate impact and disparate treatment branches of analysis.<sup>103</sup> Cases often involve fact situations amenable to analysis under alternative theories.<sup>104</sup> Such close factual calls compound doctri-

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99. The opinion has substantial importance for questions of proof by statistical evidence. See, e.g., *Criminal Records*, *supra* note 67, at 606-07; Note, *Employment Discrimination—Plaintiff's Prima Facie Case and Defendant's Rebuttal in a Disparate Impact Case*, 54 Tul. L. Rev. 1187, 1195-96 (1980) (interpreting *Beazer* to mean that statistical evidence must be more closely related to those actually qualified for employment); cf. *Statistics and Title VII Proof*, *supra* note 5, at 1039 (statistical sample must refer to available persons actually qualified to hold positions in question) (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977)).

100. See *Judicial Dualism*, *supra* note 3, at 415-16 (incorporation of concept of pretext into disparate effect doctrine may signal merger of impact and treatment branches of prima facie case structure). See *supra* note 13 and accompanying text.

101. As a matter of policy, the Supreme Court has suggested (in a disparate treatment case) that courts are ill-equipped to evaluate alternatives. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices"). One writer has characterized this attitude approvingly as a sound policy of judicial restraint. See *Rebutting the Griggs Prima Facie Case*, *supra* note 13, at 209.

102. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-54 (1981) (stressing that the burden of persuasion in disparate treatment case always remains with the plaintiff; defendant's burden is one of articulation, not proof, and defendant need not actually have been motivated by the proffered business purpose); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978) (per curiam) (same).

103. See, e.g., *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) (reversing district court's mistaken application of disparate treatment "business purpose" standard to disparate impact claim); *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (facts supported business necessity; court cited *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) for "manifest relation" language, but articulated defendant's burden in terms of "genuine business need": "its criteria were reasonable and related to job necessities"), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972). This standard seems analogous to the business purpose threshold of disparate treatment cases.

104. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' . . . Either theory may, of course, be applied to a particular set of facts."); see also Schwemm, *supra* note 2, at 242.

nal confusion.

Courts have also taken different theoretical approaches to the analysis, however. The majority of the circuits have taken a rigorous view of assertions of business necessity<sup>105</sup> and have not emulated the deferential posture of *Beazer*.<sup>106</sup> Nevertheless, the Fourth Circuit, which had led the mainstream development of business necessity analysis,<sup>107</sup> seems to have adopted a distinctly more deferential attitude.<sup>108</sup>

Considering the uncertain future of disparate impact and business necessity doctrine in Title VII, it is more critical than ever to understand the analogy between Title VII and the Fair Housing Act, as well as the crucial structural and philosophical differences between the laws and the activities that they affect.

## II. BUSINESS NECESSITY AND HOUSING: TITLE VIII

### A. *General Observations and Background*

Residential segregation, the target of Title VIII, remains prevalent.<sup>109</sup> In addition to its primary effect on the housing opportunities of minorities, it has significant secondary effects in school segregation and employment opportunity.<sup>110</sup> The relation between these areas is especially

105. See *supra* notes 50-54 and accompanying text.

106. See *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 840-41 (10th Cir. 1981) (stringent scrutiny for asserted business necessities) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971)).

107. See *supra* notes 49-56 and accompanying text.

108. See *Newman v. Crews*, 651 F.2d 222, 224-26 (4th Cir. 1981) (holding disparate effect of testing standard adequately justified).

The court's analysis backs away from the close examination typical of business necessity analysis. The court quoted its own formulation of the business necessity standard from *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). See *supra* note 50 and accompanying text. But the court significantly omitted stringent language ("compelling," "overriding") that it had used in *Lorillard* to characterize the nature of business interest sufficient to support business necessity—instead stating that the burden was to prove that the challenged employment practice "serves legitimate employment objectives of the school district." *Newman*, 651 F.2d at 224 (emphasis added). The court further noted that the district court had found "both a rational relationship to a legitimate employment objective and business necessity." *Id.* The finding of a rational relation here is understandable, but the Fourth Circuit's willingness to equate it with business necessity signals a sharp change of direction. The Tenth Circuit has expressly rejected a rational relation standard for Title VII analysis. See *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 841 (10th Cir. 1981) (mere rationality is not enough, nor is it sufficient that legitimate management functions are served by the employment practice).

109. Weaver, *Housing Discrimination: An Overview*, in *A Sheltered Crisis: The State of Fair Housing In the Eighties* 1, at 5 (1983) [hereinafter cited as *A Sheltered Crisis*]. Residential segregation, far from declining, has instead increased. See Schwemm, *supra* note 2, at 201. Comparable deterioration is evident in minority unemployment. See *Judicial Dualism*, *supra* note 3, at 377 n.9.

110. The relationship was recognized at the time Title VIII was passed.



invidious because they are mutually reinforcing.<sup>111</sup>

Segregation in shelter results largely from intentional discrimination.<sup>112</sup> Empirical evidence persuasively suggests that residential segregation is not exclusively attributable to black poverty or inability to pay for housing.<sup>113</sup> It is also clear, however, that racially neutral practices of

The increasing concentration of Negroes in the inner cities and the movement of white people into the suburbs bear serious consequences with respect to schools and jobs.

This de facto separation of races between city and suburb perpetuates de facto segregation of schools. The educational consequences of such segregation are grave. . . .

Exclusion of Negroes from the housing market has the effect also of denying Negroes equal job opportunities.

114 Cong. Rec. 9591 (1968) (statement of Rep. Ryan); cf. Golubock, *Housing Discrimination Against Families with Children: A Growing Problem of Exclusionary Practices*, in *A Sheltered Crisis*, *supra* note 109, at 128, 129 (aim of no-children policies may be in part to perpetuate school segregation in predominantly white areas).

111. See Comment, *Redlining, Disinvestment and the Role of Mutual Savings Banks: A Survey of Solutions*, 9 *Fordham Urb. L.J.* 89, 92-93 n.10 (1980) (identifying a "multiplier effect" by which discrimination in employment and housing influence each other) [hereinafter cited as *Redlining Solutions*]; see also *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1540-41 (S.D.N.Y. 1985) (City's pattern of confining subsidized housing in certain areas and persistent refusal to locate any such housing elsewhere in city contributed to perpetuation of school segregation).

112. Most Title VIII cases have in fact turned on the issue of intentional discrimination, even where disparate effect liability provided an alternative ground of decision. *Calmore*, *supra* note 2, at 633; *Schwemm*, *supra* note 2, at 238.

Purposeful discrimination has survived under fair housing laws in part by taking more subtle forms. See Pearce, *A Sheltered Crisis: The State of Fair Housing Opportunity in the Eighties*, in *A Sheltered Crisis*, *supra* note 109, at 143, 144. See *infra* note 198 and accompanying text.

Blacks are not the only targets of discriminatory practices. See Marshall, *Women with Children in Today's Housing Market*, in *A Sheltered Crisis*, *supra* note 109, at 110, 111 (noting persistence of "significant discrimination against female[-headed] households"); see also Packer, *Discrimination Against Hispanic Women in Housing*, in *A Sheltered Crisis*, *supra* note 109, at 114, 123 (sex bias "is alive and well") (quoting U.S. Dep't of Housing and Urban Development, *Women and Housing: A Report on Sex Discrimination in the American Cities*, at ii (1976)).

113. See, e.g., Massey, *Effects of Socioeconomic Factors on the Residential Segregation of Blacks and Spanish Americans in U.S. Urbanized Areas*, 44 *Am. Soc. Rev.* 1015, 1017-19 (1979) (although Hispanic/white segregation is highly responsive to differences in level of education, income and occupation, black/white segregation remains relatively constant); Farley, *Residential Segregation in Urbanized Areas of the United States in 1970: An Analysis of Social Class and Racial Differences*, 14 *Demography* 497, 514 (1977) (patterns of segregation among whites and blacks of like education and income not attributable to economic and social differences); Hermalin & Farley, *The Potential for Residential Integration in Cities and Suburbs: Implications for the Busing Controversy*, 38 *Am. Soc. Rev.* 595, 608 (1973) (residential segregation attributable, not to economic factors, but to explicit or covert white discrimination); Taeuber, *Residential Segregation*, *Sci. Am.*, August 1965, at 12, 19 (neither free choice nor poverty sufficiently explains urban segregation); see also Darden, *Population Growth and Spatial Distribution*, in *A Sheltered Crisis*, *supra* note 109, at 7, 13.

Most past studies have concluded that upper income blacks are no less segregated residentially from whites than lower income blacks and that poor whites seldom live in the same neighborhoods as poor blacks. Regardless of income,

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.<sup>114</sup>

The prima facie case structure, including effect-based liability, is now a generally accepted part of Title VIII doctrine.<sup>115</sup> A plaintiff who can persuade a court to apply the business necessity analysis as generally articulated in Title VII<sup>116</sup> has a powerful weapon with which to fight dis-

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most whites live in predominantly white neighborhoods and most blacks live in predominantly black neighborhoods.

*Id.* One explanation advanced for this phenomenon is that blacks themselves prefer to live in black neighborhoods. *Id.* at 22. But surveys indicate that, although blacks are willing to reside in racially mixed neighborhoods, whites tend to be more reluctant to do so. *Id.* The argument that segregation is attributable to choice also overlooks critical distinctions between white ethnic immigrant groups, which clustered together because of shared linguistic, cultural and religious traditions: blacks are linked more by common grievances, and as an involuntary adaptation to discrimination. Economic factors are of minor importance. *Id.*

114. See *supra* notes 31-32 and accompanying text.

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.

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

115. Despite some early disagreement over the applicability of the doctrine, see Schwemm, *supra* note 2, at 200-01, the circuits now essentially agree that the disparate-impact prima facie case is applicable in Title VIII litigation. See, e.g., Arthur v. City of Toledo, No. 84-3898, slip op. at 18-19 (6th Cir. Jan. 24, 1986); Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 (4th Cir. 1984); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036-37 (2d Cir. 1979); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 148 & n.32 (3d Cir. 1977), cert. denied, 435 U.S. 908 (1978); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978); Smith v. Anchor Bldg. Corp., 536 F.2d 231, 233 (8th Cir. 1976); see also Comment, *The Legality of Redlining under the Civil Rights Laws*, 25 Am. U.L. Rev. 463, 478 (1976) [hereinafter cited as *Legality of Redlining*].

The Second Circuit approach remains unclear. In *Boyd v. Lefrak Org.*, 509 F.2d 1110 (2d Cir.), reh'g denied, 517 F.2d 918 (four judges in favor of granting rehearing, three opposed, one disqualified; petition denied for want of majority of the eight judges in active service), cert. denied, 423 U.S. 896 (1975), the court held that intent was necessary to make out a violation of Title VIII, *id.* at 1113, in the face of what appeared to be at least a colorable showing of disparate impact (the defendant's income criterion was alleged to exclude predominantly-minority public income recipients). The decision has been tellingly criticized. See, e.g., Calmore, *supra* note 2, at 632 ("[i]t is unlikely that *Boyd* is still good law"); Schwemm, *supra* note 2, at 248.

The *12 Lofts* decision casts considerable doubt on the viability of *Boyd*, but the Second Circuit chose to distinguish it on the facts. See *12 Lofts*, 610 F.2d at 1037 n.10. The effort is not particularly convincing. The recognition of liability based on effect in *12 Lofts* brings the Second Circuit into line with the majority view, and at the same time erodes the doctrinal foundation of *Boyd*. Nevertheless, within a year of the *12 Lofts* decision, a district court in the Second Circuit cited and relied upon *Boyd*. See *Dreher v. Rana Mgmt., Inc.*, 493 F. Supp. 930, 935 (E.D.N.Y. 1980).

116. See *supra* notes 51-55 and accompanying text.

criminary practices.<sup>117</sup> Because Title VIII cases are few, judicial application has not been as consistent as in Title VII. General outlines of the defense may be discerned, however.

For the private defendant, most courts in Title VIII cases have adopted their circuit's Title VII formulations of business necessity.<sup>118</sup> Thus, as in Title VII, the courts weigh the defendant's interests against the disparate effect of the challenged action, considering also the availability of alternatives and the costs of such alternatives to the defendant.<sup>119</sup>

Two distinctions are critical, however. First, there is some indication that the recent trend of greater judicial deference toward employer discretion in Title VII cases will not have a counterpart in Title VIII.<sup>120</sup> Even the circuits that now seem to afford employers broader latitude in defining necessity do not treat housing defendants the same way. While housing cases do not follow identical formulations of the proper degree of deference to private defendants' assertions of business necessity, the burden is typically heavy.<sup>121</sup> Second, the Title VIII cases have developed distinct standards for treatment of the public-entity defendant,<sup>122</sup> analogous to business necessity analysis but reflecting the different imperatives of public entities' activities in housing.<sup>123</sup> Title VIII challenges to public entity housing conduct involve either regulation of the housing activities of third parties through zoning or permit policy,<sup>124</sup> or the administration

117. See Calmore, *supra* note 2, at 624 ("if the court can be persuaded to adopt a credible interpretatio[n] of the [business necessity] standard as adopted by a majority of the federal courts, then a very heavy burden can be imposed on defendant").

118. See, e.g., *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988-89 (4th Cir. 1984); *Smith v. Anchor Bldg. Co.*, 536 F.2d 231, 235-36 (8th Cir. 1976); *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974).

119. See *supra* notes 48-59 and accompanying text. Not all cases draw on Title VII analogies, however, because of the different treatment accorded public entity defendants in Title VIII. See *infra* notes 278-79 and accompanying text, and Part II.B.1.

120. Compare *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988-89 (4th Cir. 1984) (Title VIII; high threshold of justification) with *Newman v. Crews*, 651 F.2d 222, 224 (4th Cir. 1981) (Title VII; distinctly less exacting standard). As already noted, see *supra* note 108 and accompanying text, the Fourth Circuit in *Newman* moved away from its previous stringent business necessity stance of *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), and embraced a more deferential rational relation analysis. *Newman*, 651 F.2d at 224. But in *Betsey*, the Fourth Circuit returned to the *Lorillard* view—gleaned, however, not from its own cases, but from a decision of another circuit relying on *Lorillard*. *Betsey*, 736 F.2d at 988 (citing *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981)). *Betsey* mentioned, but did not quote, *Lorillard*. *Betsey*, 736 F.2d at 989. Seemingly, the Fourth Circuit intends to maintain a double standard for housing and employment. If a more deferential standard is appropriate for Title VII, then this is an excellent example for courts that are in doubt about the future course of housing doctrine.

121. See, e.g., *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 (4th Cir. 1984) (compelling business necessity); *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir.) (there must be no acceptable alternatives), *cert. denied*, 419 U.S. 1027 (1974).

122. See *infra* Part II.C.

123. See *infra* notes 283-84, 295-98 and accompanying text.

124. See *infra* notes 296-97 and accompanying text.

of low-income housing and other assistance programs.<sup>125</sup> Regulatory activities have no counterpart in the conduct subject to Title VII.<sup>126</sup> Housing assistance involves the public entity in activities analogous to those of private parties<sup>127</sup> but critical distinctions, particularly the absence of profit motive and the remedial nature of the programs,<sup>128</sup> limit the analogy. This phenomenon has no counterpart in the employment context, in which the legitimate interests of public and private employers are not analytically different.<sup>129</sup> Together, these systematic distinctions point up the underlying fundamental differences between housing and employment, and focus attention on the need for a different approach to business necessity analysis under Title VIII.

Three distinct kinds of housing relationships have been held subject to disparate impact liability, and business necessity analysis, under Title VIII. First are those between principals to the housing transaction,<sup>130</sup> typically the sale<sup>131</sup> or rental<sup>132</sup> of residential property. Second are those involving the provision of secondary services,<sup>133</sup> such as brokerage,<sup>134</sup> appraisal,<sup>135</sup> lending<sup>136</sup> and insurance,<sup>137</sup> which affect the relationship between the principals but which are provided by non-principal third parties. Last are those involving governmental entities,<sup>138</sup> for whom a different analysis is triggered. Consideration of each of these areas elucidates the application of business necessity to the housing "business."

## B. *Private Defendants*

### 1. Housing Relationships Between Individuals

#### a. *Sale of Residential Property*

The seller of residential property is primarily interested in being paid.<sup>139</sup> The buyer's essential qualification is therefore ability to pay the

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125. See *infra* notes 298-302 and accompanying text.

126. This writer is unaware of any Title VII discrimination challenges to licensing or regulatory practices of public entities.

127. For example, public entities may be involved in the construction of housing (typically low-income developments) and the administration of housing rental projects. See *infra* notes 298-305 and accompanying text.

128. See *infra* notes 303-04 and accompanying text.

129. See *infra* notes 273-74 and accompanying text.

130. See *infra* Part II.B.1.

131. See *infra* Part II.B.1.a.

132. See *infra* Part II.B.1.b.

133. See *infra* Part II.B.2.

134. See *infra* Part II.B.2.a.

135. See *infra* Part II.B.2.b.

136. See *infra* Part II.B.2.c.

137. See *infra* Part II.B.2.d.

138. See *infra* Part II.C.

139. See 114 Cong. Rec. 9583 (1968) (statement of Rep. Erlenborn); *id.* at 9573 (statement of Rep. Steiger). In the typical transaction, of course, the buyer obtains financing for the purchase. See *infra* Part II.B.2.c. The seller's scrutiny of the buyer's financial soundness is then, in essence, carried out by the lender.

price. This attitude is reflected in the remarks of the legislators who passed the Act.<sup>140</sup> It is also implicit in the principle of brokerage law that the broker earns his commission by producing a buyer ready, willing and able to buy—ability being measured as *financial* ability.<sup>141</sup> Moreover, the relationship between buyer and seller ends, unlike that between employer and employee.<sup>142</sup> Thus most of the employer's concerns are inapposite in the sale of real estate. Indeed, the seller's refusal to accept a good faith offer from a person able to pay the price is immediately suspect, since the seller's right to the best market price—his only "real interest"—is satisfied.<sup>143</sup>

The seller is rightly entitled to use objective criteria in evaluating a potential buyer's ability to pay.<sup>144</sup> Clearly, a buyer's credit rating interests the seller, especially if the seller also finances the purchase.<sup>145</sup> But the seller may less justifiably rely on facially sensible rules of thumb to

140. "In buying a house, this bill says that a man's bankroll and his credit rating—not the color of his skin—will be major factors in his choice." *Id.* at 9583 (statement of Rep. Erlenborn).

Title VIII was seen as requiring that one "must treat equally all persons who are in the market for housing. That is, you cannot, because of one reason—race—refuse to sell or rent property." *Id.* at 9573 (statement of Rep. Steiger); *id.* at 9579 (statement of Rep. Cowgmer).

Although proponents of the legislation echoed these sentiments, there was substantial opposition. The roll call vote of 229-195 (nine not voting) by which the Fair Housing Act passed the House, *id.* at 9620-21, suggests more in the way of doctrinal disagreement than was probably the case, however. Much opposition to the bill stemmed from its procedural posture, which Rep. Brown summarized. *Id.* at 9597; *see also* Schwemm, *supra* note 2, at 208-09. A number of the Representatives who rose in opposition shared this objection while expressing sympathy for the aims of the Fair Housing Act. *See, e.g.*, 114 Cong. Rec. at 9587-88 (statement of Rep. Morton); *id.* at 9588 (statement of Rep. Derwinski).

Some Representatives also expressed reluctance to consider the measure in the highly emotional atmosphere that prevailed in the days following the assassination of the Rev. Dr. Martin Luther King, Jr. on April 4, 1968. *See, e.g., id.* at 9593 (statement of Rep. Dowdy) ("this bill is before us today, because of demands from mobs of rioting looters and arsonists"); *id.* at 9589 (statement of Rep. Hagan) ("It is shameful that Congress must endure such pressure. It is shameful that fear can dominate commonsense. It is shameful that the criminal acts in our Nation are clouding legislative process."). But as Rep. Horton noted, debate on the bill had been scheduled for the 14th before civil unrest changed the atmosphere; he felt that "such events outside the sphere of Government should not be permitted to disrupt or postpone action which has already been scheduled by the Congress . . ." *Id.* at 9607-08.

141. D.B. Burke, Jr., *Law of Real Estate Brokers* 99, 106 (1982).

142. Schwemm, *supra* note 2, at 235.

143. In a real estate transaction, it seems to me that the seller's principal interest is financial—that he gets the best market price. . . .

If the seller has a right to the best price the market will allow him, and the buyer has a right to purchase the best house he can afford, then it seems to me that everybody's real interests are taken care of.

114 Cong. Rec. 9583 (1968) (statement of Rep. Erlenborn).

144. *Id.*

145. Schwemm, *supra* note 2, at 235 (seller financing sale is concerned with buyer's ability to meet financial and other contractual obligations).

gauge the adequacy of the buyer's income,<sup>146</sup> for example, without some evidence that they meaningfully further his interests. Such practices invite attack if they disproportionately burden a protected class, and the seller should be prepared to demonstrate that some thought has gone into their formulation and application.

Subjective considerations may influence the seller's decision.<sup>147</sup> In view of the congressional determination that race cannot be a factor in housing transactions,<sup>148</sup> however, such considerations deserve careful judicial scrutiny.<sup>149</sup> If subjective nonracial factors create discriminatory effects and lack utility in furthering the seller's interests, it is unlikely that a plausible "business necessity" could be predicated on them.

#### b. *Lease of Residential Property*

When the actions of a private landlord are held up to disparate impact challenge, business necessity analysis is clearly appropriate.<sup>150</sup> For the landlord who maintains a degree of rationality between tenant selection criteria and his legitimate interests, with an eye to his obligations under Title VIII, business necessity can be a shield. For the tenant or prospective tenant wrongfully excluded because of criteria or policies not meaningfully aligned with the landlord's legitimate interests, business necessity analysis can be a powerful tool.

The tenant's ability to pay lies at the core of the landlord's concerns. Present ability is important, but unlike the seller of residential prop-

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146. Such a rule might express purchase price as a function of income—for example, "[u]nder normal cases, families should not be buying homes costing over two and one half times their annual incomes." S. McMichael, *McMichael's Appraising Manual* 169 (4th ed. 1951).

147. Title VIII provides that race, color, religion, sex or national origin may *not* be grounds for refusing a sale. See 42 U.S.C. § 3604(a) (1982). See *supra* notes 2-4 and accompanying text. By implication, anything other than those characteristics should be allowed unless it produces a discriminatory effect.

148. See *supra* note 3 and accompanying text.

149. See *Newman v. Crews*, 651 F.2d 222, 225 (4th Cir. 1981) (Title VII; subjective evaluations necessarily involve substantial potential for discrimination in application); *Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 836 (7th Cir. 1976) (defendant's refusal of plaintiff's full price offer, followed by acceptance of another's offer below full price, supported inference of racially motivated treatment); *cf.* *Bush v. Kaim*, 297 F. Supp. 151, 162 (N.D. Ohio 1969) (case under 42 U.S.C. § 1982) (owner free to rely on subjective considerations, but may later be called upon to demonstrate that they, not applicant's race, motivated him).

150. The landlord or owner of rental property is the housing actor most analogous to the Title VII employer. Each deals personally with the subject matter of the statute and the persons protected.

The actions of the landlord are particularly likely to be challenged on grounds of disparate effect because blacks are statistically overrepresented in the pool of renter households. Similarly, black and female-headed households labor under income/rent ratios in excess of the national average. G. Sternlieb & J. Hughes, *The Future of Rental Housing* 65-66 (1981).

erty,<sup>151</sup> the landlord desires evidence of the tenant's ability to continue paying for the term of the lease.<sup>152</sup> The landlord also wishes to preserve the value of the property, an interest mirrored in the common law devices that protect the reversion. Thus he also seeks a tenant of good character. The central feature of the relationship, however, is the exchange of money for an interest in property.<sup>153</sup> A lessor's refusal to accept money should be regarded with suspicion comparable to that accorded a seller's refusal of a bona fide offer.<sup>154</sup> The owner or landlord properly may consider such matters as credit history and income, but should also be prepared to show that the criteria rationally and persuasively relate to the legitimate end of ensuring payment.<sup>155</sup>

The landlord's freedom to choose a suitable tenant is a difficult issue because his decision can never be wholly objective. Even so simple a matter as defining a "successful tenant" is problematic; one court has described such a tenant as one who stays for the period of the lease, timely pays rent and complies with the lease terms.<sup>156</sup> Courts have recognized the landlord's right to follow reasonable, objective, nonracial rental criteria, and to inquire into the prospective tenant's background.<sup>157</sup>

Beyond such minimal objective criteria, the landlord's decision may

151. See *supra* notes 139-43 and accompanying text.

Coop boards occupy a position somewhere between those of seller and lessor. Board approval must typically be obtained for the transfer of shares from one owner to another. Although the underlying transaction is a sale, the board takes into account the ongoing relationship created by admission of the new owner. See Siegler, *Cooperatives, Condominiums*, N.Y.L.J. Feb. 6, 1985, at 1, col. 1. Boards thus consider factors analogous to those taken into account by lessors. See *id.* at 2 (listing factors).

152. Schwemm, *supra* note 2, at 235.

153. See B. Henszey & R. Friedman, *Real Estate Law* 261 (1979) (landlord's basic right in the transaction is to receive rent; tenant's corresponding right is to the exclusive use, enjoyment and occupation of the leasehold premises).

154. See *supra* note 143 and accompanying text. Cf. Schwemm, *supra* note 2, at 235 (comparing housing supplier's refusal to deal with minority prospect to employer's refusal to hire minority jobseeker).

155. Income as a criterion is perfectly acceptable; problems arise when it is analyzed loosely in making a decision about a prospective tenant. Thus the sort of rule of thumb already noted in the sale of real estate, see *supra* note 148, may be encountered in rental as well. For example: "Except on the extreme income levels, rentals should lie between 20 and 25 per cent of a family's monthly income." S. McMichael, *supra* note 146, at 169.

Where the evidence of an income criterion's business necessity is weak—that is, where it is not clear that the efficient operation of the rental operation would be significantly compromised—even such a criterion should be enjoined if it has disparate impact on a protected class. See Schwemm, *supra* note 2, at 249.

156. *Bishop v. Pecsok*, 431 F. Supp. 34, 37 n.5 (N.D. Ohio 1976). The court found that the defendant had intentionally discriminated against plaintiffs, a mixed-race couple, because the wife was black. See *id.* at 36. But even if intentional discrimination had not been found, the court observed, the defendant's asserted objective grounds for rejecting plaintiffs would have failed under disparate effect analysis: "Objective criteria cannot have the effect of excluding blacks from housing unless the criteria are demonstrably a reasonable measure of the applicants' ability to be a 'successful tenant.'" *Id.* at 37.

157. Calmore, *supra* note 2, at 633; Schwemm, *supra* note 2, at 239.

This right is not unlimited and may be examined closely. See *Bush v. Kaim*, 297 F.

properly turn on personal taste: refusal may be predicated on any honest basis unrelated to race.<sup>158</sup> But where subjective factors are concerned, the landlord should be cautious about his conduct. Title VIII requires landlords to suppress personal aversions to minorities.<sup>159</sup> In that respect the statute flatly limits freedom of action.<sup>160</sup> Discrimination in this area may well take the form of disparate treatment,<sup>161</sup> but where it does not,

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Supp. 151, 163 (N.D. Ohio 1969) (case under 42 U.S.C. § 1982) (scrutiny of subjective criteria).

One commentator has suggested four factors to consider in evaluating a rejection based on the landlord's applicant characteristic criteria:

- (1) whether normal procedures 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.

Calmore, *supra* note 2, at 634. "Sometimes pretext can be shown because defendant's selection criteria do not relate to tenant suitability." *Id.* at 635. The first three factors are more nearly related to disparate treatment analysis. Indeed, in a disparate effect case, the plaintiff by definition relies on the fourth factor alone to challenge the business necessity of the criterion. This list thus illustrates how the two branches of the *prima facie* case structure can overlap, and how each might be pleaded in the alternative.

158. See Schwemm, *supra* note 2, at 204; see also *Hamilton v. Miller*, 477 F.2d 908, 910 (10th Cir. 1973) (Defendant told black plaintiff apartment had been rented, but told white testers it was still available. Defendant argued successfully that rejection was result of plaintiff's attitude and aggressiveness, but defendant lied to him so as not to personalize the rejection.). Of course, if race plays *any part* in the landlord's decision, his conduct will violate Title VIII. See *supra* note 4 and accompanying text.

159. Title VIII expressly forbids outright discrimination. But a rejection predicated on an apparently arbitrary nonracial reason demands close examination. "[T]here is no reason to believe that stereotypes have ceased to be a factor in the dealings between blacks and whites . . . . [R]acial discrimination should be suspected." Calmore, *supra* note 2, at 636; see also *Stevens v. Dobs, Inc.*, 483 F.2d 82, 83 & n.2 (4th Cir. 1973) (*per curiam*) (rejection held unlawful when defendant's reason was that there was an "offensive odor" about plaintiff).

160. The right of the landlord to select a tenant he considers appropriate may well conflict with the right of the prospective tenant to have access to housing for which he is objectively suitable. Title VIII represents a congressional policy choice: "In a free society . . . all of us have many rights; and one man's rights do occasionally collide with another's. When that occurs, the one right must yield and the other right must take precedence. It is a function of government to decide which right shall prevail." 114 Cong. Rec. 9583 (1968) (statement of Rep. Erlenborn).

161. As in Title VII, the line between disparate treatment and disparate impact is not always clear: some fact situations may productively be analyzed under either branch of the *prima facie* case structure. See *supra* notes 103-04 and accompanying text.

Confusion can result where the plaintiff raises a disparate treatment claim and the defendant offers a business necessity defense. For example, the mixed race couple in *Bishop v. Pecsok*, 431 F. Supp. 34 (N.D. Ohio 1976), claimed that the defendant refused to rent to them because of the wife's race. See *id.* at 35-36. That is a claim of intentional discrimination, unlawful in any view. But the landlord maintained that the rejection flowed from his "policy" of renting only to graduate students and those financially able to pay the rent. *Id.* at 36. This is implicitly a business necessity defense, as the court in effect acknowledged in its dictum rejecting the assertedly objective criteria. See *id.* at 37 & n.5 (dictum). But there was evidence that the plaintiffs met the "objective" criteria, and that the defendant did not apply the standards to white tenants—echoing disparate treatment thinking. See *id.* at 36.



an asserted "criterion" that has a disparate effect on a protected class will be vulnerable to business necessity analysis.

Landlords often argue economic factors as the basis of necessity.<sup>162</sup> At least one case has turned on the pecuniary benefit the defendant landlord derived from conduct that had a discriminatory effect.<sup>163</sup> This advantage was one of several factors the court cited in holding that the conduct's disparate impact was adequately justified. Nevertheless, such reasons must be carefully scrutinized for genuineness<sup>164</sup> and are subject to pretext analysis.<sup>165</sup>

Comparison of tenant selection criteria with analogous matters in employment emphasizes the limitations on the transferability of Title VII doctrine to Title VIII. The employer has broad, objective and quantifiable concerns with employee skill, proficiency and aptitude with respect to the performance of job tasks. These concerns largely do not transfer to the housing context. For example, training or experience criteria,<sup>166</sup>

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162. For example, such an argument may be made when the plaintiff challenges an income cutoff criterion. See *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1112 (2d Cir.), cert. denied, 423 U.S. 896 (1975); cf. *Williamson v. Hampton Mgmt. Co.*, 339 F. Supp. 1146, 1148 (N.D. Ill. 1972) (landlord's application of income cutoff held not plausible basis for refusal to rent to plaintiffs). For a case involving general economic considerations, see *infra* note 163 and accompanying text.

It is difficult for a plaintiff to overcome the seeming legitimacy of an economic or business policy and convince the finder of fact that the disparate effect merits a finding of liability. Calmore, *supra* note 2, at 636. This underscores the need for business necessity analysis, which affords the defendant an opportunity to explain his policy while giving the plaintiff the right to a satisfactory explanation.

163. *Dreher v. Rana Mgmt., Inc.*, 493 F. Supp. 930 (E.D.N.Y. 1980). The defendant agreed to lease his building to a university for student housing, an action that removed it from the open market. *Id.* at 931. The current tenants therefore had to relocate. *Id.* at 931-32. The plaintiff's lease was not renewed, and she sued under Title VIII alleging that the effect of the defendant's action was to deprive predominantly black low income tenants of adequate housing. *Id.* at 932. The court acknowledged that discriminatory impact without intent could support a Title VIII violation, *id.* at 933-34, but held that the weak showing of disparate effect was outweighed by the economic benefits accruing to the defendant. *Id.* at 935. The court relied in part on the controversial *Boyd* decision. See *Dreher*, 493 F. Supp. at 935 (citing *Boyd v. Lefrak Org.*, 509 F.2d 1110, 1114 (2d Cir.), cert. denied, 423 U.S. 896 (1975)). It held that the defendant's economic rights were "in no manner diminished by the Fair Housing Act." *Id.* at 935.

This holding is consistent with *Boyd*, but the questionable status of that case combined with the unusual facts presented in *Dreher*, where the landlord's action was essentially economic in nature and had a weak disparate impact, minimize *Dreher's* precedential value.

164. This scrutiny is analogous to that accorded subjective hiring procedures. See *supra* note 62.

165. The pretext component of the disparate treatment branch has been adopted in disparate effect cases under Title VII. See *supra* note 14. There would seem to be no analytical reason to omit this adoption from Title VIII analysis.

166. See *supra* notes 76-78 and accompanying text.

"[T]he consequences of an error in admitting a tenant do not seem nearly as severe as, for example, the consequences of an error in hiring an unqualified airline pilot." Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.-C.L. L. Rev. 128, 174 (1976).

tests to measure job-related skills<sup>167</sup> and even height and weight requirements<sup>168</sup> may support an assertion of business necessity in employment. These types of criteria have no application to housing decisions. Similarly, cases under Title VII having to do with the plaintiffs' personal appearance have little applicability since the employers in those situations typically impose the requirements for safety reasons,<sup>169</sup> or because the employee must deal with customers<sup>170</sup> or wear a uniform on the job.<sup>171</sup> Such considerations may be credible in employment, but the landlord has no comparable interests.<sup>172</sup> In a disparate impact case under Title VIII, tenant selection involves a narrower range of permissible concerns and corresponding applicant characteristics.

A landlord's assertion of safety considerations might be one of the few areas in which a credible transfer of Title VII considerations could be made. Thus, inquiry into criminal records<sup>173</sup> might be a defensible landlord practice. The issue has not been raised in a Title VIII case, but the lessons of Title VII would seem transferable. The statistical disparate effect on minorities would be the same in housing as in employment.<sup>174</sup> As in Title VII cases, courts should demand a connection between the crime and the landlord's concerns.<sup>175</sup> Plausible situations might include,

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167. See *supra* notes 60-62 and accompanying text.

168. See *supra* notes 65-66 and accompanying text.

169. See *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984) (per curiam) (no-facial-hair policy necessary because employee had to wear a mask respirator; not an unlawful employment practice even though the employee was a Sikh forbidden by his religious convictions to shave).

170. See *EEOC v. Trailways, Inc.*, 530 F. Supp. 54, 59 (D. Colo. 1981) (no-beard policy for customer-contact positions; discriminatory effect on black males held sufficient to make out Title VII violation because "slight modifications" would serve employer's interests); cf. *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 191 (3d Cir. 1980) (similar challenge to no-beard rule, but plaintiff's evidence fell short of making out prima facie case).

171. Uniform or other dress requirements may conflict with an employee's religious convictions. See, e.g., *EEOC Dec. No. 81-20*, *EEOC Dec. (CCH) ¶ 6769* (Apr. 8, 1981) (female bus driver's religion required that she wear skirt; employer required drivers to wear trousers); *EEOC Dec. No. 76-37*, *EEOC Dec. (CCH) ¶ 6628* (Sept. 30, 1975) (cab driver's religion required that he wear turban; employer required cabbies to wear cap and badge). Under Title VII, a statutory balancing test requires the employer to make reasonable accommodation to the employee's religious beliefs unless to do so would work undue hardship in the employer's business. See 42 U.S.C. § 2000e(j) (1982). This balancing is analogous to business necessity analysis. In the context of religion, however, it imposes an affirmative duty on the employer. See *TWA v. Hardison*, 432 U.S. 63, 75 (1977).

172. Of course if the applicant's personal appearance somehow leads the lessor to conclude that the applicant would make an unsuitable tenant, this judgment would support rejection. Such a case would shade off into disparate treatment analysis and is not really comparable to the dress-and-grooming requirements typical in the Title VII cases.

173. The use of criminal records in the hiring process has already been discussed in the context of Title VII. See *supra* notes 67-75 and accompanying text.

174. Disproportionate arrest and conviction rates in the minority population would translate into a racially disparate impact. See *supra* note 70 and accompanying text. See *Criminal Records*, *supra* note 67, at 598 (Title VII).

175. See *supra* notes 71-72 and accompanying text.

for example, protecting the property where the conviction is for a crime such as arson or vandalism or protecting other tenants where the conviction is for assault or robbery. As in Title VII, the public policy of fostering convict reform<sup>176</sup> militates against affording the landlord unfettered discretion. Similarly, reliance on arrest records should be circumscribed.<sup>177</sup>

A neutral factor unique to the housing context, with considerable potential for disparate impact challenge, is the increasing incidence of no-children policies.<sup>178</sup> Despite the prevalence of such policies,<sup>179</sup> there is mixed evidence that they serve any useful purpose.<sup>180</sup> Landlords recite that the practice is needed because tenants are reluctant to rent in build-

176. See *supra* note 73 and accompanying text. If anything, the argument for limiting the situations in which a landlord would be permitted to reject a tenant for having a criminal record seems stronger than the same argument made as to an employer, at least as to property crimes, because the tenant cannot steal the landlord's property, or that of the landlord's "customers," simply by virtue of being a tenant: a tenant does not have a pass key or access to the landlord's cash. A duty to inquire into the circumstances of the crime imposes some additional expense and inconvenience, but probably not enough to overcome the general rule that mere inconvenience does not amount to business necessity. See *supra* note 55 and accompanying text.

177. The probative value of mere arrest records is no greater here than in the employment context. See *supra* note 74 and accompanying text.

178. See Golubock, *Housing Discrimination Against Families with Children: A Growing Problem of Exclusionary Practices*, in *A Sheltered Crisis*, *supra* note 109, at 128, 128; Ridings, *Discrimination Against Women in Housing Finance*, in *A Sheltered Crisis*, *supra* note 109, at 104, 108; see also Packer, *Discrimination Against Hispanic Women in Housing*, in *A Sheltered Crisis*, *supra* note 109, at 114, 123 (among "major obstacles" faced by women seeking shelter; restricted access not attributable to economic factors alone).

Analogous policies with similar effects include limitations on the ages and maximum number of children allowed in units, the sharing of bedrooms by children of opposite sex, designated no-children floors within buildings, and higher rent levels for renters with children. Packer, *supra*, at 125.

State law may regulate these practices. See N.J. Stat. Ann. § 2A:42-101 (West 1952 & Supp. 1985); N.Y. Real Prop. Law § 236 (McKinney 1968 & Supp. 1986).

179. A 1980 survey undertaken by the Department of Housing and Urban Development revealed that:

- (1) Seventy percent of all rental households have no children.
- (2) Nearly one-fourth of all units are closed to families with one child.
- (3) One-fourth of all units are closed to families with children because of cost.
- (4) One-third of all units nationwide are closed to families with two children.
- (5) The extent of discrimination varies according to the racial composition of the neighborhood, with white neighborhoods having a higher percentage of restrictive policies (20 percent) than do black neighborhoods.
- (6) Families with children pay higher rents than those without children, and often must live in substandard housing in inferior neighborhoods.
- (7) The newer the rental complex, the more likely it is that restrictive policies exist. (Three out of every five units built since 1970 have restrictive policies against children.)

Ridings, *supra* note 178, at 108.

180. Assertions about the negative effect of children are questionable. See *infra* notes 181-83 and accompanying text. Some evidence suggests that landlords can charge higher rents in buildings with no-children policies. Golubock, *supra* note 178, at 130. Such considerations might be the sort of economic benefit that helped persuade the court to

ings where there are children, and because it limits maintenance costs and damage.<sup>181</sup> Most tenants seem indifferent to the presence of children,<sup>182</sup> however, and there seems to be no statistical correlation between the presence of children and increased costs of maintenance and repair.<sup>183</sup> No court has yet heard a Title VIII challenge to such a policy, but disparate effect on women, and especially minority women, is a clear consequence.<sup>184</sup> Proof may be difficult for the individual plaintiff,<sup>185</sup> but a showing of disparate effect would hold the practice up to business necessity analysis. The apparent magnitude of that effect demands more in the way of justification than the conclusory explanations usually offered.

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find the defendant's conduct adequately justified in *Dreher v. Rana Mgmt.*, 493 F. Supp. 930 (E.D.N.Y. 1980). See *supra* note 163 and accompanying text.

181. See *Packer, supra* note 178, at 125. Landlords and apartment owners argue that children are destructive, noisy and unruly, that parents allow children to roam unsupervised at all hours, and that more doors are opened and toilets flushed, causing increased wear and tear on property. Perhaps these concerns, so far as they are legitimate, could be met by good management on the part of owners, and by owner/tenant cooperation. *Ridings, supra* note 178, at 107.

182. One survey found that most renters "would not object if children were admitted to their developments." *Packer, supra* note 178, at 125. A survey found that only about one-fifth of renters in no-children buildings considered that fact in deciding to live there; 81% indicated they would not move if the policy changed. *Golubock, supra* note 178, at 131.

183. See *Golubock, supra* note 178, at 130 ("landlords often cite higher maintenance costs as the reason for no-children policies, but . . . there are no empirical studies or other evidence to support such higher costs"). Managers who *do* rent to families with children were far less likely to cite such problems than managers who imposed no-children policies. The usual assertions may be more a matter of misperception than of real business experience. *Id.*

184. See *Ridings, supra* note 178, at 107 (Title VIII does not bar discrimination against children, but "[s]tudy after study has concluded that these policies can and do exclude more [minorities and women, groups within the scope of Title VIII] from particular buildings, apartment complexes, and neighborhoods").

Minority and female-headed families are particularly hard hit by exclusionary policies for many reasons. Perhaps the most obvious is that they are more likely to be renters and to have children in their care than are nonminority and male-headed households. In 1977 while only 26.1 percent of the housing occupied by nonblack families with children consisted of rental units, 56.2 percent of the units occupied by black families with children were rented. Thus, black families with children were more than twice as likely as other families to be renting. . . .

For female-headed households the numbers show the same phenomenon as for black households . . . .

Denial of access to housing because of the presence of children is also particularly detrimental to minority and female-headed families' search for adequate housing because they overwhelmingly tend to be low income.

*Golubock, supra* note 178, at 129 (footnotes omitted). One commentator has suggested that landlords, knowing they cannot discriminate expressly on the ground of race or sex, use these policies deliberately to accomplish discrimination without facially violating Title VIII. *Id.* at 130. Such a possibility underscores the need for effect-based liability. On balance, the argument for disparate effect liability in these situations seems strong. See *id.* at 131-32.

185. See *Golubock, supra* note 190, at 130.

## 2. Secondary Services

The purchaser of residential property typically requires a constellation of secondary services without which the transaction would be impossible in the modern market. These include brokerage, appraisal, lending and insurance. Actions in these "real estate business" fields can have repercussions sufficient to raise the possibility of effect-based liability. The consequences of these effects are magnified because actions in each field affect decisions in the others. Appraisal, for instance, is a service needed by the insurer and lender as well as the buyer.<sup>186</sup> Similarly, lenders often require insurance as a condition for making a mortgage loan.<sup>187</sup>

The real estate industry has itself been identified as a factor in residential segregation.<sup>188</sup> The problem is particularly insidious because the racial attitudes behind many practices are garbed in facially plausible, seemingly reasonable "neutral factors."<sup>189</sup> Requiring proof of discriminatory intent would effectively foreclose challenge to such practices.<sup>190</sup> Disparate effect liability is therefore especially important, and business necessity analysis is productive in assessing whether such factors serve important business interests.

### a. Brokerage

The real estate broker acts as an intermediary between the buyer and seller of residential property. The business routinely raises civil rights questions.<sup>191</sup> The Code of Ethics of the National Association of Realtors reflects the broker's obligations not to discriminate.<sup>192</sup> Nevertheless, intentionally discriminatory practices persist.<sup>193</sup> Although Title VIII ex-

186. Lenders rely on appraisers for estimates of value and for the proper understanding of neighborhood analysis for purposes of loan underwriting. United States Dep't of Housing and Urban Dev., *Redlining and Disinvestment as a Discriminatory Practice in Residential Mortgage Loans I-33* (1977) [hereinafter cited as *Redlining Study*].

187. Badain, *Insurance Redlining and the Future of the Urban Core*, 16 Colum. J.L. & Soc. Probs. 1, 1-2 (1980) (banks will not make loans in older urban communities without insurance).

188. See *The Housing Advocates, Inc., An Annotated Bibliography of Housing and School Segregation Articles and Documents 3* (1980).

189. Economic criteria, for example, are difficult to attack. See *supra* note 162 and accompanying text. Such criteria are frequently encountered in this area.

190. See *supra* note 31 and accompanying text.

191. D.B. Burke, *supra* note 141, at 283. A HUD publication for the real estate industry (specifically brokers) reflects the fact that "real estate practices cannot fail to have an impact on housing discrimination." Office of Policy Dev., U.S. Dep't of Housing and Urban Dev., *Fair Housing and the Real Estate Industry 1* (1975).

192. The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin. Nat'l Ass'n of Realtors Code of Ethics, art. 10, reprinted in F. Fisher, *Broker Beware/Selling Real Estate Within the Law 146* (1981). "It is very important that licensees . . . realize that they must not transact real estate business in any type of discriminatory fashion." F. Fisher, *supra*, at 26.

193. See *Hobson v. George Humphreys, Inc.*, 563 F. Supp. 344, 348 (W.D. Tenn.

pressly prohibits steering,<sup>194</sup> the practice of showing minority clients property only in neighborhoods populated predominantly by minorities,<sup>195</sup> it still occurs regularly.<sup>196</sup> Other intentionally discriminatory conduct is by no means rare,<sup>197</sup> and its guises have become increasingly subtle.<sup>198</sup> The broker who does not consider his or her practices "racist" in the usual sense—that is, not "bigoted"—may still engage in courteous but disparate treatment of minority clients.

These practices should be extremely difficult to justify even as a matter of "business purpose." The interests they serve are negligible. As business conclusions, they tend to be a product of ingrained industry stereotyping rather than informed professional judgment.<sup>199</sup>

1982) (broker made different representations about asking price of property to black plaintiffs and white testers).

194. See 42 U.S.C. § 3604(d) (1982); see also *Zuch v. Hussey*, 394 F. Supp. 1028, 1048 (E.D. Mich. 1975), *aff'd mem.*, 547 F.2d 1168 (6th Cir. 1977).

195. Steering is essentially a statutory intentional tort. The tort is one of interference with what would otherwise be an open market. Liability requires some showing of intent. D.B. Burke, *supra* note 141, at 301.

196. See *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135, 139 (6th Cir. 1985) (instances of steering violative of 42 U.S.C. § 3604(a) (1982)), *petition for cert. filed sub nom. Hilltop Realty, Inc. v. City of Cleveland Heights*, 54 U.S.L.W. 3500 (U.S. Dec. 31, 1985) (No. 85-1157); see also N.Y. Daily News, Nov. 15, 1985, at 22, col. 1 (settlement in prosecution of real estate broker charged with steering blacks away from expensive and heavily white residential area); *Baldwin Realtor One Of Four In Racial Discrimination Probe*, *The Leader* (Freeport, N.Y.), Dec. 12, 1985, at 1 (report of civil suit charging that brokers "routinely deny blacks the opportunity to purchase homes in white areas while, at the same time, encouraging them to move to already-integrated or black areas").

197. See Marshall, *Women with Children in Today's Housing Market*, in *A Sheltered Crisis*, *supra* note 109, at 110, 113 (survey found discrimination against blacks in 15% of their visits to real estate agents).

198. The discrimination took the form of receiving less courteous treatment, receiving less information, or being shown fewer units. And the effect is cumulative; that is, if a black visits four sales agents, he or she could expect discrimination 48 percent of the time. Although the study's focus was blacks, the estimates of discrimination can be considered the lower bounds for female-headed black households and other sets of nontraditional households.

*Id.* Women face similar problems. See Packer, *supra* note 178, at 123-24 (quoting United States Dep't of Housing and Urban Dev., *Women and Housing: A Report on Sex Discrimination in the American Cities*, at ii (1976)). For minority women the effect is doubled. See *id.* at 123.

At each stage of the housing search, blacks received less attention than did whites, and in general were treated less favorably. Pearce, *supra* note 112, at 145. Thus, more whites were shown the multiple listings book and were invited to see homes. *Id.* Agents spent more time with blacks determining if they were financially able to buy a home. For white customers, the emphasis was on selling the home and arranging financing. *Id.* Agents treated blacks with courtesy and respect; only comparison with the treatment accorded white homeseekers revealed the differences. *Id.*

199. It is no defense to say that the broker merely followed community customs. D.B. Burke, *supra* note 141, at 301. If there is any nondiscriminatory reason for steering, it would seem to be that the broker believes, honestly and without racial animus, that the customers prefer it this way. See deVise, *Housing Discrimination in the Chicago Metropolitan Area: The Legacy of the Brown Decision*, 34 DePaul L. Rev. 491, 502-03 (1985) (broker perceives segregation to be preference of both buyer and community). Even if

More properly, the broker's legitimate interests are implicit in the rule that the broker earns his commission when he produces a buyer ready, willing and *financially able* to buy.<sup>200</sup> The inquiry should end at the prospective purchaser's financial ability to pay the price; to this extent the broker's interests are coextensive with those of the seller he represents,<sup>201</sup> and his right to rely on subjective factors should be no broader. The broker who treats legitimate "prospects" discriminatorily limits his own potential economic benefit.<sup>202</sup> But if brokerage practices yield disparate effects, business necessity analysis has a force beyond mere self-interest to bring the broker's practices into line with his legitimate concerns.<sup>203</sup>

### b. *Appraisal*

The function of the appraiser is to evaluate the market value of real property.<sup>204</sup> Historically, the appraisal profession regarded its task as one based on experience and subjective judgment tempered by familiarity

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this reasoning would be a cognizable "business purpose" in the disparate treatment branch of the analysis, it would seem improbable that it could support an assertion of "business necessity."

200. See D.B. Burke, *supra* note 141, at 99, 106. In the minority view, the broker earns his commission only when the sale is consummated—that is, on closing rather than merely on producing an able buyer. See *id.* at 109. This distinction does not alter the essence of the principle for present purposes. As Professor Burke observes, the minority view merely reflects the fact that "the practical test of a purchaser's . . . financial ability is met only at the closing." *Id.*

201. The broker is an agent of the seller for the purposes of the sale. *Id.* at 191-92. The resulting duties include "a duty to further the interests of his client, both legal and financial, and to avoid the loss of . . . legal rights." *Id.* at 202 (emphasis added).

202. Discriminatory practices limit the pool of possible buyers. One commentator has observed that such practices may force employers to pay more for labor because they limit the pool of eligible workers unnecessarily. See *supra* note 40. By analogy, artificial limitations on the size of the buyer pool would seem likely to lower housing prices—and decrease the broker's commission—by restricting demand.

203. As a matter of policy, HUD has counseled real estate brokers to avoid conduct that has discriminatory effects. See Fair Housing and the Real Estate Industry, *supra* note 191, at 6, 10-12. HUD expressed the business necessity analysis as prohibiting conduct that "either has no valid business-related purpose; or does have a valid business-related purpose, but . . . can be accomplished in some other way without having an exclusionary or harmful impact on minority groups." *Id.* at 10. This formulation tracks the majority view of business necessity analysis. See *supra* notes 55-64 and accompanying text.

204. See Wendt, *Recent Developments in Appraisal Theory*, in 1 Readings in Real Property Valuation Principles 307, 307 (1977) (market value "central concept in real estate valuation").

Even though the appraisal is a concrete figure, "appraising real estate is not believed to be an exact science." R. Arnold, How to Estimate Market Value in Selling Real Estate 25 (1962); see also Redlining Study, *supra* note 186, at I-27 (appraiser seeks to mirror the market as seen through the eyes of the typically informed purchaser). The resulting tension between the objective ideal and the subjective reality is at the center of the debate when the disparate effect of appraisal practices is raised.

with local market conditions.<sup>205</sup> In recent years the profession has moved toward objective criteria intended to make appraisals more quantitative and less dependent on the individual appraiser's personal judgment.<sup>206</sup>

The underlying tension between objectivity and subjectivity has generated differences of opinion within the profession concerning the proper role of subjective factors and personal experience.<sup>207</sup> At the same time, appraisers seem to agree that their goal is to predict an objectively "accurate" market price.<sup>208</sup> The emphasis on objectivity and market reality conflicts with the appraiser's inevitable reliance, at least to some extent, on his subjective judgment.

Even some traditional "neutral factors" now are acknowledged to be products of accepted wisdom rather than statistical or scientific analysis.<sup>209</sup> For example, the profession for many years considered the age and racial composition of neighborhoods to be relevant objective factors.<sup>210</sup> But little more than presumption supported these criteria. No systematic relationship seems to link racial composition of an area and decreasing property values.<sup>211</sup>

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205. In the early years of the [American Institute of Real Estate Appraisers]—and, as a matter of fact, before its formation—the principal emphasis was placed on experience. Judges, for instance, considered the principal qualification for an appraiser [as an expert witness] to be "forty years of experience as a broker."

Dolman, *The Appraiser's Dilemma*, in 1 Readings in Real Property Valuation Principles 43, 46 (1977).

206. See Ratcliff, *Is There a "New School" of Appraisal Thought?*, in 1 Readings in Real Property Valuation Principles 61, 62 (1977) (one "school" focuses on mechanisms of appraisal analysis); Dolman, *supra* note 205, at 45 (criticizing the "tendency to consider the most detailed and documented report as necessarily the most ethical and one least responsible for a divergency").

207. Compare L. Ellwood, *Ellwood Tables for Real Estate Appraising and Financing* xiii (4th ed. 1977) ("experience can teach lessons which may lead to sound judgment. . . . [but] I find it difficult to accept the notion that dependable valuation of real estate is nothing more than experience and judgment.") with Dolman, *supra* note 205, at 46 ("greater emphasis must now be placed on the factor of judgment").

208. See Ratcliff, *supra* note 206, at 63-64 (appraiser's "simple, direct and realistic" task is to judge the probable selling price of the property; appraiser must assume client seeks prediction of value under conditions as they actually exist, regardless of "fairness").

209. One commentator observed general acceptance within the profession of what he called a "Gresham's Law of Neighborhoods"—that bad neighbors and bad people drive out good neighbors and good people. Redlining Study, *supra* note 186, at I-29. Apparently, "bad" meant "minority," yet subsequent studies revealed no correlation between racial change and property value. *Id.* at I-29-30.

Less objectionable yet no more quantified neutral factors might include, for example, the architectural consistency of the neighborhood, changing patterns of land use (such as evolution from residential to commercial), the availability of similar property in the local market, or the condition of the building. See R. Arnold, *supra* note 204, at 31-32.

210. Badain, *supra* note 187, at 35.

211. See Redlining Study, *supra* note 186, at III-2 ("The literature on property values and race and on mortgage delinquency and foreclosures reveal [sic] no systematic relationship between race, composition of an area, decreasing property values, increasing rates of delinquency or foreclosures.").



The appraiser's dilemma is nowhere more acute than in the use of racial and ethnic characteristics in and of themselves as factors in computing property value.<sup>212</sup> Reliance on such factors seems not to have been meant as endorsement,<sup>213</sup> but merely to reflect what was widely regarded by the profession as socioeconomic reality.<sup>214</sup>

These attitudes are changing. A major appraisers' organization, the American Institute of Real Estate Appraisers (AIREA), was sued under Title VIII by the United States in 1976.<sup>215</sup> AIREA entered into a settlement agreement that renounced racial, ethnic or religious homogeneity as "desirable" factors.<sup>216</sup> The decree also provided that racial, religious and ethnic characteristics are not reliable predictors of value, and that it is improper to base an appraisal on stereotyped or biased racial presumptions.<sup>217</sup>

These principles exemplify the trend toward decreased reliance on presumptions involving race and racial characteristics.<sup>218</sup> The inevitable subjectivity of appraisal requires courts, as well as appraisers and their clients, to remain alert to judgments that seem to rely on conclusory ra-

212. Certain ethnic or racial characteristics were assumed to influence the value of real estate. See *infra* notes 213-14.

213. Appraisers seek to measure the value of the property in the real world. They do not ask whether the factors that influence that value are fair or rational—only whether they influence it. Some of the literature endorsing the use of racial criteria therefore carefully emphasizes that the appraiser need not share the sentiments his professional opinion reflects. See S. McMichael, *supra* note 146, at 164-65 (tastes and desires of general market, not those of appraiser, influence valuation). Thus on the role of racial transition in property value: "Whether rightly or wrongly, some families avoid or leave a neighborhood of mixed race or national origin. This reduces the market for homes in the area, and consequently may at first affect values adversely." *Id.* at 169. McMichael's *Manual*, an "early and respected appraisal text," Redlining Study, *supra* note 186, at III-38, reproduced a list of 10 racial and ethnic characteristics that supposedly "registers an opinion or prejudice that is reflected in land values." S. McMichael, *supra* note 146, at 160. The author somewhat apologetically cautioned that the "classifications may be scientifically misleading from a standpoint of inherent racial characteristics," *id.*, but presented the ranking seriously. It is embarrassing to the modern reader; one can scarcely imagine the meaning, still less the significance, of categories such as "Jews (lower class)." See *id.* Yet such was the attitude of appraisers to ethnic characteristics as predictors of market value.

214. See *United States v. American Inst. of Real Estate Appraisers*, 442 F. Supp. 1072, 1085 (N.D. Ill. 1977) (individual appraiser opposed consent decree, arguing that it restricted his freedom to take into account racial and ethnic factors that he considered "relevant to the appraisal profession"), *appeal dismissed*, 590 F.2d 242 (7th Cir. 1978).

215. *Id.* at 1076. The court held, as a matter of its jurisdiction to enter the settlement order, that the United States had stated a claim under the Fair Housing Act against the Institute. *Id.* at 1078-79.

216. *Id.* at 1077.

217. *Id.* Although the consent decree is a welcome recognition of problems within the profession, it lacks the force of a judgment on the merits and binds only those who are party to it. *Id.* at 1084-85.

218. See Redlining Study, *supra* note 186, at I-29 (some members of profession acknowledging that bias against integrated neighborhoods is unwarranted); see also *id.* at I-30 (professional organization reviewing its teaching materials to expunge biased views).

cial factors;<sup>219</sup> the AIREA decree provides useful guidance toward this end. That alertness must be tempered by a proper sympathy for the inevitable uncertainty of the appraiser's task.<sup>220</sup> But statistical or demographic support should be required of an appraiser who chooses to rely, for instance, on the racial composition of a neighborhood. If a valid argument can be made for such a proposition as a matter of business necessity, courts should demand that it be made.

### c. *Lending and Mortgage Redlining*

Once the buyer finds an attractive property and a willing seller the critical next step is to procure financing—a mortgage. But discrimination in home financing seriously impedes minorities from doing so.<sup>221</sup> While Title VIII prohibits express discrimination in residential financing,<sup>222</sup> the use of neutral, facially reasonable criteria may disproportionately exclude minority applicants.<sup>223</sup> The problem, as with appraisal, is that objectively cautious policies may be merely arbitrary.<sup>224</sup>

Like the appraiser, the lender seeks to make sound professional deci-

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219. Such presumptions may be encountered even when the appraiser is otherwise sympathetic to the aims and problems of fair housing. Consider the following statement concerning obstacles to the construction of low-income housing in cities: "[t]his problem . . . is compounded by . . . the disposition of sponsors to seek inexpensive sites in *less socially complicated* outlying areas where *problems in tenant relations* are expected to cause less difficulties . . ." White, *Values and Valuation Techniques in the Seventies*, in 1 Readings in Real Property Valuation Principles 49, 53 (1977) (emphasis added). Wariness of such statements, or at least a healthy curiosity about the support behind them, would serve a court or litigant well.

220. The appraiser's opinion of market value is at best an informed professional evaluation of *probability*, or a range of predicted selling prices. Ratcliff, *supra* note 206, at 65-66.

221. Searing, *Discrimination in Home Finance*, 48 Notre Dame Law. 1113, 1113-14 (1973).

222. See 42 U.S.C. § 3605 (1982).

Express discrimination may take many forms, from outright denial of mortgage credit for minorities to refusal to extend credit to such borrowers for the purchase of property in white neighborhoods. Minorities may also face different conditions such as higher interest, shorter terms or larger down payments. More subtle is denial of credit to white borrowers for the purchase of property in black or integrating neighborhoods. Searing, *supra* note 221, at 1113-14; see also Note, *Attacking the Urban Redlining Problem*, 56 B.U.L. Rev. 989 (1976) (similar practices imposed in designated *geographical areas*) [hereinafter cited as *Attacking Redlining*].

223. For example, arbitrarily discounting all or part of a working wife's income in computing total family income, noninclusion of stable income from overtime, production bonuses and part-time work, or the use of isolated credit difficulties as an absolute bar to obtaining a loan, all of which may disproportionately burden minorities. Searing, *supra* note 221, at 1114.

224. See *Redlining Solutions*, *supra* note 111, at 124. Lending practices are frequently based on assumptions rather than sound business judgment. Comment, *The Legality of Redlining under the Civil Rights Laws*, 25 Am. U.L. Rev. 463, 482 (1976) [hereinafter cited as *Legality of Redlining*].

sions.<sup>225</sup> The bank officer is further constrained by the fiduciary duty owed depositors.<sup>226</sup> Bankers face double pressure to make prudent judgments because a high default rate will compromise chances of professional advancement.<sup>227</sup> These professional exigencies may conflict with the imperatives of Title VIII.<sup>228</sup>

The lender's two fundamental legitimate interests are the borrower's personal ability to make the payments on the loan<sup>229</sup> and the adequacy of the collateral to secure payment in the event of default.<sup>230</sup> Thus the borrower's income, credit history and financial stability are proper areas of inquiry.<sup>231</sup> Similarly, the lender's long-term interest in the mortgaged property requires consideration, not only of its present value, but of its value over the life of the loan.<sup>232</sup>

Where lending practices generate discriminatory effects, business necessity analysis suggests that, at a minimum, mere presumptions about risk and creditworthiness should not be tolerated. Lenders may in fact incur greater costs in making the urban loans in which Title VIII

225. See *Attacking Redlining*, *supra* note 222, at 1009 ("lending policies are of a professional nature").

The secondary mortgage market also imposes strictures on the originating lender. See *Redlining Study*, *supra* note 186, at I-33; Watson, *Creative Forms of Finance Discrimination*, in *A Sheltered Crisis*, *supra* note 109, at 94, 94.

226. *Legality of Redlining*, *supra* note 224, at 482 (comparable to fiduciary duty of corporation to its stockholders).

This obligation also has a regulatory component. See *Attacking Redlining*, *supra* note 222, at 991; *cf.* Watson, *supra* note 225, at 94 ("S&Ls that deviate from sound lending practices are courting problems with their regulatory agencies."); *Legality of Redlining*, *supra* note 224, at 468 (foreclosure is an option if the borrower defaults, but regulatory agencies do not look favorably on foreclosed property as security for savings); *Redlining Solutions*, *supra* note 111, at 123-24 (traditional institutional conservatism rooted in duty to depositors, but depositors are now protected by regulatory agencies).

227. To ensure professional advancement, individual banking officers try to make only the safest loans. *Attacking Redlining*, *supra* note 222, at 991.

228. See *supra* note 223 and accompanying text.

229. See Duncan, Hood & Neet, *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 *Urb. Law.* 510, 512 (1975) (one of mortgage lender's dual goals is to secure regular flow of principal and interest payments); *Attacking Redlining*, *supra* note 222, at 991-92 (lender's concerns expressed in terms of risk of default).

230. See *Redlining Study*, *supra* note 186, at I-10 (security risk arises when the underlying value of the property is not enough to pay the outstanding loan balance plus costs of foreclosure).

231. Watson, *supra* note 225, at 94 (these factors are part of the lender's normal underwriting standards to assess the prospective buyer's creditworthiness).

232. See *Redlining Study*, *supra* note 186, at II-42 (underwriting takes into consideration both present appraised value and long-term value of the property); *Attacking Redlining*, *supra* note 222, at 992-93 (adequate protection requires anticipation of probable value over several decades).

In this respect, many practices noted in the context of appraisal, see *supra* Part II.B.2.a., are encountered again. Lenders' property evaluation forms at one time sought information about the racial stability and composition of neighborhoods as a factor in evaluating loans. See *Legality of Redlining*, *supra* note 224, at 469 & n.37. Bankers considered racial composition a legitimate factor because it affected property values.

problems are most likely to arise.<sup>233</sup> These costs include administrative expenses, the unique risks to which urban property is subject, and the post-foreclosure problems that the urban property presents.<sup>234</sup> Where such exigencies are asserted as the reason for the denial of a loan, the lender should be prepared to demonstrate and defend them. Of the two parties to the transaction, the institutional lender, not the individual borrower, is best equipped to make this showing.<sup>235</sup> In the alternative component of the analysis, the lender should be required to inquire into factors, such as federal assistance available to the urban owner,<sup>236</sup> that may not customarily be part of the institution's evaluation of creditworthiness.

Redlining, the policy of denying loans within geographically defined areas denominated "bad risks" without considering the merits of the individual applicant,<sup>237</sup> has been a particularly difficult problem for urban minority property owners.<sup>238</sup> As a business evaluation of neighborhood characteristics,<sup>239</sup> redlining is not facially discriminatory. Its disparate effect on minorities, however, is now generally acknowledged<sup>240</sup> and it has been identified as a factor in urban decay.<sup>241</sup>

Many of the justifications for redlining are credible.<sup>242</sup> Factors present

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233. See *Attacking Redlining*, *supra* note 222, at 994-96. There is some contrary evidence, however. See *supra* note 211.

234. See *infra* note 243 and accompanying text.

235. Lending evaluation machinery is in place; any change of practice would be more in the nature of calibrating the kind of questions asked and the kind of answer the lender is willing to accept than in installing new mechanisms. Simply to expunge presumptions and document conclusions would substantially improve matters; such procedures would also operate to protect the lender in the event of a lawsuit.

236. For example, special mortgage insurance is available to low-income persons. See 12 U.S.C. § 1715z-2 (1982); 24 C.F.R. § 237.1 (1985).

237. See *Legality of Redlining*, *supra* note 224, at 465.

238. See *Searing*, *supra* note 221, at 1113-14 (redlining renders areas off limits for lending, principally in central cities or suburban pockets occupied largely by blacks).

239. See *Redlining Study*, *supra* note 186, at I-10 (reluctance to lend in a designated area ostensibly based on the lender's perception of economic risk); *Legality of Redlining*, *supra* note 224, at 465 (lenders redline because of age of property and the low income or racial composition of residents). Racial motivations may influence the decision, but they are difficult to disentangle from business and economic considerations. See *id.* at 469.

240. Redlining has been held violative of Title VIII's prohibition of discrimination in financing, 42 U.S.C. § 3605 (1982). See *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976). The *Laufman* court also intimated that redlining in financing was within the scope of the omnibus "otherwise make unavailable or deny" provision of the Fair Housing Act, 42 U.S.C. § 3604(a) (1982). "The same conduct may be prohibited by either or both provisions." *Laufman*, 408 F. Supp. at 493; see also *Harrison v. Heinzerth Mortgage Co.*, 430 F. Supp. 893, 896 (N.D. Ohio 1977) (defendant's agent discouraged plaintiff from purchasing property in racially transitional area and imposed unusual financing terms; conduct held violative of 42 U.S.C. §§ 3604, 3605, and 3617).

241. See *Legality of Redlining*, *supra* note 224, at 465-66. New owners cannot buy, present owners cannot sell or refinance. *Id.* This consequence is clear, regardless of whether redlining itself is cause or effect. See *Attacking Redlining*, *supra* note 222, at 1005-06.

242. See *Attacking Redlining*, *supra* note 222, at 996.

in the urban environment may objectively put repayment and collateral sufficiency at risk.<sup>243</sup> But under business necessity analysis, conclusory presumptions cannot justify practices that disproportionately affect protected groups.<sup>244</sup> Considering that evidence of actual difficulties in urban areas is inconclusive,<sup>245</sup> a lender should be prepared to back up a conclusion of area-wide risk with hard data; its unsubstantiated, conclusory opinion should never suffice. Moreover, the lender should have to show how failure to redline would jeopardize its assets,<sup>246</sup> not merely posit assumptions to the effect that it would. Indeed, the availability-of-alternatives component of the analysis would seem to indicate that redlining has tenuous validity: it is unlikely that the practice furthers any legitimate business purposes that could not be achieved by nondiscriminatory or less discriminatory means.<sup>247</sup>

#### d. *Redlining in the Insurance Industry*

Redlining by property insurers shares characteristics and motivations with redlining by lenders.<sup>248</sup> The decision to insure or not to insure must

243. *Id.* at 994-95. High unemployment, low per capita income, and age of structures may coincide to cause risk of default and collateral insufficiency. *Id.*

Administrative costs are higher on urban loans: fixed costs represent a higher percentage of the small urban loan. Because of the likelihood of vandalism, the lender must also incur costs of inspection unnecessary for property located elsewhere. See *Legality of Redlining*, *supra* note 224, at 467.

The lender is likely to incur increased costs in forcing delinquents to pay. Such costs may multiply for the lender with a large portfolio of urban loans and it may be unable to absorb the losses. Foreclosure, because of the expense and time involved, is also unattractive; the lender becomes the owner of possibly undesirable urban property, with problems and costs of management. Older urban residential property often has little to recommend it as a prudent investment. See *id.* at 467-68.

244. See *Legality of Redlining*, *supra* note 224, at 482 (institution's unsubstantiated belief that no profitable loans could be made in redlined area would not establish business necessity) (quoting 2 U.S. League of Sav. Ass'ns Fed. Guide ¶ U 13-49.2, at 8173-76 (1974)); see also *Attacking Redlining*, *supra* note 222, at 1007 ("if a perfectly sound neighborhood is disinvested for arbitrary reasons, it is entirely reasonable to place the burden on institutional lenders by requiring them to alter their lending practices").

245. See *supra* note 211 and accompanying text. As already noted, strong arguments can be made that urban mortgage lending is risky. See *supra* note 243 and accompanying text.

246. See *Legality of Redlining*, *supra* note 224, at 482 (arguing that lender should be required to show actual, substantiated loss experience as opposed to minimal unprofitability).

247. *Id.* at 481 (quoting 2 U.S. League of Sav. Ass'ns Fed. Guide ¶ U 13-49.2 at 8173-76 (1974)).

248. These factors have already been discussed in the context of mortgage redlining. See *supra* notes 244-46 and accompanying text.

One author interprets insurance redlining expansively, including not only outright refusals to provide services on the basis of the location of the property, but *all* institutional practices that have the effect of limiting the availability or affordability of insurance (and lending) services in certain neighborhoods. See Badain, *supra* note 187, at 4. These practices include refusing insurance for structures over 40 years old and limiting coverage to market value rather than higher replacement cost to decrease incentive to commit arson for profit. *Id.* at 13-14.

be based on sound underwriting principles.<sup>249</sup> This supposedly objective analysis should support a refusal to insure if it exposes a connection to actual or anticipated loss experience.<sup>250</sup> Despite the objective factors with which insurers seek to quantify their judgments, decisions tend to be more impressionistic than empirical.<sup>251</sup>

A refusal to insure will also have a significant secondary effect for the prospective home buyer since the lender's decision is typically conditioned on insuring the property. Insurance redlining therefore exacerbates and accelerates disinvestment. For the minority homebuyer in the urban environment, the resultant depressing effect on housing opportunity is devastating.<sup>252</sup>

Although Title VIII does not by its terms apply to the insurance industry,<sup>253</sup> one district court has held that the practice of insurance redlining falls within the general "otherwise make unavailable or deny" provision of the Act.<sup>254</sup> In *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*,<sup>255</sup> the court noted the "nexus among insurance, financing, and the availability of suitable housing"<sup>256</sup> and held that insurance redlining effectively restricted the availability of housing<sup>257</sup> and was therefore violative of Title VIII.<sup>258</sup>

The *Dunn* court's conclusion seems a sound and logical consequence of the acceptance of liability based on disparate impact.<sup>259</sup> But its view

249. See Badain, *supra* note 187, at 4 n.16 (quoting Advisory Comm. to the Nat'l Ass'n Of Ins. Comm'r's Task Force on Redlining Ninety Day Report 2-3 (1978)). Profitability in the insurance industry depends on adverse selection—selling to the lowest-risk customers. *Id.* at 5.

250. See Advisory Comm. to the Nat'l Ass'n Of Ins. Comm'r's Task Force on Redlining Ninety Day Report 2-3 (1978), *quoted in* Badain, *supra* note 187, at 4 n.16.

Practices that have the effect of limiting access to services therefore should not be considered unlawful if there is a "direct causal relationship to an increased probability of loss." Badain, *supra* note 187, at 4.

251. Badain, *supra* note 187, at 37.

Insurance officials cannot quantify many of the factors on which they rely, yet express considerable faith in them. *Id.* at 14 n.72 (quoting *Rights and Remedies of Insurance Policyholders: Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 82-83 (1978) (testimony of William S. Gibson, Vice President and Assoc. General Counsel, Continental Ins. Cos.)).

252. Badain, *supra* note 187, at 35; *see also id.* at 3 & n.8, 5 (insurance availability and affordability in urban areas are crises of monstrous proportion, with profound effect in cycle of disinvestment in inner cities) (quoting *Insurance Crisis in Urban America* 44 (1978)).

253. Title VIII covers insurers, but only when they act in the capacity of lenders and provide financing. 42 U.S.C. § 3605 (1982).

254. *Id.* § 3604(a). See *supra* note 2.

255. 472 F. Supp. 1106 (S.D. Ohio 1979).

256. See *id.* at 1109.

257. See *id.*

258. See *id.*

259. See Dale, *Discrimination in Housing: A Legal Perspective*, in Congressional Research Service, House Comm. on Banking, Finance and Urban Affairs, 98th Cong., 1st Sess., *Housing—A Reader*, at 139, 148-49 (Comm. Print 1983) (characterizing *Dunn*

was rejected by the Fourth Circuit in *Mackey v. Nationwide Insurance Cos.*,<sup>260</sup> which held the practice of insurance redlining not within the coverage of Title VIII.<sup>261</sup> The *Mackey* court relied heavily on legislative intent gleaned from the failure of amendments that would have brought the insurance industry expressly within the purview of the Act.<sup>262</sup> From that failure the *Mackey* court concluded that Congress intended to exclude the insurance industry, traditionally a matter of state regulation,<sup>263</sup> from the strictures of Title VIII. "If [Title VIII] was designed to reach every discriminatory act that might conceivably affect the availability of housing," the court observed, "[its] specific prohibition of discrimination in the provision of financing would have been superfluous."<sup>264</sup>

This argument fails to account for other considerations suggested by settled Title VIII doctrine. Disparate impact liability was not expressly contemplated by the legislators who enacted Title VII or Title VIII,<sup>265</sup> yet is recognized under each statute.<sup>266</sup> Similarly, the Fair Housing Act has been applied to public entities although it does not by its terms so apply.<sup>267</sup> Moreover, as the Supreme Court has observed, the sweeping language of Title VIII merits generous interpretation.<sup>268</sup> This breadth reflects urgent legislative concern with the national priority of integrated

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holding as "a small transition" from similar holding on mortgage redlining); Jennings, *Redlining—Now Insurers Are Guilty of It, Too*, 8 Real Estate L.J. 323, 329 (1980) ("the step to involvement of insurers is not a dramatic one").

260. 724 F.2d 419 (4th Cir. 1984).

261. *See id.* at 423.

262. *See id.* at 424.

263. *See id.* at 423.

264. *Id.*

265. Neither statute defines discrimination in terms of effect—nor, however, does either define it in terms of purpose. Schwemm, *supra* note 2, at 202 & n.23. Statutory language is ultimately inconclusive on the issue of disparate impact liability. *Id.* at 207 (Title VIII). The concept of business necessity antedates the passage of Title VII but was only judicially incorporated. *Judicial Dualism*, *supra* note 3, at 379.

266. Since *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the Supreme Court has reiterated its approval of disparate effect liability in Title VII. *See Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 327-28 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). There is similar agreement among the circuits in Title VIII. *See supra* note 115 and accompanying text. *See also* Schwemm, *supra* note 2, at 215 (disparate impact analysis formulated in *Griggs* less as matter of statutory construction than because it "simply makes sense"). Congress itself has expressed approval of disparate impact liability. *See Connecticut v. Teal*, 457 U.S. 440, 447 n.8 (1982); *Judicial Dualism*, *supra* note 3, at 381; *see also* 117 Cong. Rec. 31,961 (1971) (statement of Rep. Perkins).

267. *See infra* Part II.C.

268. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (white residents had standing to sue because discriminatory landlord practices deprived them of benefits of integrated housing; generous construction of statute proper).

"This mandate by a unanimous Supreme Court to construe Title VIII broadly has become the foundation for all subsequent judicial interpretations of the Fair Housing Act." R. Schwemm, *Housing Discrimination Law* 39 (1983). The language of the statute is "as broad as Congress could have made it." *United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975).

housing.<sup>269</sup> Against this background, the intimate connection between insurance practices and housing availability would seem to support a prima facie case based on its disparate effect. At the very least, the argument for subjecting insurance redlining to effect-based liability has a logical force that the *Mackey* court's discussion does not fully dispel.

If a court can be persuaded to accept the *Dunn* view, it is difficult to imagine how a convincing showing of such impact could be reconciled with business necessity scrutiny. As in both appraisal and lending, traditional reliance on supposedly objective factors in the insurance business may not be highly rational.<sup>270</sup> Indeed, many such factors are not objectively quantified and others are statistically dubious.<sup>271</sup> Insurance underwriters may act out of an excess of caution stemming from concern with professional advancement in an industry that prizes conservatism.<sup>272</sup> At the very least, the defendant insurer should be held to a significant burden of demonstrating some relationship between its underwriting criteria and protection of the interests it urges as matters of business necessity.

### C. *The Public Defendant*

The treatment of public entity defendants highlights a critical analytical distinction between the employment and housing contexts. Title VII is applied to both public and private employers.<sup>273</sup> For public and private employers, the business necessity standard is appropriate to assess the job-relatedness of testing programs, for example, or the relevance of physical requirements to the employment. The interests of public entities as employers are analytically no different from those of private employers.<sup>274</sup>

In Title VIII, however, the consensus is that a different approach is appropriate for public defendants.<sup>275</sup> This reflects the role of public enti-

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269. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211-12 (1972).

270. For discussion of these factors in the context of appraisal and lending, see *supra* notes 209-14, 224 and accompanying text.

271. See *Badain*, *supra* note 187, at 17-18 (age of structure an accurate loss predictor only in very limited circumstances; "moral hazard" problem, i.e., the idea that insurance over market value encourages arson, not as large as assumed—at least with respect to owner-occupied buildings—and amenable to solution by methods other than refusal to insure at all).

272. *Id.* at 13 & n.65. Preconceptions are reinforced by the underwriter's or agent's contact with his or her colleagues within the industry. *Id.* at 37.

273. *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) ("for both private and public employers, '[t]he touchstone is business necessity'") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

274. Courts that have applied the business necessity analysis to public defendants have made no distinction based on the fact that the defendant is not a private "business" entity. See, e.g., *Newman v. Crews*, 651 F.2d 222, 224 (4th Cir. 1981); *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835, 839-40 (10th Cir. 1981); *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 676 (9th Cir. 1978).

275. See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 n.5 (4th Cir. 1984) ("a business necessity test is inapplicable in situations where the defendant is a public entity").



ties in performing administrative and regulatory functions that have no counterpart in employment.<sup>276</sup> When public entities engage in activities analogous to those of private landlords, such as construction or administration of public housing projects, a different standard is still proper because of the remedial nature of the activities.<sup>277</sup>

It is generally agreed that public defendants are subject to disparate-effect liability,<sup>278</sup> but there is no consensus on an appropriate standard for such defendants' rebuttal of the prima facie case. Courts that have considered the issue agree that a different, and in some respects more exacting, standard is indicated.<sup>279</sup> The concept of business necessity is not available as such to the public entity:<sup>280</sup> it cannot raise many issues of legitimate concern to the private defendant. But neither can the public defendant be held strictly liable. Some room for justification is needed.

### 1. Justifying the Public Entity's Actions

Several courts have confronted the question of the proper rebuttal burden for the public defendant. The tests they have used vary widely in language, but each essentially balances the defendant's interests against the discriminatory impact of the action.

The most straightforward of these tests is that formulated by the Third Circuit in *Resident Advisory Board v. Rizzo*.<sup>281</sup> "[A] justification must serve, in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact."<sup>282</sup> The court acknowledged the fact-specific nature of the inquiry,<sup>283</sup> distinguishing the Title VII employment context and its more quantifiable "job-related qualities."<sup>284</sup>

A second view manifests a desire to place a heavy burden on the public

276. See *Arthur v. City of Toledo*, No. 84-3898, slip op. at 4-5 (6th Cir. Jan. 24, 1986) (referenda on sewer extension ordinances; defeat alleged to have had discriminatory effect of impeding low-income housing construction); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1285 (7th Cir. 1977) (zoning decision; similar effect), *cert. denied*, 434 U.S. 1025 (1978).

277. See *infra* notes 299-302 and accompanying text.

278. See, e.g., *Arthur v. City of Toledo*, No. 84-3898, slip op. at 18 (6th Cir. Jan. 24, 1986); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). Older cases argue by analogy to Title VII, but *Arthur v. City of Toledo*, No. 84-3898, slip op. at 18-19 (6th Cir. Jan. 24, 1986) draws exclusively on the now-substantial body of Title VIII doctrine.

279. See *infra* notes 281-95 and accompanying text.

280. See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 n.5 (4th Cir. 1984).

281. 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978).

282. *Id.* at 149.

283. See *id.*

284. See *id.* at 148.

defendant when it engages in governmental functions.<sup>285</sup> In *United States v. City of Black Jack*,<sup>286</sup> the Eighth Circuit adopted the strict scrutiny of equal protection doctrine for a public defendant under Title VIII.<sup>287</sup> The *Rizzo* court had rejected the standard as too stringent for actions unmotivated by discriminatory animus.<sup>288</sup> The *Black Jack* standard seems to acknowledge this concern implicitly, for its "necessary to a compelling interest" language is tempered by three further factors derived from mainstream Title VII business necessity analysis, including the availability of less discriminatory alternatives.<sup>289</sup> In reality, then, the Eighth Circuit approach resembles Title VII thinking: its invocation of strict scrutiny seems functionally more an expression of policy than a true "standard."

The third formulation is the most narrowly tailored to the particular facts of the case before the court. In *Metropolitan Housing Development*

285. The governmental-function distinction suggests a heavier burden of justification, as this view implies. Should a similar weight carry over into the non-governmental activities of the public entity? Such activities play a critical role in remedial programs addressed to segregation in housing and to the needs of low-income persons. For reasons of public policy, a heavier burden seems appropriate for governmental programs in areas analogous to private housing activity. See *infra* notes 298-305 and accompanying text.

286. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

287. See *id.* at 1185 & n.4. The court applied the standard without discussion, stating simply that, "once the United States established a prima facie case of racial discrimination, it became proper to apply the compelling governmental interest requirement of the equal protection cases." *Id.* at 1185 n.4.

The Supreme Court has since held that equal protection standards do not, in some respects, apply in Title VII and Title VIII. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court held that the disparate impact standard of Title VII was insufficient to make out an equal protection violation; the Court emphasized that the statutory and constitutional levels required different rules. *Id.* at 238-39. An equal protection violation, unlike Title VII, requires a showing of discriminatory purpose. *Id.* at 239.

In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), the Court reiterated this distinction in the context of housing. *Id.* at 264-65. The Court held that effect alone did not make out an equal protection violation, but remanded for consideration of the Title VIII claim. *Id.* at 270-71.

The Court has not spoken on the related question of whether the strict scrutiny of equal protection may be invoked under the statutes. Since the Court's *Washington* and *Arlington Heights* opinions, no circuit has invoked the compelling interest standard in a Title VIII case. The *Black Jack* court indeed adjusted the standard to bring it into line with conventional Title VIII thinking. See *infra* note 289 and accompanying text.

288. See *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978). The district court had followed *Black Jack* in holding the defendant to the compelling interest standard, but the Third Circuit held that standard applicable only to cases involving purposeful discrimination. See *id.*

289. In determining whether any of these [asserted interests] rise to the level of a compelling governmental interest, we must examine: 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.

*United States v. City of Black Jack*, 508 F.2d 1179, 1186-87 (8th Cir. 1974) (footnotes omitted), *cert. denied*, 422 U.S. 1042 (1975). Compare this with the classic Title VII formulation, *supra* note 50 and accompanying text.

*Corp. v. Village of Arlington Heights*<sup>290</sup> the Seventh Circuit held that the liability of a public defendant depended on

[f]our critical factors . . . . (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.<sup>291</sup>

In considering the governmental entity's interests, the Seventh Circuit noted that greater deference would be appropriate when the action attacked falls "within the ambit of legitimately derived authority,"<sup>292</sup> especially in the area of zoning, where municipalities are traditionally afforded wide discretion.<sup>293</sup> But the court also implied that the strength of those interests is, at least in part, a function of the relative strength of the plaintiff's interests—including "furthering the congressionally sanctioned goal of integrated housing."<sup>294</sup> In this sense, the test balances competing interests.

The analogy to business necessity analysis is helpful in evaluating the justification offered by public defendants. The concept of business necessity suggests that any defendant should be required to explain its actions, and to bear liability if the explanation is inadequate. For a governmental entity, whose actions have tremendous potential for harm,<sup>295</sup> a high threshold of justification seems appropriate. The balancing process at the core of the courts' analyses allows consideration of all relevant factors.

290. 558 F.2d 1283 (7th Cir. 1977) (*Arlington Heights II*), cert. denied, 434 U.S. 1025 (1978).

291. *Id.* at 1290.

The second of these factors was discounted by the court, which called it "the least important of the four." *Id.* at 1292. Indeed, it is conceptually puzzling because, by definition, a disparate effect case may be made out without showing intent, and intentional discrimination is always violative of Title VIII. See *supra* note 4 and accompanying text. The Sixth Circuit, in recognizing disparate effect liability for a public entity defendant, adopted the *Arlington Heights II* "critical factors," but omitted the second. See *Arthur v. City of Toledo*, No. 84-3898, slip op. at 19 (6th Cir. Jan. 24, 1986).

The tailoring of this analysis to the facts of *Arlington Heights II* limits its applicability in other situations. The Fourth Circuit has observed that it has no application to private defendants. *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 988 n.5 (4th Cir. 1984) (test from *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982), identical to that in *Arlington Heights II*). The list of factors may also lend the test a quality of concreteness it does not really have. See Schwemm, *supra* note 2, at 257 (criticizing the test's lack of guidance on relative weight of the four factors).

292. *Arlington Heights II*, 558 F.2d at 1293.

293. *Id.*

294. *Id.*

295. For example, the government entity can impede construction of new moderate-income housing by its zoning, as in *Arlington Heights II*, or can fail to provide assistance services without which a project cannot proceed, as in *Rizzo*. It may take such actions without awareness of their discriminatory effect, or, as in *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1373 (S.D.N.Y. 1985), do so deliberately.

Although each commits the resolution to the discretion of the trial court, all echo the rationale of the business necessity defense in affording the public entity the opportunity to overcome the prima facie case.

The availability-of-alternatives component of the analysis provides incentive to explore approaches that might reduce racially discriminatory impact. If none is in fact available, the public entity will have tried and will be able to document the attempt. In both respects, this part of the analysis has considerable potential for fostering the goals of Title VIII.

## 2. Public Entities as Governmental and as Quasi-Private Housing Actors

The temptation to hold the governmental entity to the compelling interest standard is strongest when the challenged action is one traditionally performed by government. Zoning and issuing of building permits are two examples;<sup>296</sup> these functions clearly have substantial impact on the housing activities of third persons and may have discriminatory effects.<sup>297</sup> In such a situation, the standards discussed above come into play to assess the justification put forward by the governmental defendant.

In addition to regulatory activities that affect private activity, the government may itself be an actor in the housing arena.<sup>298</sup> In federally-supported programs alone, the local housing authority may own and operate public housing projects<sup>299</sup> as well as administer certification for existing-housing rent subsidies.<sup>300</sup> The same statutes that provide for the assist-

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296. Land use regulation and construction permit policy are particularly amenable to analysis under the *Arlington Heights II* standard. See *supra* note 291 and accompanying text. The *Rizzo* standard may be an even more useful tool because of its high degree of adaptability to varying fact situations. See *supra* note 282.

297. In *Rizzo*, the defendant failed to provide police protection and a contractor who was building a low-income housing project was unable to proceed in the face of community protest. *Rizzo*, 564 F.2d at 135. The plaintiff in *Arlington Heights II* had requested a zoning variance; the defendant's denial "effectively precluded the construction." *Arlington Heights II*, 558 F.2d at 1286. These cases exemplify the power of governmental entities over the activities of private parties.

298. Interesting facts were presented in *Parks v. Coleman*, No. N-81-24, slip op. (D. Conn. July 19, 1985). The defendant public housing authority (PHA) administered two assistance programs. One was PHA-run low-income housing funded by the federal government. *Id.* at 2. The other was an in-place rent subsidy program ("Section 8") that enabled low-income persons to live in private housing. *Id.* at 3. The PHA had a 25% rule for the subsidy program: priority was accorded applicants who spent more than 25% of monthly income on housing. *Id.* at 4.

Because the residents of public housing were paying less than 25% of their income for housing—their rents were, of course, artificially low—they were effectively precluded from receiving Section 8 assistance. *Id.* at 7-8. So, because the residents of public housing were overwhelmingly black, *id.* at 2, the 25% rule had a racially disparate effect. *Id.* at 14.

These facts illustrate both the typical activities of a local public-entity housing actor, and the morass of conflicting duties it can encounter even when it acts in good faith.

299. See *Parks v. Coleman*, No. N-81-24, slip op. at 2, 5 (D. Conn. July 19, 1985).

300. 42 U.S.C. § 1437f (1982).

ance also impose affirmative obligations on the local housing authority to administer the programs in a nondiscriminatory fashion.<sup>301</sup> In this scheme, the local entity plays a critical role in programs that serve twin goals of assisting the needy and ameliorating segregated housing patterns.<sup>302</sup>

The public entity as landlord makes tenant selection decisions analogous to those made by private landlords.<sup>303</sup> However, many factors that are proper considerations for the private businessperson cannot rightly be taken into account by the public entity. For instance, the private landlord's relative freedom to base decisions on subjective criteria<sup>304</sup> is more sharply circumscribed where the landlord is a public housing authority. Similarly, income criteria are less critical.<sup>305</sup>

### CONCLUSION

Despite the usefulness of Title VII precedent in Title VIII housing litigation, the limits of the analogy between the two laws are critical. The different considerations operative in the housing context suggest that a strict attitude toward the defendant's burden of justification in disparate impact cases is appropriate in Title VIII. This distinction further suggests that the more stringent attitude should be retained in Title VIII regardless of any tendency in Title VII toward greater deference to employer discretion. The business necessity defense illustrates and focuses these limits. While it can be useful in housing cases, it must be tailored and adjusted to correspond to the peculiar problems of the housing context. So adjusted, the defense—or, more properly, the analytical process it represents—can be useful in encouraging a close relation between legitimate business needs and criteria responsive to those needs, while serving the purposes of Title VIII in minimizing unintended discriminatory effects.

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301. The local housing authority is required to certify to HUD that the authority intends to comply with Title VIII, inter alia. 24 C.F.R. § 882.204(b)(1)(iii) (1985). A violation of Title VIII in the administration of a Section 8 program is thus privately actionable under 42 U.S.C. § 3612(c) (1982).

302. *Cf. Parks v. Coleman*, No. N-81-24, slip op. at 18 (D. Conn. July 19, 1985) (available alternatives would allow defendant to serve the greatest number of eligible households).

303. See *supra* Part II.B.2.b.

304. See *supra* notes 158-61 and accompanying text. It is difficult to imagine what sort of subjective criteria might be used by a public entity. Rather, it would seem best for it to develop comprehensive eligibility standards that minimize the influence of subjective judgment.

305. Income criteria cannot have the same meaning for the public entity as for the private actor because the latter is carrying on business for profit. Similarly, where the private landlord is interested in tenants who make *enough* to pay the rent, the public entity is concerned with restricting eligibility to those who *cannot* make enough.