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Betsey v. Turtle Creek Associates: All-Adult Housing Policy May Violate the Fair Housing Act

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I. INTRODUCTION

The problem of housing discrimination against families with children is a growing phenomenon which presents complex legal issues with serious sociological ramifications. Several jurisdictions...
have responded with legislation prohibiting various "all-adult" housing policies and practices. Although the Fair Housing Act


The importance of housing has long been recognized. See, e.g., Block v. Hirsh, 256 U.S. 135, 156 (1921), where Justice Holmes noted that "[h]ousing is a necessary of life." "There cannot be the slightest doubt that shelter, along with food, are the most basic human needs. . . . It is plain beyond dispute the proper provision for adequate housing for all categories of people is certainly an absolute essential in promotion of the general welfare. . . ." Southern Burlington County NAACP v. Mount Laurel, 67 N.J. 151, 178-79, 336 A.2d 713, 727, cert. denied, 423 U.S. 808 (1975). See Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1984).


3. 42 U.S.C. §§ 3601-19 (1982); e.g., Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982). The Fair Housing Act is a "broad legislative plan to eliminate all traces of discrimination within the housing field." Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974). In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209-12 (1972), the Court noted that the Fair Housing Act is "broad and inclusive" and must be given "a generous construction." Id. at 211. Congress declared Fair Housing to be a national policy which it considered "to be of the highest priority." Id.; 42 U.S.C. § 3601 (1982). In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413-17 (1968), the Court noted that the Fair Housing Act is a "comprehensive open housing law" that is "applicable to a broad range of discriminatory practices."

The Fair Housing Act seeks to produce "truly integrated and balanced living patterns." 114 CONG. REc. 3422 (1968)(Statement of Senator Walter Mondale).

See Otero v. New York City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973); Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972)(en banc). "[T]he purpose of the [Fair Housing] Act is to promote integrated housing rather than simply outlaw invidious discrimination." In re Malone, 592 F. Supp 1135, 1166 (E.D. Mo. 1984), citing R. SCHWEMM, HOUSING DISCRIMINATION LAW 42-43, 127 (1983). "Congress was aware that the measure [Fair Housing Act] would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole character of the housing market." Mayers v. Ridley, 465 F.2d 630, 652 (D.C. Cir. 1972)(en banc) (Wilkey, J., concurring). See generally, Dubofsky, Fair Housing: A Legislative History and
prohibits discrimination because of race, color, religion, sex, or national origin, it does not expressly forbid discrimination on the basis of age or family makeup. However, all-adult housing policies have broad implications which may, under some circumstances, violate the Fair Housing Act. A case-by-case analysis is necessary in order to determine if a particular all-adult policy may violate the Fair Housing Act.


In *Betsey v. Turtle Creek Associates,* the United States Court of Appeals for the Fourth Circuit recently held that a prima facie case under the Fair Housing Act may be established where an all-adult housing policy has a disparate adverse impact upon minorities. *Betsey* recognized that minorities need only show that a housing policy or practice has a discriminatory impact on them as individuals. *Betsey* noted that an “immediate and substantial impact is sufficient,” and rejected the asserted defense that the “bottom line” of the all-adult policy was nondiscriminatory in that it resulted in some sort of an acceptable racial balance in the apartment complex or community.7

*Betsey* is the first circuit court case to directly apply the Title VII prima facie case doctrine using disparate impact analysis in the case of a private non-governmental defendant charged with housing discrimination. *Betsey* is particularly noteworthy because it clarifies the standard of proof to be applied in housing discrimination cases involving private defendants. *Betsey* is the first circuit extent that the plaintiffs’ allegations showed a violation of the Fair Housing Act. *Arlington II*, 558 F.2d 1283.

6. 736 F.2d 983, 988-88 (4th Cir. 1984).


court case to expressly find a prima facie case of racially disparate impact as a result of an all-adult housing policy. Landlords and policymakers must carefully consider the far-reaching implications of Betsey when formulating or administering housing policy.

This article will focus on Betsey and its implications. It discusses standard of proof problems and sets forth alternative methods of establishing a prima facie case of housing discrimination under the Fair Housing Act.

II. FACTS OF BETSEY V. TURTLE CREEK ASSOCIATES

The defendants in Betsey owned and managed The Point, a three-building apartment complex in Silver Spring, Maryland, containing 1,119 housing units. In May 1980, the defendants (landlord) issued eviction notices to families with children under age twenty-one residing in Building Three, allegedly to implement an all-adult rental policy. The plaintiffs were tenants of Building Three, most of whom were black and had children. Blacks then occupied 31.5 percent of the units in Building Three. However, 62.9 percent of the black tenants received eviction notices, as opposed to only 14.1 percent of the white tenants. In terms of the total number of individuals residing in Building Three, 74.9 percent of the blacks and 26.4 percent of the whites were evicted.9


Application of a standard test of statistical significance to the Betsey data indicates that the landlord’s conduct (which affected 54.3 percent of all black-occupied units and 14.1 percent of all white-occupied units) had a differential effect in the range of 7.5 standard deviations. Of the total number of people affected (74.8 percent of all blacks and 26.7 percent of all whites), the all-adult policy had a differential effect of approximately 15 standards deviations. These figures greatly exceed the number of standard deviations held to be statistically significant in establishing a prima facie case of disparate impact. As the Fourth Circuit noted in EEOC v. American National Bank, “[s]tandard deviations of more than three . . . confirm the legitimacy of an inference of discrimination based upon judicial approval that [such] disparities are, to the legally trained eye, ‘gross.’” 652 F.2d at 1192. See generally, Bogen & Falcon, The Use of Racial Statistics in Fair Housing Cases, 34 Md. L. Rev. 59 (1974). It is well established that statistical proof alone may establish a prima facie case of discrimination, even without evidence of specific instances of discrimination. See infra note 53; Alabama v. United States, 304 F.2d 583, 586 (5th Cir.), aff’d per curiam, 371 U.S. 37
The plaintiffs (tenants) filed suit under the Fair Housing Act, alleging that the landlord’s use of the all-adult policy was premised upon racially discriminatory intent, and that the evictions would have a racially disparate impact. The complaint alleged a pattern of harassment by the landlord against black residents of The Point and a “deliberate and systematic effort to alter the racial character” of the property.

A. District Court Disposition

The tenants moved for a preliminary injunction, and the district court consolidated the hearing with a trial on the merits. The court recognized that under the Fair Housing Act, plaintiffs may establish a prima facie case of racial discrimination by showing either that the practice complained of was racially motivated or that it would have a racially discriminatory impact.

The court concluded that the tenants had established a prima facie case of discriminatory intent, but that the landlord refuted the tenant’s prima facie case by articulating a valid non-discriminatory reason for the all-adult policy. The court employed the Title VII prima facie case doctrine in assessing the discriminatory intent issue. The court identified several “economic considerations” as valid non-discriminatory reasons for the all-adult policy. Among those reasons were: 1) a desire to decrease the vacancy rate in Building Three, 2) that all-adult buildings are quieter, and therefore more desirable, 3) that maintenance costs would be lower because of less vandalism due to the lack of children, and 4) an expressed desire by prospective tenants for an all-adult building. The court concluded that the landlord’s asserted economic considerations were sufficient to rebut the tenant’s prima facie case under the intent standard. Consequently, the court held that no violation was established under the discriminatory intent standard.10

(1962) (“statistics... tell much and courts listen”). An inference of discriminatory intent may be drawn from statistical evidence. E.g., American Federation of State, County, and Municipal Employees v. State of Washington, 770 F.2d 1401, 1407 (9th Cir. 1985).

10. A violation of the Fair Housing Act may be established under an intent standard, and, under some circumstances, proof of discriminatory effect alone may be sufficient. E.g., Smith v. Town of Clarkton, 682 F.2d 1055; United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980), aff’d as modified, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); McGuinness, supra note 3, at 580-86. See Perry, The Disproportionate Impact Theory of Racial Discrimina-
In its original opinion, the court indicated that it was unnecessary to reach the issue of whether the tenants had established a prima facie case under the disparate impact standard, but nevertheless expressed the opinion that it did not think the plaintiffs could have done so. However, in a later opinion, the district court found that the evidence failed to make out a prima facie case of disparate impact. Consequently, the court did not address the issue of whether or not the landlord had a valid business necessity.

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1. Under the intent standard, a plaintiff need only establish that a protected classification was one of the motivating factors involved. E.g., Wood-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982); Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979); McGuinness, supra note 3, at 580-82.

2. Under the intent standard in an individual case, as opposed to a class-type case, courts have often analogized to Title VII and applied a disparate treatment theory. E.g., Phillips v. Hunter Trails Community Ass'n, 685 F.2d 184 (7th Cir. 1982); Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976). A prima facie case of disparate treatment may be established by proving that the plaintiff: 1) belongs to a minority group, 2) that he applied for and was qualified to rent or purchase the housing, 3) that he was rejected despite his qualifications and, 4) that the housing remained available. Robinson v. 12 Lofts Realty, 610 F.2d at 1038; Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 551 (9th Cir. 1980) (construing 42 U.S.C. § 1982); McHaney v. Spears, 526 F. Supp. 566, 570 (W.D. Tenn. 1981). See McDonnell Douglas v. Green, 411 U.S. 792 (1973). "[T]he McDonnell Douglas Formula does not require direct proof of discrimination." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). Cf. Arlington I, 429 U.S. 252, 266-68 (1977) (Court identified factors to be considered to determine whether or not discriminatory intent or purpose is present). See Broderick, The Nature of The Constitutional Process: Equal Protection And The Burger Court, 12 N.C. CENT. L.J. 320, 323 (1981).

11. No. R-80-1907, slip op. at 2 (D. Md. November 27, 1981). The Supreme Court has repeatedly held that a prima facie case of employment discrimination under Title VII may be established by practices which are facially neutral, but discriminatory in effect. Int'l Bhd. of Teamsters v. United States, 431 U.S. at 349; Albermarle Paper Co. v. Moody, 422 U.S. 405, 422-25 (1975); McDonnell Douglas, 411 U.S. at 802 n.14; Griggs v. Duke Power Co. 401 U.S. 424, 431 (Title VII "proscribes not only overt discrimination but also practices which are fair in form, but discriminatory in operation." Id.).

to support the all-adult policy. In holding that the plaintiffs failed to establish a prima facie case of disparate impact, the court reasoned that:

The statistics in this case do show that the immediate effect of the conversion will have a disproportionate impact on the black tenants. However, there is no evidence that the conversion will have a continuing disproportionate impact on blacks. In fact, the percentage of blacks at The Point continues to exceed by a substantial margin both the percentage of black renters in the election district in which The Point is located as well as in Montgomery County as a whole. Absent statistics which indicate that the conversion of Building Three would perpetuate or tend to cause segregated housing patterns at The Point, the court would be reluctant to find that plaintiffs had made a prima facie case of discriminatory impact. There is no evidence that the conversion of Building Three will have a greater impact on blacks in the local community nor is there evidence that the conversion will perpetuate segregation at The Point. 13

Thus, the court's finding that the tenants failed to establish a prima facie case of disparate impact was premised on three primary bases: 1) the absence of a continuing disparate impact on blacks, 2) The Point, as a whole, had a higher percentage of blacks under appropriate circumstances. The court explained the business necessity defense: "In order to rely upon a 'business necessity' justification for a business policy which, though fair in form, is discriminatory in operation a defendant must demonstrate the absence of any acceptable alternative that will accomplish the same business goal with less discrimination." Id. See Comment, The Business Necessity Defense to Disparate-Impact Liability Under Title VII, 46 U. Chi. L. Rev. 911 (1979); Note, Business Necessity Defense Under Title VII of the Civil Rights Act of 1964: A No Alternative Approach, 84 Yale L.J. 98 (1974).

While the circuit courts are in accord that a significant discriminatory effect is sufficient to establish a prima facie case under the Fair Housing Act, there is no uniformity as to which of the various effects tests to apply. Also, there is no uniformity concerning the standard of justification which the defendant must meet where the prima facie case doctrine is employed. McGuinness, supra note 3, at 584. In Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 149 (3d Cir. 1977), the Third Circuit stated that the defendant may rebut the plaintiff's prima facie case by showing that the defendant's conduct serves "in theory and practice, a legitimate, bona fide interest of the Title VIII defendant, and that 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." Id. Cf. Williams v. Matthew, 499 F.2d 819, 827 (8th Cir. 1974); Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976).

than in the local community, and 3) the impact on blacks in the local community would be insignificant, and that the conversion of Building Three to all-adult would not perpetuate segregation at The Point.

B. Fourth Circuit Court of Appeals Disposition

On appeal, the tenants argued that: 1) the district court had erroneously applied the disparate impact test, 2) the disparate impact of the all-adult policy was substantial enough to establish a prima facie case, and 3) the landlord failed to rebut the evidence of disparate impact because it failed to prove that the all-adult policy was based on a valid business necessity.

Betsey presented a case of first impression concerning what standard of proof would apply in the case of a private non-governmental defendant in a housing discrimination case premised upon a disparate impact theory. In Smith v. Town of Clarkton, the Fourth Circuit recently adopted a four-prong disparate impact test in a housing discrimination case where the Town of Clarkton, North Carolina, blocked the construction of a low income housing project. The four critical factors, as identified by the court in Clarkton, are:

1) how strong is the plaintiff's showing of discriminatory effect; 2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis; 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.

However, in Betsey, the Fourth Circuit held that the Clarkton four-prong analysis should only be applied where a public body is the defendant. Instead, the court adopted the prima facie case

15. Clarkton, 682 F.2d at 1065; Arlington II, 558 F.2d at 1290. See McGuinness, supra note 3, at 582-86.
16. 736 F.2d at 988 n.5. The Clarkton analysis applies to a wide range of practices by governmental bodies which have discriminatory effects. See Arlington II, 558 F.2d at 1283 (7th Cir. 1977) (exclusionary land use practices). Cf. Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied, 435 U.S. 908
doctrine developed from Title VII where the defendant is a private entity.\textsuperscript{17}

Griggs v. Duke Power Co. and its progeny have established a three-part analysis to be applied to disparate impact claims. First, a plaintiff must establish a prima facie case by proving that the facially neutral practice had a significant discriminatory impact. Second, the employer may rebut the plaintiff’s prima facie case by showing that the practice has a “manifest relationship to the employment in question.” Griggs went on to note that “[t]he touchstone is business necessity.”\textsuperscript{18} Third, even where the employer has proved that the practice in question was due to business necessity, the plaintiff may prevail if he can show that the employer was using the practice as a pretext for discrimination.\textsuperscript{19}

Betsey concisely identified the analysis to be applied in a housing discrimination case against a private entity:

\begin{quote}
[t]he inquiry is whether either discriminatory intent or impact can be proved and, if either or both is proved, whether there is a legitimate non-discriminatory reason sufficient to overcome the showing of intent, or whether a compelling business necessity exists, sufficient to overcome the showing of disparate impact.\textsuperscript{20}
\end{quote}

Unfortunately, the court blended together the analysis for both the intent and impact theories. However, the court’s analysis is sufficiently clear so that it is not confusing.

\textsuperscript{17} See Griggs, 401 U.S. at 431, Williams v. Colorado Springs School Dist. No. 11, 641 F.2d 835, 842 (10th Cir. 1981); Burwell v. Eastern Air Lines, Inc., 633 F.2d 361, 369 (4th Cir. 1980) (per curiam), cert. denied, 450 U.S. 965 (1981); Wright v. National Archives and Records Serv., 609 F.2d 702, 711 (4th Cir. 1979) (en banc). In Arlington II, 558 F.2d at 1293, the Seventh Circuit recognized that courts should use greater scrutiny in reviewing private housing practices which have racially discriminatory effects. “If the defendant is a private individual . . . seeking to protect private rights, the courts cannot be overly solicitous when the effect is to perpetuate segregated housing.” Id., citing Smith v. Anchor Bldg. Corp., 536 F.2d 231 (8th Cir. 1976).


\textsuperscript{20} 736 F.2d at 988 n.5.
1. Business Necessity

The Fourth Circuit also discussed the business necessity defense. The court stated that: "when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice." In adopting the business necessity test, the Betsey court relied upon Robinson v. Lorillard, which is perhaps the leading case setting forth the standards by which business necessity is measured. In Robinson, the Fourth Circuit identified the business necessity defense as follows:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Betsey failed to make clear whether and to what extent each of the components of the Robinson business necessity test are applicable in a housing discrimination case. Betsey held that "when confronted with a showing of discriminatory impact, defendants must prove a business necessity sufficiently compelling to justify the challenged practice." Yet, the Robinson test includes additional factors which would be more difficult for the defendant to prove. However, since the district court did not find a prima facie

21. Id. at 988.
23. 444 F.2d at 798 (footnotes omitted). In Blake v. Los Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980), the Ninth Circuit noted that "the 'business necessity' defense is very narrow . . . ." Id. at 1377.
24. 736 F.2d at 988.
25. See supra note 23 and accompanying text. The additional Robinson factors requiring the defendant to prove that the challenged practice must carry out the alleged business purpose, and the no less drastic means requirement would obviously make the defendant's policy or practice more difficult to justify. In Dothard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977), the Court noted that "a discriminatory employment practice must be shown to be necessary to safe and
case of disparate impact, it did not reach the issue of whether or not the landlord proved that the all-adult policy was premised upon a business necessity. The Fourth Circuit remanded the case to the district court for a determination of the business necessity issue without expressing any view as to whether the evidence was sufficient to sustain the business necessity defense.

Although the court in Betsey did not address the issue, it is worth noting that mere opinion testimony of an interested party regarding the need for a particular policy is generally insufficient to meet the defendant's burden of proving a business necessity.\(^ {26}\) The business necessity defense must be established "by independent, objective evidence." A subjective belief that the policy is necessary and effective is not sufficient.\(^ {27}\) The business necessity defense "succeeds or fails on objective necessity based on facts available to it at the time it designed the controverted policy."\(^ {28}\) Therefore, in order for a landlord to successfully rebut a prima facie case by proving that the challenged policy was premised upon business necessity, the landlord must affirmatively prove the business necessity with independent objective evidence. Even assuming that defendants could produce independent evidence demonstrating that a substantial portion of their prospective tenants had a strong desire for all-adult housing, tenant preference alone would be insufficient to justify a policy which has a racially discriminatory effect.\(^ {29}\)

One of the reasons asserted by the landlords in Betsey for the all-adult policy was that the maintenance costs would be lower in the absence of children. However, the landlord failed to introduce efficient job performance to survive a Title VII challenge.” Thus, the Supreme Court has recognized at least part of the Robinson business necessity test.

26. See Griggs, 401 U.S. at 431; Albermarle Paper Co. v. Moody, 422 U.S. at 431-35; Dothard v. Rawlinson, 422 U.S. at 329; Wright v. Olin Corp., 697 F.2d at 1190; Robinson, 444 F.2d at 798.


29. United States v. Youritan Constr. Co., 370 F. Supp. 643, 650 (N.D. Cal. 1973), aff'd in relevant part, 509 F.2d 623 (9th Cir. 1975). In Youritan, the court held that "prospective compatibility with other tenants is not an appropriate rental consideration when its application would have a discriminatory racial impact." Cf. Bishop v. Pecsok, 431 F. Supp. 34, 37 (N.D. Ohio 1978) (“Objective criteria cannot have the effect of excluding blacks from housing unless the criteria are demonstrably a reasonable measure of the applicant’s ability to be a successful tenant”); United States v. Grooms, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972).
any significant independent evidence that maintenance costs would be diminished by implementing an all-adult policy. Rather, the available research suggests that renting to families with children does not necessarily increase maintenance costs. After an exhaustive search, one study concluded that "there is no empirical data which compares maintenance costs in buildings which do and do not allow children." However, the study did find that "the insurance industry, with its enormous amounts of data on claims, does not consider the presence of children a significant factor in setting rates for apartment buildings." In another study, the Department of Housing and Urban Development found that "there are no empirical studies comparing maintenance costs in buildings which do and do not rent to children. Nor is there any evidence supporting manager's reports of higher costs for rental units leased by families with children." In Marina Point Ltd. v. Wolfson, the California Supreme Court recognized expert testimony that the basic profitability of operating an apartment complex does not generally vary with the type or age of its tenants. Thus, it appears that landlords will be unable to prove business necessity by introducing unsupported conclusory testimony that the presence of children would necessarily increase maintenance costs.

Even if a landlord could prove that the presence of children would increase maintenance costs, increased costs alone will not necessarily justify policies that have a racially disparate impact. As the Fourth Circuit noted in Robinson v. Lorillard: "while considerations of economy and efficiency will often be relevant to determine the existence of business necessity, dollar cost alone is not determinative." "[A]voidance of the expense of changing employ-

32. Department of Housing and Urban Development, Housing Our Families 5-16 (1980); citing R. Marans, M. Colten, R. Groves and B. Thomas, Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey 64 (1980). However, the HUD survey found that 81 percent of the landlords surveyed believed that maintenance costs of renting to families with children were either a "big problem" or "somewhat a problem." Id.
33. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982). In Marina Point, the court also considered and rejected testimony from two real estate agents who testified that maintenance costs of buildings which allow children were higher than for those which prohibited children.
34. 444 F.2d at 799 n.2.
ment practices is not a business purpose that will validate the racially differential effects of an otherwise unlawful employment practice."35 The issue is whether or not increased maintenance costs due to the presence of children, if affirmatively proven by the landlord, is sufficiently compelling to override the racially disparate impact of the all-adult policy. This determination may turn on the degree of disparate impact. A policy which is marginally discriminatory might be justifiable, while a substantially disparate impact will likely be difficult to overcome.

Another reason asserted by the landlord in Betsey to support the all-adult policy was the perceived demand for all-adult housing. While few studies exist concerning tenant preferences with respect to the presence of children, one study conducted by the Survey Research Center of the University of Michigan found that "only 20 percent [of tenants residing in all-adult buildings] said they chose their building because no children were living there." The study concluded that "the majority of renters in the sample would take no action if the policies or practices concerning children in their buildings were changed."36 Moreover, in United States v. Youritan Construction Co.,37 the court noted that "prospective compatibility with other tenants is not an appropriate rental consideration when its application would have a discriminatory racial impact." Therefore, a landlord's use of tenant preference to justify an all-adult policy is questionable in any case where that policy results in a disparate impact. Where a landlord attempts to use tenant preference to justify an all-adult policy, the landlord must be prepared to affirmatively prove that such a preference exists with independent objective evidence.38

2. Disparate Impact Analysis Applied To Affected Tenants

Another noteworthy consideration in Betsey concerned the application of the disparate impact test to the current residents of Building Three, as opposed to prospective tenants and residents of

35. Id. at 800. "Administrative convenience is not a sufficient justification for [discriminatory] practices." Blake v. Los Angeles, 595 F.2d 1367, 1375-76 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980).
36. Department of Housing and Urban Development, Housing Our Families, 5-9, 10 (1980).
38. See supra notes 26 and 27 and accompanying text.
the entire apartment complex. Generally, a policy or practice has a racially disparate impact if it disadvantages a significantly greater proportion of one racial group than another. 39

In Betsey, the district court found that "there is no evidence that the conversion [to all-adult housing in Building Three] will have a continuing disproportionate impact upon blacks," since "there was no showing that in the pool of prospective renters . . . the percentage of blacks with families compared to the total numbers of blacks . . . was disproportionately higher than the same figures for whites." 40 The landlord argued that the relevant group on which to assess the impact of the conversion to all-adult was The Point as a whole, rather than the tenants of Building Three. The landlord asserted that there was no community-wide or project-wide discriminatory impact, thus, the "bottom-line" of the rental policy was not discriminatory. However, the Fourth Circuit concluded that "plaintiffs are not required to show a discriminatory impact on anyone but the existing minority residents of Building Three. This simple verity renders consideration of the rest of the 'local community,' the rest of The Point, or even prospective applicants for space in Building Three irrelevant." 41 Consequently, given the significant disparate impact of the all-adult policy on the tenants of Building Three, a prima facie case under the Fair Housing Act was established.

The district court erred when it looked beyond the impact that the all-adult policy had on the current residents of Building

39. E.g., Smith v. Town of Clarkton, 682 F.2d at 1061, 1064, 1065; Arlington II, 558 F.2d at 1290; United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Atkins v. Robinson, 545 F. Supp. at 867-68. Cf. Uniform Guidelines on Employee Selection Procedures-1978, 29 C.F.R. § 1607, which adopted the eighty percent or four-fifths rule for determining what degree of impact is adverse. A selection procedure that selects minorities at eighty percent or more of that rate at which majorities are selected does not have an adverse impact. See Clady v. Los Angeles, 770 F.2d 1421, 1427 (9th Cir. 1985); Blumrosen, The Bottom Line Concept in Equal Opportunity Law, 12 N.C. CENT. L.J. 1, 2, 17 (1980).


41. 736 F.2d at 987.
Three. It erroneously focused on the impact of the all-adult policy on the pool of prospective tenants. The plaintiffs only challenged the landlord’s decision to evict the tenants with children residing in Building Three. The plaintiffs did not allege any continuing discriminatory impact on blacks which might seek to live at The Point in the future, even though an all-adult policy may cause such a continuing discriminatory impact.

Where a policy or practice is challenged because of its adverse impact upon current residents, courts look to the existing tenants, not the population at large, as the appropriate pool by which to measure the impact of the challenged policy or practice. Where a policy or practice is challenged because it interferes with the initial availability of housing opportunities, courts examine the impact of the policy or practice on the prospective applicants. This approach is similar to that followed in employment discrimination cases brought under Title VII.

3. Rejection of The Bottom-Line Defense

In Betsey, the landlord asserted that the “bottom-line” of the all-adult policy was not discriminatory because it continued to rent to a significant proportion of black applicants, and The Point continued to house a significant number of blacks. However, the

42. See United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978); Concerned Tenants Ass'n v. Indian Trails Apartments, 496 F. Supp. 522 (N.D. Ill. 1980). In United States v. Mitchell, the Fifth Circuit held that the clustering of black tenants in one section of a multi-building apartment complex is one kind of “significant discriminatory effect” that is “sufficient to demonstrate a violation of the Fair Housing Act.” 580 F.2d at 791.

43. In Smith v. Town of Clarkton, 682 F.2d at 1055, 1061-65, the Fourth Circuit examined the discriminatory impact of the termination of the proposed public housing project on the black population of Bladen County. Sixty-nine percent of all black families in Bladen County were presumptively eligible for low income housing, while only twenty-six percent of the white population was qualified. Id. at 1061. See Resident Advisory Bd. v. Rizzo, 564 F.2d at 142.

44. Where plaintiffs challenge a hiring practice on the grounds that it has discriminatory impact, courts examine the effect of the practice on the pool of potential employees as reflected by the relevant application pool or the appropriate labor market. See Dothard v. Rawlinson, 433 U.S. 321 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Griggs, 401 U.S. 424 (1971). Where plaintiffs challenge a practice that affects the existing work force, such as policies relating to promotions, working conditions or terminations, courts focus on the current pool of employees, rather than applicants or potential employees. See Connecticut v. Teal. 457 U.S. 440 (1982); Wright v. Olin, 697 F.2d 1172 (4th Cir. 1982).
Fourth Circuit squarely rejected the bottom-line defense, relying upon *Connecticut v. Teal.*

In *Teal*, the Supreme Court noted that the principal focus of Title VII is the protection of the *individual* employee, rather than the protection of the minority group as a whole. Applying this reasoning in *Betsey*, the Fourth Circuit implicitly concluded that the individual tenants of Building Three derived similar protection from the Fair Housing Act. "'Bottom line' considerations of the number and percentage of minorities in the rest of the complex or community are 'of little comfort' to those minority families evicted from Building Three." Consequently, the fact that an apartment complex may be integrated to some extent or that other blacks may be able to rent units at the complex is not a legitimate defense. The fact that other blacks may move into the complex does not diminish the discriminatory impact of evictions on blacks families faced with displacement. Thus, regardless of the bottom-line of a housing policy, a discriminatory impact upon residents of a particular building is sufficient to establish a prima facie case under the Fair Housing Act.

4. Discriminatory Impact of All-Adult Housing Policies

Looking beyond the particular case of *Betsey*, the discriminatory impact of all-adult housing policies is national in scope, as evidenced in several comprehensive studies. A study commissioned


47. 42 U.S.C. § 3604(b) provides that it is unlawful "[t]o discriminate against any person." (emphasis added).

by the United States Department of Housing and Urban Development, using interviews of renters with children in nineteen metropolitan areas, found that:

Among the respondents . . . , minorities were the most heavily burdened by serious problems caused by restrictive rental policies. The severity of their burden may be the result of insufficient income. However, even among those with incomes of $15,000 and above, a statistically significant difference was found between the frequency of serious problems experienced by minority complainants. This raises the question as to whether at times no-children policies are a smoke screen for racial discrimination. 49

Another study designed to evaluate the effect of adults-only policies nationwide found that “[m]inority group renters were more likely to have children in the households.” 50 Thus, even without examining the impact of a particular policy, all-adult policies will generally tend to have a disparate impact upon minorities.

These studies also show that all-adult housing policies have an adverse effect on minorities in other respects. All-adult housing is often concentrated in predominantly white areas. 51 Given the de-

50. R. MARANS, M. COLTEN, R. GROVES & B. THOMAS, Measuring Restrictive Rental Practices Affecting Families With Children: A National Survey 9-10 (1980). While blacks constituted 18 percent of the renter households in this survey, they made up 25 percent of all renter households with children. Id. at 13, Table II-1. In 1980, 55.8 percent of blacks and other minorities were renters, while only 31.3 percent of whites were renters. U.S. Bureau of The Census, Statistical Abstract of the United States: 1982-83, 757 (1982). Another study found that 24 percent of all white renter households in California have children, while 41 percent of black renter households and 54 percent of hispanic renter households have children. Such disparities are even greater in areas with a sizeable minority population. D. ASHFORD AND P. EASTON, The Extent and Effect of Discrimination Against Children in Rental Housing: A Study of Five California Cities (1979). In Los Angeles, 71 percent of advertised apartments did not allow children. Id. “The cumulative impact of that [all-adult] policy could be as segregating as were racial covenants in the first half of the century, a fact that could lead to a finding of discrimination if presented in the context of the regional impact.” Kushner, supra note 4, at 91.
51. C. Reid, A. Keating and L. Long, Patterns of Discrimination Against Children in Rental Housing in the Metro-Atlanta Area (1979) (43.7 percent of all adult rental units located in predominantly white sections of Atlanta, while only 6.4 percent located in minority areas); J.G. & Associates, Child Discrimination in Rental Housing: A Comparative Analysis of Apartment Policies in Dallas, Texas Regarding the Acceptance of School-Aged Children (1979) (68
clining birth rate among whites, and the increasing birth rate among blacks, and the concentration of all-adult policies in largely white areas, all-adult policies have the effect of perpetuating existing patterns of racial segregation.52

5. Methods of Establishing A Prima Facie Case of Disparate Impact

A prima facie case of disparate impact as a result of an all-adult housing policy may be established in several ways. Through general population statistics, a plaintiff may demonstrate that minorities, either nationally or in a specific geographical area, have children at a significantly higher rate than whites.3 This entails a percent of all adults-only units located in predominantly white areas, while 11 percent located in minority areas); R. MARINS, M. COLTEN, R. GROVES, & B. THOMAS, supra note 50, at 34-37 (rental units in predominantly white neighborhoods are twice as likely to restrict families with children than rentals units in predominantly black areas).

52. R. MARINS, M. COLTEN, R. GROVES, & B. THOMAS, supra note 50, at 43, 46; House Select Comm. on Children, Youth, and Families, U.S. Children and Their Families: Current Conditions and Recent Trends, 98th Cong., 1st Sess. 3 (May, 1983). This perpetuation of existing residential segregation is a basis for a finding of discriminatory effect violative of the Fair Housing Act. See supra note 39; Comment, Justifying A Discriminatory Effect Under the Fair Housing Act: A Search for the Proper Standard, 27 U.C.L.A. L. Rev. 398, 411 (1979). In addition, widespread use of all-adult policies forces families with children to look longer and pay more for housing, to accept housing that is less attractive, farther from work or located in racially concentrated areas, or to endure the frustration of being unable to find decent housing. See, e.g., J. GREEN & G. BLAKE, supra note 49, at 1-4; D. ASHFORD & P. ESTON, supra note 30, at 11-33. Finally, by limiting the housing opportunities available to minority families with children, these policies serve to exacerbate the already dismal conditions in which many minority households are forced to live. As one recent study has found, minority families with children are "inadequately housed at nearly twice the rate as the population as a whole, and at more than twice the rate for whites." See Children's Defense Fund, Portrait of Inequality: Black and White Children in American 107, Table 52 (1980).

53. See supra notes 50 and 52 and accompanying text; Morales, supra note 4 at 744 & n.11. Cf. Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (An employer's use of a high school diploma as a condition of employment was discriminatory in operation because census figures of North Carolina showed that "while 34% of white males had completed high school, only 12% of Negro males had done so."). Dothard v. Rawlinson, 433 U.S. 321, 324-30 (1977) (National demographic statistics demonstrated the discriminatory effect of a job's height and weight requirements which would exclude "41.13% of the female population while excluding less than 1% of the male population"). See SMITH, CRAVER & CLARK,
comparison of the percentage of minorities in the general population excluded by an all-adult policy with the percentage of whites in the general population that would be excluded by the policy. This approach assesses the discrimination against potential tenants.

A plaintiff may establish a prima facie case through a population disparity analysis which compares the proportion of minorities in an all-adult building with their proportion in the relevant geographical area in order to demonstrate that minorities are significantly underrepresented in the building. This approach was affirmed by the Supreme Court in Teamsters and Hazelwood, where the Court reasoned that "[a]bsent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic compositions of the population in the community from which employees are hired." A population disparity analysis may be difficult to obtain because many apartment buildings are small, with few units; therefore, there will be few tenants to compare with

EMPLOYMENT DISCRIMINATION LAW 450-53 (2d. ed. 1982).


54. Morales, supra note 4, at 747 & n.12. See United States v. Real Estate Dev. Corp., 347 F. Supp. 776 (N.D. Miss. 1972); Schwemm, supra note 8, at 243-46. Cf. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (Prima facie case of discrimination can be established by comparing racial composition in the relevant labor market). In Hazelwood, the Court noted that a definition of the relevant labor market is a precondition to a comparison of the racial composition of the defendant's work force with the racial composition of the community. 433 U.S. at 308 n.13. See generally, Shoben, Probing The Discriminatory Effects of Employee Selection Procedures With Disparate Impact Analysis Under Title VII, 56 Tex. L. Rev. 1 (1977); Note, Employment Discrimination: Plaintiff's Prima Facie Case and Defendant's Rebuttal in a Disparate Impact Case, 54 Tul. L. Rev. 1187 (1980). In a housing discrimination case applying this analysis, the determination of the relevant housing market will likely be a hotly contested issue, as it may largely determine the degree of statistical disparity.

the population of the surrounding area.\textsuperscript{56}

A prima facie case may be established through \textit{applicant flow data} showing that the defendant's all-adult policy rejects minorities at a significantly higher rate than whites.\textsuperscript{57} Applicant flow data may be difficult to obtain because many landlords do not maintain records of applicants, and many prospective applicants with children will be deterred from filing applications through pre-screening and other devices.\textsuperscript{58}

A plaintiff may establish a prima facie case through the \textit{perpetuation of segregation} theory where the area is residentially segregated.\textsuperscript{59} Finally, under the theory employed in Betsey, a prima facie case may be established with data demonstrating that the imposition of an all-adult policy results in the eviction, or less favorable treatment of, a disproportionate number of minorities.\textsuperscript{60}

The theory employed in Betsey and the use of general population statistics appear to be the most potent weapons for challenging all-adult policies.\textsuperscript{61} General population statistics are readily

\textsuperscript{56} Morales, \textit{supra} note 4, at 738.

\textsuperscript{57} Morales, \textit{supra} note 4, at 737-38 & n.13. \textit{Cf.} Griggs, 401 U.S. at 430 (Employer's use of standardized test "resulted in 58% of whites passing the tests, as compared with only 6% of the blacks.").

\textsuperscript{58} Morales, \textit{supra} note 4, at 738.

\textsuperscript{59} \textit{See supra} note 39; Morales, \textit{supra} note 4, at 738.

\textsuperscript{60} Morales, \textit{supra} note 4, at 738.

\textsuperscript{61} In addition to attacking all-adult housing policies under the Fair Housing Act, plaintiffs may proceed under state or municipal legislation prohibiting all-adult policies, if available. \textit{See supra} note 2. Also, where the requisite state action is present, federal and state constitutional provisions may afford a basis for relief. \textit{See} Boyd v. Lefrak Org., 509 F.2d 1110 (2d Cir.) \textit{cert. denied}, 423 U.S. 896 (1975) (discriminatory practice by a private landlord did not involve state action); Langley v. Monumental Corp., 496 F. Supp. 1144 (D. Md. 1980) (constitutional challenge to all-adult policy dismissed due to absence of state action). Constitutional challenges to all-adult policies have met with mixed success. \textit{Cf.} Halet v. Wend Inv. Co., 672 F.2d 1305, 1310-11 (9th Cir. 1982) (court found that state action infringed on the plaintiff's fundamental right to live with his family; but the court remanded for consideration of whether a "generally significant deprivation" had occurred, and if so, whether the all-adult policy could survive strict scrutiny); Molina v. Mayor of Glassboro, 116 N.J. 195, 204, 281 A.2d 405, 412 (L. Div. 1971)(court held that a zoning ordinance which had the effect of excluding children violated the state's equal protection clause); Marina Point v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1972) (en banc) (court invalidated all-adult policy on the basis of an equal protection analysis of the Unruh Civil Rights Act.). Other courts have rejected Fourteenth Amendment challenges to all-adult policies. \textit{E.g.}, White Egret Condominium v. Franklin, 379 So. 2d 346 (Fla. 1979); Riley v. Stoves, 526 P.2d 747 (Ariz. App. 1976).
available from census and other data. Analysis of such general population data is perhaps an appropriate starting point in developing a challenge to an all-adult policy. The general data might be sufficient to allege a violation of the Fair Housing Act. Then, through discovery, a plaintiff may develop additional supporting evidence through population disparity and applicant flow data. Also, a showing of discriminatory impact is often an important starting point in determining whether discriminatory intent or purpose may be present.62

III. CONCLUSION

In *Betsey v. Turtle Creek Associates*, the Fourth Circuit extended and improved a developing avenue of relief for victims of housing discrimination. *Betsey* represents a much needed clarification in the standard of proof principles in housing discrimination law. *Betsey* carefully delineated and explained the application of the prima facie case doctrine to a housing discrimination case premised upon the disparate impact theory. The Fourth Circuit distinguished the *Clarkton* four-prong analysis, which is applicable to public entities, from the Title VII prima facie case doctrine, which is applicable to private defendants.63

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Since housing is not a fundamental right under the federal constitution, Lindsey v. Normet, 405 U.S. 56 (1972), and age is not a suspect classification, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976), due process appears to be the stronger basis for a constitutional challenge to all-adult policies. In *Halet v. Wend Inv. Co.*, the Ninth Circuit noted that "family life, in particular the right of family members to live together, is part of the fundamental right of privacy . . . ." 672 F.2d at 1311. See Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).


63. 736 F.2d 988 n.5. Much confusion exists among the circuit courts concerning the various discriminatory effects tests. McGuinness, *supra* note 3, at 584-86. See Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), cert. denied,
The application of the prima facie case doctrine to all-adult housing policies is a fair mechanism to assess the consequences of a particular all-adult policy. Employing the test enunciated in Betsey, plaintiffs will likely find it somewhat easier to establish a prima facie case. However, landlords are then afforded a fair opportunity to rebut the prima facie case by proving "a business necessity sufficiently compelling to justify the challenged practice." While Halet v. Wend Investment Co. recognized that "significant discriminatory effects flowing from rental decisions [all-adult housing policies] may be sufficient to demonstrate a violation of the Fair Housing Act," Betsey removed the uncertainty in developing a challenge to such policies by setting forth the precise analysis to be applied in determining whether a violation has been established. Betsey is a valuable tool in the arsenal of fair housing litigants, and represents a major step toward fulfilling the national policy of fair housing.

435 U.S. 908 (1978), where the court purported to set forth a prima facie case test, but also mentioned, without explanation, that the Arlington II factors may be relevant. Id. at 149 n.36. In United States v. Mitchell, 580 F.2d 789 (5th Cir. 1978), the Fifth Circuit adopted the Arlington II language concerning perpetuation of segregation as a discriminatory effect, but Mitchell failed to apply the Arlington II four-prong test. However, Betsey has laid much of this confusion to rest, at least in the Fourth Circuit.


66. 672 F.2d at 1311.