

MINIMUM CONTACTS

It is reasonable to conclude, however, that the *Seider* procedure can no longer stand upon the quasi-in-rem rationale of *Harris*, so clearly repudiated by the Court in *Shaffer*. Moreover, as long as the procedure functions as a judicially created direct action statute in which the nonresident tortfeasor still remains the real party at interest, it is of doubtful constitutional validity under the fairness standard adopted in *Shaffer*.

CONCLUSION

By rejecting the territorial theory underlying in rem jurisdiction and extending the principles of *International Shoe* to cover all assertions of state court jurisdiction, the Court in *Shaffer* provided a more sensible standard for the resolution of jurisdictional questions in a modern society in which disputes arise from complex interstate transactions involving both persons and property. However, in concluding upon the facts before it that the Delaware courts could not validly assert jurisdiction over nonresident corporate fiduciaries in a stockholder's derivative suit involving a Delaware corporation, the Court applied the minimum contacts test too restrictively. The Court's focus upon the absence of the defendants' literal "acts" within the forum ignored the defendants' implicit contacts with the forum as corporate officers and directors of a domestic corporation. Moreover, from a practical viewpoint, the fact that the controversy centered upon the mismanagement of a Delaware corporation virtually eliminated the choice of law question under the general rule of conflicts governing corporate officer liability. The Court's relegation of the state's regulatory interest to a choice of law consideration unnecessarily separated the jurisdictional and choice of law issues when no danger of unfairness to the defendants actually existed.

The eventual impact of the Court's decision upon other jurisdictional issues previously decided upon the in rem rationales of *Pennoyer* and *Harris* remains to be determined upon a case by case basis. With respect to the *Seider* jurisdictional procedure devised upon the now repudiated quasi-in-rem rationale of *Harris*, it would appear unlikely that the procedure can survive under the standard of fairness as applied by the *Shaffer* Court. *Shaffer* reveals that the Court, in its approach to questions of jurisdiction under the fairness standard, has not yet adopted interest analysis as urged by some commentators and as employed most recently by proponents of the continued validity of the *Seider* jurisdictional procedure.

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THE ROLE OF CIRCUMSTANTIAL EVIDENCE IN PROVING DISCRIMINATORY INTENT: DEVELOPMENTS SINCE *WASHINGTON V. DAVIS*

In its landmark decision in *Washington v. Davis*,¹ the Supreme Court held that proof of both an invidious discriminatory purpose and a racially disproportionate impact is necessary to establish that a law or other official

¹ 426 U.S. 229 (1976).

act violates the equal protection clause.² While clearly expressing this intent requirement, the *Washington* Court failed to elucidate the proper evidentiary standard to apply in considering the sufficiency of plaintiffs' proof of discriminatory intent.³

The plaintiffs in *Washington* introduced statistical evidence showing that black applicants for employment with the District of Columbia police force failed an employment qualification test at a rate four times that of white applicants.⁴ The Court held that this evidence of disproportionate impact, standing alone, was insufficient to warrant the conclusion that the test was an intentionally discriminatory device.⁵ This holding suggests that the Court found objective evidence of discriminatory impact insufficient to establish the requisite intent without some direct proof of subjective discriminatory motive.⁶

Although the Court indicated a reluctance to base a finding of intent on objective evidence of discriminatory effect, it did note that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."⁷ In this vein, the *Washington* majority observed that in jury selection cases, for example, statistical evidence showing a total or seriously disproportionate exclusion of blacks may be sufficient to establish discriminatory intent, "because in various circumstances the discrimination is very difficult to explain on nonracial grounds."⁸ In making this observation respecting the import of statistical or other evidence of impact, however, the *Washington* majority failed to specify either the degree of statistical disparity necessary to allow a court to infer discriminatory intent, or the situations in which the probative value of such evidence would be lessened by the presence of alternative, nonracial explanations for the disproportionate impact.⁹

Justice Stevens, concurring in *Washington*, noted that the burden of proving discriminatory intent involves different evidentiary considerations depending on the context in which the alleged discrimination arises.¹⁰ He observed that "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor" will frequently be the most probative evidence of intent.¹¹ Justice Stevens contended that this conclusion was particularly true when the alleged discrimination involves government action which is the product of compromise, collective decision-making, and mixed motivations, since in these contexts it is difficult or impossible to uncover evidence of the actual subjective intent

² *Id.* at 239.

³ *Id.* at 242.

⁴ Among the applicants tested from 1968 through 1971, 57% of the blacks and 13% of the whites failed the tests. *Davis v. Washington*, 512 F.2d 956, 958-59 (D.C. Cir. 1975).

⁵ 426 U.S. at 246.

⁶ The Court in *Washington* did not distinguish between the terms "intent," "purpose" and "motive." The Court has never made an express distinction between objective intent and subjective motive, and has often used the terms interchangeably. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

⁷ 426 U.S. at 242.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 253 (Stevens, J., concurring).

¹¹ *Id.*

of the decisionmakers.¹² While Justice Stevens' opinion suggests a more liberal attitude toward the weight and role of objective evidence of effect in inferring discriminatory intent than does the majority's opinion,¹³ both opinions leave unsettled the specific circumstances in which evidence of discriminatory effect is sufficient to establish an equal protection violation without direct evidence of discriminatory intent.¹⁴

This note will initially examine the different types of evidence which may be used to establish discriminatory intent. It will then propose a test for determining which of these types of evidence is most probative of discriminatory intent in the various factual contexts in which equal protection claims arise. In developing this test, particular emphasis will be placed on determining when the use of statistical evidence is proper. Finally, the test will be applied to post-*Washington* equal protection cases in three areas—housing, school desegregation, and jury selection—to compare the manner in which the proposed test comports with the evidentiary standards actually employed by the courts.

I. TYPES OF EVIDENCE USED TO PROVE INTENT

Evidence which proves intent may be classified into two categories: direct and circumstantial.¹⁵ Direct evidence, as it relates to equal protection intent, includes evidence respecting facts tending to establish the subjective motives of the officials involved in the alleged discrimination.¹⁶ Thus, public statements,¹⁷ minutes of meetings,¹⁸ facially discriminatory actions or legislation,¹⁹ and actual testimony²⁰ are examples of direct evidence of intent. Circumstantial evidence in the equal protection context includes evidence of facts which, although not establishing discriminatory motive, nevertheless form a basis for inferring discriminatory intent.²¹ Accordingly,

¹² *Id.*

¹³ See text at note 6 *supra*.

¹⁴ See 426 U.S. at 254 (Stevens, J., concurring).

¹⁵ The Supreme Court has long recognized that intent may be established by direct evidence of motive or purpose, or by circumstantial evidence of effect. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (intent to discriminate in housing); *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) (intent to aid religion); *Radio Officers' Union of the Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 45 (1954) (intent to discriminate against union); *Cramer v. United States*, 325 U.S. 1, 31 (1945) (intent to commit treason). See, e.g., Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

¹⁶ Thus, the sources of evidence of intent listed by the Court in *Arlington Heights*, 429 U.S. at 267-68, which included the historical background, prior event, and contemporaneous statements by officials, fall into the direct evidence category since they tend to establish the motivation of the officials involved. See text at notes 58-64 *infra*.

¹⁷ See *Palmer v. Thompson*, 403 U.S. 217, 250 (1971); *Resident Advisory Bd. v. Rizzo*, 425 F. Supp. 987, 1001 (E.D. Pa. 1976), modified, 564 F.2d 126 (3d Cir. 1977).

¹⁸ *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977).

¹⁹ *Loving v. Virginia*, 388 U.S. 1 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Reed v. Rhodes*, 422 F. Supp. 708, 715 (N.D. Ohio 1976).

²⁰ *Palmer v. Thompson*, 403 U.S. 217, 253-54 (1971).

²¹ Thus, the evidence of the discriminatory impact or effect of an official action may be used to infer intent. *Arlington Heights*, 429 U.S. at 266. See also *Akins v. Texas*, 325 U.S. 398, 403-04 (1945) ("A purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race.")

examples of circumstantial evidence of intent include statistical evidence of racially disproportionate²² impact and facially neutral official actions having foreseeably discriminatory results.²³

The terms "direct" and "circumstantial" are thus applied to these types of intent evidence because of the important conceptual difference between what these two types of evidence show. On one hand, direct evidence proves the actual, subjective intent of the defendants charged with discrimination.²⁴ On the other hand, circumstantial evidence redefines intent in terms of objectively observable data, but proves nothing about the actual subjective intent on the defendants.²⁵ The majority opinion in *Washington*, by holding that plaintiffs' circumstantial evidence of discriminatory impact was insufficient to allow the trier of fact to infer intent on the part of the defendants,²⁶ seemed to suggest that some direct evidence of intent is necessary in most equal protection cases.²⁷ Nevertheless, as noted earlier, this interpretation of *Washington* is substantially eroded by the Court's observation that in jury selection cases, circumstantial evidence may often be sufficient to allow an inference of discriminatory intent.²⁸

Although the Court in *Washington* suggested that direct intent evidence was to be preferred,²⁹ and held that such evidence was required in the case before it,³⁰ it did not provide guidelines for determining when this presumption favoring direct evidence of intent should be overridden so that circumstantial evidence alone would be sufficient to prove intent. It is submitted that courts should be guided by two factors in determining whether circumstantial evidence should be held sufficient to prove intent. These factors are the relative *availability* and *reliability* of the two types of evidence.³¹ In applying these factors, courts should permit plaintiffs to establish intent through reliable circumstantial evidence of discriminatory effect when direct evidence of intent is either unavailable or unreliable.³²

²² *Castaneda v. Partida*, 430 U.S. 482 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²³ Numerous courts, particularly in the school desegregation context, have used the foreseeable consequences test to infer intent from evidence of facially neutral actions with discriminatory impact. The test is applied to evidence of official actions, and holds that if the actions had a natural, probable, foreseeable and actual segregative effect, the actor intended that effect. See *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974); *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 252 (S.D. Ohio 1977); *Arthur v. Nyquist*, 429 F. Supp. 206, 211 (W.D.N.Y. 1977). A similar test of intent is used in tort and criminal law. See W. PROSSER, *THE LAW OF TORTS* § 8 (4th Ed. 1971); *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *Cramer v. United States*, 325 U.S. 1, 31 (1945).

²⁴ See Brest, *supra* note 15, at n.104.

²⁵ *Id.*

²⁶ The *Washington* Court suggested that the plaintiffs' evidence may have raised an inference of intent, but that defendants "negated any inference" of intent. 426 U.S. at 246.

²⁷ *Id.* at 245.

²⁸ *Id.* at 239, 241.

²⁹ "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Id.* at 242.

³⁰ *Id.* at 246.

³¹ Brest, *supra* note 15, discusses the "ascertainability," "futility" and "disutility" of evidence of motive, which this note refers to as direct evidence of intent. The factor of availability roughly parallels that of ascertainability, and reliability corresponds to futility and disutility, but the concepts are not meant to be identical.

³² Weighing these competing factors results in a "sliding scale" approach to evidentiary problems in equal protection cases. Other commentators have similarly advocated a sliding scale approach for balancing evidence of motive and effect. See Note, 25 EMORY L. J. 737,756 (1976).

These factors may be applied to the specific problem of establishing discriminatory intent in the equal protection context. For example, direct evidence of intent will be unavailable when, because of the routine nature of the official practices under consideration, officials need not give any motives or explanations for their actions.³³ If the actions themselves are facially neutral and follow accepted procedures, and if they implement non-discriminatory policies or purposes, the plaintiffs may be unable to adduce any direct evidence of motive.³⁴ Similarly, direct evidence will be unreliable when the alleged equal protection violations occur over an extended period of time or involve a relatively large number of officials. The motivation of any one official in these situations is apt to be less reliable for determining the intent of the official body as a whole in committing the alleged violations than in situations where the violation involves action by a few officials over a short period of time.³⁵

If direct evidence is either unavailable or unreliable, the plaintiff should be able to rely more heavily on available circumstantial evidence of discriminatory impact or effect than when such direct evidence is readily available. Such circumstantial evidence could include statistics of racial under-representation,³⁶ or of the disproportionate impact of the challenged action,³⁷ or evidence of a pattern of facially neutral acts which had foreseeable discriminatory results.³⁸ The reliability of this circumstantial evidence for proving intent depends on two factors: (1) the possibility of alternative, nonracial explanations for the disproportionate impact, and (2) the actual degree of discriminatory impact. When there are no alternative explanations for the impact and the degree of impact is high, the reliability of the circumstantial evidence should presumably be established and it should carry great probative weight.³⁹ Conversely, when alternative nonracial ex-

³³ For example, in the jury selection context, district attorneys striking prospective jurors under a peremptory challenge system would not be required to give motives for their actions. See *Swain v. Alabama*, 380 U.S. 202, 220 (1965). Similarly, school administrators engaged in the routine assignment of pupils to schools under a neighborhood assignment policy may not be required to give their motives for any particular assignment. See *Reed v. Rhodes*, 422 F. Supp. 708, 712-17 (N.D. Ohio 1976).

³⁴ Questioning of officials as to their discriminatory motives often may be futile, see *Brest*, *supra* note 15, at 125, and such motives may be protected by legislative immunity. See note 46 *infra*.

³⁵ See *Keyes v. School Dist. #1*, 413 U.S. 189, 233 (1973); *Hart v. Community School Bd.*, 512 F.2d 37, 50 (2d Cir. 1975) ("the injustice of ascribing collective will to articulate remarks of particular bigots"); Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 284-85 (1972).

³⁶ See *Swain v. Alabama*, 380 U.S. 202, 205-09 (1965).

³⁷ See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

³⁸ See *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 181-82 (6th Cir. 1974).

³⁹ These factors seemingly underlay the *Washington* Court's recognition of a greater probative value for statistical effect evidence in jury discrimination cases than in other contexts. See text at note 8 *supra*. See also *Arlington Heights*, 429 U.S. at 266 n.15. If differences in qualifications for jury service are taken into account, statistics showing a high degree of minority under-representation on a number of juries are apt to be very reliable indicators of discriminatory intent, since the possibility of alternative explanations is reduced.

In *Washington*, the statistical evidence indicated a 4 to 1 failure rate for blacks over whites. 426 U.S. at 237. While this was evidence of a high degree of discriminatory impact, the evidence was not given great probative weight since the possibility of alternative explanations existed in the employment context. The Court suggested that levels of competence and verbal skills, rather than intentional racial discrimination, explained the disproportion. *Id.* at 245-46. The court of appeals considering the case also noted that the disproportionate failure rate "is

planations are available, and the degree of disproportionate racial impact is low, the reliability of the circumstantial evidence for proving intent will be less, and some direct evidence of discriminatory motive may be required.

The use and weight given to circumstantial evidence under the proposed test should be determined by balancing the availability and reliability of the circumstantial evidence against that of direct evidence in the particular discrimination context involved. Since often both types of evidence are available and reliable,⁴⁰ and since a great deal of evidence is neither wholly direct nor wholly circumstantial in nature,⁴¹ no exact lines can be drawn for determining when circumstantial evidence alone will be sufficient to prove intent. In general, however, as the availability and reliability of direct evidence is reduced, the probative value of reliable circumstantial evidence must be increased. One corollary to this conclusion is that when direct evidence of discriminatory motive is totally unavailable or unreliable, circumstantial evidence alone should be sufficient to establish discriminatory intent.

II. APPLICATION OF THE AVAILABILITY/RELIABILITY TEST TO SELECTED EQUAL PROTECTION AREAS

Having identified the factors of availability and reliability as key determinants of the relative probative weights to be assigned to direct and circumstantial evidence of intent, it is useful to apply these factors to different equal protection contexts. This section will discuss the application of the general principle to the areas of housing, school desegregation, and jury selection, and will examine how courts since *Washington* have treated evidence of discriminatory intent in these contexts.

A. Housing Discrimination

The evidentiary standard for proving discriminatory intent in housing cases is influenced by the fact that often a single act or decision of the local zoning board, rather than a pattern of activities or longstanding practice, is the basis of the alleged equal protection violation.⁴² Consequently, a court may narrowly focus its inquiry upon the action of a relatively small number of individuals over a short period of time.⁴³ The motives of these few indi-

the result of the long history of educational deprivation, primarily due to segregated schools, for blacks." *Davis v. Washington*, 512 F. 2d, 956, 961 (D.C. Cir. 1975). Thus, the presence of an alternative explanation based on differences in educational levels for white and black applicants reduced the reliability of the statistical evidence for inferring discriminatory intent.

⁴⁰ Courts have noted the availability of both circumstantial and direct evidence in *Castaneda v. Partida*, 430 U.S. 482, 495-99 (1977) and in *Resident Advisory Bd. v. Rizzo*, 564 F. 2d, 126, 144 (3d Cir. 1977).

⁴¹ Justice Stevens in *Washington* noted that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume." 426 U.S. at 254 (Stevens, J., concurring). In the case of some official actions with discriminatory impact, the actions themselves may be directly indicative of intent, and intent may also be inferred from the consequences or effects of the actions. See *Reed*, 422 F. Supp. at 715.

⁴² The housing decisions since *Washington* have involved single acts of zoning boards or city agencies. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 130 (3d Cir. 1977).

⁴³ In *Arlington Heights*, the zoning board consisted of only seven persons. 429 U.S. at 258.

viduals will therefore be highly probative of the intent of the board as a whole; the reliability of direct evidence of motivation for proving the intent behind the official act accordingly should be high.

The availability of direct evidence in housing cases is also apt to be high because zoning decisions and enforcement of housing ordinances often require the board members to make decisions based on individual, particular situations and fact patterns rather than on the routine application of general rules.⁴⁴ Public statements and minutes of meetings may be available, although zoning decisions are frequently made behind closed doors.⁴⁵ Finally, to the extent that housing and zoning boards are characterized as administrative rather than as legislative bodies, the motives of their members would not be subject to the presumption of constitutionality that courts often impute to legislative motives, and the officials could be closely questioned at trial.⁴⁶ Thus, both the reliability and availability of direct evidence of intent in housing discrimination cases generally should be high.

The high availability and reliability of direct evidence of intent in housing cases is particularly significant since circumstantial evidence may not always be immediately available. Plaintiffs may have to wait for some time after the allegedly discriminatory decision for its impact to be reflected in statistics showing disproportionate racial effect, such as changes in the racial composition of the area.⁴⁷ However, if the decision involved the refusal to build housing specifically designated for minorities, the discriminatory impact would be felt at once, and circumstantial evidence would be immediately available.⁴⁸

In addition to the problem of varying availability, the reliability of circumstantial evidence in housing cases is often suspect. The presence of alternative explanations for zoning decisions based, for example, on a desire to protect property values⁴⁹ tends to weaken the reliability of statistical evidence seemingly showing that a particular decision disproportionately affected racial minorities.

⁴⁴ See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

⁴⁵ See Cohen, *Equal Protection Clause and The Fair Housing Act: Judicial Alternatives for Exclusionary Zoning Challenges after Arlington Heights*, 6 ENV. AFF. 63, 81 (1977), where the author discusses the manner in which zoning decisions are made, noting that frequently there is "no published, or readily obtainable, report of the meeting." *Id.*

⁴⁶ *Arlington Heights*, 429 U.S. at 268. The *Arlington Heights* Court noted that judicial review of legislative motives at trial might be barred by the separation of powers doctrine or by legislative immunity from testifying. *Id.* See also 8 J. WIGMORE, EVIDENCE §2371 (McNaughton rev. ed. 1961). These problems would not be present in the judicial review of administrative motives. See Cohen, *supra* note 45, at 80.

⁴⁷ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369, 390 (1967) (Harlan, J., dissenting).

⁴⁸ The cancellation by city officials of a planned public housing project to be occupied largely by blacks furnished immediate evidence of discriminatory impact in *Resident Advisory Bd. v. Rizzo*, 564 F. 2d 126, 143-44 (3d Cir. 1977).

⁴⁹ A zoning decision based on property values might be challenged on wealth discrimination rather than on racial discrimination grounds. The Supreme Court has held that legislative classifications based on wealth are not inherently suspect, and thus not subject to strict scrutiny under traditional equal protection analysis unless a fundamental interest is involved. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 24, 29 (1973); *United States v. Kras*, 409 U.S. 434, 446 (1973); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666-70 (1966). The right to housing is not a fundamental interest for equal protection purposes. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

On balance, while both direct and circumstantial evidence of intent may be available in housing discrimination cases, the reliability of direct evidence of motives will often be greater than that of circumstantial evidence of impact for proving discriminatory intent. Since only a relatively small number of officials may be involved in the decision, and since the decision itself may be a single official action, the reliability of direct evidence of discriminatory motives for proving discriminatory intent on the part of the board as a whole should be high. In these circumstances, the proposed test set forth above would mandate that in housing discrimination cases the presumption in favor of direct evidence of motive should prevail, and circumstantial evidence of discriminatory impact alone should not be sufficient to prove discriminatory intent.

This result is in fact that reached by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*⁵⁰ There, the plaintiff, a nonprofit housing developer, applied for a rezoning of a single family tract to permit the construction of low- and moderate-income multiple family housing. The Village denied the rezoning request, citing a concern for property values and the integrity of the Village's zoning plan. The plaintiff brought suit, alleging that the Village's decision violated the equal protection clause. The court of appeals agreed, and held that the denial of the petition for rezoning violated the fourteenth amendment since its "ultimate effect" was discriminatory.⁵¹

The Supreme Court reversed, determining that plaintiff had failed to prove that a discriminatory purpose was a motivating factor in the official zoning decision.⁵² Proof of this purpose required an "inquiry into such circumstantial and direct evidence of intent as may be available."⁵³ Circumstantial evidence of discriminatory impact, the Court concluded, is not determinative of discriminatory intent unless the degree of discriminatory impact is so extreme that it is "unexplainable on grounds other than race."⁵⁴

⁵⁰ 429 U.S. 252 (1977).

⁵¹ *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 517 F.2d 409, 414 (7th Cir. 1975). The court of appeals reversed the district court, which had held that the village had been motivated by a legitimate desire to protect property values and to preserve the integrity of the zoning plan, and had found no discriminatory effect. 373 F. Supp. 208, 211 (N.D. Ill. 1974).

⁵² 429 U.S. at 270. It is interesting to compare this emphasis on the motivations of officials with the Court's earlier statement in *Palmer v. Thompson*, 403 U.S. 217, 224 (1971), that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." *Id.*

⁵³ 429 U.S. at 266.

⁵⁴ *Id.* The Court in *Arlington Heights*, as it had in *Washington*, failed to enunciate a standard for determining what specific level of discriminatory impact would be inexplicable on nonracial grounds. The Court did cite as examples of inexplicable impact *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). 429 U.S. at 266.

In *Gomillion*, the official act of redrawing city boundaries changed the shape of Tuskegee, Alabama from a square to a twenty-eight sided figure and removed all but four of the city's four hundred black voters from the city limits, while not removing a single white voter. 364 U.S. at 341. In *Yick Wo*, a local board had granted laundry permits to all but one of about eighty white applicants, and had refused to grant permits to any of the two hundred Chinese applicants. 118 U.S. at 359.

The Court's reference to *Gomillion* and *Yick Wo* suggests that the discriminatory impact must be virtually total, affecting almost only minorities, in order for circumstantial evidence of impact to be sufficient to prove intent. Yet, the *Arlington Heights* Court noted that "[b]ecause of the nature of the jury-selection task, however, we have permitted a finding of constitutional

The Court's reasoning in *Arlington Heights* thus mirrors that underlying the proposed availability/reliability test in two significant ways. First, the *Arlington Heights* Court stated that both direct and circumstantial evidence, if available, should be examined.⁵⁵ The proposed test also considers the availability of the two types of evidence in order to determine their relative probative value. Second, the Court indicated that in order for circumstantial evidence to be deemed determinative of the intent issue the degree of discriminatory impact must be sufficient to make alternative explanations for the disproportion extremely improbable.⁵⁶ The proposed test similarly holds that effect evidence must be very reliable in order to be determinative of intent. The Court also noted that in many cases, including presumably housing discrimination, evidence of disproportionate impact has limited probative value due to the heterogeneity of the nation's population.⁵⁷ That is, such evidence is unreliable because the diversity of the population makes it probable that any official action will influence some minority groups disproportionately; thus the probative value of the effect evidence is reduced, and direct evidence is required to prove intent.

As noted earlier,⁵⁸ the required use of direct evidence should increase as the availability of such evidence increases. In this regard, it is noteworthy that the *Arlington Heights* Court identified a number of evidentiary sources which are available in many kinds of equal protection cases for establishing direct proof of racial motivation.⁵⁹ These include (1) the historical background of the decision, particularly if that background reveals a series of purposeful discriminatory actions;⁶⁰ (2) the specific sequence of events leading up to the challenged decision;⁶¹ (3) departures from normal procedural sequences or substantive criteria;⁶² and (4) the legislative or administrative history of the decision, especially contemporaneous statements by officials, minutes of meetings, reports, or testimony as to motivation.⁶³ Significantly, each type of evidence noted by the Court involves an analysis of a single decision made by a few individuals; thus, the inquiry into motivation would be narrowly focused, and the reliability of the evidence would be high.⁶⁴

A similar conclusion respecting the reliability of direct evidence in housing discrimination cases was reached subsequent to *Arlington Heights* by the United States Court of Appeals for the Third Circuit in *Resident Advisory Board v. Rizzo*.⁶⁵ In *Rizzo*, plaintiffs challenged a decision by the city of Philadelphia cancelling construction of a proposed public housing project

violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*," 429 U.S. at 266 n.13. This latter statement indicates that no single standard can be set for determining when statistical impact evidence is sufficient to prove intent, but that the nature of the discrimination context, and the factors of availability and reliability of the impact evidence, must be considered separately in each case.

⁵⁵ 429 U.S. at 266.

⁵⁶ *Id.*

⁵⁷ *Id.* at n.15.

⁵⁸ See text at notes 40-41 *supra*.

⁵⁹ *Id.* at 267-68. The Court does not define these as "direct" evidence sources, but the evidence in each case goes to the motives behind the decision rather than to its effects. *Id.*

⁶⁰ *Id.* at 267.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 268.

⁶⁴ See text at notes 42-43 *supra*.

⁶⁵ 564 F.2d 126 (3d Cir. 1977).

in a white neighborhood of the city. The project would have been occupied largely by blacks, and accordingly the cancellation had an immediate and obvious disproportionate impact. The court of appeals found that the circumstantial evidence of impact coupled with direct evidence of motive were sufficient to prove a discriminatory purpose.⁶⁶ Direct evidence satisfying each of the four sources listed in *Arlington Heights* was available, and the reliability of the evidence was supported by the fact that a single decision—the city's termination of the proposed housing project—was the basis of the plaintiffs' claim.⁶⁷ Thus, the high availability and reliability of direct evidence required the use of that evidence to prove discriminatory motives.

In sum, courts in housing discrimination cases since *Washington* have recognized the availability and reliability of direct evidence of motive for proving discriminatory intent, and have not treated circumstantial evidence of effect as sufficient to establish this intent. The Supreme Court's emphasis in *Arlington Heights* on discriminatory motive, and its suggested sources of evidence, indicate that in the housing context direct evidence of motive is necessary to prove an equal protection violation.

B. School Desegregation

In school desegregation cases, plaintiffs must prove that defendants acted with a purpose or intent to segregate a meaningful or significant portion of the school system.⁶⁸ If segregation in the pertinent school system was not previously mandated by law, determining whether purposeful segregation has occurred requires an analysis of official school board action, often extending over a period of time.⁶⁹ This analysis, in turn, may require reference to a large quantity of evidence, since many officials and agencies at both the state and local levels may have been involved in the actions alleged to have violated the equal protection clause.⁷⁰

The above factors tend to reduce the probative value of direct evidence of discriminatory motive under the proposed availability/reliability test. This conclusion is supported by two considerations. First, the availability of direct evidence of intent in school desegregation cases is low. The routine nature of many school board actions, such as district line changes and attendance zone determinations, makes it unlikely that school officials will have provided a statement of the reasons or motivations behind these actions.⁷¹ Furthermore, the actions are often facially neutral, and may be justified by such nonracial policies as the desire for neighbor-

⁶⁶ *Id.* at 144-45.

⁶⁷ *Id.* at 143-44.

⁶⁸ *Keyes v. School Dist. #1*, 413 U.S. 189, 208 (1973).

⁶⁹ In *Armstrong v. Brennan*, 539 F. 2d 625 (7th Cir. 1976), the period was twenty years. *Id.* at 634. In *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229 (S.D. Ohio 1977), the period of the alleged violations was twenty-three years. 429 F. Supp. at 236-37.

⁷⁰ In *Reed*, defendants were the Governor of Ohio, the state Attorney General, the State Board of Education, the Superintendent of Instruction, the Cleveland Board of Education, its individual members, and the Superintendent of the Cleveland schools. 422 F. Supp. at 712.

⁷¹ In *Reed*, the district court had to engage in guesswork and accept post hoc explanations for changes in attendance zones and other school board actions over a twenty year period, since contemporaneous statements or explanations of motives had not been made. *Id.* at 715-17.

hood schools or the minimization of costs.⁷² Departures from normal procedures and racially motivated statements by officials may be present, but in general the availability of direct evidence will be slight.⁷³ Second, in proving an intent to segregate a meaningful portion of the entire school system, the reliability of direct evidence that any one action or official was motivated by racial discrimination is minimal,⁷⁴ due to the large number of officials involved and the extended time period of the violations. Thus, in the school desegregation context, direct evidence of motive will be less available and reliable than in the housing discrimination context.⁷⁵

In contrast, two types of circumstantial evidence of intent are readily available in school desegregation cases. First, statistical evidence of racially disproportionate enrollments is frequently available to plaintiffs.⁷⁶ Second, circumstantial evidence of official school board actions with foreseeable segregative results often is available to infer intent.⁷⁷ The extended time period and the large number and variety of school board actions indicate that many such "foreseeably segregative actions" should be present in a typical school desegregation case. Consequently, the availability of circumstantial evidence in most cases will be high.

The reliability of circumstantial evidence of intent in desegregation cases hinges on the degree of racial imbalance and the number of actions which are shown to have foreseeable segregative impact. Where the racial disproportion in student attendance patterns is high, and a large number of foreseeably segregative acts are shown to have been committed by the defendant school officials and their predecessors over a period of time, the reliability of this circumstantial evidence increases since the possibility of alternative explanations for the disproportion based on residential segregation⁷⁸ or migration⁷⁹ is reduced.

On balance, the extended duration of the segregation violation, the routine character of school board actions, and the multiplicity of actors involved in school desegregation suits sharply reduces the availability and reliability of direct evidence of motive. Circumstantial evidence, because of its greater availability and potential reliability for proving intent, thus should carry more probative weight in desegregation cases than should direct evidence. If the degree of imbalance and extent of foreseeable segregative actions are great enough to preclude alternative explanations for the discriminatory effect, circumstantial evidence alone should be sufficient to prove discriminatory intent.

Notwithstanding these considerations, the Supreme Court has been reluctant to assign a greater probative weight to circumstantial evidence

⁷² See *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 257 (S.D. Ohio 1977) (benefits of neighborhood school policy).

⁷³ See *Hart v. Community School Bd.*, 512 F.2d 37, 50 (2d Cir. 1975).

⁷⁴ See text at note 35 *supra*.

⁷⁵ See text at note 35 and notes 44-48 *supra*.

⁷⁶ Such evidence was presented in *Keyes v. School Dist. #1*, 413 U.S. 189 (1973); *Arthur v. Nyquist*, 429 F. Supp. 206 (W.D.N.Y. 1977).

⁷⁷ *Hart v. Community School Bd.*, 512 F.2d 37, 50 (2d Cir. 1975); *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 182 (6th Cir. 1974).

⁷⁸ *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 58 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).

⁷⁹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14 (1971).

than to direct evidence in school desegregation cases. In *Austin Independent School District v. United States*,⁸⁰ the Court in a per curiam decision vacated a lower court judgment⁸¹ and remanded the case for reconsideration in light of *Washington*.⁸² The Fifth Circuit, noting that "it is difficult—and often futile—to obtain direct evidence"⁸³ of school officials' intentions, had based its finding of intent on the natural, foreseeable, and inevitable segregative results of the school district's compliance with a policy of assignment of students to the schools closest to their homes.⁸⁴ The Fifth Circuit thus had inferred intent from circumstantial evidence.⁸⁵

Justice Powell, in a concurring opinion to the Court's decision in *Austin*, suggested that "the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified."⁸⁶ Justice Powell's opinion indicates that the Court may have found the circumstantial evidence too unreliable to justify a finding of system-wide segregative intent in the absence of any direct evidence of motive.⁸⁷ The evidence of foreseeable segregative effect may have been sufficient to justify a finding of intent in a smaller part of the system, but some direct evidence of facially discriminatory actions might have been necessary to establish system-wide intent.

The Supreme Court also considered the relative probative value of direct and circumstantial evidence of intent in the school desegregation context in *Dayton Board of Education v. Brinkman*.⁸⁸ In *Dayton*, the district court had held that a three-part "cumulative violation" had been established in the Dayton school system,⁸⁹ and ordered a system-wide desegregation remedy. The Supreme Court vacated the judgment on the ground that the violation did not "suffice to justify the remedy imposed."⁹⁰ While the Court's decision was based on the scope of the remedy, its opinion also discussed the evidentiary problem. The Court noted that "[f]indings as to the motivations of multimembered public bodies are of necessity difficult,"⁹¹ but also implied that such findings were necessary given the limited nature of the circumstantial evidence presented in the "cumulative violation."⁹²

Lower courts have been more willing than the Supreme Court to treat available circumstantial evidence of foreseeable segregative actions and re-

⁸⁰ 429 U.S. 990 (1977).

⁸¹ *United States v. Texas Educ. Agency*, 532 F. 2d 380 (5th Cir. 1976).

⁸² 429 U.S. at 990.

⁸³ 532 F. 2d at 388.

⁸⁴ *Id.* at 390.

⁸⁵ *Id.* at 388.

⁸⁶ 429 U.S. at 991.

⁸⁷ Justice Powell noted that specific circumstantial evidence of actions by school officials contributing to segregation of Mexican-American students had been available and was used to infer intent at an earlier stage in the case, but that this evidence was not used as a basis for finding intent by the court of appeals. *Id.* at n.1. Under the availability/reliability theory, this additional evidence would have increased the reliability of the circumstantial evidence used by the court of appeals and thus would have increased its probative value for inferring intent.

⁸⁸ 433 U.S. 406 (1977).

⁸⁹ *Id.* at 413. The cumulative violation included (1) the rescission of pro-integration resolutions by the school board, (2) the racial imbalance of the school system and (3) the use of optional attendance zones for two high schools. *Id.* at 411-13.

⁹⁰ *Id.* at 414.

⁹¹ *Id.*

⁹² *Id.* Under the theory proposed in this note, the more widespread and numerous segregative actions are, the greater their reliability for proving intent since the possibility of non-racial explanations is reduced.

sulting racial imbalance as sufficient to infer discriminatory intent.⁹³ Several courts have expressly found that the *Washington* requirement of intent does not prohibit the inference of that intent from actions with foreseeable segregative consequences.⁹⁴ The unavailability of direct evidence has been noted by these lower courts. For example, one court stated that "[a] standard requiring plaintiffs in a school desegregation case to adduce *direct* proof of a 'racial motive' on the part of a multi-person school board would border on the impossible."⁹⁵ This perceived unavailability of direct evidence underlies the lower courts' willingness to use the foreseeable consequences test to infer intent circumstantially.

The foreseeable consequences test has been applied to a wide variety of school board actions by lower courts to infer discriminatory intent. In *Reed v. Rhodes*,⁹⁶ plaintiffs claimed that the actions and policies of a number of school officials had the "purpose and effect" of segregating the Cleveland public schools.⁹⁷ Unlike the Supreme Court in *Austin* and *Dayton*, the district court in *Reed* considered a large number of school board actions to be available sources of circumstantial evidence of intent. These included the failure to transfer black students to white schools,⁹⁸ the use of optional attendance zones,⁹⁹ the use of "intact" busing of entire classes of black students,¹⁰⁰ the racially based assignment of faculty and staff,¹⁰¹ and the selection of school construction sites.¹⁰² By finding so many available sources of circumstantial evidence, the reliability of the evidence as a whole was increased.

Reed v. Rhodes also demonstrates how the line between direct and circumstantial evidence, or between motive and effect, may become blurred in the school desegregation context. The district court, apparently unwilling to base its finding of discriminatory intent solely on circumstantial evidence of actions with foreseeable segregative results, adopted an interesting though somewhat disingenuous approach. The court maintained that when the circumstantial evidence of discriminatory impact was so great that no alternative explanation to discriminatory intent was possible—that is, when the circumstantial evidence was extremely reliable—the evidence should be reclassified as direct evidence.¹⁰³ Thus, the court concluded, "there is no

⁹³ See e.g., *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229 (S.D. Ohio 1977); *Arthur v. Nyquist*, 429 F. Supp. 206 (W.D.N.Y. 1977).

⁹⁴ In *Reed*, the district court concluded that the use of the foreseeable consequences test was "totally reconcilable" with the holding of *Washington v. Davis*, 422 F. Supp. at 715. In *Arthur*, the court stated, "this court does not read either *Washington v. Davis* or *Arlington* to prohibit the use of the foreseeable consequences test to analyze circumstantial evidence in evaluating the intent of defendants in school cases." 429 F. Supp. at 211.

⁹⁵ *Penick*, 429 F. Supp. at 255 (emphasis in original).

⁹⁶ 422 F. Supp. 708 (N.D. Ohio 1976).

⁹⁷ *Id.* at 712.

⁹⁸ *Id.* at 732-33.

⁹⁹ *Id.* at 776-82.

¹⁰⁰ *Id.* at 782-84.

¹⁰¹ *Id.* at 786-88.

¹⁰² *Id.* at 790-92. All of these sources were used in *Reed* as circumstantial evidence of intent. Another court also considered the gerrymandering of attendance zone lines, the choice of school bus routes, and the failure to hire or promote minority faculty and staff. *Alvarado v. El Paso Independent School District*, 426 F. Supp. 575, 591-92 (W.D. Tex. 1976). Some of these actions fall into a middle ground between direct and circumstantial evidence; their segregative effect can be used to infer intent, but the actions themselves may be facially non-neutral and indicative of discriminatory motives.

¹⁰³ 422 F. Supp. at 715.

need to resort to the inferring of intent from effect."¹⁰⁴ The circuitous approach adopted by the *Reed* court would be unnecessary under the availability/reliability theory, since the inference from very dramatic circumstantial evidence is itself considered sufficiently reliable for finding intent, without direct evidence of motive.¹⁰⁵

In summary, both the Supreme Court and lower courts have responded to the lack of available and reliable direct evidence of intent in school desegregation cases by placing greater probative weight on circumstantial evidence of actions with foreseeable discriminatory effects. In doing so, however, the courts have failed to develop a coherent standard for determining when such evidence is sufficient to permit an inference of intent. Moreover, the Supreme Court has seemingly required a greater number of specific segregative actions,¹⁰⁶ and thus a higher level of reliability, for systemwide intent to be inferred from such circumstantial evidence than have the lower courts.¹⁰⁷

C. Jury Discrimination

The *Washington* Court observed that in cases alleging racial discrimination in the selection of juries, circumstantial evidence showing the systematic exclusion of minorities could itself establish intent.¹⁰⁸ Applying the availability/reliability theory to the jury selection context leads to the same result.

In the selection of jurors for petit juries in criminal and civil cases, the district attorney has broad latitude to disqualify prospective jurors.¹⁰⁹ Under a peremptory challenge system, no reasons or motives for disqualification need be given.¹¹⁰ Direct evidence of discriminatory motives in the selection of jurors for petit juries will therefore be unavailable unless prosecutors voluntarily state their motives. In the earlier selection of jurors for jury venires, however, the objective criteria used for qualification may be examined to determine if, on their face, they are racially neutral.¹¹¹ In this situation, some direct evidence would be available.

The reliability of direct evidence of motive in the actual jury selection process depends in part on the number of officials involved and the length of time over which the alleged discrimination took place. The subjective motive of an individual prosecutor in disqualifying a single juror is less dis-

¹⁰⁴ *Id.*

¹⁰⁵ The court in *Reed* implied that a motive was shown: "Many of the incidents established at trial . . . can be rationally attributed only to a deliberate and conscious desire to create or perpetuate a segregated condition." *Id.*

¹⁰⁶ *Austin Independent School Dist. v. United States*, 429 U.S. at 991 (Powell, J., concurring).

¹⁰⁷ See text and note 92 *supra*.

¹⁰⁸ 426 U.S. at 241.

¹⁰⁹ The district attorney may disqualify a prospective juror for cause or without cause through the exercise of peremptory challenges. See *Swain v. Alabama*, 380 U.S. 202, 211 (1965).

¹¹⁰ *Id.* at 220. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.*

¹¹¹ See *Castaneda v. Partida*, 430 U.S. 482, 492-99 (1977) (selection procedures highly subjective, subject to possible abuse); *Swain v. Alabama*, 380 U.S. 202, 209 (1965) (qualifications found to be neutral).

positive on the issue of intent than if the alleged pattern of discrimination occurred over a period of many years and involved many prosecutors.¹¹² Additionally, a motive to disqualify a black juror because the prosecutor felt the juror would be unduly sympathetic to a black defendant is distinguishable from a prosecutorial motive to disqualify the same juror where the motive stemmed from a desire to keep all blacks off juries. While the former motive may be permissible,¹¹³ the latter would not.¹¹⁴ Thus, evidence that a prosecutor removed a juror "because he was black" is, standing alone, insufficient and unreliable to prove intent. In contrast, direct evidence of racially biased qualifications for jury venires would be reliable, if those qualifications were applied during the period of the alleged equal protection violation,¹¹⁵ since by their nature they provided more objective grounds for analysis than do the motives of individuals.

Circumstantial evidence of jury selection discrimination usually consists of statistical evidence of minority under-representation or exclusion.¹¹⁶ As the degree of exclusion increases, the reliability of the evidence increases since the disproportion becomes statistically more meaningful and thus the probative value of statistical evidence becomes greater.¹¹⁷ In addition, the reliability of statistical evidence is increased if the statistics are chosen so as to reflect the disproportion due only to race, and not due to other factors such as age or education.¹¹⁸

On balance, the relative unavailability and lack of reliability of direct evidence of intent in petit jury selection and the high reliability of circumstantial statistical evidence of disproportionate effect indicate that the probative value of statistical evidence in petit jury discrimination cases should be higher than in housing or school desegregation cases. Since the probative value is very high, a lesser degree of discriminatory effect should be required to establish discriminatory intent in petit jury cases than in housing or desegregation cases. However, in cases of discrimination involving the selection of jury venires, direct evidence of intent may be available by questioning individual jury commissioners about their motives in selecting jurors, or by examining the criteria for venire selection to determine if they are discriminatory on their face or subject to possible abuse. In venire cases, therefore, some direct evidence of intent may be required, and a

¹¹² See, *Castaneda*, 430 U.S. at 495 (eleven years); *Swain*, 380 U.S. at 205 (eleven years); *Carter v. Jury Commission*, 396 U.S. 320, 327-28 (1970) (six years).

¹¹³ See *Swain v. Alabama*, 380 U.S. 202, 220 (1965). But see *United States v. Robinson*, 421 F. Supp. 467, 473 (D. Conn. 1976) (cumulative effect of excessive numbers of legitimate challenges may require corrective action).

¹¹⁴ See *Swain*, 380 U.S. at 223-24 (precluding challenges to the results of a peremptory challenge system in any one case, but indicating that if a peremptory challenge system were used to exclude blacks from all petit juries in case after case, this would violate equal protection); *United States v. McLaurin*, 557 F. 2d 1064, 1076 (5th Cir. 1977) (no evidence of continued and systematic exclusion).

¹¹⁵ See *Castaneda v. Partida*, 430 U.S. 482, 495-99 (1977).

¹¹⁶ Such statistical evidence was employed in *Castaneda v. Partida*, 430 U.S. 482, 486-87 (1975); *Carter v. Jury Comm.*, 396 U.S. 320, 327-28 (1970); *Whitus v. Georgia*, 385 U.S. 545, 550-52 (1967); *Akins v. Texas*, 325 U.S. 398, 405-06 (1945).

¹¹⁷ See generally Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 340-53 (1966).

¹¹⁸ Justice Burger's dissenting opinion in *Castaneda* considered differences in age and literacy as possible alternative explanations for the racial disproportion. 430 U.S. at 504-07.

greater discriminatory effect should be required to establish intent than in the petit jury cases.

The jury discrimination cases decided since *Washington* support the conclusion that circumstantial evidence of the disproportionate effect of a juror selection system should be highly probative of intent. In *Castaneda v. Partida*,¹¹⁹ the Supreme Court considered both direct and circumstantial evidence of intent in concluding that the Texas system of grand jury selection violated the equal protection clause.¹²⁰ The Court first looked to the available statistical evidence, and found that although the relevant county population was 79.1% Mexican-American in 1970, over an eleven year period only 39% of those summoned for grand jury service were Mexican-Americans.¹²¹ The state failed to show that the eleven year period was not reliable,¹²² and the Court considered at length the statistical improbability that the under-representation could have been caused by random selection.¹²³

The inference of intent raised by the circumstantial evidence in *Castaneda* was supported by direct evidence that the selection process relied on highly subjective criteria¹²⁴ to choose grand jurors, so that the procedures were subject to abuse and were not facially neutral.¹²⁵ Thus, although the Court's finding of intent in *Castaneda* did not rely solely on circumstantial evidence, the order and length of discussion of each type of evidence indicates clearly that the Court considered the statistical evidence to be the most probative of intent.¹²⁶

Lower courts have also treated statistical evidence of discriminatory impact in jury selection cases as being the most probative of intent.¹²⁷ However, the courts have noted that the statistical under-representation must be substantial¹²⁸ and must involve more than a single jury before an inference of intent is permissible.¹²⁹ In *United States v. Robinson*,¹³⁰ the district court held that the use of a peremptory challenge system which reduced the number of petit juries with at least one black member from an expected figure of 50% to an actual figure of 18%¹³¹ was sufficient to

¹¹⁹ 430 U.S. 482 (1977).

¹²⁰ *Id.* at 500-01.

¹²¹ *Id.* at 495.

¹²² *Id.* at 496. The statistical evidence may have carried a presumption of reliability in the majority's view, since the majority placed the burden of proof for showing its unreliability on the state. *Id.*

¹²³ *Id.* at n.17. Justice Burger's dissent also focused on the reliability of the statistical evidence, but concluded that it was insufficient to make out a prima facie equal protection violation. *Id.* at 507.

¹²⁴ The following qualifications were among those used: the juror must be a citizen of Texas and of the county, a registered voter, of "sound mind and good moral character," literate, with no prior felony convictions, and under no indictment. *Id.* at 485.

¹²⁵ *Id.* at 497.

¹²⁶ The Court noted that the statistical evidence alone was sufficient to establish a prima facie case of discrimination. *Id.* at 495-96. Thus, although direct evidence of intent was also available, the Court indicated that such direct evidence was not necessary to prove intent. *Id.* at 496.

¹²⁷ See, e.g., *Newman v. Henderson*, 539 F.2d 502 (5th Cir. 1976); *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976).

¹²⁸ *United States v. Kleifgen*, 557 F.2d 1293, 1297 (9th Cir. 1977).

¹²⁹ *United States v. Jackson*, 433 F. Supp. 239, 242 (W.D.N.Y. 1977).

¹³⁰ 421 F. Supp. 467 (D. Conn. 1976).

¹³¹ *Id.* at 472.

prove discriminatory intent,¹³² even though the court recognized that non-racial factors might have caused some of the disproportion.¹³³ The court in *Robinson* made it clear that the intent required was inferred solely from evidence of effect, and that direct evidence of racial motivation was irrelevant and unnecessary.¹³⁴

Similarly, in *Newman v. Henderson*,¹³⁵ the United States Court of Appeals for the Fifth Circuit inferred discriminatory intent solely from circumstantial evidence of statistical under-representation of blacks on grand juries.¹³⁶ The court distinguished *Washington* by comparing the reliability of circumstantial evidence in employment and in jury cases. In the jury context, the statistics presented to the court took into account the possibility of alternative explorations in defining the disparity so that "any disparity cannot be attributed to the fact that one group is better qualified than another, as in *Washington*."¹³⁷ The statistics used showed the disparity between the percentage of blacks qualified to sit on grand juries and the percentage which did in fact sit on grand juries.¹³⁸ Since the possibility of alternative explanations based on differences in qualifications was eliminated, the statistical evidence was reliable and sufficient to establish discriminatory intent.

In conclusion, the Supreme Court and lower court since *Washington* have treated statistical evidence as sufficient to establish intent in the cases of discrimination in the selection of juries. In the jury venire cases, some direct evidence of intent may be available and, if so, should be required.

CONCLUSION

Washington v. Davis left unresolved the proper evidentiary standards to be used in proving discriminatory intent in different equal protection areas. This note has identified two major types of evidence of intent, direct and circumstantial, and has suggested that by examining their availability and reliability courts may be able to determine the relative probative weight to assign to each type.

In general, proof of discriminatory motives is far more difficult for plaintiffs in equal protection cases than proof of discriminatory impact or effect. To the extent that courts demand direct evidence of intent and define that intent subjectively, as in the housing cases, the burden of proof on plaintiffs increases and it becomes more difficult to challenge successfully a statute or official action on equal protection grounds. Conversely, to the extent that circumstantial evidence is sufficient to establish objectively defined intent, as in the jury cases, the burden of proof on plaintiffs is reduced.

¹³² *Id.* at 473.

¹³³ The court mentioned that the disproportion could also be due to differences in voting registration or education levels. *Id.* at 472-73.

¹³⁴ *Id.* at 473 n.7. The *Robinson* court recognized that *Swain* precluded attack on the use of peremptory challenges on any one jury, but noted that *Swain* intimated that the excessive use of peremptory challenges to exclude blacks from the entire jury process would warrant corrective action. *Id.* at 473-74.

¹³⁵ 539 F. 2d 502 (5th Cir. 1976).

¹³⁶ *Id.* at 505.

¹³⁷ *Id.*

¹³⁸ *Id.*

Thus, by altering the evidentiary standard for proof of intent, courts presumably could advance those rights felt to be essential, such as fair representation on juries, and impede those rights felt to be superfluous or socially disruptive, such as the right to integrate neighborhoods. By adopting the availability/reliability test, the issues of policy would properly be removed from the evidentiary problem of proving intent, and courts would be provided with a single objective standard for weighing the sufficiency of plaintiffs' proof of intent in all equal protection contexts.

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