IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29431

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

WEST PEACHTREE TENTH CORPORATION d/b/a
ONE TENTH STREET APARTMENTS, et al.,

Defendants-Appellees,

On Appeal from the United States District Court for
the Northern District of Georgia

BRIEF FOR THE UNITED STATES

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* Also referred to herein as Title VIII of the Civil Rights Act of 1968 and as the Fair Housing Act.

STATUTES INVOLVED

The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 et seq., provides in pertinent part:

> 42 U.S.C. 3604 . . . It shall be unlawful --
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, or national origin.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. 3613:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title, or that any group of persons has been denied any of the rights granted by this title and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this title.

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QUESTIONS PRESENTED

A. Whether the District Court, in holding that the United States had failed to establish a pattern or practice of resistance by the defendants to the enjoyment of rights secured by the Fair Housing Act of 1968, applied correct legal standards to its own evidentiary findings and to undisputed evidence in the record.

B. Whether the District Court properly denied relief on the basis of a subjective finding that defendants acted in good faith, without requiring them to adopt objective reviewable procedures or to take affirmative steps to correct the effects of past discrimination.

I

STATEMENT

A. Procedural History

This is an appeal by the United States from a Judgment of the United States District Court for the Northern District of Georgia, entered January 5, 1970, denying relief from the defendants' alleged racial discrimination in housing.

The action was commenced on June 26, 1969. The Complaint alleges in substance that the defendants operate the One Tenth Street Apartment, a 96-unit complex in downtown Atlanta, on a racially discriminatory basis, in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 et seq. The complaint further alleges that the defendants' unlawful conduct is pursuant to a "pattern or practice" of resistance to the enjoyment of rights secured by the Act, and prays that

defendants be enjoined from further discrimination and required to correct the effects of their past discriminatory practices. Defendants deny the allegations of discrimination.

Hearings were held in Atlanta on October 1, 1969, and November 5, 1969. On January 5, 1970, the District Court found that the defendants had engaged in systematic discrimination before the effective date of the Civil Rights Act but held the evidence of post-Act discrimination insufficient to constitute a "pattern or practice" of resistance. The Court further found the defendants' present disposition to be such that no useful purpose could be served by the entry of an injunction.

B. Facts

1. The Defendants

The West Peachtree Tenth Corporation, which operates the subject apartment house has been incorporated and doing business pursuant to the laws of the State of Georgia since May, 1965.(A-529) Mr. Ted Levy and Mr. Robert Miller are the only two shareholders in the Corporation. (A-588) As majority stockholder and President of the Corporation, Mr.

Levy has general responsibility for the operations of the One Tenth Street Apartments. (A-319) Aside from the signing of leases as representative of the defendant corporation, (A-338) Mr. Levy has delegated the bulk of his managerial responsibility to his managing agent, Mrs. Frances E. Price, (A-338) who in turn hires and supervises three night managers and part-time rental clerks. (A-319)

The One Tenth Street Apartments advertise 96 rental units ranging in price from $139 to $186 per month. (A-49) Most units are rented on a six month lease, but shorter leases, from three months to one month, are also available. (A-320) The defendants' rental office is located on the ground floor. (A-522)

There is a high turnover rate. (A-321-322) The defendants' apartment house accommodated approximately 118 new, incoming tenants during the period from January 1, 1969, to September 26, 1969. */ Only 33 of the approximately 96 tenants residing at the One Tenth Street Apartments on January 1, 1969, were still living there as of September 26, 1969. */

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*/ These figures are extracted from Defendant's records. (Pl. Exs. 2 and 3 attached to the deposition of Mrs. Price)

At the time this suit was filed, all the defendants' tenants were white. (A-487-488) The first Negro tenant entered the building in July, 1969. (A-489)

2. Procedures for Admission to the Building

Defendant Levy and his rental agent, Mrs. Frances E. Price, testified that the following procedure is used to fill vacancies in the subject apartment house:

(a) The Application. Prospective tenants are required to complete a written application requesting: name; unit desired; present address; telephone number; landlord; length of time there; former address and landlord; present occupation; employer; his telephone number; former employer and his address; the number of adults to occupy the premises; the date of occupancy; two personal references; and, two credit references. (A-359)

(b) Personal Interviews. Mrs. Price testified that she is able to "determine a great deal" about any applicant through personal interviews. (A-124, 349) The part-time agents have been trained by Mrs. Price to conduct personal interviews and report the results to her. (A-340) By this process the

defendants evaluate an applicant's honesty and sincerity (A-124), attitude (A-147, 349), and compatibility with incumbent tenants. (A-29, 378, 532)

In addition to evaluating the applicant for the subjective characteristics enumerated in the preceding paragraph, defendants' agents use the personal interview to determine which of the various items of information available on the application will be weighed as the "most important" with regard to that particular applicant. (A-360)

c. "Earnest Money Deposit"

Unless the applicant is someone known to Mrs. Price personally, or is referred to her by a personal friend, or is a prior tenant, he must submit an earnest money deposit of $100 (or a substantial portion thereof) with his application. (A-115, 352-358, 553-554) To Mr. Levy and Mrs. Price, failure to submit such a deposit means that the applicant is not sufficiently interested in securing an apartment. (A-76, 116, 352, 553-554) Consequently, they consider those applications submitted without an earnest money deposit, as "absolutely dead." (A-96, 107-109, 116, 554) With only two

identifiable exceptions, */ it is the defendants' policy not to process such applications or to make further reference to them, even though apartments may later become available. (A-76-77, 107-109, 116, 553-555)

According to Mr. Levy and Mrs. Price, all applicants are informed of this "earnest money deposit" requirement. (A-103-104, 356, 369, 575) However, the evidence shows, and the Court found, that all but one of the black applicants were not told of it; (A-602-606) the exception, John Lloyd, was not asked about this when he testified. (A-27-42)

After the application is processed and the applicant signs a lease, this earnest money deposit is converted into a traditional security deposit. (A-352) An earnest money deposit is refunded if the application is not approved, or if the applicant later decides he does not want the apartment. (A-355)

d. Credit Check

According to Mr. Levy and Mrs. Price, the defendants'

*/Mrs. Price claims that two Negro applicants, Mr. John Lloyd and Miss Sandra Threadcraft, were told of the need for an earnest money deposit but submitted their applications without the deposit and then "harassed" her into processing their applications. (A-117-118, 384) Mrs. Price rejected both applications.

policy is to consult the Atlanta Credit Bureau for a credit report if the applicant has submitted an "earnest money deposit" with his application. (A-76, 573) It is "unusual" for them to do so without having an "earnest money deposit." (A-384) There is evidence, however, that a significant number of whites were admitted to the building immediately without any credit check (A-604, 606)

The District Court concluded: */ "There is considerable subjective decision by Mrs. Price in rentals. While such procedure appears necessary and practical on the part of management in order to keep undesirables of any race out of the building, it does create the 'opportunity' for discrimination in rentals." (A-602)

3. Negro Applicants

The defendants testified that approximately 12 Negroes have made application to their building since the start of business in 1965. (A-365) It was not until nearly a month after the institution of this suit, however, that the first

*/The District Court found that the earnest money deposit is only required where there is a suitable vacancy and the applicant is able to meet the subjective requirements. (A-601) This is apparently an inadvertent error inconsistent with the defendants' testimony. (See pp. 6 and 7, supra)

Negro tenant was admitted to the defendants' building. (A-507) There is evidence as to some fifteen applications and inquiries by nine black applicants during 1968 and 1969.

(a). Pre Act Negro Applicants

The District Court found, on the basis of ample evidence, and despite the defendants' denials, that Negroes were effectively excluded from the One Tenth Street Apartments prior to January 1, 1969, pursuant to a deliberate program of racial restriction. (A-609) This evidence is summarized in the opinion, (A-602-604) and we deal here only with the highlights.

Five Negro witnesses testified that they submitted applications prior to January 1, 1969, the effective date of the Act, and were unable to obtain apartments. (A-602-604) */ Four of these applications bear racial designations. (A-604)

Mrs. Price denied that the applications of those of the pre-Act black applicants, Mr. Martin, Dr. Codwell, and Miss Jones, who unsuccessfully attempted to secure apartments at One Tenth Street in February, April, and November, 1968,

*/ All of these Negroes are college graduates, have substantial incomes, and are otherwise qualified for apartments. (A-602-604)

respectively, had been rejected for residency at all. Rather, defendants contend that each of these applicants failed to submit an "earnest money deposit". (A-211, 376, 391) For this reason, the three applicants were claimed to have shown no interest, and their applications were placed in what Mr. Levy called the "absolutely dead" file. (A-554)

The Negroes testified, however, that they were not informed of any such requirement, (A-404, 410, 417, 430, 433) and the Court so found. (A-602-606)

Miss Sandra Threadcraft applied for an apartment in May 1968, and was rejected at the outset because, according to Mrs. Price, "She did not display the type of attitude that we feel is necessary." (A-378) The defendants, however, never communicated this deficiency to Miss Threadcraft, who continued to contact the rental office through the fall of 1968 seeking information as to the status of her application and the availability of apartments. (A-416-417) Each time she was told that no apartments were available. (A-416) On one occasion, a white fellow employee made a similar inquiry immediately afterwards, and was told that there were apartments and, in effect, to "come on down." (A-425)

Robert Pitts, an assistant professor of Modern Languages at Atlanta University, made application in August, 1968, but was told that no apartments were available. (A-432) He made several further inquiries between then and October 15, 1968, always to no avail. (A-432-433) On one occasion, when accompanied by the Chairman of the Chemistry Department, Atlanta University, he volunteered to leave a deposit if to do so would improve his chances of obtaining an apartment. (A-433) Subsequently, in October 1968, Mr. Pitts was finally told by Mrs. Price that his application had been rejected because of the owner's refusal "to integrate the building until forced to do so." (A-434) Mr. Pitts' cousin, who accompanied him on this occasion, verified his account. (A-456)

Mr. Pitts complained to the Atlanta Leadership Summit Conference. (A-446). This organization wrote a letter to Mr. Levy which inquired as to his racial policies. (A-449; Pl. Ex.-14) Mr. Levy never answered the letter. (A-451)

(b). Post Act Negro Applicants

Miss Threadcraft and Mr. Pitts, doubtless hopeful that the Fair Housing Act would improve their prospects, recontacted

the defendants after the effective date of the Act. (A-417, 437) At least four other Negroes */ also applied during 1969;

(1) On or about January 15, 1969, Robert Pitts telephoned Mrs. Price and asked if there had been "any changes" in the "no integration" policy of which she had advised him. (A-437) Mrs. Price said "No, there has not been any change, and that is all I am permitted to say." (A-437)

With reference to this telephone call the Court aptly remarked at the hearing of October 1, 1969:

> I think this inference if [sic] he made the call and identified himself and wanted to know if there had been any changes, this is tantamount to re-applying; I am not too worried about that. (A-443) **/

(2) In May, 1969, Sandra Threadcraft made a renewed

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*/ One of the four, Miss Barbara Storey, did not testify in this case; another, Jon Brown, applied for an apartment on July 18, 1969 (25 days after this suit was filed) and was accepted on July 19, 1969.

**/ This characterization is at odds with the Court's decision of January 5, 1970, where it is stated that "Pitts did not effectively renew his application by the short telephone call of January, 1969. He apparently called for informational purposes, but made no request, demand, or application for rental at that time or anytime during 1969." (A-609)

effort to secure an apartment in the defendants' building. She visited the rental office and offered supplemental credit references. (A-417) Mrs. Price accepted this information, and said she would conduct a credit check and call Miss Threadcraft. (A-417) Again, Miss Threadcraft was not told of the alleged "earnest money" requirement or asked to leave a deposit. (A-417) Subsequently, after not hearing anything from the defendants, Miss Threadcraft telephoned the rental office and spoke with Mr. David Marshall (identified by the defendants as a part-time rental agent) (A-319) who told her over the phone that the reason she did not get the apartment was that she did not leave a $100.00 deposit. (A-417) Thereafter, Miss Threadcraft telephoned Mrs. Price and was told that her application had been rejected. (A-417)

At the trial, Mrs. Price testified that Miss Threadcraft's paper qualifications were "sufficient" and she would have been able to obtain an apartment but for her "attitude." (A-385) Mrs. Price stated that, from the outset, (May 1968) (A-383) this applicant was "potential trouble and harassment." (A-383)

(3) John Lloyd telephoned the subject apartment house on or about May 20, 1969, to inquire about apartments. He

spoke to an unidentified male employee who gave him Mrs. Price's home telephone number and advised him to call her there. (A-28-29) Mr. Lloyd did so that evening and was informed by Mrs. Price over the telephone that an apartment was available. (A-29) She invited Mr. Lloyd to stop at her office next day to fill out an application. */ (A-34-35)

On May 21, 1969, Mr. Lloyd visited the rental office but was told by Mrs. Price that no apartments were available. (A-29) He submitted an application and was told by Mrs. Price that he would be contacted. (A-30) Ten days later, not having heard from her, Mr. Lloyd called Mrs. Price and was again told nothing was available. (A-30)

Mr. Lloyd testified that he is 41 years old and has a wife and six children who live in Washington, D. C. (A-32) On cross examination, he explained that he did not tell this to Mrs. Price because he has no present plans to relocate them in Atlanta. (A-34) Mr. Lloyd's application, written in his hand, states that he was seeking accommodations for "one" (Pl. Ex. #1, Deposition of J. Lloyd). He testified that he was willing to sign a one year lease. (A-39) In fact, he now

*/Mr. Lloyd testified that he is an experienced radio broadcaster and his voice has no trace of ethnic or racial characteristics. (A-38)

lives by himself in the Howell House, another downtown Atlanta apartment house. (A-33)

The District Court held that Mr. Lloyd was justifiably rejected because of his family situation and because Mrs. Price could not get any credit information on him. (A-605) This is inconsistent with the record.

Mrs. Price initially testified at the hearing to the effect that one of the reasons Mr. Lloyd was rejected was because he is a married man with several children. (A-385). On further cross examination she conceded, that "possibly" she was unaware of this until after the decision was made to reject him. (A-386) The principal basis for Lloyd's rejection, according to Mrs. Price's trial testimony, was actually insufficient humility; he

> . . . tried to impress me with the fact that he was so and so, and he was going places, and he was really going to be somebody someday, and I ought to feel like it was a great honor, and not question anything on this application. (A-386)

Mr. Pitts "harassed" Mrs. Price; (A-369) Miss Threadcraft was "belligerent" and had a "bad attitude," (A-378, 385), and Mr. Lloyd harassed her and was "loud and boisterous." (A-386) The building remained all-white.

(4) Mr. Franklin Biggins, a college graduate and HUD employee, visited the rental office on June 26, 1969, two days after this suit was filed, and submitted an application for an apartment in the $139 - $150 range, as advertised. (A-459-460) Mr. Biggins testified, and the court found, that he was not told of the alleged "earnest money deposit" requirement or asked to leave a deposit. (A-460) He was told that there were no vacancies in his price range, and that he would be called when one appeared. (A-459)

Mrs. Price also failed to advise Mr. Biggins that in the Fall of 1968, a rent increase was put into effect (A-179, 181) which would raise the rent in each apartment as a new tenant moved in. (A-175-176) There were only two apartments available within Mr. Biggins' specified price range at the time he applied, (A-179) and, even in those, in the normal course of events, the rents would be increased beyond his range (to $153.00) (A-175) before he could move in. Consequently, no apartment within Biggins' specified price range would ever have become */ available. Mrs. Price made

*/ Mr. Levy testified that Mrs. Price did call Biggins after the October 1 hearing, but he stated also that this was an exceptional act done only because Biggins was a "part of this case." (A-552-555)

no effort to interest Mr. Biggins' in other apartments (A-179-181) even though the defendants have done so with white persons. (A-86, 182, 476, 480-481)

4. White Applicants

The difficulties experienced by Negro applicants were in sharp contrast to the ease with which whites are admitted to this apartment house. Their testimony indicates that the credit and other requirements which allegedly disqualified the blacks were simply not applied to whites, and that every means available was used to expedite their admission to the apartment house.

Mr. Samuel W. Bourne, an Urban Intern with HUD, was new to Atlanta from Kentucky, technically unemployed (he had a commitment from HUD but was not yet on the payroll), (A-465) and had no local credit references. (A-465) He was able to move into an apartment on the same day he applied, June 18, 1969. (A-464) He tendered a month's rent in advance and a deposit of $100. He was not required to sign a lease until several days after he moved in. (A-467-469)

Mr. James Cauthran also had a commitment from HUD but was not yet on the payroll when he applied for an apartment.

(A-472) Although he lacked established credit references, (A-471) he was accepted on the same day that he applied (June 1968). (A-471) Furthermore, because Cauthran was unable to tender the entire security deposit at the commencement of his lease, the defendants accommodated him by allowing a portion of the deposit to be paid each month with his rent. (A-471)

Miss Maurine Thompson, an unemployed school teacher, (A-477) was new to Atlanta from Mississippi, (A-479) as was her roommate, an unemployed registered nurse. (A-477) On the morning of September 18, 1969, they visited the apartments and looked at a unit but left without making an application. (A-476) They returned early that afternoon, told Mrs. Price that they would take the apartment, filled out an application and left a $100 deposit. (A-476) Mrs. Price told them to return at 4:00 p.m., when their apartment would be made ready for them. (A-476) They returned at 4:00 p.m., signed the lease and moved in that day. (A-476)

Mrs. Patricia Kirkeberg was new to Atlanta from Florida, had no local credit or personal references or employment when she made application on September 20, 1969. (A-480-481) She

filled out an application, submitted a $100 deposit with one month's rent in advance and was accepted immediately. (A-480) As of October 1, she had not yet signed a lease. (A-482)

In addition to the above, the Government introduced the applications and leases of three more incumbent white tenants who were accepted by the defendant despite the fact that the applicants were new to Atlanta, had no local references, and were unemployed when they submitted their applications. (A-569, 571, 572)

5. Defendants' Disregard for Federal Law

Three of the five Negro applicants who were denied apartments pursuant to defendants' pre-Act discriminatory policy, Miss Threadcraft, Mr. Pitts, and Miss Jones -- had significant contact with the defendants subsequent to June 17, 1968, the date of Jones v. Mayer, 392 U.S. 409, in which the Supreme Court held that 42 U.S.C. 1982 prohibits racial discrimination in housing. From June 17, 1968 on, defendants' "program of restriction" was plainly unlawful.

The defendants likewise took no steps following either the passage or the effective date of the Fair Housing Act to assure that their employees would change their discriminatory practices. The record shows that no agent of the defendants was ever instructed to discontinue in any respect the prior racial practices. (A-323, 339)

In spite of the findings outlined above, the Court described the Threadcraft incident as an "isolated" act of discrimination, and held that the Government's post-Act evidence was insufficient to warrant a finding that the defendants' discriminatory conduct was pursuant to a pattern or practice of resistance to the enjoyment of rights secured by the Act. The Court further held that the defendants had acted in good faith and that an injunction would therefore serve no useful purpose. Accordingly, the Court denied the United States any relief whatever.

We believe that the decision of the District Court is inconsistent with its evidentiary findings, and rests on a misapprehension as to what the Government must prove to make out a case. While the opinion is not entirely clear on the point, it appears that the District Judge believed that no pattern or practice may be established without a showing that significant numbers of formal post-Act applications by Negroes have been rejected on account of race. Consequently, the District Judge gave no consideration to other evidence in this case which, in our view, not only warranted but required a

finding of pattern or practice. Specifically, we believe that the Court did not give proper consideration to the statistical evidence, to the effect of pre-Act discrimination, to the subjective character of Mrs. Price's criteria and procedures, to the defendants' creation of a discriminatory image, and to the actual rather than purported white standards. Had the Court given due weight to these factors, its own evidentiary findings would have required it to hold that there was a pattern or practice of resistance.

We think the second ground on which the Court denied relief -- the statement that the defendants acted in good faith -- likewise falls wide of the mark. Even if good faith were established,*/ we believe that the district court had the duty, in view of its findings of discriminatory practices, to require the defendants to take affirmative steps to correct

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*/ Judge Smith made a number of evidentiary findings which establish that he disbelieved testimony by the defendants. Under these circumstances, reference in the opinion to the defendants' good faith appears to be more of a conclusion than a factual finding, and a somewhat questionable conclusion at that.

the effects of their conduct and to adopt and implement objective and reviewable standards for admission to the building. Since defendants never even claimed that they would do either of these things, an injunction should have been granted to require them to do so. Moreover, we think that the Court failed to apply to this case the rules of law applicable to actions of this kind; namely, that irreparable injury is presumed from the proof of violation and that injunctive relief will be denied after such proof only in unusual cases.

III

ARGUMENT

A. THE DISTRICT COURT APPLIED INCORRECT LEGAL STANDARDS TO THE ISSUE WHETHER DEFENDANTS' DISCRIMINATION WAS PURSUANT TO A PATTERN OR PRACTICE

While the phrase "pattern or practice" is not defined in the Fair Housing Act, it has been the subject of considerable judicial discussion since its introduction into civil rights litigation in the Civil Rights Act of 1960, 42 U.S.C. 1971(e), and its general import is well established. The concept was

designed to exclude from the Government's litigation responsibility the situation of an "isolated, accidental or peculiar" incident of discrimination which was an aberration from a non-discriminatory policy normally followed by the defendant. United States v. Mayton, 335 F. 2d 153, 158-59 (5th Cir. 1964); United States v. Mintzes, 304 F. Supp. 1305, 1313-15 (D. Md. 1969). Together with other provisions of civil rights statutes, the pattern or practice section is to be liberally construed. United States v. Jordan, 302 F. Supp. 370, (E.D. La. 1969); see Miller v. Amusement Enterprises, 394 F. 2d 342 (5th Cir. 1968) (en banc). There is no magic numerical touchstone. To reject five out of five hundred Negro applicants might not, in many instances, constitute a pattern or practice, but different treatment for five out of five (or, as here, nine out of nine) would be an entirely different matter.

Proof of a series of several unlawful acts -- for example, unlawful "blockbusting" representations to the owners of three properties -- is one way to establish a pattern or practice, United States v. Mintzes, supra, but it is by no means the only

way.*/ As Senator Keating pointed out during the debates on the 1960 law, a single act directed at disfranchising Negroes collectively would itself constitute a pattern or practice of discrimination. See United States v. Ramsey, 331 F. 2d 824, 837, note 19 (5th Cir. 1964) (opinion of Rives, J.). In United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969), it was held that a restaurateur's single act of holding his establishment out as a private club, when it was in fact open to the public, deterred Negroes far more effectively than a few refusals of service would have done, and constituted a pattern or practice. Moreover, where a defendant admits that he discriminates (as Mrs. Price did to Pitts), the number of times that he is shown to have done so is obviously irrelevant. See United States v. Richburg, 398 F. 2d 523 (5th Cir. 1968), in which discrimination was not in dispute and it was unnecessary to discuss pattern or practice at all.

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*/ We submit, however, that even if this were the only test, the disparate treatment accorded black applicants by the defendants both before and after the Act was easily sufficient on any reasonable numerical standard to constitute pattern or practice. The quantum of proof far exceeded that in Mintzes.

To determine whether discrimination is the "usual rather than the unusual situation," United States v. Mayton, supra, the Court should consider the entire context of the defendants' conduct. Large numbers of formal rejections are not in any sense an indispensable element of the Government's proof. In fact, a pattern or practice may be established without a single discriminatory post-Act rejection, where the defendant has created a discriminatory image or reputation which deters Negroes from applying and has inadequately corrected it after the effective date of the Civil Rights Act. United States v. Sheetmetal Workers, 416 F. 2d 123, 127, 132 (8th Cir. 1969); United States v. Medical Society of South Carolina, 298 F. Supp. 145, 152 (D. S.C. 1969); United States v. Jordan, supra. See also United States v. Plumbers Local No. 73 of Indianapolis, _____ F. Supp. _____, 61 C.C.H. Lab. Cases, Para. 9329 (S.D. Ind. 1969). We think that the fundamental error underlying the District Court's approach was to consider the Threadcraft rejection as the only event relevant to pattern or practice. Having asked the wrong question, the Court reached the wrong answer.

1. Statistical Evidence and Burden of Proof

In cases of racial discrimination, statistics often

tell much, and courts listen. State of Alabama v. United States, 304 F. 2d 583, 588 (5th Cir. 1962), aff'd 371 U.S. 37 (1962). Nothing is more emphatic than zero. United States v. Hinds County Board of Education, 417 F. 2d 852, 858 (5th Cir. 1969). Where, as here, the city in which the apartments are located is almost half Negro, the turnover has been heavy, the number of distinguished black applicants over two years significant, and the whiteness of the building total, the import to be given to the statistics must be considerable. The Fair Housing Act, like the fair employment provision of the Civil Rights Act of 1964, "permits the use of evidence of statistical probability to infer the existence of a pattern or practice of discrimination." United States v. Sheetmetal Workers, supra, 416 F. 2d at 127, note 7. To paraphrase a paragraph from a law review note*/ which was adopted by the Eighth Circuit in Sheetmetal Workers, supra:

> Obviously, when a large [apartment house] in an area with a diverse population is found to have no

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*/ Note, Enforcement of Fair Employment Under the Civil Rights Act of 1964, 32 U. of Chi. L. Rev. 430, 461 (1965).

> Negro [tenants] even though it [rents to] new persons regularly and has standard [rental] requirements, the inference of discrimination is reasonable. 416 F. 2d at 127.

See also Avery v. Georgia, 345 U.S. 559 (1953), (juries) for the presumption arising from all-white statistics and racial markings.

Once a prima facie case of exclusion has been made by the statistical evidence described above, the burden to rebut that case shifts to the defendant. Whitus v. Georgia, 385 U.S. 550 (1967). Moreover, this burden cannot be sustained, nor may the prima facie case be defeated, simply by conclusory denials of discrimination. Whitus, supra, at 551; Norris v. Alabama, 294 U.S. 597, 598 (1935). Accordingly, while the District Court's statement in Conclusion of Law No. 8 (A-609) that the Government has the burden of proof is theoretically correct, we believe that the Court should have recognized that the statistical evidence created a prima facie case which defendants failed to rebut.

2. Pre-Act Discrimination

After holding that the defendants had deliberately excluded Negroes from the building prior to the Act, the District Court concluded that no pattern or practice existed because the evidence was insufficient to demonstrate a continuation of that program after the Act. The assumption which underlies the Court's conclusion is that, irrespective of how strong the pre-Act evidence may be, the Government is obliged to prove a brand new post-Act pattern or practice, or it must lose the case. While it is our view that the evidence of post-Act discrimination is plainly sufficient even under that test (see pp. 41-45), we believe that the District Judge's approach incorrectly applies the law. If, irrespective of the probative value of pre-Act evidence, the Government were obliged to prove an independent post-Act pattern or practice, it is difficult to see for what purpose the pre-Act material was admitted. Under the Court's theory, it could not affect the result.

Evidence of pre-Act discrimination is admissible not only to shed light on the purpose and character of post-Act

conduct,*/ but also because it may form a part of the pattern or practice and convert what might otherwise be a post-Act isolated incident into a typical element of a routine activity. As this Court said in Kennedy v. Lynd, 306 F. 2d 222, 228, (5th Cir. 1962), cert. den., 371 U.S. 952 (1963), evidence of a pattern or practice of discrimination can go back "many, many years." See also, e.g., United States v. Duke, 332 F. 2d 759 (5th Cir. 1964), wherein findings as to the exclusion of Negroes from the franchise go back to the beginning of the century.

Several decisions under the fair employment provisions of the Civil Rights Act of 1964 have found the existence of a pattern or practice of discrimination which embraced both pre-Act and post-Act conduct.**/ One such case, United States v.

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*/ F.T.C. v. Cement Institute, 333 U.S. 683, 705 (1948); Machinists Local v. Labor Board, 362 U.S. 411, 416 (1960); United States v. Building Trades Council of St. Louis, 271 F. Supp. 454, 459 (E.D. Mo. 1966).

**/ E.g., Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969) aff'g 294 F. Supp. 368 (E.D. La. 1967), United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D. S.C. 1969).

Sheetmetal Workers, 416 F. 2d 123 (8th Cir. 1969), rev'g 280 F. Supp. 719 (E.D. Mo. 1968), is remarkably similar to the present litigation. There, as here, the district court found pre-Act discrimination. In Sheetmetal Workers, the trial court found no post-Act discrimination; in this case, the Court found one "isolated instance." Judge Meredith in Sheetmetal Workers dismissed the suit on the grounds that "there is no pattern or practice of discrimination in this case since the effective date of the Act." 280 F. Supp. at 730. Judge Smith did likewise here.

The Court of Appeals reversed Judge Meredith's decision. A portion of the reversal was predicated on the existence of a kind of "grandfather clause" in referral -- pre-Act exclusion of blacks from the union put them at a competitive post-Act disadvantage under the system of hiring hall preferences, in which persons with experience under union agreements were given priority. The Court also held, however, that the pattern or practice extended to the unions' admission policies as to journeymen and apprentices, even though there were no post-Act refusals of applications for admission, and even though there

was no grandfather clause problem with respect to these issues. The unions had embarked on programs to publicize their non-discriminatory policies, but the Court of Appeals held that in view of the extensive evidence of pre-Act discrimination and the discriminatory image created thereby, these efforts were not sufficient.

While the District Court held in the present case that the defendants discontinued their discriminatory practices after the Act, the steps held insufficient in Sheetmetal Workers far exceed anything defendants did here. The testimony shows that Mr. Levy never instructed his subordinates to change what the Court found to be a discriminatory policy. In contrast to the unions' publicity program in Sheetmetal Workers, no efforts were made here to inform the black community that discrimination had ended. In fact, Mr. Levy and Mrs. Price missed splendid opportunities to do just that in their dealings with Pitts, Threadcraft, and with the Atlanta Summit Conference. Consequently, we believe that the considerations leading to the reversal of Judge Meredith's decision in Sheetmetal Workers apply with still greater force here.

* * * * *

It is also noteworthy that several of the incidents of pre-Act discrimination in this case occurred after Jones v. Mayer and were therefore unlawful. This enhances their probative value as to the nature of defendants' policy; if they disobey one federal fair housing law, the probability is less that they will obey another. A violation of the Fair Housing Act is surely not "isolated" in the "pattern or practice" sense if several similar unlawful violations of 42 U.S.C. 1982 have occurred only a few months earlier.

3. Subjective Standards

We have noted, pp.5 and 6 , supra, that in order to become a tenant at West Peachtree Tenth, an applicant must satisfy Mrs. Price or her subordinates as to his honesty, sincerity, attitude and compatibility with incumbent tenants. "Attitude" is important, for Pitts, Lloyd, and Miss Threadcraft -- all qualified on any objective standard of income and responsibility -- were rejected after the effective date of the Act wholly or in part on that ground. The persons who are to

decide on black applicants' "sincerity" and "attitude" are the same ones who, as the District Court found, excluded Negroes as a matter of policy before the Act, even after Jones v. Mayer. The "compatibility" which the applicant must demonstrate to these persons is an ability to get along with a body of tenants which is all-white by reason of purposeful discrimination.

The enjoyment of the right to equal housing opportunity cannot realistically be assured unless the criteria upon which a black man can be excluded are far more clearly defined and far more susceptible of review. "Absent objective criteria, covert subversion . . . could occur." Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047, 1055 (1969). The current system "provides no effective remedy whereby arbitrary and capricious action by [the rental agents] may be prevented or redressed." United States v. State of Louisiana, 225 F. Supp. 353, 384 (E.D. La. 1963), aff'd 380 U.S. 145 (1965) (voting). To paraphrase the Supreme Court, applications of Negroes to rent apartments at West Peachtree Tenth are left "to the passing whim or impulse of the individual [rental agent]." Louisiana v. United States, 380 U.S. 145, 153 (1965). See also Cypress v.

Newport News Mem. Hospital, 375 F. 2d 648, 654 (4th Cir. 1967); Cf. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928).

In United States v. Sheetmetal Workers, supra, the Court, speaking of a situation virtually identical in principle to that here, said:

> The government's contention that Local 36 continues to violate Title VII by permitting a single member of the Local, Mr. Schultz, to conduct and grade journeymen's examinations in the manner he does is well taken:
>
> (1) The examinations are a prerequisite to employment. A passing grade is essential to all who are required to take them. A person's very right to earn a living in the trade of his choice is involved.
>
> (2) As long as the examinations are partially subjective in nature and are graded "pass" or "fail," with no established standard for either grade, there is no practical way in which the judgment of the examiner can be reviewed.
>
> (3) In the light of Local 36's pre-1967 record of discriminating against them as to membership and related benefits, it is essential that journeymen's examinations be objective in nature, that they be designed to test the ability of the applicant to do that work usually required of a journeyman and that they be given and graded in such a manner as to permit review. (The Local gives such an examination to apprentices.) Compare, Dobbins v. Local 212, International Bro. of Elec. Wkrs., 292 F. Supp. 413, 447, 464, 465 (S.D. Ohio 1968).

> In reaching this conclusion, we do not necessarily accept the government's contention that Mr. Schultz, as an individual, would, because of his past participation in the exclusionary policies of the Local, discriminate against Negroes in giving and grading journeymen's examinations. We are not here concerned with the individual who gives and grades the examination. We are concerned rather with the system, the nature of the examination, its objectivity and its susceptibility to review. 416 F. 2d 135-36. */

The District Judge, while acknowledging the opportunity for discrimination inherent in the subjective character of Mrs. Price's determinations, stated that such procedure "appears necessary and practical on the part of management." We perceive no basis for that statement. Living in a 96-unit apartment house in a metropolitan center is not like renting a private home in a "neighborhood." Cf. Bush v. Kaim, 297 F. Supp. 151 (N.D. Ohio 1969). Nor is this a Mrs. Murphy case where the owner lives on the premises. 42 U.S.C. 3603(b)(2) Life in a building

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*/ See also United States v. Plumbers Local 73, ____ F. Supp. ____, 61 C.C.H. Lab Cases, Para. 9329 (S.D. Ind. 1969), also involving apprenticeship tests, in which the Court held that allocation of 25 per cent of the applicant's point total on the tests to performance on a personal interview allowed too much leeway for subjective factors. The Court ordered that all but 15 per cent of the point total was to be based on objective reviewable tests.

of this size involves less personal relations between tenants, and less need for subjective factors, than those which exist among members of labor unions (which are, characteristically, known as "brotherhoods")or among doctors on a hospital staff. If subjective criteria may properly be eliminated to assure nondiscrimination in union */ and hospital staff **/ situations, the same should be true to an even greater degree with respect to metropolitan apartment houses. To the extent that this may involve some inconvenience to a landlord -- and we think that would be trivial -- it is now well settled that the rights of Negroes to equal treatment under the law outweigh the convenience of those who have discriminated against them in the past. Coppedge v. Franklin County Board of Education, 293 F. Supp. 356 (E.D. N.C. 1968), aff'd 404 F. 2d 1177 (4th Cir. 1968).

4. The Defendants' Discriminatory Image and Deterrence of Negro Applicants

The Fair Housing Act, like other constitutional ***/ and statutory ****/ prohibitions against unequal treatment, nullifies

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*/ See Sheetmetal Workers, supra, Plumbers Local 73, supra.

**/ Cypress, supra.

***/ Lane v. Wilson, 307 U.S. 268, 275 (1939).

****/ Dobbins and United States v. Local 212, IBEW, 292 F. Supp. 413, 447 (S.D. Ohio 1968).

"sophisticated as well as simple-minded modes of discrimination." The prohibition against the discriminatory rejection of blacks would be meaningless if conduct assuring that there will be no black applicants, or few, cannot be reached by the law. If a man acts in such a way that the foreseeable result of his conduct is to discourage Negroes from trying to live in his apartment house, he is presumed to intend that result. */ Such conduct has been held to be sufficient for a finding of a pattern or practice of resistance. **/

In United States v. Medical Society of South Carolina, 298 F. Supp. 145 (D. S.C. 1969), a hospital desegregation case, there was no evidence of post-Act attempts by Negro patients to be admitted to Roper Hospital. After the Civil Rights Act was passed, however, the hospital had discontinued participation in various federal programs, and, while defendants denied that this was done for discriminatory reasons, the newspapers treated the withdrawal as evidence that Roper was segregated.

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*/ Radio Officers v. Labor Board, 347 U.S. 17, 45 (1954); Rabinowitz v. United States, 366 F. 2d 34 (5th Cir. 1966).

**/ United States v. Medical Society of South Carolina, 298 F. Supp. 145, 152 (D. S.C. 1969); United States v. Plumbers' Local No. 73 of Indianapolis, ____ F. Supp. ____, 61 C.C.H. Lab. Cases Para. 9329 (S.D. Ind. 1969); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969).

Obviously, Roper had no legal duty to continue to accept federal programs, but its conduct was nevertheless held relevant to pattern or practice:

> Roper Hospital has been and is regarded in the Charleston community, and particularly among Negroes, as a white-only hospital, at least with respect to the admission of in-patients. Accordingly, Negro doctors in Charleston have made no attempt to secure admission of their patients to Roper Hospital, and few if any Negroes have sought treatment at the Hospital on an in-patient basis. Since the effective date of the Civil Rights Act of 1964, the defendants have taken no steps to correct this image. 298 F. Supp. at 148

The Court then added the following Conclusion of Law:

> A man is presumed to intend the probable consequences of his conduct, Radio Officers' Union, etc. v. National Labor Relations Board, 347 U.S. 17, 74 S. Ct. 323, 98 L. Ed. 455, 41 A.L.R. 2d 621 (1954). Where, as here, the defendants' course of conduct has predictably resulted in practically no Negroes being patients at Roper Hospital, this is sufficient to meet the [pattern or practice and intent] requirements of 42 U.S.C. §2000a-5(a). 298 F. Supp. at 152

The defendants' conduct in the present case was markedly similar. Without regard to whether Mr. Levy was otherwise legally obliged to respond to the Atlanta Summit Conference, a responsive answer would predictably have had the effect of

encouraging Negroes to apply, whereas to ignore the letter was to make them continue to feel unwelcome. The Conference's letter was not, after all, a harassing one, and it was prompted by an openly racial refusal to rent to Mr. Pitts, in violation of 42 U.S.C. 1982. The coldly deliberate decision to perpetuate the impression that blacks will not be admitted is relevant to the defendants' intent and to the issue of pattern or practice.

Even more telling in this respect was the post-Act conversation between Pitts and Mrs. Price. In the first place, quite apart from the question whether it constituted a refusal of an apartment, the mere statement by Mrs. Price that the pre-Act discriminatory policy had not changed was unlawful. */ Aside from its intrinsic illegality, such a comment to an influential and qualified Negro will almost inevitably have the effect -- and the intended effect -- of discouraging all but those Negroes who relish a battle from applying. Discrimination by a rental agent, especially when

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*/ 42 U.S.C. 3604(c) provides that it shall be unlawful to "make . . . any statement . . . with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination based on race, color, religion or national origin."

it is so open, not only denies housing to the individual concerned, but also "inhibits other qualified [applicants] from running the gauntlet of discriminatory and humiliating practices by the [rental agent] and [her assistants]." United States v. State of Louisiana, 225 F. Supp. 353, 397 (E.D. La. 1963), aff'd 380 U.S. 145 (1965), quoting United States v. Manning, 215 F. Supp. 272, 288 (E.D. La. 1963).

5. Disparity Between White and Negro Standards

In United States v. Duke, 332 F. 2d 759 (5th Cir. 1964), the United States brought suit against a county registrar of voters, alleging a pattern or practice of discrimination in voting. The evidence showed that a number of Negro applicants had been rejected after they had failed to write correct interpretations of sections of the Mississippi Constitution, as required by state law. The evidence further showed that the test had been largely waived for white applicants, and that many white illiterates were registered. The District Court denied relief, on the ground that, since the Negro applicants had failed to meet the requirements of Mississippi law, their rejection was lawful. This Court, however, reversed, holding in effect that the District Judge had asked the wrong question. The issue,

the Court ruled, was not whether the rejected Negroes had met the requirements of state law, but rather, whether they had been treated differently from accepted white applicants. Finding that their treatment was racially discriminatory, this Court held that a pattern or practice of discrimination had been established and ordered that Negroes who were able to meet the requirements actually applied to whites were entitled to be registered, even though this would involve a departure from state law as written.

We believe that Judge Smith fell into the same error that was made by the District Court in Duke. In holding that the discriminatory denial of an apartment to Sandra Threadcraft was an "isolated incident," and that the treatment of the post-Act applications of Pitts, Lloyd and Biggins was lawful, the Court did not attempt any close comparison between the processing of these applications and those of our white witnesses. Rather, the District Judge evaluated the defendants' conduct vis-a-vis black applicants on the basis of an abstract standard of reasonableness, which was the very approach held inadequate by this Court in Duke. In other words, the issue here is not whether, in retrospect, the defendants had some seemingly rational, justifiable, nonracial basis for rejecting any

particular Negro applicant, but whether the defendants applied to the rejected Negro applicants the same standards used to assess successful white applicants.

If the post-Act experiences of Pitts, Lloyd, and Biggins are appraised not in a vacuum, but in terms of what happened to their white counterparts, they must be found to have been discriminatory, and the Threadcraft incident turns out not to be "isolated" at all, but rather typical of the post-Act pattern as well as of the pre-Act policy. For example:

(a) Whether or not Robert Pitts' telephone call in January 1969, amounted to a reapplication, it is evident that his treatment was different from that accorded to whites. No white applicant has ever been told by the defendants that whites are not admitted. Pitts, on the other hand was in effect told twice, once after the Act, that blacks should keep out. Mrs. Price's post-Act remarks to Pitts were an admission of a discriminatory policy -- or pattern or practice -- and nothing less.

(b) Assuming that it would have been reasonable on some abstract standard to have rejected John Lloyd because of his six out of town children and because credit information was

difficult to secure, it was not nondiscriminatory. With respect to credit information, the record shows, and the trial court found, that several unemployed white persons, new to Atlanta and without any credit rating there, moved in on the day they applied (see pp.17-19, supra). With respect to the six children, of whom Mrs. Price probably knew nothing at the time of rejection anyway (see p. 15, supra), there is no evidence that nonresident children are a general disqualification, or that anybody was ever turned down for such a reason, except this black applicant, whom Mrs. Price, moreover, according to her own testimony, did not like. */

(c) The District Court found that the application of Franklin Biggins was "pending," and concluded that he was not a victim of discrimination. The Court found with respect to Biggins, that "no deposit was requested" -- an aberration from what Mrs. Price said was her general policy, but a normal aberration as to blacks -- and the rental agent then used the lack of a deposit as a basis for not checking further

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*/ To the extent that Lloyd, Pitts and Miss Threadcraft were rejected on attitudinal grounds, the record is barren of any suggestion that a white applicant has ever been so excluded.

on his application. Similarly, she did not give him the information about apartments in a different price range which she ordinarily provided to white applicants, or that none in his price range would be available.*/

* * * * *

We submit, in the light of the foregoing, that it is inconceivable that Pitts and Lloyd, and even Biggins, would have been treated in the same way had their skins been white. When added to the discriminatory denial of an apartment to Sandra Threadcraft, this proof establishes a pattern or practice of resistance even if all else is ignored.

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*/ The fact that Biggins' application remained "pending" did not mean that he was not the victim of racial discrimination. Dr. John Codwell's April 1968 application, which bore a racial marking and was a part of what Judge Smith found to be a pre-Act pattern of discrimination, was also described by Mrs. Price as "pending" at the trial, a year and a half after it was filed. (A-391)

B. THE DISTRICT COURT'S DENIAL OF AN INJUNCTION ON THE BASIS OF A SUBJECTIVE FINDING OF DEFENDANTS' GOOD FAITH APPLIED INCORRECT LEGAL STANDARDS AS TO THE NECESSARY SHOWING FOR AN INJUNCTION AND FAILED TO REQUIRE DEFENDANTS TO ADOPT AND IMPLEMENT OBJECTIVE REVIEWABLE STANDARDS AND TO CORRECT THE EFFECTS OF PAST DISCRIMINATION

As an alternative ground for denial of relief, the District Court held that no purpose would be served by the issuance of an injunction because of "the good faith and present disposition of the defendant to adhere to the letter and spirit of the law."

We note at the outset that several of the District Court's evidentiary findings show that the Court did not believe some of the testimony of the defendants' agents. With respect to pre-Act evidence generally, both Levy and Mrs. Price denied under oath that there had been discrimination; */ the Court found that there was a deliberate policy. (A-609) The Judge's finding as to Pitts' pre-Act encounter with Mrs. Price dovetails with Pitts' account, and cannot be reconciled with the testimony of Levy and Mrs. Price that race was never mentioned as to Pitts. Mrs. Price testified that she told each Negro of the earnest

*/Mr. Levy testified that "there is not, and there has not been, and there won't be [any discriminatory policy]." (A-292)

money deposit requirement; the Court found that she did not. Moreover, the persistent testimony by Mrs. Price, both on deposition and at trial, that she "did not know" (A-230, 345) whether some of her tenants were black or white is not only inherently incredible, but is also inconsistent with the Court's finding that there were no blacks in the building and that she told Pitts that Levy would not integrate it. */ (A-603-604)

In assessing the defendants' present intentions, we believe that the District Judge neglected to heed the Supreme Court's warning that "it is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform," United States v. Oregon Medical Society, 343 U.S. 326, 333 (1952), particularly in the context of an actual or threatened suit. United States v. United States Steel Corp., 251 U.S. 417, 445 (1919). See also United States v. Atkins, 323 F. 2d 733, 739 (5th Cir. 1963), Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047, 1055 (5th Cir. 1969). But even accepting the "good faith" finding at face value, the denial of an injunction cannot stand because the defendants have not agreed to

*/Mr. Levy also had an improbable ignorance as to the race of his tenants. (A-286-291)

do, and will not do, what has to be done.

The District Court had

> not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Louisiana v. United States, 380 U.S. 145, 154 (1965).

It would not have been sufficient here simply to enjoin discrimination, even if that had been done. */ The duty to correct the effects of past discrimination applies even though some of the discrimination took place before the Act. **/ To paraphrase this Court's comment in Henry v. Clarksdale Municipal Sep. School Dist., 409 F. 2d 682, 684 (5th Cir. 1969), "good faith does not excuse a [defendant's] noncompliance with its affirmative duty [to correct the effects of the past]." On this

*/ "For a forceful prohibition against discrimination [defendants] need look no farther than the Civil Rights Act itself." Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047, 1051 (5th Cir. 1969).

**/ United States v. Papermakers Local 189, 416 F. 2d 980 (5th Cir. 1969); United States v. Sheetmetal Workers, supra; United States v. Medical Society of South Carolina, supra.

record, it is "not the spirit but the bodies that count." United States v. Indianola Municipal Sep. School Dist., 410 F. 2d 626, 631 (5th Cir. 1969). The District Court was required to use all of the elastic resources of a court of equity to fashion appropriate relief, which might include, for example, offers to rejected blacks, suitable notice to the black community, or other appropriate measures. State of Alabama v. United States, 304 F. 2d 583 (5th Cir. 1962) aff'd 371 U.S. 37 (1962). Absent a meaningful decree, the United States would have "won a lawsuit but lost a cause." United States v. International Salt Co., 332 U.S. 392, 401 (1947)

By the same token, defendants had a duty to adopt and implement objective, reviewable standards for admission, and to eliminate the unfettered discretion vested in their rental agents. See pp. 33-37, infra. In the absence of an injunction spelling out what the standards should be, the legal obligation to adopt and implement them cannot be fulfilled.

* * * * *

While the District Court did not elaborate on the basis for its comments about the defendants' good faith,*/ the apparent thrust of this alternative ground of decision is that the Government has not proved that it would be irreparably injured without an injunction. In this respect the result is in direct conflict with United States v. Hayes International Corporation, 415 F. 2d 1038, 1045 (5th Cir. 1969). It was expressly held in Hayes that in an action by the Attorney General to restrain a pattern or practice of racial discrimination, irreparable injury is presumed from the very fact that the statute has been violated. When a qualified black person is denied an apartment on account of race, he suffers irreparable injury and so does the country as a whole.

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*/ We believe that the Court's reference to Mr. Levy's Jewish religion and "liberalism" on race and politics (A-606) is an unpersuasive basis for that holding. See But Not Next Door, Rosen, Obolensky, N.Y., 1962.

IV

CONCLUSION

For the reasons stated, the decision below should be reversed and the cause remanded to the District Court for the entry of an appropriate injunction requiring the defendants to cease all discriminatory practices, to adopt and implement objective and reviewable admission standards, and to take comprehensive affirmative steps to correct the effects of past discrimination.

Respectfully submitted

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Certificate of Service

I hereby certify that on May 5, 1970, I served the foregoing brief for the United States upon the parties to this appeal by mailing two copies by United States air mail special delivery, postage prepaid, to Maurise N. MaLoof, Esquire, 310 Fulton Federal Building, Atlanta, Georgia 30303.

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