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Civil Rights - Discrimination in Placement of Low-Rent Housing- Statute's Requirement that Locality's Governing Body Agree to Cooperate with HUD Used as a Shield to Protect Suburbs from Integration by Low Income Blacks

NOTES

ADMINISTRATIVE LAW—Practice and Procedure—Tenants of a Public Housing Project Must be Accorded Due Process Protections Before the Promulgation of an Across-the-Board Rent Increase. *Burr v. New Rochelle Municipal Housing Authority*, 479 F.2d 1165 (2d Cir. 1973).

Plaintiffs were tenants in apartments controlled and operated by the defendant New Rochelle Municipal Housing Authority, a public corporation organized under New York State law to provide low rent housing for persons with low incomes.[1] In June 1971, the chairman of the housing authority notified all tenants of the imposition of a $2.00 per room per month service charge.[2] Several tenants instituted an action under section 1983 of the Civil Rights Act[3] and asked the court to declare the service charge invalid and enjoin the adoption of any such increase unless the tenants were first accorded a hearing on the merits.[4]

The United States District Court for the Southern District of New York, in granting plaintiffs' summary judgment, held that plaintiffs had a due process right to notice and a full adversary-type hearing before being required to pay higher rents or an across-the-board service charge.[5] The Court of Appeals for the Second Circuit modified the lower court judgment, and held that while tenants must be granted certain due process rights before the imposition of an across-the-board rent increase, their rights in these circumstances can be adequately protected without a formal adversary hearing.[6]

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1. Burr v. New Rochelle Municipal Housing Auth., 479 F.2d 1165, 1166-67 (2d Cir. 1973), *modifying* 347 F. Supp. 1202 (S.D.N.Y. 1972).
2. *Id.* at 1167.
3. 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."
4. 479 F.2d at 1167.
5. 347 F. Supp. 1202 (S.D.N.Y. 1972).
6. 479 F.2d at 1169-70.

Initially, cases in the area of procedural due process centered on the "right-privilege" distinction. Government benefits were considered "privileges" in which the individual recipient had no "right" and therefore no constitutionally protected interest.[7] Relying on this distinction, some courts have held that housing authorities could act both arbitrarily and summarily.[8] In recent years, however, there has been a growing disfavor with the distinction, and a new test for determining whether procedural due process will be required has gradually developed.[9]

The breakthrough occurred in *Joint Anti-Fascist Refugee Committee v. McGrath*,[10] where Mr. Justice Frankfurter in a concurring opinion rejected a "right-privilege" analysis and outlined the factors to be weighed in considering the elements of due process required in a particular situation.[11] According to Justice Frankfurter, the implementation of procedural protections depends on the extent to which an individual may be "condemned to suffer grievous loss."[12] A decade later, a majority of the Court followed this lead in *Cafeteria & Restaurant Workers Union v. McElroy*,[13] a case involv-

7. *E.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (per curiam). *See* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 888 (1973).

8. United States v. Blumenthal, 315 F.2d 351 (3d Cir. 1963); Brand v. Chicago Housing Auth., 120 F.2d 786 (7th Cir. 1941); Chicago Housing Auth. v. Ivory, 341 Ill. App. 282, 93 N.E.2d 386 (1950); Columbus Metro. Housing Auth. v. Simpson, 85 Ohio App. 73, 85 N.E.2d 560 (1949); Pittsburgh Housing Auth. v. Turner, 201 Pa. Super. 62, 191 A.2d 869 (1963).

9. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Davis, *The Requirement of Opportunity to be Heard in the Administrative Process*, 51 YALE L.J. 1093 (1942).

10. 341 U.S. 123 (1951).

11. *Id.* at 163. Factors to be considered are: (1) nature of the interest involved, (2) manner in which the interest was adversely affected, (3) reason why interest was disturbed, (4) availability of an alternative, and (5) general balancing of the interest involved. Justice Frankfurter's reasoning was supported in separate opinions by Justices Black, Douglas, and Jackson.

12. *Id.* at 168.

13. 367 U.S. 886 (1961).

ing a worker who was summarily barred from his place of work for security reasons. In *McElroy*, the Court held that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest" affected by the governmental action.[14] Once this determination is made, the public (government function) and the private interest must be balanced to determine the procedures that due process may require.[15] In *Sherbert v. Verner*,[16] where unemployment compensation benefits were denied solely because of appellant's refusal to accept employment that required her to work on Saturday contrary to her religious belief, the Court said that a procedural due process challenge could not be answered by the argument that unemployment compensation benefits were a "privilege" and not a "right."[17]

The Court's decisions on the "right-privilege" doctrine culminated in *Goldberg v. Kelly*,[18] a case where a welfare recipient demanded a hearing before benefits were discontinued. The Court found that welfare benefits were a matter of statutory entitlement[19]

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14. *Id.* at 895.
15. *See generally id.* at 895-99.
16. 374 U.S. 398 (1963).
17. *Id.* at 404.
18. 397 U.S. 254 (1970).
19. *Id.* at 262. It may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights which do not fall within traditional common-law concepts of property. It has been aptly noted that "[s]ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Reich, *Individual*

for persons qualified to receive them, that the recipient was "immediately desperate," and that the termination of such benefits involves state action affecting important rights.[20] Based on these facts, the Court concluded that the extent to which due process is required "depends upon whether the recipient's interest in avoiding that loss (of status) outweighs the governmental interest in summary adjudication."[21]

Since *Goldberg*, the Court has utilized a two step process in analyzing cases involving deprivation of a government benefit.[22] The initial step requires a determination of whether the interest sought to be protected is, under the due process clause, a "property" interest or a "liberty" interest.[23] Should the interest fall into either of

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Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965). *See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

20. 397 U.S. at 263.

21. *Id.*

22. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

23. Perry v. Sinderman, 408 U.S. 593, 599-603 (1972); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). "[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Stanley v. Illinois, 405 U.S. 645 (1972). A "property interest" subject to procedural due process protection is not limited by a few rigid, technical forms. Rather "property" denotes a broad range of interests secured by existing rules or understanding. 408 U.S. at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Id.* The Supreme Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them, has a property interest in continued receipt of those benefits, that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254 (1970). Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Educ. 350 U.S. 551 (1956), and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183 (1952), have property interests in continued employment that are protected by due process. 408 U.S. at 576-77.

these two categories, a further step is taken. This second step involves a *Goldberg* balancing.[24] The court is required to weigh the importance of the interests involved, and the efficacy of the requested procedure in protecting those interests, against the cost of requiring the procedure.[25]

As a result of these cases, there has been a growing awareness that when a government adopts a statutory scheme of low and middle-income housing the governmental landlord and the tenants are in a posture quite different from the usual landlord-tenant relationship.[26] Since the acts of the landlord are the acts of the state, housing authorities are subject to due process requirements.[27] This has been manifested most noticeably in the area of evictions, where the trend is to require that the governmental landlord have cause to evict, give the tenant notice of that cause, and hold a hearing at which the tenant can contest the action.[28]

In *Vinson v. Greenburgh Housing Authority*,[29] the court held that state action in the housing sphere was necessarily subject to the same constitutional commands applicable to any governmental action:

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24. Morrissey v. Brewer, 408 U.S. 471, 481-90 (1972).

25. *Id. See* Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970). *See also* Note, *Procedural Due Process in Government—Subsidized Housing*, 86 HARV. L. REV. 880, 889-90 (1973).

26. McQueen v. Druker, 317 F. Supp. 1122, 1129 (D. Mass. 1970), *aff'd*, 438 F.2d 781 (1st Cir. 1971).

27. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955). In *Rudder*, the court rejected the claim that a housing authority has the same freedom to evict tenants as a private landlord and said: "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process." 226 F.2d at 53. *See also* Thorpe v. Housing Auth., 386 U.S. 670, 678 (1966) (Douglas, J., concurring).

28. Brown v. Housing Auth., 471 F.2d 63 (7th Cir. 1972); Caulder v. Durham Housing Auth., 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); Glover v. Housing Auth., 444 F.2d 158 (5th Cir. 1971); Escalera v. New York City Housing Auth., 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970); Vinson v. Greenburgh Housing Auth., 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968), *aff'd*, 27 N.Y.2d 675, 262 N.E.2d 211, 314 N.Y.S.2d 1 (1970).

29. 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (2d Dep't 1968).

> "[d]ue process of law . . . is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature." Once the State embarks into the area of housing as a function of government, necessarily that function, like other governmental functions, is subject to the constitutional commands.[30]

In *Escalera v. New York City Housing Authority*,[31] the court, in holding that tenants in public housing projects could not be constitutionally evicted without being accorded adequate procedural safeguards, stated:

> [T]he tenant should be notified in advance of the complete grounds for the proposed action; should have access to all the information upon which any decision will be based, and should be afforded the right to confront and cross examine witnesses in appropriate circumstances [and] . . . should be afforded the opportunity to present his side of the case in the presence of an impartial official . . . .[32]

Rent increases have received considerable attention in recent cases,[33] with the courts divided on whether this action necessitates due process protection. The first case in which tenants sought procedural protection prior to a rent increase was *Hahn v. Gottlieb*,[34] wherein members of a tenants association sought to enjoin Federal Housing Authority (FHA) approval of a rent increase for a privately owned federally subsidized project.[35] The Court of Appeals for the

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30. *Id.* at 340-41, 288 N.Y.S.2d at 163, *citing* Stuart v. Palmer, 76 N.Y. 183 (1878).

31. 425 F.2d 853.

32. *Id.* at 863 (citations omitted).

33. Burr v. New Rochelle Municipal Housing Auth., 479 F.2d 1165 (2d Cir. 1973); Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970); Keller v. Maremount Foundation, C-71-1585 RFP (N.D. Cal., June 16, 1972), *summarized at* 2 CCH POVERTY L. REP. ¶ 16,403; Armbrester v. Albany Housing Auth., 71-Civ.-21 (N.D.N.Y., Jan. 24, 1972); Geneva Towers Tenants Org. v. Federated Mortgage Investors, C-70-104 SAW (N.D. Cal., Jan. 3, 1972), *summarized* at 2 CCH POVERTY L. REP. ¶ 16,402.

34. 430 F.2d 1243 (1st Cir. 1970).

35. 12 U.S.C. § 1715*l*(d)(3) (1970). A section 221(d)(3) project is a privately owned federally subsidized housing complex, providing housing for those "families with incomes that do not permit home ownership at current construction costs and at market interest rates, but who have

First Circuit, in deciding that the tenants had no right to due process protections prior to a rent increase, distinguished *Hahn* from *Goldberg* on the grounds that: (1) Hahn was not legally "entitled" to low rent in the same sense that the welfare recipient in *Goldberg* was entitled to basic sustenance;[36] (2) the government action in this case (a rent increase) posed a less serious threat to the private interest than the termination of welfare benefits, which deprived the recipient of the means of existence, or the eviction in *Escalera* which meant the total loss of decent low-rent housing;[37] (3) rent increases involve legislative rather than adjudicative facts;[38] and (4) the gov-

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incomes too high for public low-rent housing." S. REP. No. 281, 87th Cong., 1st Sess. 3, 4 (1961). Congressional recognition of low income families' need for housing is enunciated in the Housing Act of 1949 which established as the national housing policy "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . . ." National Housing Act of 1949, 42 U.S.C. § 1441, 1441a (1970). The rental housing program established by § 221(d)(3) is one of several strategems created by Congress to help achieve that goal. The statute itself indicates that the program is "designed to assist private industry in providing housing for low and moderate income families and displaced families." National Housing Act, § 221(a), 12 U.S.C. § 1715*l*(a) (1970)." Note, 1 FORDHAM URBAN L.J. 83 n.1 (1972). This assistance to the private sector takes two forms; first, the FHA provides insurance on long-term mortgage loans covering up to 90 percent of a project's cost, thus encouraging private investment in projects which would otherwise be too risky. 12 U.S.C. § 1715*l*(d)(4)(iv) (1970). Second, eligible borrowers can obtain below-market interest rates on FHA insured loans, thus reducing the rentals necessary to service the landlord's debt obligations. 12 U.S.C. § 1715*l*(d)(5) (1970). *See* 430 F.2d at 1245; Note, 1 FORDHAM URBAN L.J. 83 n.1 (1972).

37. *Id.*

38. *Id.* at 1248. At this point, the *Hahn* court relied on Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). In characterizing the process of FHA approval of a rent increase as "ratemaking," turning on general economic conditions rather than specific factual disputes, like those which might be involved in an eviction proceeding, the first circuit held that the procedural safeguards of the due process clause of the fifth amendment "are characteristic of adjudicatory proceedings, where the outcome turns on accurate resolution of specific factual disputes. Such safeguards are not, however, essential in 'legislative' proceedings, such as rate-making, where decision depends on broad familiarity with

ernment interest in maintaining procedural flexibility is greater than any of the private interests which weighed against granting a hearing as in *Goldberg*.[39]

Approximately one year later, the Court of Appeals for the Second Circuit decided *Langevin v. Chenango Court, Inc.*[40] The facts, similar to those of *Hahn*,[41] involved tenants in a housing project owned by the defendant and constructed under a low and middle income housing program authorized by section 221(d)(3) of the National Housing Act.[42] The landlord filed an application for a rent increase which the FHA subsequently granted. Many tenants refused to pay. Chenango instituted a suit in the New York courts for either rents due or for the eviction of tenants who had not paid the increase. The tenants, having been denied access to all information submitted by Chenango to the FHA relevant to the rent increase and denied an opportunity to present opposing material, commenced an action to enjoin the increase and declare the FHA approval of the rent in-

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economic conditions." *Id.* (citations omitted). *See also* Note, 1 FORDHAM URBAN L.J. 83, 89 (1972). "[A]djudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties. . . . The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence." K. DAVIS, ADMINISTRATIVE LAW TEXT, § 15.03, at 272 (1959). *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT, § 7.03, 7.05 (1972); Davis, *The Requirement of A Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956); Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORDHAM L. REV. 604, 605 (1969); Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112, 123-24 (1969).

39. 430 F.2d at 1245-46, 1248.

40. 447 F.2d 296 (2d Cir. 1971).

41. *Id.* at 298-99. *See* Note, 1 FORDHAM URBAN L.J. 83, 89 (1972).

42. *See* note 35 *supra*.

crease violative of the due process clause of the fifth amendment.[43] The court denied the tenants' claim for a pre-rent increase hearing.[44] Although the court found that the facts involved in the tenants' case were adjudicative rather than legislative,[45] the majority decision was based on the grounds that "here the Government did not itself increase the rents but simply allowed the landlord to institute an increase upon the termination of existing tenancies, as the landlord would have been legally free to do but for its regulatory agreement with the FHA."[46] By basing the decision on private ownership the *Langevin* court minimized both the relevancy of the public interest in denying the increase[47] and the nature of the facts in dispute.[48] These criteria were used by the *Hahn* court in deciding that a rent increase does not necessitate due process protections.[49] In effect, the second circuit in *Langevin* implicitly rejected the rule enunciated by the first circuit in *Hahn*.[50] The court in *Langevin* leaves no doubt that had the landlord been a public body the decision would have been otherwise.[51]

Shortly thereafter, in *Geneva Towers Tenants Organization v. Federated Mortgage Investors*,[52] tenants in a federally assisted California housing project[53] sought a pre-rent increase hearing. The dis-

43. 447 F.2d at 299.

44. *Id.* at 300-02.

45. *Id.* at 300. *See also* discussion in note 35 *supra*.

46. *Id.* at 301. Judge Oakes, in his dissent, was not persuaded by the majority's argument that the government did not itself increase the rent, but allowed the landlord to implement the increase. *Id.* at 304. Judge Oakes wrote "[t]o my mind, a tenant in a project financed with the use of public funds at subsidized interest rates should stand in no worse shoes than the tenants in, say, city housing authority projects. The distinction advanced by the majority, that here the Government did not itself increase the rents but simply allowed the landlord to institute an increase, is to me a distinction without a difference." *Id.* (citations omitted).

47. *Id.* at 301.

48. *Id.* at 300.

49. *See* notes 38 & 39 *supra*.

50. *See* text accompanying notes 36-39 *supra*.

51. 447 F.2d at 300-01. *See also* text accompanying note 57 *infra*.

52. No. C-70 104 SAW (N.D. Cal. Jan. 3, 1972), *summarized at* 2 CCH POVERTY L. REP. ¶ 16,402.

53. 12 U.S.C. § 1715*l*(d)(3) (1970).

trict court found that a formal hearing before a rent increase was too cumbersome and would unduly burden the subsidized housing program without affording the tenant much added protection.[54] Nonetheless, it held that because great harm and possible eviction for the inability to pay could result because of a rent increase, elementary notions of due process required that tenants be given (1) notice of the application for FHA approval of the proposed rent increase, including a brief description of the reasons given by the landlord for the increase; (2) an opportunity to make a written objection to the increase; and (3) a concise statement of FHA's reasons for approving the rent increase.[55] This holding conflicts with *Hahn* and extends *Langevin* so as to give a section 221(d)(3) tenant who is faced with a rent increase some due process protection.

With this division of authority in mind, the District Court for the Southern District of New York decided *Burr v. New Rochelle Municipal Housing Authority*.[56] The *Burr* court reasoned that in *Langevin* the second circuit had refused to hold the actions of a publicly subsidized private owner as taken under color of state law, and, therefore, a hearing was not required; and, further, that the *Langevin* court left no doubt that had the landlord been a public body, the decision would have been otherwise. Moreover, the court held that since the case involved a public body, the *Langevin* rationale dictated that a hearing be required.[57] The court then held that the tenants had a right under the due process clause of the fourteenth amendment to notice and a formal adversary hearing before being required by the New Rochelle Municipal Housing Authority to pay higher rents or an across-the-board service charge.[58]

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54. Geneva Towers Tenants Org. v. Federated Mortgage Investors, C-70 104 SAW, at 4 (N.D. Cal. Jan. 3, 1972).

55. *Id.* at 5; *accord*, Keller v. Maremount Foundation, No. C-71 1585 RFP (N.D. Cal. June 16, 1972), *summarized at* 2 CCH POVERTY L. REP. ¶ 16,403.

56. 347 F. Supp. 1202 (S.D.N.Y. 1972).

57. *Id.* at 1205.

58. *Id.* at 1206. A formal adversary hearing, also referred to as a trial-type hearing requires: (1) timely and adequate notice and reasons for the hearing; (2) opportunity to present evidence; (3) opportunity to present written or oral argument or both; (4) disclosure of evidence against you; (5) right to confront and cross-examine adverse witnesses; and (6) a deter-

The Court of Appeals for the Second Circuit, in modifying the lower court's judgment, held that due process does not require a formal adversary-type hearing before the imposition of a general rent increase or service charge.[59] While acknowledging the importance of the tenants' interest, the court held that the tenants could be adequately protected through a less formal procedure.[60] This would entitle the tenants to notice well in advance of a proposed rent increase, an opportunity to file written objections, the right to submit any material relevant to the rent increase, and a statement from the Reviewing Board outlining the reasons for its decision.[61] The court's reasoning can be traced to three principal factors: the official actions of the Housing Authority were actions taken under color of state law;[62] the interest at stake was substantial and of such a nature as to be within the protection of the fourteenth amendment;[63] and since the decision to raise rents turns on the resolution of legislative as opposed to adjudicative facts, an adversary hearing would be both burdensome and unnecessary.[64]

The significance of *Burr* lies in the fact that it is the first appellate holding mandating that public housing tenants be accorded certain due process protections before the promulgation of an across-the-

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mination on the record. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.01, at 157 (1972).

59. 479 F.2d at 1169.

60. *Id.* at 1170.

61. *Id.*

62. *Id.* at 1167.

63. *Id.* at 1167-68. At this point the court quoted from its earlier decision of Escalera v. New York City Housing Auth., 425 F.2d 853, 864 (2d Cir. 1970). "[T]he small size of the 'additional' rent charges [cannot] be relied on to deny tenants automatically fair procedures. To be sure, the size of the charges is relevant to the question of the burdensomeness of the required procedures, but even small charges can have great impact on the budgets of public housing tenants, who are by hypothesis below a certain economic level." *Id.* at 1168. *See also* text accompanying note 25 *supra.*

64. 479 F.2d at 1168. The court continued, "[s]ome five hundred tenants are directly involved in the imposition of the service charge by the New Rochelle Municipal Housing Authority and tenant representation at an adversary hearing would be difficult but perhaps not impossible . . . ." *Id.*

board rent increase.[65] There remain, however, certain ambiguities and unanswered questions. The first is whether the procedure set down by the court adequately protects the tenants' due process rights under the circumstances.[66]

The second circuit held that the tenants were entitled to a statement by the "reviewing board" outlining the board's reasons for either approving or rejecting the rent increase.[67] This implies that the ultimate decision regarding the increase rests with the "reviewing board."[68] However, the board does not fix the rents. The board's only function is to review appeals by tenants who have been found ineligible for admission to, or continued occupancy in, housing projects.[69] Therefore, the *Burr* decision, which mandates that the reviewing board advise tenants of the reasons for the approval or disapproval of a rent increase, may be inappropriate since that board has no power over rents.[70]

Assuming the inappropriateness of referring rent increase questions to the board, another question which arises is whether the procedural protections mandated by *Burr* meet with the require-

65. "We must consider the effect of our decision in other areas. The New York City Housing Authority, for example, operates 188 housing projects, housing approximately 600,000 persons in 155,610 apartments. A full adversary hearing in such a situation with all attendent procedures would present the most serious difficulties. The virtual impossibility of setting up an equitable scheme for the representation of 155,000 tenant families in New York is apparent." *Id.* It is interesting to note that the New York City Housing Authority filed an amicus curiae brief arguing for the defendant's position in the instant case on appeal.

66. *Id.* at 1169.

67. *See* note 61 *supra.*

68. The rules and regulations of the Housing Authority establishes these Boards and provides: "all housing authorities, except the New York City Housing Authority shall establish and [sic] authority board of review, hereinafter referred to as the board. The board shall consist of at least three members of the authority and be appointed by the chairman of the authority." 9 NYCRR § 1627-7.3(a) (1963). However, since the board is composed of authority members there is a strong implication of partiality. This is mitigated by the board's limited functions. *See* note 69 *infra* and accompanying text.

69. 9 NYCRR § 1627-7.3(b) (1963).

70. *See* note 69 *supra.*

ments of *Goldberg*. In *Goldberg* the Supreme Court held that before welfare benefits could be terminated an adversary-type hearing was required[71] where there was a finding, by an administrative agency, that the individual had failed to take certain actions.[72] *Burr*, on the other hand, did not turn on the actions of an individual. Moreover, while the rent increase would affect all tenants in the public housing project individually—to the extent that each tenant would have to pay any rent increase—the increase was not precipitated by an individual's actions. Therefore, legislative and not adjudicative facts were involved in *Burr*. In addition, affording a hearing to all tenants prior to a rent increase would be extremely burdensome. In *Goldberg*, on the other hand, a hearing was required when the actions of the individual resulted in his being deprived of a benefit. Such a hearing was not required when the acts of the agency affected all persons uniformly. Thus, the administrative burden in *Goldberg* was, arguably, less onerous than it would be in the *Burr* situation were a full adversary hearing required. Further, when the interest involved in *Burr*, not paying increased rent, is compared with that in *Goldberg*, it is clear that the *Burr* interest is less substantial. Thus, applying the *Goldberg* balancing test, *i.e.*, balancing the private interest against the public interest in a speedy determination, it is clear that the latter is superior.

While *Burr* has expanded the requirement of due process into new areas,[73] the decision leaves certain questions unanswered. Such questions as the possible extensions of due process requirements to service reductions, parking fees, and other areas will have to be

71. 397 U.S. 254, 260-66 (1970).

72. *Id.* at 256 n.2.

73. In *Hahn*, the first circuit held that a section 221(d)(3) tenant need not be afforded a hearing before the imposition of a rent increase. In *Langevin*, the second circuit also held that a section 221(d)(3) tenant need not be accorded due process protections before the promulgation of a rent increase. In *Geneva Towers*, a California district court held that a section 221(d)(3) tenant must be given some due process safeguards before a rent increase is imposed. In *Burr*, a New York district court held that a tenant in a public housing project must be granted full due process protections before the promulgation of a rent increase. In *Burr*, the second circuit held that certain due process protections must be given the public housing tenant before the imposition of a rent increase.

dealt with in the future. However, *Burr* is one more step on the road to the granting of limited due process in all areas of public and perhaps federally subsidized housing.

CIVIL RIGHTS—Discrimination in Placement of Low-Rent Housing—Statute's Requirement that Locality's Governing Body Agree to Cooperate with HUD Used as a Shield to Protect Suburbs from Integration by Low Income Blacks. *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1245 (N.D. Ohio 1973) (*Mahaley I*); *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973) (*Mahaley II*).

Plaintiffs challenged the constitutionality of certain sections of the National Housing Act[1] which require a community to consent to the construction of federally assisted low income housing within its borders. They alleged that the consent requirement perpetuated segregated housing patterns by giving white suburbs the power to bar the construction of low income housing in their area, thereby limiting such housing to predominantly black areas in urban centers.[2] Alternatively, plaintiffs argued that if the statute was consti-

1. 42 U.S.C. § 1415(7)(b) (1970) provides in part: "[T]he Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter." As was said in Cole v. Housing Auth., 312 F. Supp. 692, (D.R.I. 1970): "42 U.S.C. § 1401 establishes the policy objectives of the federal low-rent housing laws. Additionally, § 1401 states the general policy to permit maximum authority to local agencies in the administration of low-rent housing. Certainly, § 1401 seeks to preserve broad powers of control, consistent with the statute, in local authorities in order to carry out cooperative federalism, one of the underlying philosophies of the statute." *Id.* at 695-96. *See* OHIO REV. CODE ANN. § 3735.27 *et seq.* (Page 1970) for a description of Ohio metropolitan housing authorities. "CMHA has sought Cooperation Agreements with all of Cleveland's suburbs but has received no positive response. The City of Cleveland signed Cooperation Agreements in 1937, 1941, 1949 and most recently in 1971. These agreements authorized CMHA to build a total of 14,000 units in Cleveland." Mahaley v. Cuyahoga Met. Housing Auth., 355 F. Supp. 1257, 1260-61 (N.D. Ohio 1973). An attempt by the City of Cleveland to cancel the cooperation agreement of 1971 was held void in Cuyahoga Met. Housing Auth. v. Harmody, 474 F.2d 1102 (6th Cir. 1973).

2. Mahaley v. Cuyahoga Met. Housing Auth., 355 F. Supp. 1245, 1247 (N.D. Ohio 1973) (three judge court).

tutional, it was being applied with discriminatory effect. Plaintiffs further contended that in specific instances localities had refused to enter into cooperation agreements with the public housing authority[3] thus barring the construction of federally assisted low income housing in their communities.[4] They also alleged that the cooperation agreement entered into between the City of Cleveland and the Cuyahoga Metropolitan Housing Authority (CMHA) was inadequate because it did not provide for sufficient low income housing construction to meet the needs of the City.[5] They asked that a new agreement be reached which would better reflect low income housing needs.[6]

The challenge to the constitutionality of the statute was heard by a three-judge federal district court.[7] Plaintiffs argued that the statute interfered with the right to travel and was an unlawful delegation under the fifth, thirteenth and fourteenth amendments of the Constitution.[8] The court rejected these contentions[9] and held the consent requirement constitutional even though the suburbs had manipulated it to prevent integration by low income blacks.[10] The panel then remanded the case to a single judge for a ruling on the claim that local communities were using the provision of the statute for discriminatory purposes.[11] On remand, the court held that, absent a rational basis, suburbs which failed to enter into cooperation agreements were perpetuating segregated housing patterns through-

3. The defendants were the board members of the Cuyahoga Metropolitan Housing Authority (CMHA), a public corporation authorized to engage in the development and administration of low-rent housing in all of Cuyahoga County, Ohio, except Chagrin Falls Township; the City of Cleveland; the suburban cities of Euclid, Garfield Heights, Parma, Solon and Westlake which are municipal corporations in Cuyahoga County; and the Department of Housing & Urban Development of the United States (HUD), which administers the federal low-rent housing laws. *Id.* at 1246-47.

4. 355 F. Supp. at 1247.

5. *Id.*

6. *Id.*

7. 28 U.S.C. §§ 2281-84 (1970).

8. 355 F. Supp. at 1247.

9. *Id.* at 1248 n.1.

10. *Id.* at 1250.

11. *Id.* at 1250-51.

out the metropolitan area and were violating the thirteenth amendment, the due process and equal protection clauses of the fourteenth amendment, various civil rights acts including the Civil Rights Acts of 1964 and 1968,[12] the United States Housing Act of 1937,[13] and regulations of the Department of Housing and Urban Development (HUD).[14] The court ordered the CMHA to prepare a plan within 90 days setting forth the number of scattered site units to be placed in each of the defendant suburbs. Objections and counter proposals were to be made within 90 days of submission of the plan. Unless the objections were constitutionally permissible the court would have no alternative but to conclude that the objections were racially motivated and appropriate judicial action would be undertaken.[15]

Under the Housing Act,[16] HUD may provide federal assistance for the acquisition or construction of low-rent housing to meet unsatisfied housing needs upon the application of a local public housing agency[17] which has concluded that "there is a need for such low-rent housing which is not being met by private enterprise."[18] HUD is authorized to make loans "to public housing agencies to assist the development, acquisition, or administration of low-rent housing or slum-clearance projects by such agencies."[19] In enacting the Housing Act of 1949,[20] Congress expressly conditioned the receipt of federal assistance upon the local public housing agency entering into a cooperation agreement with the governing body of the locality in which low-rent housing was to be situated.[21] These agreements in-

12. 42 U.S.C. §§ 1981, 1982, 1983, 2000d, 3601 *et seq.* (1970).
13. 42 U.S.C. §§ 1401 *et seq.* (1970).
14. HUD Site Selection Criteria, 24 C.F.R. §§ 200.700-710 (1973).
15. 355 F. Supp. at 1269.
16. 42 U.S.C. § 1401 (1970).
17. *Id.*
18. *Id.* § 1415(7)(a) (1970).
19. *Id.* § 1409 (1970).
20. *Id.* § 1401 *et seq.* (1970).
21. *Id.* § 1415(7)(b)(i) (1970). "This bill [Housing Act of 1949] . . . is based upon the firm foundation that, although the housing problem is obviously national in scope, it is fundamentally a local problem, and that the first responsibility for its solution therefore rests with the local community . . . . This bill fully incorporates the basic philosophy that, if the people of a local community take no interest in that community's housing problems, it is not for the Federal Government to impose a program upon

sured that federally assisted housing would be exempt from state and local taxes[22] and that the new dwellings would result in the elimination or amelioration of unsafe or insanitary housing in the locality.[23]

Congress established a national housing policy in the United States Housing Act of 1937:

> It is . . . the policy of the United States . . . to assist the several States and their political subdivisions . . . to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . that are injurious to the health, safety, and morals of the citizens of the Nation.[24]

Title VI of the Civil Rights Act of 1964 proscribes discrimination in

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them." 2 U.S. CODE CONGRESSIONAL SERVICE 1550-51, 81 Cong., 1st Sess. (1949). "*Cooperation agreement.* A contract between a Local Authority and the governing body of the locality, providing for tax exemption, elimination of unsafe and insanitary dwelling units, supplying of public services, and other forms of cooperation by the local government, and for payments in lieu of taxes by the Local Authority, in connection with a low-rent housing project." 24 C.F.R. § 275.1(f) (1973). The CMHA has the power to "clear, plan and rebuild slum areas . . . or to provide safe and sanitary housing accommodations to families of low income . . . ." OHIO REV. CODE ANN. § 3735.31 (Page 1970).

22. 42 U.S.C. § 1410(h) (1970); OHIO REV. CODE ANN. § 3735.34 (Page 1970). In place of taxes the housing project pays 10 per cent of its shelter rents to the taxing authority. 42 U.S.C. § 1410(h) (1970). The public housing projects must, under federal statute, pay the municipality for all services at the same rate as private housing projects. *Id.* § 1410(i).

23. 42 U.S.C. § 1410(a) (1970). "Those federally-assisted housing programs which are not for low income persons do not require a local approval. *See, e.g.*, 12 U.S.C. §§ 1709(b), (h), (i), (m); 1715e, 1715l, 1715m, 1715n, u, y, z, z-1; and 1713 (federal homeowner mortgage insurance and mortgage subsidy programs); 12 U.S.C. § 1701q (loans for housing for elderly and handicapped); 38 U.S.C. §§ 801, 1810, 1811 (housing subsidies for veterans). The federally-assisted housing programs for low income persons require local approval or a cooperation agreement. 42 U.S.C. § 1421b(a)(2) (leased housing); P.L. 92-383, 86 Stat. 540 (rent supplement); 42 U.S.C. § 3304(b)(1) (city demonstration)." 355 F. Supp. at 1255 (Lambros, J., dissenting).

24. United States Housing Act of 1937 § 1, 42 U.S.C. § 1401 (1970). *See* Cuyahoga Met. Housing Auth. v. Cleveland, 342 F. Supp. 250 (N.D. Ohio 1972).

programs or activities receiving federal financial assistance, including public housing and urban renewal projects.[25] Discriminatory acts can be penalized by a cut-off in federal funding.[26] Title VIII of the Civil Rights Act of 1968[27] directs the Secretary of HUD to act in an affirmative manner in furthering the policy of fair housing.[28] A recent federal court decision summarized the progression of these acts as follows:

> Read together, the Housing Act of 1949 and the Civil Rights Act of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight . . . . Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondisciminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.[29]

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25. Title VI of Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970) provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *See* Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, 749.

26. 42 U.S.C. § 2000d-1 (1970).

27. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (1970). The Fair Housing Act of 1968 was enacted as Title VIII of the Civil Rights Act of 1968.

28. Title VIII of the Civil Rights Act of 1968 provides in part: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.* § 3601 (1970). "(d) The Secretary of Housing and Urban Development shall . . . (5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." *Id.* § 3608(d)(5) (1970). *See* 24 C.F.R. § 100.1 (1973).

29. Shannon v. HUD, 436 F.2d 809, 816 (3d Cir. 1970), *quoted in* 355 F. Supp. at 1262 (emphasis omitted). *See* Note, 10 DUQUESNE L. REV. 289 (1971). An excellent history of the issue of racial discrimination in public housing site selection is found in Note, *Racial Discrimination in Public Housing Site Selection*, 23 STAN. L. REV. 63 (1970). In it are listed the criteria that HUD uses in selecting sites for public housing: "(1) The suitability of the site in relation to the surrounding neighborhood and the city plan. (2) The physical characteristics of the site. (3) The use of scattered sites as opposed to the use of single sites. (4) The cost of the site itself and

In *Mahaley I* the three-judge court held that the consent requirement did not violate the equal protection clause of the fourteenth amendment.[30] A state created classification which is either unreasonable or irrational violates the equal protection clause.[31] Moreover, where a reasonable classification infringes upon a fundamental constitutional right, a compelling governmental interest[32] must be

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of the required site improvements. (5) The feasibility of relocating all site occupants to standard housing, within their financial means, in reasonably convenient locations, and available on a nondiscriminatory basis. (6) The suitability of the site from the standpoint of facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964 and agency regulations and requirements issued pursuant thereto." *Id.* at 69. After discussing the defenses that Local Housing Authorities [LHA] can use to avoid integration in housing site selection, the author concludes: "Cost, zoning, and local political review—the same factors that lie at the heart of the system of constraints facing all LHA's—are singled out by HUD regulation as satisfactory excuses for an LHA's failure to achieve nondiscriminatory site selection. So long as an LHA is provided with such a formidable excuse, the inevitable result will be the perpetuation of de facto segregation in public housing site location." *Id.* at 116. The cases in this note show the trend toward limiting the defenses the local governing bodies can employ as a shield against integration of housing by low income blacks.

30. 355 F. Supp. at 1248-50.

31. "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23, 30 (1968). "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." Loving v. Virginia, 388 U.S. 1, 10 (1967). *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Yick Wo v. Hopkins, 118 U.S. 356 (1886). "[T]he standards of equal protection are met if a classification, or a distinction among classes, has some reasonable basis." Bauch v. New York, 21 N.Y.2d 599, 607, 237 N.E.2d 211, 214, 289 N.Y.S.2d 951, 955, *cert. denied*, 393 U.S. 834 (1968).

32. "[A]ny classification which serves to penalize the exercise of that

shown.[33] When a statute has a racially discriminatory effect, the courts distinguish between racial motivation and legitimate nonracial concerns.[34] In distinguishing between discriminatory intent and discriminatory effect in the area of housing discrimination, at least five circuits have held that if an act, though neutral on its face, results in housing discrimination it violates the fourteenth amendment unless it can be justified on reasonable nonracial grounds.[35] In *Mahaley I*, the court noted that:

> Equal protection, absent an invidious discrimination, requires only that a Congressional enactment have some reasonable relation to a statutory objective or purpose. This statute is certainly not arbitrary, or capricious and has

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right [fundamental right of interstate travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

33. Cases where wealth has been held to be a suspect classification include Boddie v. Connecticut, 401 U.S. 371 (1971) (prepayment of costs in divorce actions); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax); Douglas v. California, 372 U.S. 353 (1963) (indigents entitled to counsel on appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent defendants entitle to free transcript). *See* Note, *Low Income Housing in the Suburbs: The Problem of Exclusionary Zoning*, 24 U. FLA. L. REV. 58 (1971). "The determination as to whether a statute is to be tested under the strict scrutiny or traditional approach turns upon an examination of the trait used as the basis of the classification, and the nature of the interest affected by the classifying statute. If the classifying trait is one deemed 'suspect' . . . or if the statute impinges upon a 'fundamental interest' . . . then the statute is said to 'trigger' active review." Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORDHAM L. REV. 605, 610 (1973).

34. 355 F. Supp. at 1251 (Lambros, J. dissenting).

35. 355 F. Supp. at 1249-52 (Lambros, J. dissenting). "If proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." Dailey v. Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970). Banks v. Perk, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd*, 473 F.2d 910 (6th Cir. 1973); Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972); Kennedy Park Homes Ass'n v. Lackawana, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); Dailey v. Lawton, 296 F. Supp. 266 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037, 1039, 1049 (10th Cir. 1970); Southern Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 295-96 (9th Cir. 1970).

> a rational basis. This consent requirement was provided to ensure that low-rent housing would be coupled with the slum clearance provisions of the Act, and to buttress the notion of cooperative federalism.[36]

The court, citing *Lindsey v. Normet*,[37] disagreed with plaintiffs' contention that there is a fundamental right to housing outside the inner city.[38] In addition, the court held that the consent requirement was not discriminatory on its face, and did not result in an invidious discrimination based upon wealth.[39] The court relied on *James v. Valtierra*[40] where an article of the California constitution which provided that "[n]o low rent housing project shall hereafter be developed, constructed, or acquired . . . by any state public body. . . ." without the approval of a majority of those voting at a community election was challenged.[41] The Supreme Court held that the procedure for mandatory referenda, which were also required in California for the approval of other types of legislation, ensured democratic decision making and did not violate the equal protection clause.[42]

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36. 355 F. Supp. at 1249.

37. "We are unable to perceive in . . . [the Constitution] any constitutional guarantee of access to dwellings of a particular quality. . . ." Lindsey v. Normet, 405 U.S. 56, 74 (1972).

38. "To date the right [to housing outside the inner city] asserted here has not been elevated to the level of a fundamental right." 355 F. Supp. at 1250.

39. 355 F. Supp. at 1249. "An 'invidious' classification or trait is one which combines, in greater or lesser degree and in varying proportions, three qualities: (1) a general ill-suitedness to the advancement of any proper governmental objective; (2) a high degree of adaptation to uses which are oppressive in the sense of systematic and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence; (3) a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness. A law requiring racial segregation epitomizes the idea of 'invidiousness.' " Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1969).

40. 402 U.S. 137 (1971). *See* Comment, *James v. Valtierra: Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115 (1971); Note, 1972 WIS. L. REV. 268; Note, 25 U. MIAMI L. REV. 790 (1971).

41. CAL. CONST. art. XXXIV, § 1.

42. 402 U.S. at 143. "By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-

The Court held that:

> The Article requires referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority. And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority.[43]

Hunter v. Erickson[44] involved an amendment to the city charter of Akron, Ohio, which provided that any ordinance which regulates the use, sale, or transfer of real property on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the voters before becoming effective.[45] The Supreme Court concluded that the charter amendment contained an explicitly racial classification and placed special burdens on racial and religious minorities within the governmental process by making it more difficult for them to secure legislation on their behalf since "the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that."[46] The Court concluded that the charter amendment failed to meet the "far heavier burden of justification"[47] imposed on racial classifications.

The *James*[48] court distinguished *Hunter* on the ground that the Akron referendum placed "special burdens on racial minorities"[49] while in *James* the referendum was necessary "for any low-rent

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rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted." *Id.* at 140.

43. *Id.* at 141. The Supreme Court opinion cited the case of Gomillion v. Lightfoot, 364 U.S. 339 (1960). In *Gomillion*, an Act of the Alabama State Legislature altering the shape of the City of Tuskegee, Alabama, from a square to an irregular 28-sided figure in order to eliminate all but four or five of its 400 black voters was held to violate the fifteenth amendment, which forbids a state to deprive any citizen of the right to vote because of his race.

44. 393 U.S. 385 (1969).

45. *Id.* at 389.

46. *Id.* at 391.

47. *Id.* at 392 *quoting from* McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

48. 402 U.S. 137 (1971).

49. Hunter v. Erickson, 393 U.S. 385, 391 (1969), *quoted in*, 402 U.S. at 140.

public housing project, not only for projects which will be occupied by a racial minority."[50] This reasoning indicates that while racial classifications in housing are not valid, economic classifications are permissible. In *Mahaley* the federal statute was held to constitute an economic, not a racial, classification.

The court in *Mahaley* interpreted *James* as indicating "that wealth, per se, is not a suspect classification in the context of the constitutional examination of a provision relating to housing assistance or welfare."[51] If the statute had specifically provided that blacks could not live in white neighborhoods, it would clearly be unconstitutional, but "[t]he racial effect of this statute, if any, is not caused by the statute itself but rather by municipal action or inaction which may have used this provision as a shield to protect its inhabitants from integration by low income Negroes."[52] Plaintiffs had not shown a cause and effect relationship between the statute and the fact that low income blacks did not live in the defendant suburban cities.[53]

Having decided that section 1415(7)(b)(i) was not unconstitutional on its face or as applied, the three-judge court remanded the case to a single district court judge for a ruling on the claim that local communities were using the consent provisions of the statute for discriminatory purposes.[54]

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50. 402 U.S. at 141.

51. 355 F. Supp. at 1249. For cases in which wealth was held to be a suspect classification see note 33 *supra. But see* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24 (1973): "[W]here wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages."

52. 355 F. Supp. at 1250.

53. *Id.*

54. *Id.* at 1250-51. Judge Lambros dissented from the decision to remand the case to Chief Judge Battisti for his ruling as a single judge on the claim of racial discrimination. He believed the dissolution of the three-judge court was not justifiable either for reasons of judicial economy or the orderly disposition of the case. Since the court had already heard the evidence on the constitutionality of the statute and the claim of discrimination on the defendant's part, no time savings resulted from ruling on the first while remanding the second. *See* Perez v. Ledesma, 401 U.S. 82, 90 (1971) (Stewart, J., concurring); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 84, 85 (1960). He also stated his belief that the relief

Several recent decisions have dealt with attempts to alleviate segregation by the development of public housing. In *Banks v. Perk*[55] a housing authority and its executive director in the City of Cleveland were enjoined from planning any future public housing in black neighborhoods. In Cleveland 90 percent of the families on the waiting list for federally assisted public housing were black, a fact which compelled the court to conclude that the failure of the metropolitan housing authority to place new public housing units in white neighborhoods constituted a violation of the federal public housing and civil rights statutes since: "in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, overt, subtle or concealed, which perpetuates or reasonably could perpetuate discrimination especially in public housing, cannot be tolerated."[56] In *Crow v. Brown*[57] a county refused to issue building permits for apartments when it was discovered that the tracts, which had been legitimately zoned for the construction of apartments, would be occupied by low income black tenants. The district court concluded that in the absence of supervening necessity, any county action or inaction, which perpetuated concentration of blacks in compacted areas, or thwarted the correction of such conditions, was a deprivation of equal protection.[58] This finding was

requested could be granted upon a finding of discrimination without reaching the question of the constitutionality of the statute. *Id.* at 1251. The practice of avoiding rulings on the constitutionality of a federal statute where relief can reasonably be granted without reaching that question is one consistently sanctioned by the Supreme Court. *See* Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

55. 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd*, 473 F.2d 910 (6th Cir. 1973).

56. 341 F. Supp. at 1180. As for the issue of discriminatory intent, the court said, "As Mr. Justice Clark stated in Burton v. Wilmington Parking Authority 'It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith.' " *Id.* at 1183 *quoting from* 365 U.S. 715, 725 (1961) (citations omitted).

57. 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

58. 332 F. Supp. at 392. The court ordered that the building permits be issued and that a program of balanced and dispersed public housing throughout the city be developed and implemented. *Id.* at 395-96. "Taken

affirmed by the court of appeals: "The record is clear that the County officials denied building permits . . . for the purpose and foreseeable result of continuing the present pattern of racial segregation."[59]

In *Kennedy Park Homes Association v. Lackawanna*,[60] a home association and others brought a suit to compel the city to take all necessary steps to allow the development of a low income housing project on a certain location. The court of appeals upheld the district court's finding of racial discrimination by city officials. After steps were taken toward construction of a low income housing project, the city council adopted a moratorium on new subdivisions, and zoned certain land, including the proposed project's site, as open space and park area, despite a contrary recommendation of a planning expert. The court, after describing the past history of Lackawanna's racial discrimination, stated:

> This panoply of events indicates state action amounting to specific authorization and continuous encouragement of racial discrimination, if not almost complete racial segregation. . . . The plaintiffs sought to exercise their constitutional right of "freedom from discrimination by the States in the enjoyment of property rights." The effect of Lackawanna's action was inescapably adverse to the enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality. The City has failed to demonstrate an interest so compelling.[61]

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together and viewed in their historical context, the actions of the County in resisting attempts designed to achieve the national housing policy of balanced and dispersed public housing and failing to assist such attempts violate the Equal Protection Clause of the Fourteenth Amendment. Relief from this violation of the constitutional and statutory rights of plaintiffs [blacks on AHA waiting list] . . . must be granted by this court." *Id.* at 392. *See* HUD Site Selection Criteria, 24 C.F.R. § 200.700-710 (1973).

59. 457 F.2d at 790.

60. 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

61. 436 F.2d at 114 (citations omitted). Another facet of the problem was presented in Reitman v. Mulkey, 387 U.S. 369 (1967). Here the Supreme Court was concerned with what constitutes state involvement in discrimination. The case involved an article of the California Constitution prohibiting the state from denying the right of any person to decline to sell, lease or rent his real property to such persons as he in his absolute discretion chooses. The California Supreme Court held that "[t]he instant case

These three cases demonstrate that municipal inaction which leads to discrimination may violate the equal protection clause.

Manifestly, the cooperation agreement required by the federal statute and at issue in *Mahaley II* might be "used" to perpetuate segregated housing. Should a locality refuse to enter into such an agreement arbitrarily or after a need for low income housing is shown, new housing is blocked and segregation continued. In *Mahaley II* the court construed the requirement to enter into a cooperation agreement as mandatory once the need for low income housing was determined. Moreover, where this need is known or clearly present, suburbs will not be permitted to thwart national housing policy "by ignoring the need or by making arbitrary determinations to the contrary."[62] The court held that the suburbs, by failing to enter into cooperation agreements, and by not presenting a logical rationale for such inaction, had discriminated against blacks and other low income persons thus perpetuating existing racial segregation throughout the metropolitan area.[63] CMHA was

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presents an undeniably analogous situation wherein the state . . . has taken affirmative action . . . designed to make possible private discriminatory practices which previously were legally restricted." Mulkey v. Reitman, 64 Cal. 2d 529, 541-42, 413 P.2d 825, 834, 50 Cal. Rptr. 881, 890 (1966). The Supreme Court agreed and held that this article would involve the state in private racial discriminations to an unconstitutional degree. 387 U.S. at 378-79. The Court also sanctioned the criteria used by the California court to examine the article; determining its " 'immediate objective,' " its " 'ultimate effect' " and its " 'historical context and conditions existing prior to its enactment.' " *Id.* at 373. The Court concluded: "here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." *Id.* at 380-81.

62. 355 F. Supp. at 1267. The court described the population distribution of Cuyahoga County as having "the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring." *Id.* at 1260. A need for low income housing clearly existed throughout Cuyahoga County. As of November 30, 1971, there were 5,652 pending applications, 73 percent by blacks, to all CMHA housing units. Despite the clear need in each community within the jurisdiction of CMHA, suburban officials had largely ignored CMHA's requests to negotiate a Cooperation Agreement. *Id.* at 1260-62.

63. 355 F. Supp. at 1267. They had acted contrary to the due process

ordered to prepare a plan within 90 days setting forth the number of scattered site units it intends to place in each of the defendant suburbs.[64]

The court concluded that unless the suburban cities' objections to the CMHA housing plan "are constitutionally permissible and meet the compelling interest test, there will be no alternative but to conclude that the suburb's failure to sign a Cooperation Agreement is for a constitutionally impermissible reason, to wit: racial discrimination and appropriate judicial action will be undertaken."[65] In using the phrase "compelling interest test," the court was referring to plaintiffs' right to be free from discrimination not to any fundamental right to housing outside the inner city.

The *Mahaley* decisions support the proposition that if a statute, neutral on its face, is manipulated in a discriminatory manner it may violate the equal protection clause of the fourteenth amendment.

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and equal protection clauses of the fourteenth amendment, the Civil Rights Acts of 1964 and 1968, and to the United States Housing Act of 1937 as amended, and regulations of the Department of Housing & Urban Development.

64. *Id.* at 1269. The court also held that while Cleveland had not used the Cooperation Agreement requirement in a discriminatory manner, the principles stated in its opinion would apply to its future actions. *Id.* at 1268. The court had considered issuing a declaration that the statute was unconstitutional as applied, but concluded, rather, that it had been used in such a way as to perpetuate discrimination. *Id.* CMHA was ordered to prepare a housing plan, a remedy which was seen as "the only constitutionally permissible solution." *Id.* at 1269. Objections and counter-proposals to the plan were to be submitted within 90 days of submission.

65. *Id.* at 1269. Thus, while the referendum procedure in housing was upheld in *James*, where a state had a history of referendum decision making, similar procedures used with the intention of preventing such housing from being built would be "suspect." In James v. Valtierra, 402 U.S. 137, 145 (1971) Justice Marshall in his dissenting opinion stated: "It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect." *Id.* at 145.

CIVIL RIGHTS—Right to Treatment—Neither Due Process nor Equal Protection Clause of the Fourteenth Amendment Guarantees the "Right to Treatment" for Mentally Retarded Children Confined in a State Institution Through Noncriminal Procedures. *Association for Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973).

In a civil rights action[1] brought[2] on behalf of the residents of Willowbrook State Hospital by their parents and guardians the plaintiffs attacked the conditions and treatment offered by the hospital as violative of due process and equal protection. They petitioned the court "to require . . . programs . . . [to] raise the conditions at Willowbrook . . . ."[3] The court,[4] in *Association for Retarded Children v. Rockefeller*,[5] refused to extend a right to treatment[6] to patients civilly committed to state hospitals, thereby forestalling an extension of such rights to the retarded.

Willowbrook State Hospital, located on Staten Island, opened in 1951.[7] The facility attracted public attention in January, 1972, when the devasting effects of a year long-hiring freeze, compounded with a high staff turn-over rate, made conditions so deplorable as to attract the attention of the media.[8] Actions challenging these condi-

1. Association for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

2. The action was brought under 28 U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970), against Nelson Rockefeller, individually and as Governor of New York State, Alan Miller, M.D., individually and as a Director of Willowbrook State School.

3. 357 F. Supp. 752, 755.

4. The case was heard by Judge Judd in the Eastern District of New York.

5. 357 F. Supp. 752.

6. *Id.* at 758-61.

7. *Id.* at 755-56. The number of residents within the institution had reached 6,200 by 1969, but had been reduced to 4,727 by the time of trial. *Id.*

8. Geraldo Rivera of WABC-TV, New York, brought attention to the plight of Willowbrook residents in a week long feature news report, later expanded in G. RIVERA, WILLOWBROOK: A REPORT ON HOW IT IS AND WHY IT DOESN'T HAVE TO BE THAT WAY (1972) which was followed by special reports on other metropolitan stations and in newspapers.

tions were filed in March, 1972,[9] and were later consolidated. Despite significant steps by the state to correct these conditions,[10] the court found[11] the conditions at Willowbrook inhumane and ordered remedial steps taken.[12] The court refased, however, to recognize a constitutional right to treatment.[13]

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9. Two actions were filed separately under the civil rights statutes 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343 (1970). The plaintiffs, alleging a broad public interest in protecting the patients against irreparable injury, sought a preliminary injunction against the infringement of the patient's constitutional rights. *See* Green v. Kennedy, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed, sub nom.* Cannon v. Green, 398 U.S. 956 (1970).

10. 357 F. Supp. at 756.

11. The court dismissed defendants' eleventh amendment challenge to its jurisdiction. Under the eleventh amendment, a suit may not be brought in a federal court by a citizen against a state without its consent. *See* Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972). Although Judge Judd recognized the eleventh amendment bar, he did not find it to be a "jurisdictional impediment." 357 F. Supp. at 765. Apparently the court accepted the plaintiffs' argument that "intolerable consequences far more devastating than the usual delay resulting from an abstention doctrine" would result. *See* Reply Brief for Plaintiff at 25, Association for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) [hereinafter cited as Plaintiffs' Reply Brief]. *See also* Post Trial Memorandum of Law of Plaintiffs at 20, 27-33, 357 F. Supp. 752 (E.D.N.Y. 1973) [hereinafter cited as Post Trial Memorandum].

12. 357 F. Supp. at 758. The court implemented the institutional standards required by the American Association of Mentally Deficient (A.A.M.D.) and rejected the more detailed standards prepared by the Accreditation Council for Facilities for the Mentally Retarded (A.C.F.M.R. Standards), requested by the plaintiffs. At the time this case was brought, only one private Arizona institution had met the A.C.F.M.R. Standards.

13. *Id. See also* notes 56-57 *infra* and accompanying text. The right to treatment had been recognized by several courts for convicts imprisoned in mental hospitals. In Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), *appeal after remand*, 387 F.2d 241 (D.C. Cir. 1967), an appeal from the denial of a habeas corpus petition by a petitioner confined to a mental institution after criminal acquittal based on insanity, Judge Bazelon noted that confinement without treatment might draw into question the constitutionality of a penal statute which required commitment in all cases where defendants were acquitted by reason of insanity. *See also* Haziel v.

At the time the suit was brought, patients were civilly committed to Willowbrook (and other state mental institutions) either voluntarily or involuntarily. Voluntary admission[14] was based on application by the patient, his parents, or guardians, while involuntary admission was based on certification by a court[15] or doctor.[16] Civil

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United States, 404 F.2d 1275 (D.C. Cir. 1968); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Anonymous v. Fish, 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1st Dep't 1964). *See* notes 22-28 *infra* and accompanying text. Three years ago, in Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *additional relief mandated*, 344 F. Supp. 387 (M.D. Ala. 1972), a federal district court in Alabama, in a major decision, extended a guaranteed right to treatment to those patients involuntarily committed to state mental institutions in civil proceedings. *Wyatt* was a class action initiated by guardians of patients confined at a state mental hospital and by certain employees assigned to the hospital, seeking court relief for lack of effective rights. Judge Johnson determined that the programs for treatment were inadequate and deprived patients of their constitutional rights but reserved decision for six months to afford the state officials an opportunity to fully implement an adequate program. In a later ruling, the court mandated the implementation of standards which Judge Johnson set forth in his first ruling. *See also* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 151-55 (1972).

14. Law of April 11, 1961, ch. 504, § 14, [1961] N.Y. Laws 1697-98 (repealed 1972) which was applicable to the suit provided: "[T]he director of any State school . . . for the care and treatment of the mentally defective . . . may receive and retain therein as a patient any person suitable . . . who voluntarily makes written application . . . or if such person be under eighteen . . . such written application shall be made by the parent or legal guardian. . . . In the discretion of the director . . . such person may be detained . . . sixty days . . . and thereafter until fifteen days after receipt of notice in writing stating his intention to leave . . . . It shall be the duty of the department to examine such cases and determine if the persons so admitted are suitable for continued detention on a voluntary basis . . . ." This section was replaced in part by N.Y. MENTAL HYGIENE LAW § 33.23 (McKinney Supp. 1973) which mandates annual review of each patient's mental condition. *See also id.* §§ 33.15, -.17, -.21, -.25. In the Post-trial Reply Memorandum for Plaintiff at 2-3, Association for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) [hereinafter cited as Reply Memorandum], the plaintiffs claim that only 27 percent of the present residents were admitted under the old section.

15. Law of April 11, 1961, ch. 504, § 16, [1961], N.Y. Laws 1699 (repealed 1972), provided: 1. "A person alleged to be mentally defective, and

commitment is to be distinguished from commitment under the state penal law, where, after a court ordered-mental examination, a defendant found to be incompetent to stand trial is committed to a maximum security prison facility for the mentally ill.[17]

The plaintiffs attempted to base the constitutional right to treatment on the existence of state action in the commitment process itself. They sought to classify the vast majority of commitments as

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. . . not in confinement on a criminal charge, may be certified to and confined in any licensed private institution for the . . . treatment of the mentally defective, upon an order made by a judge of a court of record . . . or of a children's court, or a justice of the supreme court or may be, upon a certificate made by two examining physicians or an examining physician and a certified psychologist, accompanied by a petition . . . after a hearing . . . certified to the jurisdiction of the department . . . and retained as a patient in an institution . . . in the department designated by the commissioner." Law of May 9, 1969, ch. 407, § 66, [1969] N.Y. Laws (repealed 1972), provided: "Any person with whom an alleged mentally defective person may reside . . . or the nearest relative or friend . . . or the committee of such persons, or an officer of any well-recognized charitable institution . . . or commissioner of public welfare . . . may apply for an order. . . . [S]uch petition shall be accompanied by the certificate of the examining physicians . . . ." For the current applicable statute see N.Y. MENTAL HYGIENE LAW §§ 33.33, -.35 (McKinney Supp. 1973). In Reply Memorandum, *supra* note 14, at 2, it was alleged that nearly 40 percent of the patients were committed by court order.

16. Law of April 11, 1961, ch. 504, § 15, [1961] N.Y. Laws 1698-99 (repealed 1972), provided: "The director . . . in charge of any state school or facility . . . for the care and treatment of the mentally defective . . . may receive and retain therein as a patient . . . on a petition . . . accompanied by a certificate executed by an examining physician or certified psychologist . . . dated not more than six months before the date of admission. In the discretion of the director such person may be detained . . . for a period of sixty days and thereafter until fifteen days after receipt of notice in writing from such person or of any person in his behalf, of his intention or desire to leave . . . . If the director . . . shall deem further detention necessary, he shall so certify . . . to a judge of a court of record, who may in his discretion . . . issue an order certifying such person to such institution for care, custody and treatment." This section was replaced by N.Y. MENTAL HYGIENE LAW §§ 33.27, -.29, -.31 (McKinney Supp. 1973). The plaintiffs claim that nearly 32 percent of the patients were confined on one physician certificate. Reply Memorandum, *supra* note 14, at 2.

17. N.Y. CRIM. PRO. LAW § 730.10-.70 (McKinney 1971).

involuntary despite original admission data, thus allegedly mandating due process protection. Plaintiffs challenged admissions delineated as voluntary[18] by the mental hygiene laws and sought to limit the category to truly voluntary admittants.[19] The proposed redefinitions would require a pre-commitment hearing in many cases where it is not presently required. The court noted that labelling a person mentally retarded might cause harm to the person so labelled.[20] Thus, when a child's interests in avoiding harm were not protected in commitment proceedings, a nominally voluntary commitment was, in reality, involuntary. However, the court concluded that to guard against this harm a constitutional right to treatment was not needed; rather, a hearing with procedural safeguards would suffice. In certain cases, therefore, a court may find the appointment of a guardian at law an appropriate means of preventing harm to the child. Further, when such harm is possible, the court suggested that a hearing be held. While not delineating the procedural rights to be afforded at such a hearing, the court noted that "the full panoply

18. The plaintiffs allege that nearly 75 percent of the patients were compelled by law to reside at Willowbrook. Reply Memorandum, *supra* note 14, at 2. Among the voluntary residents, many are minors signed in by their parents or guardians. Plaintiffs charged that some parents, after voluntarily institutionalizing their minor children, have since moved or abandoned them. In 1970 alone, Willowbrook had nearly 10 percent of its mailing to parents and guardians returned or undelivered. *Id.* at 3.

19. Authorities have often questioned the characterization of admittance under these procedures as truly voluntary. The overwhelming majority of patients are either children or those who were institutionalized as children with the consent of their parents. If the retardate is truly committed voluntarily, he could not seek a constitutional right to treatment predicated upon deprivation of liberty because he would be free to go at any time. The logic of such a proposition, of course, ignores the fact that many of the retarded in institutions cannot live outside of the sheltered environment and that the right to leave in this context is as illusory as in the area of mental illness. *See* Murdock, *supra* note 13, at 155. *See also* Reply Memorandum 2-4. In testimony received during the trial, plaintiffs complained of retrogression instead of progress in their committed children. They questioned whether institutionalization is indeed the proper or best treatment for the mentally retarded. *See* Post Trial Memorandum 8-16.

20. 357 F. Supp. at 762.

of criminal due process rights" do not extend to all cases at all times.[21]

Prior decisions[22] have held that due process requires a hearing prior to the revocation of a fundamental right.[23] This hearing requirement has been extended to prevent situations where a classification of an individual might effectively result in some future harm.[24] Thus, the safeguards of procedural due process do not compel treatment, but prevent arbitrary classification and the harm which flows therefrom. Procedural due process is, therefore, not a basis for mandating a constitutional right to treatment.[25]

Plaintiffs claimed that the state's failure to provide Willowbrook residents[26] with an education substantially equal to that given non-institutionalized retarded children[27] created a suspect classification

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21. *Id.*

22. Past case law mandated a hearing prior to either the exclusion of a mentally retarded child from public school, or prior to a change in educational assignment. *See* Williams v. Dade County School Bd., 441 F.2d 299 (5th Cir. 1971); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Mills v. Board of Educ., 348 F. Supp. 866, 875 (D.D.C. 1972); Association for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 298 (E.D. Pa. 1972); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388 (E.D. Mich. 1969).

23. Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971). In this case, the fundamental right was the loss of liberty through civil commitment.

24. *See* Wisconsin v. Constantineau, 400 U.S. 433 (1971), where the Supreme Court mandated a hearing prior to any state classification which tends to stigmatize a citizen.

25. The due process discussion failed to meet the question raised in its most drastic form by the functionally borderline retardate. Assuming that an absence of treatment would lead to, at best, no improvement, a failure to treat in this situation would amount to indefinite, if not permanent confinement. This arguably is a denial of liberty without due process.

26. *See* Plaintiffs' Reply Brief, *supra* note 11, at 20-21; Post Trial Memorandum, *supra* note 11, at 179-87. Although defendants implied that the per capita input for those residents attending Willowbrook school was roughly equal to the amount allocated by the state in its special classes for the handicapped, defendants conceded that fewer than one third of the residents between the ages of 5 and 21 attend the Willowbrook School. *See* Post Trial Memorandum 180.

27. Under N.Y. EDUC. LAW § 4407 (McKinney 1970) a grant of up to

within the meaning of the equal protection clause.[28] An order was sought requiring the state officials at Willowbrook to conform to a principle of fiscal neutrality and to allocate funds for the education of each Willowbrook resident equal to the amount allocated for each retarded child attending public schools.

In evaluating an equal protection challenge, a court must first determine the nature of the right involved.[29] The importance of education to enable an individual to participate meaningfully in today's society has been recognized by courts since the decision in *Brown v. Board of Education*.[30] Nevertheless, the right to education

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$2000 is available toward school year tuition of the handicapped child at an approved specialized private school. Defendants admitted to a budget of $1350 per pupil per year for those residents who do attend school, of which only $820 was spent during the regular school year. Reply Memorandum, *supra* note 14, at 9-10. Plaintiffs also mentioned the inadequate amount spent per resident on health services as compared to the amount spent for mentally ill children in a state hospital. *Id.* at 11-12. Non-education of the handicapped poses even more of a threat, since "[w]ithout a well planned and structured education, these children, unlike others, may never learn." It proves costly not only to the child who suffers "[i]rretrievable learning losses and emotional distress" but also gives the parents the responsibility to furnish "alternative custodial or educational arrangements" and necessitates the continued cost of institutionalization for the state. Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995, 1003-04 (1972).

28. Comment, *Developments in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1125-29 (1969). *See also* note 29 *infra*.

29. Comment, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 107 (1973). Under this test, the court examines the right involved to determine whether it is fundamental. If held to be fundamental, then any classification which results in a limitation or prohibition on the exercise thereof by the members of the class, is held to be suspect and requires a compelling justification. Thus, had education been considered fundamental, the classification resulting from the difference in the per pupil expenditure might be subject to strict scrutiny. In any event, the failure of the educational program at Willowbrook to meet the needs of the retardate, while similar needs of noninstitutionalized retardates were met, would be subject to strict scrutiny.

30. 347 U.S. 483 (1954).

has not been recognized[31] as fundamental by federal courts.[32] Indeed, the Supreme Court, in *San Antonio Board of Education v. Rodriguez*,[33] denied the inclusion of education among those rights characterized as fundamental:

> While acknowledging the importance of education in society, and its connection to the ability to exercise meaningfully the fundamental rights of free speech and voting, these factors could not overcome the absence of any explicit constitutional recognition of a right to education.[34]

Once a court has decided that a right is not fundamental, a state is not required to show a compelling interest for classifying persons.[35] The state must, however, show a rational basis for its statute.[36] Since the right to education is not fundamental, the court considered whether the state's distinction between an institutionalized and non-institutionalized retarded child was irrational, thereby violating equal protection.[37] The court held that given the state's finite financial resources and budgetary considerations, the classification was rational and no requirement of fiscal neutrality was mandated.

Although the court rejected the plaintiffs' due process and equal protection arguments, relief was granted to the Willowbrook patients on the theory of a right to protection from harm.[38] While not specifically identifying the source of this right, the court noted that:

> The rights of Willowbrook residents may rest on the Eighth Amendment, the

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31. Comment, *Development in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1129 (1969). "Education . . . presents a more difficult task for justification of active review. . . . [J]udicial competence to deal with the complex problems that plague educational institutions is open to serious question. Moreover the difficulties of giving effect to decisions in this area are enormous.

32. In Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), a California court found education to be a fundamental interest. *Id.* at 605-10, 487 P.2d 1255-59, 96 Cal. Rptr. 615-19.

33. 411 U.S. 1 (1973).

34. Comment, *supra* note 29, at 111.

35. Comment, *Development in the Law, Equal Protection*, 82 HARV. L. REV. 1065, 1076-77, 1087-88, 1127-29.

36. *Id.* at 1082-83.

37. 357 F. Supp. at 763-64.

38. *Id.* at 764.

> due process clause of the Fourteenth Amendment or the equal protection clause of the Fourteenth Amendment (based on irrational discrimination between prisoners and innocent mentally retarded persons). It is not necessary now to determine which source of rights is controlling.[39]

Prior decisions indicate that improvements in living conditions within prisons have been enforced by the constitutionally mandated protection against cruel and unusual punishment,[40] which is directly applicable to the states through the due process clause of the fourteenth amendment.[41] Similarly, in cases where treatment of prisoners adjudicated as mentally incompetent proved necessary, treatment was mandated on eighth amendment grounds.[42]

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39. *Id.*

40. U.S. CONST. amend VIII. *See* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878) which illustrates the Court's difficulty in defining with exactness the extent of the protection from cruel and unusual punishment when examining the treatment of prisoners. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), restricted the use of the strap for disciplinary measures in an Arkansas state prison since such punishment violated the cruel and unusual punishment clause. Punishment, such as the use of solitary cells, has been banned in federal and state prisons. *See, e.g.*, Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Howard v. Smyth, 365 F.2d 428 (4th Cir.), *cert. denied*, 385 U.S. 988 (1966); Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965); Haynes v. Harris, 344 F.2d 463, 466 (8th Cir. 1965); Inmates of Boys' Training School v. Afflick, 346 F. Supp. 1354 (D.R.I. 1972).

41. U.S. CONST. amend XIV, § 1. The eighth amendment's guarantee against the infliction of cruel and unusual punishment has been held applicable to the states through the due process clause of the Fourteenth Amendment. *See, e.g.*, Powell v. Texas, 392 U.S. 514, 531-32 (1968); Robinson v. California, 370 U.S. 660, 666 (1962), and Mr. Justice Douglas's concurring opinion, *id.* at 675; Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947); Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967).

42. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972) which held that an untried defendant who had been committed as incompetent to stand trial could only be held for a reasonable period to determine whether he might attain competency within the foreseeable future, and any delay would be violative of due process. *See also* McNeil v. Director of Patuxent Institution, 407 U.S. 245 (1972), in which the Court, citing *Jackson*, rejected the state's holding of a petitioner for an indefinite period for "observation," and mandated that "[d]uration of the confinement . . . be strictly limited." *See also* Creek v. Stone, 379 F.2d 106, 111 (D.C. Cir. 1967) which mandated some attempt be made to relate the detention to the needs of the juvenile. Class actions have been brought for rehabilita-

Although many cases[43] now pending in the courts have sought the extension of a right to treatment[44] on various constitutional grounds, few decisions have been reached.[45] In the few cases dealing specifically with a constitutional right to treatment, the results have varied. In *Wyatt v. Stickney*,[46] a federal district court in Alabama

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tion programs for young people who are defined as "[persons] in need of supervision" under N.Y. FAMILY CT. ACT § 732 (McKinney 1963). *See, e.g.*, Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); Matter of Lloyd, 33 App. Div. 2d 385, 308 N.Y.S.2d 419 (1st Dep't 1970); People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 302 N.Y.S.2d 624 (2d Dep't 1969); People *ex rel.* Kaganovitch v. Wilkins, 23 App. Div. 2d 178, 259 N.Y.S.2d 462 (4th Dep't 1965); Anonymous v. People, 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1st Dep't 1964). In Rouse v. Cameron, 373 F.2d 451, 454-55 (D.C. Cir. 1966), Judge Bazelon found a Congressionally created right to treatment in the 1964 Hospitalization of the Mentally Ill Act, D.C. CODE ANN. § 21-562 (1967), a statutory right to treatment not only to those civilly committed to public mental institutions, but also for prisoners committed to mental institutions for the criminally insane, who may serve out their prison terms without receiving the care necessary to make release possible. *See also* Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966).

43. Cases presently pending, mandating a judicially enforced right to treatment include Ricci v. Greenblatt, Civ. No. 72-469 F (M.D. Mass., Feb. 11, 1972); Welsh v. Likens, Civ. No. 4-72 C. 451 (D. Minn., April, 1972); Horacek v. Exon, 357 F. Supp. 71 (1973); Saville v. Treadway, Civ. No. 6969 (M.D. Tenn., Apr. 10, 1973).

44. In Katz, *The Right to Treatment, An Enchanting Legal Fiction?* 36 U. CHI. L. REV. 755, 780 (1969), the author summarized the elements of a right to treatment as developed by the District of Columbia Circuit: "(1) The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so . . . (2) [T]he effort [must] be to provide treatment which is adequate in light of present knowledge, [though] the possibility of better treatment does not necessarily prove that the one provided is unsuitable or inadequate. . . . (3) [A]dequate number of psychiatric personnel; (4) [I]nitial and periodic inquiries [must be] made into the needs and conditions of the patient with a view to providing suitable treatment for him and that the program provided is suited to his particular needs."

45. *But see* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *additional relief mandated*, 344 F. Supp. 387 (M.D. Ala. 1972); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

46. 325 F. Supp. 781 (M.D. Ala. 1971).

mandated a right to treatment for those mental patients civilly committed, whether voluntarily or otherwise, in a state mental institution. In three rulings,[47] the district court judge set minimally acceptable treatment standards for Bryce Hospital,[48] a state institution, and later ordered the implementation of the standards[49] at Parlow,[50] a state institution for the mentally retarded. The court held that:

> [When] patients . . . involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. . . . [a]re so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. . . . [Absent] adequate and effective treatment . . . the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense."[51]

In *Burnham v. Department of Public Health*,[52] a federal district court in Georgia refused to extend a constitutional right to treat-

47. 325 F. Supp. at 781, determined that the programs of treatment at the Alabama state mental hospitals were insufficient, but reserved ruling to afford state officials six months in which to implement an adequate treatment program. 344 F. Supp. 373 (M.D. Ala. 1972) set the standards to be implemented at the Alabama state mental hospitals. 344 F. Supp. 387 (M.D. Ala. 1972) extended the implementation of the court ordered standards to Partlow, a state institution for the mentally retarded.

48. 325 F. Supp. at 781. *Wyatt* was the first case to define treatment in terms of habilitation, rather than in medical terms. Habilitation includes the nature of living conditions within an institution, including medication, diet, clothing, attendance by adequate staff, both in terms of quality and numbers. *See* Murdock, *supra* note 13, at 153-55.

49. 344 F. Supp. 373 (M.D. Ala. 1972). Judge Johnson used standards such as the American Psychiatric Association quantitative staff standards as criteria for the adequacy of treatment. *See* note 12 *supra*. Where the hospital failed to conform to the standards, Judge Johnson left open the possibility of private damages to be paid to the neglected patients. *See also* Note, 34 U. PITT. L. REV. 79, 86 (1972).

50. 344 F. Supp. at 387. The court concluded that those patients who are "civilly confined to public mental institutions" are entitled to the right to appropriate care whether mentally ill or mentally retarded. *Id.* at 390.

51. 325 F. Supp. at 784.

52. 349 F. Supp. 1335 (N.D. Ga. 1972).

ment based on civil rights statutes.[53] The court held that, in the absence of a federal statute mandating treatment standards, the plaintiffs, former patients of a Georgia mental institution, had failed to demonstrate a clear showing of deprivation of a federally protected right. Essentially the court felt that there existed "multiple adequate remedies at law available to the plaintiffs on an 'individual' basis through which redress may be obtained."[54] The court indicated that a determination in individual cases might be the only basis upon which the courts of Georgia could ascertain "whether 'treatment' or 'adequate care and treatment' is being afforded patients. . . ."[55]

Although recognizing the alternative approaches which have been applied in the right to treatment area, the court in *Association for Retarded Children v. Rockefeller*, withheld[56] taking a decisive step. Instead, limited relief guaranteeing Willowbrook patients protection against harm was ordered. The court, by the nature of the relief ordered, defined freedom from harm as limited to physical care, *i.e.*, " 'civilized standards of human decency' or the level of a 'tolerable living environment.' "[57] However, the decision fails to indicate where the right to protection from harm ends and the right to treat-

53. 28 U.S.C. § 1343 (1970) and 42 U.S.C. § 1983 (1970).

54. 349 F. Supp. at 1343.

55. *Id.*

56. While attempting to maintain a somewhat neutral stance in the developing controversy surrounding the right to treatment, Judge Judd noted that the *Wyatt* case, to some extent, was a joint effort on the part of the Alabama state hospital administrators and employees to bring pressure on the legislature. 357 F. Supp. at 760.

57. *Id.* at 765. This is apparent from the nature of the relief he provided under the right to be free from harm. The relief afforded was limited to physical improvements: "(1) A prohibition against seclusion . . . . (2) Immediate hiring of additional ward attendants [to care for the patients] . . . . (3) Immediate hiring of at least 85 more nurses [to care for the patients] . . . . (4) Immediate hiring of 30 more physical therapy personel [to administer care] . . . . (5) Immediate hiring of 15 additional physicians [to administer care] . . . . (6) Immediate hiring of sufficient recreation staff . . . . (7) Immediate and continuing repair of all inoperable toilets . . . . (8) Consummation within a reasonable time of a contract with an accredited hospital. . . ." *Id.* at 768-69. Noticeably lacking is any rehabilitation program.

ment begins. Presumably, the right to treatment is a higher standard and would require training programs and the like to be implemented.

It can be argued that the absence of programs which could lead to the eventual release of at least some of the retardates is harmful to these persons. Clearly, however, such harm was not recognized by the court. In establishing what the court determined to be acceptable conditions, particularly in terms of staffing within Willowbrook, the court neglected to detail the criteria used in formulating its requirements.[58] In light of this it would be difficult to determine whether mere compliance with the staffing ratios would actually accomplish a better living environment for the patients.

With time, the limited relief formulated by the court may prove inadequate in securing freedom from harm. Alternatives used in other cases might then prove appropriate. In *Wyatt*, the court appointed an independent administrator, a specialist within the area of mental illness, to implement the court's order.[59] When it was shown that the defendant had not succeeded in fulfilling the court order, more decisive action for insuring the defendant's cooperation was taken.[60]

In *Rockefeller*, the court assumed[61] the initial responsibility of supervising defendant's compliance with its order.[62] The success of this approach will determine whether more drastic steps will be needed to insure permanent improvement within the Willowbrook institution.

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58. *Id.*
59. 325 F. Supp. at 785-86.
60. 344 F. Supp. at 378.
61. 357 F. Supp. at 768.
62. The present decision has been clouded by a recent unpublished court order indicating that Judge Judd has reserved decision on the equal protection and right to treatment issues since neither had been litigated. Association for Retarded Children v. Rockefeller, Civil No. 72 Civ. 356-357 (E.D.N.Y., May 12, 1973).

CONSTITUTIONAL LAW—Blockbusting—Antiblockbusting Section of the Civil Rights Act of 1968 Held not Violative of First Amendment. Finding of "Group Pattern or Practice" Does Not Require a Showing of Conspiracy or Concerted Action. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

The Attorney General brought an action against Bobby L. Lawrence, president of Bob Lawrence Realty, Inc. and four other real estate brokers in Atlanta, Georgia to enjoin alleged violations of the anti-blockbusting provisions of the Fair Housing Act of 1968.[1] The complaint stated that the defendants had individually and collectively engaged in a pattern or practice to prevent the enjoyment of rights granted by the Act, and that a group of persons had been denied rights secured by the Act, raising an issue of general public importance. Defendants' agents allegedly had made unlawful representations to white homeowners concerning changes in the racial composition of their neighborhood in order to induce sales.[2]

The district court denied pre-trial motions by Lawrence and his co-defendants for summary judgment.[3] Prior to trial, consent judgments were entered against two of the defendants and the action was dismissed agains a third. At trial the district court found that

1. 42 U.S.C. § 3604 (1970) states: "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful— (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin." *See generally* 1968 U.S. CODE CONG. & ADM. NEWS, 90th Cong., 2d Sess. 1837; Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969); Comment, *The Federal Fair Housing Requirements: Title VIII of the 1968 Civil Rights Act*, 1969 DUKE L.J. 733, for a discussion of the legislative history and provisions of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (1970).

2. United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 117 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973).

3. United States v. Bob Lawrence Realty, Inc., 327 F. Supp. 487 (N.D. Ga. 1971); United States v. Mitchell, 327 F. Supp. 476 (N.D. Ga. 1971); and United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870 (N.D. Ga. 1970).

the representations in question were sufficient to constitute a "group pattern or practice" prohibited by the Act, and that the Attorney General had standing to bring the action.[4]

Only Lawrence appealed from the decision of the district court. He argued that section 3604(e) was unconstitutional under the first amendment, that the Attorney General lacked standing to maintain the action, and that the injunctive relief granted by the district court was improper.[5] The Court of Appeals for the Fifth Circuit affirmed, holding that the Act did not contravene the first amendment and that the Attorney General had standing because there existed a "group pattern or practice" in violation of the Act. The court also found the Act within the powers granted to Congress by the thirteenth amendment.[6]

Blockbusting is the practice of attempting to induce white homeowners to sell their homes by instilling in them fear that their neighborhood is undergoing a change in its racial composition which will depress property values and result in a general deterioration of the neighborhood.[7] The classic pattern is for a speculator to buy up

4. United States v. Mitchell, 335 F. Supp. 1004, 1006 (N.D. Ga. 1971). The court found that defendant's agents acted in "concert" such being necessary to establish a group pattern or practice. *Id.* 42 U.S.C. § 3613 (1970) provides: "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 subchapter, or that any group of persons has been denied any of the rights granted by this subchapter 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 subchapter."

5. 474 F.2d at 119.

6. *Id.* at 127.

7. *See* Note, 59 GEO. L.J. 170 (1970), *citing* Summer v. Teaneck, 53 N.J. 548, 551, 251 A.2d 761, 762 (1969); Contract Buyers League v. F & F Investment, 300 F. Supp. 210, 214 (N.D. Ill. 1969), *aff'd*, 420 F.2d 1191 (7th Cir. 1970); Chicago Real Estate Bd. v. Chicago, 36 Ill. 2d 530, 533, 224 N.E.2d 793, 797 (1967) for definitions of blockbusting.

homes in the panicked area at below-market prices and resell them to blacks or other minority group members at greatly inflated prices.[8] The white seller is injured by being frightened into selling at an artificially low price; the black buyer is injured by paying more than the fair market value; and the public is injured by the resentment which blockbusting engenders in both blacks and whites.[9] In *Bob Lawrence* white homeowners were induced to sell their homes by brokers who then acted as agents for the sellers. Profit results from numerous sales commissions earned as the neighborhood undergoes rapid change.[10]

Nonstatutory techniques to curb these practices have proven ineffective.[11] States have attempted to abate blockbusting by directly prohibiting those types of representations usually made by blockbusters,[12] by forbidding fraudulent representations to induce sales

8. Note, 59 GEO. L.J. 170 (1970). *See also* Vitchek, *Confessions of a Blockbuster*, SATURDAY EVENING POST, July 14, 1962, p. 15; and Glassberg, *Legal Control of Blockbusting*, 1972 URBAN L. ANN. 145 [hereinafter cited as Glassberg] for a description of how blockbusters operate.

9. Note, 59 GEO. L.J. 170 (1970). *See generally* Comment, 7 COLUM. J.L. & SOC. PROB. 538 (1971) for a discussion of the dynamics of blockbusting and its effects on both white sellers and black buyers; and Glassberg, *supra* note 8, at 148-52 which explores reasons for controlling blockbusting.

10. Note, 59 GEO. L.J. 170, 171 (1970); Glassberg, *supra* note 8, at 147-48.

11. *See* Note, 59 GEO. L.J. 170, 171-172 (1970) which points out that membership in real estate associations which enforce a code of ethics is voluntary and not a prerequisite to doing business and that self policing efforts by these associations have been ineffective. The note also describes neighborhood associations formed to fight against blockbusting. They are, however, limited to an educational function since they cannot control their members. Whether the tactics of these organizations prove successful will depend on the fortitude of the blockbuster, yet in light of 42 U.S.C. §§ 3601 *et seq.* (1970) they would now appear unnecessary.

12. MD. ANN. CODE art. 56, § 230A (1972); OHIO REV. CODE ANN. § 4112.02(H)(9) (Page Supp. 1972); WIS. STAT. ANN. § 101.22(2m) (1973), all of which provide for criminal sanctions but do not require that the representations be made for profit. KAN. STAT. ANN. § 44-1016(e) (Supp. 1972), however, includes a "for profit" provision; and MASS. ANN. LAWS ch. 112, § 87AAA(K) (Supp. 1972) provides only for suspension or revocation of a salesman's or broker's license.

or obtain listings,[13] by regulations resulting in loss or suspension of real estate licenses,[14] and by setting up human relations commissions with the power to investigate reports of blockbusting.[15] Localities have enacted ordinances designed to eliminate blockbusting such as by regulating the size and location of "For Sale" and "Sold" signs (the use of these signs is one of the blockbuster's panic-inducing weapons),[16] and by requiring a permit to conduct door to door solicitation.[17] A local ordinance which directly forbade blockbusting representations has been upheld.[18]

Private parties have also sought remedies against blockbusting activities. In *Contract Buyers League v. F & F Investment*,[19] black

13. VT. STAT. ANN. tit. 26, § 2295 (Supp. 1973).

14. N.Y. EXEC. LAW § 296(3) (McKinney 1972); CONN. GEN. STAT. REV. §§ 20-320(11), 20-328 (1968); D.C. CODE ANN. § 45-1408 (1968); N.J. STAT. ANN. § 45:15-1 *et seq.* (1963); PA. STAT. ANN. tit. 43, §§ 440 (Purdon's 1968).

15. PA. STAT. ANN. tit. 43, §§ 956-57 (Purdon's 1964).

16. Detroit, Mich., Ordinance 753-F (1962); Teaneck, N.J., Ordinance 1157 (1962) both of which are reproduced in 7 RACE REL. L. REP. 1260, 1262 (1962). *See also* Barrick Realty, Inc. v. Gary, 354 F. Supp. 126 (N.D. Ind. 1973) where an ordinance prohibiting display of a "For Sale" sign on premises in a residential area was upheld as a reasonable way to prevent blockbusting. *But cf.* People v. Diamond, 71 Misc. 2d 311, 335 N.Y.S.2d 711 (Long Beach City Ct. 1972) where such an ordinance was held unconstitutional.

17. *See* Summer v. Teaneck, 53 N.J. 548, 251 A.2d 761 (1969) where the valdity of a Teaneck, New Jersey regulation was upheld. *See* text accompanying note 7 *supra*. *See also* Annot., 34 A.L.R.3d 1432, 1435 (1970). In Breard v. Alexandria, 341 U.S. 622 (1961) the Court upheld an ordinance prohibiting door to door solicitation without invitation. New York City has empowered the Commission for Human Rights to declare neighborhoods "non-solicitation" areas for one year periods, subject to extensions. NEW YORK, N.Y., ADMIN. CODE ch. 493, §§ C1-4.0, C1-5.0 (1970). Such a statute was held unconstitutional by the Illinois Supreme Court in Illinois v. Tibbitts, 42 U.S.L.W. 2224 (Oct. 30, 1973). A discussion of New York attempts to fight blockbusting and a good analysis of the "non-solicitation" area appears in Comment, 7 COLUM. J.L. & SOC. PROB. 538 (1971).

18. Chicago Real Estate Bd. v. Chicago, 36 Ill. 2d 530, 224 N.E.2d 793 (1967), also discussed in Annot., 34 A.L.R.3d 1435-36 (1970).

19. 300 F. Supp. 210 (N.D. Ill. 1969), *noted in* 80 YALE L.J. 516 (1970).

buyers brought an action under 42 U.S.C. § 1982[20] claiming, *inter alia*, that defendants conspired to sell real property to plaintiffs at higher prices than would have been charged to whites. Their complaint alleged that the defendants engaged in blockbusting by initiating and encouraging rumors that blacks were about to move into the neighborhood, property values would fall, and the neighborhood would become unsafe for whites. The court held that plaintiffs had a cause of action under section 1982, even though blockbusting and discriminatory lending did not fall within the express terms of the section.[21]

Appellant's argument that Congress had no constitutional power to enact section 3604(e) was rejected by the court on the grounds that such authority flowed from section two of the thirteenth amendment.[22] The court relied on *Jones v. Alfred H. Mayer Co.*,[23] a landmark in civil rights decisions. In *Jones* the Supreme Court held that the Civil Rights Act of 1866[24] prohibited private as well as public racial discrimination in the sale or rental of real property.[25] Prior to *Jones* it was believed that the Act proscribed only racial discrimination which arose through "state action."[26] *Jones* made it

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20. 42 U.S.C. § 1982 (1970) provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." *See* the discussion of Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) at notes 23-30 *infra* and accompanying text. *Jones* applied this section to private conduct. The district court in *Contract Buyer's League* stated: "The Court [in *Jones*] thus understood Section 1982 as implementing the Thirteenth Amendment 'to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.' " 300 F. Supp. at 215.

21. 300 F. Supp. at 215.

22. U.S. CONST. amend. XIII provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. . . . Congress shall have power to enforce this article by appropriate legislation."

23. 392 U.S. 409 (1968).

24. *See* note 20 *supra*.

25. In *Jones* the defendant allegedly refused to sell a house to the petitioner solely because petitioner was a Negro. 392 U.S. at 412.

26. The Civil Rights Act of 1866 was passed pursuant to section 2 of

clear that congressional authority to pass the Act arose not from the fourteenth but from the thirteenth amendment,[27] thus eliminating the need for any "state action." In holding that the thirteenth amendment gave Congress this power, the Court stated:

> The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment "by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes. "By its own unaided force and effect" the Thirteenth Amendment "abolished slavery, and established universal freedom." Whether or not the Amendment itself did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed "Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.*"[28]

Although strongly criticized,[29] the *Jones* doctrine has been ex-

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the thirteenth amendment. Since it was feared that the Act may have been unconstitutional it was reenacted in 1870 subsequent to enactment of the fourteenth amendment. Consequently it was widely believed that the Act's constitutionality rested on the fourteenth rather than the thirteenth amendment. Therefore enforcement of the Act would only apply to "state action" since such was a requirement of the fourteenth amendment. *See* Comment, 17 LOYOLA L. REV. 79 (1970); Note, 82 HARV. L. REV. 1294 (1969); Comment, 23 MERCER L. REV. 519 (1972); Comment, 40 GEO. WASH. L. REV. 1024 (1972), dealing with § 1981 of the Act. The *Jones* decision itself describes the development of this area. 392 U.S. at 422-44. That the Equal Protection Clause of the fourteenth amendment does not reach conduct of private persons was reaffirmed in United States v. Guest, 383 U.S. 745 (1966).

27. 392 U.S. at 436-37 where the Court stated: "But it certainly does not follow that the adoption of the *Fourteenth Amendment* or the subsequent readoption of the Civil Rights Act were meant somehow to *limit* its application to state action. . . . [I]t would obviously make no sense to assume, without any historical support whatever, that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866" (emphasis in original).

28. *Id.* at 438-39, *quoting* from Civil Rights Cases, 109 U.S. 3 (1883) (citations omitted) (emphasis in original).

29. *See* Ervin, *Jones v. Alfred H. Mayer Co.: Judicial Activism Run Riot*, 22 VAND. L. REV. 485, 500-01 (1969), where the Court's view of the history of the Act as well as its reading of the thirteenth amendment is criticized; and 6 FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, HISTORY

panded.[30] In *Brown v. State Realty Co.*,[31] white homeowners brought an action against a real estate agency for a violation of section 3604(e),[32] claiming that defendants made unlawful representations to induce sales of property. The court, citing *Jones*, held the Act valid under the thirteenth amendment:

> [*Jones*] seems to constitute a pre-approval of the Fair Housing Title of the Civil Rights Act of 1968, of which the 'blockbusting' provision is a part.[33]

In *United States v. Mintzes*,[34] the Attorney General brought an action under 42 U.S.C. § 3613 to enjoin violations of section 3604(e). The defendant real estate agency had attempted to induce certain white homeowners to sell their property by representing that an "undesirable element" was moving into the neighborhood. The court, citing *Jones* and *Brown* granted injunctive relief and found section 3604(e) constitutional under the thirteenth amendment.[35] The court in *Bob Lawrence* also upheld the constitutionality of the section:

> We think that the mandate of *Jones* is clear. This Court will give great deference, as indeed it must, to the congressional determination that § 3604(e) will effectuate the purpose of the Thirteenth Amendment by aiding in the elimination of the "badges and incidents of slavery in the

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OF THE SUPREME COURT OF THE UNITED STATES 1257 (1971). For a criticism with a different view, *see* Note, 82 HARV. L. REV. 1294, 1321 (1969).

30. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971), *noted* in Note, 40 FORDHAM L. REV. 635 (1972); Note, 3 SETON HALL L. REV. 168 (1971); Note, 46 TULANE L. REV. 822 (1972). *See also* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

31. 304 F. Supp. 1236 (N.D. Ga. 1969).

32. 42 U.S.C. § 3612 (1970) gives a private cause of action to anyone injured by a violation of the Fair Housing title of the Civil Rights Act of 1968.

33. 304 F. Supp. at 1240. In *Jones*, the Court expressly stated: "Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law. . . . It does not refer explicitly to discrimination in financing arrangements or in the provision of brokerage services." 392 U.S. at 413. The Court went on to say: "Thus, although § 1982 contains none of the exemptions that Congress included in the Civil Rights Act of 1968, it would be a serious mistake to suppose that § 1982 in any way diminishes the significance of the law recently enacted by Congress." *Id.* at 415.

34. 304 F. Supp. 1305 (D. Md. 1969).

35. *Id.* at 1312-13.

> United States. . . ." Appellants have failed to present any argument that impugns the reasonableness of the congressional determination. Indeed, no such argument can be made in light of the role that blockbusting plays in creating and in perpetuating segregated housing patterns and thus in preventing "a dollar in the hands of a Negro . . . [from purchasing] the same thing as a dollar in the hands of a white man."[36]

The appellant in *Bob Lawrence* also contended that section 3604(e) constitutes an unconstitutional prior restraint on free speech in violation of the first amendment.[37] The fifth circuit rejected this contention on the grounds that the section regulates conduct, not speech, and "any inhibiting effect [the Act] may have upon speech is justified by the Government's interest in protecting its citizens from discriminatory housing practices . . . ."[38] The court went on to say, "Section 3604(e) regulates commercial activity, not speech. The statute is aimed at the commercial activities of those who would profiteer off the ills of society, conduct that the Thirteenth Amendment empowers Congress to regulate."[39] The court relied on *United States v. O'Brien*,[40] where the Supreme Court upheld petitioner's conviction for violating a federal statute by burning his draft card in an expression of opposition to the Viet Nam War. The court in *Bob Lawrence* concluded that section 3604(e) meets the criteria outlined by Chief Justice Warren in *O'Brien* for the regulation of conduct which is only incidentally speech:

> [G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[41]

Section 3604(e), enacted pursuant to the thirteenth amendment,[42] furthers the important governmental interest of "protecting . . .

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36. 474 F.2d at 120-21.
37. *Id.* at 121.
38. *Id.*, *quoting* from 313 F. Supp. at 872, a pre-trial *Bob Lawrence* opinion.
39. 474 F.2d at 121.
40. 391 U.S. 367 (1968).
41. *Id.* at 377.
42. *See* notes 22-36 *supra* and accompanying text.

citizens from discriminatory housing practices . . . ."[43] Moreover, the interest furthered is unrelated to speech and the incidental impact thereon is no greater than essential to that interest. This analysis assumes blockbusting to be a continuous process commencing with the inducement to sell and followed by the sale by the homeowner and the making of profit by the inducer.[44] The sale itself is not the conclusion of the process, but a means of furthering the blockbusting practice. However, the situation in *O'Brien* is readily distinguishable from that in *Bob Lawrence*. In *O'Brien*, the federal statute prohibited conduct which incidentally was a form of speech, albeit implied or symbolic speech. The statute involved in *Bob Lawrence* prohibits speech which is part of a commercial activity. This distinction does not undermine the decision in *Bob Lawrence*, for it is the thrust of *O'Brien* which should be decisive. Clearly Congress has the power, pursuant to the thirteenth amendment, to regulate activity which imposes a badge or incident of slavery.[45] With the enactment of section 3604(e) Congress found blockbusting to be such an activity.[46] Thus, where the activity is subject to regulation and involves speech, Congress may establish such limitations on speech necessary to effectuate the regulations. The court in *Bob*

43. 474 F.2d at 121 *citing* 313 F. Supp. at 872.

44. See the definition at text accompanying note 6 *supra*.

45. Civil Rights Cases, 109 U.S. 3, 20 (1883).

46. 474 F.2d at 120-21 (relying on *Jones*, 392 U.S. at 439 and *Brown*, 304 F. Supp. at 1240). There is, however, nothing in the legislative history of the statute to justify this contention. *See also* note 1 *supra*. But the court's conclusions may be supported by the following line of reasoning. In the Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court construed the thirteenth amendment to give Congress "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Id.* at 20. The Court in *Jones* upheld the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1970), as a valid exercise of Congress' thirteenth amendment powers to abolish the badges and incidents of slavery. In Hunter v. Erickson, 393 U.S. 385 (1968), the Court indicated that the Civil Rights Act of 1866 should be read together with the "far more detailed [Civil Rights] Act of 1968." *Id.* at 388. Thus, in *Erickson* the Court implicitly holds that the findings and purposes of Congress in enacting 42 U.S.C. § 3604(e) (1970) were based on thirteenth amendment considerations, *i.e.*, blockbusting imposes a badge or incident of slavery upon a segment of society.

Lawrence reached this conclusion by balancing the valid congressional interest in eliminating badges and incidents of slavery against first amendment rights. Its analysis is based on the assumption that section 3604(e) regulates conduct and, therefore, is within the conceptual limits of *O'Brien*.

To strengthen its "conduct" analysis, the court pointed to language in the statute proscribing only those representations made for profit. The court drew a distinction between speech uttered "for profit" and that which is not. To support this position, cases upholding the regulation of commercial speech were cited.[47] Under the court's reasoning, speech uttered for profit loses its character as speech and becomes conduct subject to regulation by Congress where a valid governmental interest is present.[48] Representations of the type prohibited under section 3604(e) made for the purpose of advocacy or social commentary would be protected by the first amendment if not made for profit.[49] Logically, therefore, any suppression of speech must go no further than is necessary to achieve the limited governmental purpose.[50]

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47. Valentine v. Chrestensen, 316 U.S. 52 (1942); Breard v. Alexandria, 341 U.S. 622 (1951); New York State Broadcasters Ass'n, Inc. v. United States, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

48. 474 F.2d at 122. The Court emphasized this change in character by enclosing the word *speech* in quotation marks at this point in the opinion.

49. *Id.* at 121-22: "We think the court in United States v. Mintzes . . . correctly analyzed the statute when it said: 'The words 'for profit,' as used in section 3604(e) include the purchase of property by prohibited means with the hope of selling it for a larger price, but the words are not limited to such a transaction. They were evidently included in § 3604(e) to distinguish and eliminate from the operation of that subsection statements made in social, political or other contexts, as distinguished from a commercial context, where the person making the representations hopes to obtain some financial gain as a result of the representations.' " *Id., quoting* 304 F. Supp. at 1312.

50. The court in State v. Wagner, 15 Md. App. 413, 291 A.2d 161 (Ct. Spec. App. 1972), *noted in* 77 DICKINSON L. REV. 425 (1973), was presented with a related issue. Here the statute under consideration prohibits block-

To bolster its analysis the court cited *United States v. Hunter*[51]

busting statements by a person "[w]hether or not acting for monetary gain." The Court of Special Appeals of Maryland found that the first amendment is not violated because where speech is an integral part of unlawful conduct it has no constitutional protection. The court cited *Bob Lawrence* (the 1970 pre-trial opinion) and *Chicago Real Estate Bd.* for this proposition. In *Bob Lawrence*, however, only speech made for profit is being regulated while in *Chicago Real Estate Bd.*, the ordinance limits itself to representations made in the course of soliciting sales. The Maryland statute would also apply in a non-blockbusting situation and prohibit a person from advising a neighbor to sell his home because of the entry of blacks into the area. Thus, it constitutes a complete bar to making the forbidden respresentations regardless of context. This seems to raise serious first amendment questions. The court in *Brown* also adopted this line of reasoning when it stated, "Nor does the fact that contact with the agents was initiated in some cases by the property owners or that the subject of Negro purchasers was in some cases first raised by the property owners change the result. The conduct condemned and the responsibility placed by the statute on the agent is to refrain absolutely from any such representations." 304 F. Supp. at 1241. The court in *Mintzes* seemed to recognize the issue: "The inclusion of statements made in social or political contexts would have raised serious First Amendment problems. Similar problems would arise if the Act were applied to an honest answer to a question put by the owner of a dwelling." 304 F. Supp. at 1312. The *Mintzes* court cited Abel v. Lomenzo, 25 App. Div. 2d 104, 267 N.Y.S.2d 265 (1st Dep't), *aff'd*, 18 N.Y.2d 619, 219 N.E.2d 287, 272 N.Y.S.2d 771 (1966), *discussed in* 34 A.L.R.3d 1438-39 (1970). The basis of *Abel* was the N.Y. REAL PROP. LAW art. 12A (McKinney 1968) which gives the Secretary of State the power to regulate the granting of broker's licenses. These licenses may be revoked by a showing of untrustworthiness on the part of the broker. In *Able* it was contended that a violation of the regulation against blockbusting is a demonstration of untrustworthiness. The *Mintzes* court cited *Abel* for the proposition that "as long as the information given by the brokers to those employing them 'is accurate and neither in content nor purpose seeks to encourage racial bias as regards housing, it is unexceptionable.' " 304 F. Supp. at 1312 n.3. This supports the assertion that an answer to a question posed by a homeowner concerning the influx of a minority group into a neighborhood would be outside the prohibition of the Act.

51. 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) which upheld the validity of 42 U.S.C. § 3604(c) (1970) which prohibits the publication of real estate advertisements that express a preference for or discrimination against persons of any race, color, or religion. The defendant in *Hunter* printed an advertisement for rooms in a "white home."

for the proposition that purely commercial advertising is afforded less first amendment protection than other forms of speech.[52] It also relied on *Mintzes*[53] to show that representations made "for profit" are within a commercial, as opposed to a social, political, or other context.[54] However, merely because a statement is made in a commercial context does not *ipso facto* deprive it of first amendment protection.[55] The major factor which determines whether speech in a commercial context may be controlled is content. If the content is political or artistic it will be fully protected regardless of the context;[56] but if the content is purely commercial, *i.e.* advocating

52. "It is now well settled that, while 'freedom of communicating information and disseminating opinion' enjoys the fullest protection of the First Amendment, 'the Constitution imposes no such restraint on government as respects purely commercial advertising.' " 459 F.2d at 211-12, *citing* Valentine v. Chrestensen, 316 U.S. 52 (1942); Breard v. Alexandria, 341 U.S. 622 (1951); New York State Broadcasters Ass'n, Inc. v. United States, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972).

53. *See* notes 34-35, & 50 *supra* and accompanying text.

54. 474 F.2d at 122. *See* note 50 *supra* and accompanying text.

55. *See* Breard v. Alexandria, 341 U.S. 622, 642: "[t]he fact that periodicals are sold does not put them beyond the protection of the First Amendment." In Ginsburg v. United States, 383 U.S. 463 (1966) the Court upheld a conviction for using the mails to distribute obscene material in violation of a federal statute. Justice Brennan writing for the majority stated, "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Id.* at 474. In New York Times v. Sullivan, 376 U.S. 254 (1964) the Court reversed the holding in a libel case where a newspaper was found to be liable for printing a political advertisement criticising a public official, stating, "[W]e hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement." *Id.* at 266.

56. *See* cases cited in note 52 *supra*. *See also* Pittsburgh Press v. Comm'n on Human Relations, 413 U.S. 376 (1973) for a comparison of the holding in *Valentine, supra* note 52, with the *Ginsburg* and *New York Times* cases, *supra* note 55. *Compare Valentine with* Jamison v. Texas, 318 U.S. 413 (1943), cited in *Bob Lawrence*, 474 F.2d at 122.

the purchase of goods or services, the speech may be regulated.[57] The court apparently recognized this distinction when it described the representations prohibited by section 3604(e) as "purely commercial speech."[58] The representations made by the blockbuster are commercial in the sense that he is advocating that his services be used to sell homes.

The line of precedent which allows regulation of purely commercial speech concerns advertising exclusively;[59] however, cases which have upheld the control of advertising have never totally prohibited the dissemination of the commercial message.[60] Section 3604(e) prohibits the forbidden representations for profit in any manner whatsoever, thus going far beyond what has previously been permissible advertising regulation. Though section 3604(e) might not survive a first amendment challenge attacking its total prohibition of a commercial message, it might well subsist as a properly enacted control of conduct. The speech involved may be suppressed as incidental to the control of conduct, and there should be no need to justify further this control by labelling the speech "commercial speech."

Appellant also attacked the standing of the Attorney General. The Fair Housing title of the Civil Rights Act of 1968 gives the Attorney General standing to sue persons dealing in real property for conduct violative of the Act where the dealer has engaged in an individual pattern or practice of blockbusting, or where he has par-

57. 474 F.2d at 122.

58. *Id.* The court seems to be confused on this point because it admits that the statements like those made by Lawrence may have had "informational value."

59. *See* note 52 *supra*.

60. In *Valentine* the handbill involved could have been printed in a magazine or a newspaper; likewise, cigarette commercials may appear in periodicals or on billboards despite the complete prohibition of cigarette advertising on radio and television that was upheld in *Capital Broadcasting*. In *Breard* the magazines which petitioner was prohibited from selling door-to-door were available on the newstands and the sales pitch could have been disseminated by mail or in any manner other than door-to-door soliciation. *See* Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1191-96 (1965) where it was pointed out that if no alternative means for learning about the availability of residences exist, at least for Negroes, the control of advertising means prohibition of content.

ticipated with others in a group pattern or pactice of blockbusting.[61] By tying the Attorney General's standing to a pattern or practice violative of the Act, there is an implicit limitation on that standing.

Appellant's motion for summary judgment was denied because questions of fact remained concerning the existence of coordinated efforts by defendants to make the prohibited representations.[62] If the defendants, acting independently, had engaged in isolated blockbusting activities the home owners would be left with their private remedy under the Act.[63] The lower court decided that for the Attorney General to have standing a coincidence of similar individual section 3604(e) violations would not be sufficient; there would have to be a pattern or practice on the part of the group acting together through a showing of some coordination of effort,[64] since "[a]ny less standard would provide the Attorney General with enforcement powers over the isolated acts of individual defendants acting independently of each other, merely because these persons' acts coincide in time or place with the acts of other violators."[65]

In the companion lower court case, *United States v. Mitchell*,[66] the court determined that "pattern or practice" does not mean acci-

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61. 42 U.S.C. § 3613 (1970). *See* note 4 *supra*.

62. 42 U.S.C. § 3613 (1970). The Attorney General also is granted standing whenever "any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance . . . ." The trial court held that there was insufficient evidence to raise an issue of general public importance and that, in any event, the individuals affected have a remedy under 42 U.S.C. § 3612 (1970). 335 F. Supp. at 1008. However, the court of appeals reversed stating: "The District Court's specific finding that appellant had violated § 3604(e) shows the denial of the rights of a group of persons, both black and white, to be free from racial inducements to sell and from the results of such racial inducements." 474 F.2d at 125 n.14. The court further indicated that it was for the Attorney General, not the court, to determine when an issue of general public importance justifying his intervention is raised. *Id.*

63. 42 U.S.C. § 3612 (1970). *See* note 32 *supra*.

64. 327 F. Supp. at 493.

65. *Id.* at 492-93. The court pointed out that the legislative history gave no guidance as to the meaning of the term. It styled its own view of the interpretation of "group pattern or practice" as the "plain meaning" interpretation.

66. 327 F. Supp. 476 (N.D. Ga. 1971).

dental, unintentional, or unusual representations, but instead the representations must be repeated, intentional and deliberate, and usual.[67] At trial, the evidence was held insufficient to support a finding of an individual pattern or practice by the defendants. However, the court did find that the defendant and non-defendant real estate agents alike acted in concert and knowingly engaged in a group pattern or practice thereby establishing "the necessary 'concert' of action to allow the Attorney General to bring this suit. . . ."[68]

What constitutes an individual pattern or practice has been considered in non-blockbusting cases brought under various Civil Rights Acts.[69] The most important of these was *United States v. Mayton*.[70] This case was brought for violations of 42 U.S.C. § 1971(e) which applies the phrase "pattern or practice" to interference with voting rights. In *Mayton*, the court drew upon a substantial body of legislative history concerning the meaning of the phrase: "The words *pattern or practice* were not intended to be words of art. No magic phrase need be said to set in train the remedy provided in § 1971(e). Congress so understood them."[71] *Mayton*'s interpretation of the phrase was accepted in the housing context in

67. *Id.* at 483. The court applied an objective test to the representations, *i.e.*, how would they be understood from the point of view of a reasonable man hearing them as to whether they were the type prohibited by the Act. *Id.* at 479.

68. 335 F. Supp. at 1006. It was found that there were four representations by agents of Mitchell, two by agents of Stanley, and four by agents of Lawrence.

69. Since the legislative history of the Civil Rights Act of 1968 gave no guidance as to the meaning of the term "pattern or practice" all of the § 3613 cases have looked to the prior Civil Rights Acts which use the same term, 42 U.S.C. § 2000a-5 (1970) and 42 U.S.C. § 2000e-6 (1970). Those cases likewise hold that a pattern or practice must entail more than an isolated or accidental incident. *See generally* United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. Gray, 315 F. Supp. 13 (D.R.I. 1970); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968). *See also* Annot., 13 A.L.R. Fed. 269 (1972) for a more extensive treatment of the meaning of the term pattern or practice.

70. 335 F.2d 153 (5th Cir. 1964).

71. *Id.* at 158.

United States v. West Peachtree Tenth Corp.[72] There "pattern or practice" was held to mean more than isolated or accidental events. However, the court did not imply that the number of incidents is determinative, but rather, that each case must turn on its own facts.[73] Thus when the fifth circuit considered *Bob Lawrence*, a body of law had developed dealing with individual patterns or practice. However, the two other federal anti-blockbusting cases, *Brown*[74] and *Mintzes*,[75] gave no guidance as to the meaning of "group pattern or practice." The former was brought by private citizens under section 3612, and the latter found only an individual pattern or practice.

The trial court in *Bob Lawrence* held that a finding of a group pattern or practice must rest on a "necessary concert" among the real estate brokers.[76] This seems to require some inter-broker knowledge of similar action by others. Thus the argument that a group pattern or practice could exist without such knowledge was rejected. Inter-broker knowledge would apparently be required even though homeowners in a neighborhood were exposed to numerous blockbusting representations from various individual brokers.

The court of appeals in *Bob Lawrence* reasserted the meaning of individual pattern or practice advanced in *West Peachtree*.[77] The court acknowledged that while a single act by a broker does not constitute an individual pattern or practice it may, under certain circumstances, involve the individual in a group pattern or practice.[78] The court went on to state that:

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72. 437 F.2d 221 (5th Cir. 1971). This case concerned a violation of 42 U.S.C. § 3604(a) (1970), where defendant refused to rent apartments in his building to blacks. The court found defendant's admission that his prior policy of discrimination remained unchanged after passage of the Civil Rights Act of 1968 was sufficient to establish a pattern or practice of discrimination.

73. *Id.* at 227.

74. *See* notes 31-33 *supra* and accompanying text.

75. *See* notes 34-35 *supra* and accompanying text.

76. 335 F. Supp. at 1006.

77. 474 F.2d at 123-24. *See* notes 71-72 *supra* and accompanying text.

78. *Id.* at 123. "Unless we are to construe the phrase 'group of persons' as totally superfluous, there is no need for each member of the 'group of persons' to be engaged in an 'individual pattern or practice' of violating the act before the Attorney General has standing to sue." *Id.*

> Blockbusting by its very nature does not require concerted action or a conspiracy to wreak its pernicious damage. . . . "If there be any doubt as to the meaning of the statute it is our function to construe the language of the statute so as to give effect to the intent of Congress. . . ." [A] group pattern or practice of blockbusting is established when a number of individuals utilize methods which violate § 3604(e).[79]

Thus an isolated violation by one person would not establish a group pattern or practice or confer standing on the Attorney General. If, however, there is a group of violators, each committing one violation without knowing that others are also violating the Act, a group pattern or practice is established, and the Attorney General has standing to sue.[80] The trial court did not require a showing of conspiracy in order to establish a group pattern or practice. However, the court of appeals went further when it eliminated the need for showing a "concert of action" or knowledge on the part of the individual defendants that others were engaging in the same activity.[81]

It appears that if *Jones* has any real meaning the finding is inescapable that Congress had the power to enact the Fair Housing title of the Civil Rights Act of 1968. But *Bob Lawrence* presents two very

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79. *Id.* at 124, *citing* Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc., 399 F.2d 1010, 1015 (5th Cir. 1968).

80. The Court's decision expands the standing of the Attorney General to sue. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), white apartment dwellers brought an action against the apartment owner for refusing to rent to blacks in violation of the Civil Rights Act of 1968. The court of appeals held that plaintiffs were not aggrieved persons and therefore had no standing. The Supreme Court in reversing held that the legislature intended for standing to be defined as broadly as possible in private suits, and went on to state, "So far as federal agencies are concerned only the Attorney General may sue; yet, as noted, he may sue only to correct 'a pattern or practice' of housing discrimination. That phrase 'a pattern or practice' creates some limiting factors in his authority which we need not stop to analyze." 409 U.S. at 210.

81. A similar situation arises with the concept of combination and conspiracy in the antitrust area. The cases require, in broad terms, some knowledge or mental element on the part of the defendants. However, similar conduct by various businessmen, *i.e.*, conscious parallelism, is not sufficient to support the agreement required for violation of the Sherman Act. *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962); Note, 1966 UTAH L. REV. 75; Note, 57 CAL. L. REV. 262 (1969).

difficult issues which have not yet been adequately decided. The first is the free speech problem arising from section 3604(e)'s direct prohibition of certain representations made in the course of blockbusting. The court's analysis of the problem leaves much to be desired and may well be subject to future challenge.

The second issue is the novel problem of defining "group pattern or practice." In finding Lawrence subject to the provisions of the Act even though he may have had no knowledge of the activities of other real estate agents, the court was on firmer ground. The consequence of this new interpretation is to close a very obvious loophole and increase the likelihood that the congressional intent to eliminate blockbusting and end all forms of racial discrimination in housing will be achieved.

CONSTITUTIONAL LAW—Sixth Amendment—Exclusion from Jury Selection of Residents of the Judicial District where a Crime is Committed Held Unconstitutional as a Denial of the Right to a Jury from the Vicinage. *People v. Jones*, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

Defendant Leon Jones, a Negro, was arrested for selling marijuana[1] in the 77th Street Los Angeles Police Department Precinct, and was brought to trial in the Southwest Superior Court District.[2] Jones moved[3] to transfer the trial to the Central Superior Court District[4] of Los Angeles County on the ground that the sixth and fourteenth amendments entitled him to be tried by a jury drawn from the district where the crimes occurred, and whose members would be familiar with the hair styles and clothing worn by young men in the area. The motion, along with several subsequent motions based on the same claim, were denied and Jones was convicted.

The intermediate appellate court rejected defendant's constitutional arguments and held that a jury drawn from anywhere within Los Angeles County satisfied the constitutional requirements of vicinage.[5] The court refused to define vicinage as requiring that a jury be picked from the precise area where the crime was committed.[6] On appeal, the California Supreme Court reversed and held that the sixth and fourteenth amendments required that Jones be tried by a

1. CAL. HEALTH & SAFETY CODE § 11360 (West Supp. 1974).

2. The 77th Street Los Angeles Police Department Precinct (77th Precinct) which had been part of the Southwest Superior Court district (Southwest District) became, by county ordinance, a part of the Central Superior Court district (Central District). As a result jurors who resided in the 77th Precinct served in the Central District. Due to court calendar backlog in this District, the presiding judge ordered the trial of all crimes committed in the Central District in the Southwest District. The jury empanelled in these cases was drawn from the Southwest District, thereby excluding all residents of the Central District. People v. Jones, 9 Cal. 3d 546, 548, 510 P.2d 705, 707, 108 Cal. Rptr. 345, 347 (1973).

3. *See* CAL. PENAL CODE §§ 1058-60 (West 1970).

4. The Central District had a population that was 31 percent Negro. 9 Cal. 3d at 548, 510 P.2d at 707, 108 Cal. Rptr. at 347. The Southwest District had a population that was 7 percent Negro. *Id.*

5. People v. Jones, 27 Cal. App. 3d 98, 103 Cal. Rptr. 475 (Ct. App. 1972), *rev'd*, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

6. *Id.* at 102, 103 Cal. Rptr. at 479.

jury of the "vicinage," which the court defined to be the district within the county where the crime was committed.[7] The court based its decision on the following principle:

> Although a jury drawn either from an entire county wherein the crime was committed or from that portion of a county wherein the crime was committed will satisfy the constitutional requirements of "an impartial jury of the State or district wherein the crime shall have been committed" a jury drawn from only a portion of a county, exclusive of the place of the commission of the crime, will not satisfy the requirement.[8]

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7. People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

8. *Id.* at 553, 510 P.2d at 710-11, 108 Cal. Rptr. at 350-51. *Cf.* People v. Scher, 76 Misc. 2d 71, 349 N.Y.S.2d 902 (Sup. Ct. 1973). This question is not free from difficulty and American courts have divided upon the issue. Jury of the vicinage has been held on statutory authority to mean jury of the county. *See, e.g.*, Murphy v. Supreme Ct., 294 N.Y. 440, 63 N.E. 2d 49 (1945). It has been held that exclusion of the residents of an entire county within a federal district to insure a fairer trial is within the discretion of the trial court. *See* Walker v. United States, 116 F.2d 458 (9th Cir. 1940). In a case with facts similar to *Jones*, it was held on due process grounds that no denial of rights existed since the jury was selected from an area within the court's jurisdiction. State v. Kappos, 189 N.W.2d 563 (Iowa 1971). *Cf.* United States v. Florence, 456 F.2d 46 (4th Cir.), *cert. denied*, 409 U.S. 983 (1972); State v. Clifton, 247 La. 495, 172 So. 2d 657 (1965). It has been held that no constitutional right is violated when jurors are selected from non-adjoining counties. Johnson v. Commonwealth, 391 S.W.2d 365 (Ky.), *cert. denied*, 383 U.S. 913 (1965). The principle of vicinage is to be distinguished from venue which is "the neighborhood . . . place or county in which an injury is declared to have been done, or fact declared to have happened. . . . [a]lso, the county (or geographical division) in which an action or prosecution is brought for trial, and which is to furnish the panel of jurors. . . . It [venue] relates only to the place where or territory within which either party may require a case to be tried. It has relation to convenience of litigants and may be waived or laid by consent of parties. . . ." BLACK'S LAW DICTIONARY 1727 (rev. 4th ed. 1968). *See* Panhandle Co. v. Federal Power Comm'n, 324 U.S. 635 (1945); United States v. Cores, 356 U.S. 405 (1958). In *Cores*, the Court discussed the following guidelines for laying venue: "The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed . . . [T]he Court must base its determination of the 'nature of the crime alleged and the location of the act or acts constituting it'. . . ." *Id.* at 407-08. FED. R. CRIM. P. 18 states:

In *Williams v. Florida*,[9] the Supreme Court traced the historical development of trial by jury at common law and concluded that not all features of the jury system had been embodied in the Constitution.[10] As to the right to be tried by a jury of the vicinage the Court commented: "Indeed, pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage'."[11] Ultimately, this concern led to the introduction of the jury trial provisions of the sixth and seventh amendments.[12] The words of the sixth amendment, "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" reflected a new definition of the "vicinage" requirement and was a compromise between broad and narrow definitions of the term. Implicitly, the new definition gave Congress the power to determine the size of the

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"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses." *See* United States v. Sorce, 308 F.2d 299 (4th Cir. 1962), *cert. denied*, 377 U.S. 957 (1964).

9. 399 U.S. 78 (1970).

10. *Id.* at 99.

11. *Id.* at 93. "[T]he Trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. CONST. art. III, § II, cl. 3.

12. 399 U.S. at 94. The Court explained, "As introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that: 'The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . .' The Amendment passed the House in substantially this form, but after more than a week of debate in the Senate it returned to the House considerably altered . . . [T]he Senate remained opposed to the vicinage requirement, partly because in its view the then-pending judiciary bill . . . [Judiciary Act of 1789] adequately preserved the common-law vicinage feature, making it unnecessary to freeze that requirement into the Constitution . . . . The version that finally emerged from the Committee was the version that ultimately became the Sixth Amendment. . . ." *Id.* at 94-96 (footnotes omitted). *See* JOURNAL OF WILLIAM MACLAY 144-51 (1927); 1 ANNALS OF CONGRESS 435 (1789).

"vicinage" by creating judicial districts.[13] The crucial issue underlying the holding in *Jones* is the fundamental question of what the framers of the constitution meant by "an impartial jury of the State and district wherein the crime shall have been committed."[14] American courts, both state and federal, have interpreted this clause in different ways.[15] Interwoven in the determination of the definitions of "state and district" are considerations of venue, jurisdiction and the proper application of the sixth amendment through the due process clause of the fourteenth amendment.[16]

The drafters of the sixth amendment, in seeking to limit the power of the federal government, did not contemplate application of these provisions to the states.[17] The words "state" and "district" referred to single statewide federal districts and the separate districts of two states, Virginia and Massachusetts.[18] Other federal districts could be and were subsequently created by Congress.[19] Today the concept of district means a federal jurisdictional district. Further congressional subdivision of a federal district[20] into divisions has been upheld under the sixth amendment vicinage requirement even though jurors were called from divisions within the district other than where the crime occurred.[21] In *Lafoon v. United*

13. 399 U.S. at 96.

14. U.S. CONST. amend. VI.

15. *See* note 8 *supra*.

16. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); People v. Jones 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1973).

17. Maryland v. Brown, 295 F. Supp. 63, 80 (D. Md. 1969).

18. *Id.*

19. *See* Mizell v. Vickrey, 36 F.2d 327 (10th Cir. 1929); Quinlan v. United States, 22 F.2d 95 (5th Cir. 1927).

20. The number of federal districts in each state and the number of divisions contained in each district within the state, if any, are provided for by statutes covering each of the fifty states. *See* 28 U.S.C. §§ 81-131 (1970). In 1911, Congress first enacted legislation to establish divisions of districts in many of the larger states for convenience of litigants and judicial officers. *See, e.g.*, 28 U.S.C. § 81 (1970) (Alabama); *id.* § 123 (1970) (Tennessee); *id.* § 124 (1970) (Texas).

21. So long as a division is really a division and not a district by another name, it is a venue established by Congress, not a vicinage fixed by the Constitution. Blume, *The Place of Trial of Criminal Cases*, 43 MICH. L. REV. 59, 67 (1944). *See* Clement v. United States, 149 F. 305 (8th Cir. 1906); McNealy v. Johnston, 100 F.2d 280 (9th Cir. 1938).

States,[22] the defendant robbed a bank in the Sherman Division of the Eastern District of Texas but was convicted in the Tyler Division of the district. He appealed claiming that he had not waived the venue of the Sherman Division. The court laid down the rule that "[T]he constitutional requirement for trial in the state and district of the offense does not apply to divisions within a district."[23] Therefore, the question of whether a trial is in one or another division of the same district is a question of venue and is not jurisdictional since jurors may be drawn from anywhere within the district.[24] Given the principle of *Lafoon*[25] and the applicability of the sixth amendment to the states through the fourteenth amendment, an argument can be made for applying the vicinage requirement on the state level as interpreted in *Lafoon*. This would mean that where a state judicial district is subdivided into divisions the constitutional vicinage requirement is not violated by drawing jurors from the district as a whole without reference to its various divisions.

In *People v. Jones* the districts were merely subdivisions of the Los Angeles Superior Court. The *Jones* holding requires that these districts be treated as the equivalent of federal districts. Consequently, an order[26] transferring part of one judicial district to another for venue purposes, but not vicinage, *i.e.*, juror selection,

22. 250 F.2d 958 (5th Cir. 1958).

23. *Id.* at 959. *See* FED. R. CRIM. P. 18; United States v. Ippolito, 223 F.2d 154 (5th Cir. 1955); McNealy v. Johnston, 100 F.2d 280 (9th Cir. 1938); United States v. Partin, 320 F. Supp. 275 (E.D. La. 1970); United States v. Katz, 78 F. Supp. 21 (M.D. Pa. 1948); 1 WRIGHT, FEDERAL PRACTICE AND PROCEDURE (Criminal), §§ 301-07 (1969).

24. Carrillo v. Squier, 137 F.2d 648 (9th Cir. 1943). In *Lafoon*, the jurors were all drawn from one division within the district.

25. *See* United States v. Partin, 320 F. Supp. 275, 278 (E.D. La. 1970).

26. LOS ANGELES COUNTY SUPER. CT. R. 2(5) *quoted at*, 9 Cal. 3d at 557 n.12, 510 P.2d at 718-19 n.12, 108 Cal. Rptr. at 358-59 n.12 provides: "Whenever, in the opinion of the Presiding Judge, the calendar in any district including the Central District, has become so congested as to jeopardize the right of a party to a speedy trial or to materially interfere with the proper handling of the judicial business in the district, he may order the transfer of one or more cases pending in that district to another district for trial or may order, for a limited period, that cases which may be filed in that district shall be filed in a different district."

would be invalid.[27] In so holding, the court rejected the principle of *Lafoon* and transformed the Central and Southwest Divisions of Los Angeles County, created for administrative convenience, into jurisdictional districts.

In *Maryland v. Brown*,[28] the defendant sought to have his case removed from state to federal court after the state had been granted a change of venue from a county where defendant was in danger of bodily harm. Interpreting the sixth amendment terms, "state and district," the federal district court stated: "The word county was used in section 29 of the first Judiciary Act. The words 'State and district' were used in the Sixth Amendment. A reading of the texts of that constitutional amendment and of that statute makes it clear that 'district' was not meant to connote 'county,' or vice versa."[29] The court went on to say: "[I]n addition, there would appear to be nothing in the federal Constitution to prevent a state from trying any criminal case anywhere within the state, with a state-wide jury or with a jury selected from residents of the jurisdiction in which the alleged offenses were committed."[30] The *Jones* holding appears to leave no room for a statewide jury and, to this extent, is inconsistent with *Brown*.

Vicinage is a personal right and may be waived by the defendant. Thus, where a defendant seeks a change of venue he is, in effect, waiving his right to a jury of the vicinage.[31] A court may in its discretion and upon proper motion by the state, force a waiver of the vicinage right. In *Brown*, the state secured a change of venue to a county with fewer black citizens, because Brown was in physical danger in the original county. Subsequently, the defendant[32] sought

27. 9 Cal. 3d at 553, 510 P.2d at 711, 108 Cal. Rptr. at 351.

28. *See* note 17 *supra*.

29. 295 F. Supp. at 81.

30. *Id.* at 83.

31. One court has listed the requirements for a valid waiver as: "[K]nowledge of the right [by the accused], the free exercise of an uncoerced will, and conduct or action known to the accused which evidences an intent to waive [*i.e.* presenting a motion for change of venue]." United States v. Marcello, 423 F.2d 993, 1004 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970). *See* Yeloushan v. United States, 339 F.2d 533 (5th Cir. 1964).

32. Brown was being prosecuted in Maryland state court on charges of inciting to riot.

to remove his trial from the state to the federal court. The federal court hearing the removal motion examined the guarantees of the sixth amendment and denied the removal motion, but granted the change of venue. By implication, the court did not find an absolute right to a jury of the vicinage even where, as in *Brown*, the state legislature had defined vicinage in terms of counties.[33]

A similar waiver is also possible under Rule 20 of the Federal Rules of Criminal Procedure.[34] Pursuant to Rule 20, if a defendant consents to a transfer of his case from the district where he was indicted to the district where he is apprehended, and enters a plea of guilty, he is held to have waived his sixth amendment right to a jury of the vicinage and cannot complain on appeal.[35]

In addition to the problem of waiver, the vicinage right is further complicated by the statutory doctrine of the "continuing offense."[36]

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33. "This Court does not believe that the concepts of due process or equal protection or any other federal constitutional provision including the Sixth Amendment prohibits removal of Brown's trial out of Cambridge by a Maryland state court on application by the state and over Brown's objection." 295 F. Supp. at 82.

34. FED. R. CRIM. P. 20(a) provides in part: "A defendant arrested or held in a district other than that in which the indictment or information is pending against him may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested or is held. . . ." *See, e.g.*, United States v. Gallagher, 183 F.2d 342 (3d Cir. 1950); Sons v. United States, 295 F. Supp. 642 (W.D. Okla. 1969).

35. In Hilderbrand v. United States, 304 F.2d 716 (10th Cir. 1962) defendant was indicted on a murder charge in the Western District of Washington and was apprehended in the district of Kansas. Pursuant to FED. R. CRIM. P. 20, he consented in writing to a transfer of his case to Kansas for entry of a plea of guilty and sentence. On appeal, appellant contended that Rule 20 was unconstitutional as it violated U.S. CONST. art. III, § 2 and U.S. CONST. amend. VI, and that consequently the Kansas district court lacked jurisdiction. The court concluded that Rule 20 was constitutional and treated the case as one of voluntary waiver. "[T]he constitutional provisions as to the place of trial relate to venue and are personal privileges which may be waived, as other privileges may be waived." 304 F.2d at 717. *Contra*, United States v. Bink, 74 F. Supp. 603, 616-617 (D. Ore. 1947).

36. 18 U.S.C. § 3237(a) (1970) provides in pertinent part: "Except as

Application of the doctrine, which can result in multiple venue, introduces yet another anomaly. The Supreme Court in *Travis v. United States*[37] selected Washington D.C. as the proper district for venue[38] even though the defendants resided[39] in Colorado and had begun the chain of criminal activity in that state. The holding apparently contradicts the basic reason for granting a trial by a local jury—judgment by the standards of the locality where the crime is committed.

In *Jones*, the California Supreme Court relied heavily on two cases, *Alvarado v. State*[40] and *Maryland v. Brown*,[41] to draw its guiding principle concerning the constitutional right to a jury of the vicinage.[42] The court relied on a dictum[43] in *Brown* which indicated

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otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. Any offense involving the use of mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

37. 364 U.S. 631 (1961). In this case, defendants were convicted of the crime of filing false non-communist affidavits.

38. *Id.* at 636. Commenting on 18 U.S.C. § 3237, the court acknowledged that multiple venue exists where there are crimes involving a continuously moving act. In such instances, the act for venue purposes is held to have been committed wherever the wrongdoer roamed. In addition, use of agencies of interstate commerce in the commission of a crime enables Congress to place venue in any district where a particular agency was used even if the personal presence of the offender in that district is lacking. *Id.* at 634-35.

39. *Cf.* United States v. Olen, 183 F. Supp. 212 (S.D.N.Y. 1960).

40. 486 P.2d 891 (Alas. 1971).

41. 295 F. Supp. 63 (D. Md. 1969).

42. "Although a jury drawn either from an entire county wherein the crime was committed or from that portion of a county wherein the crime was committed will satisfy the constitutional requirement of 'an impartial jury of the State and district wherein the crime shall have been committed' . . . a jury drawn from only a portion of a county, exclusive of the place of the commission of the crime, will not satisfy the requirement." 9 Cal. 3d at 553, 510 P.2d at 710-11, 108 Cal. Rptr. at 350-351.

that absent compelling reasons, residents of the district where the crime is committed must always be included in the group from which the jury is drawn.

An examination of *Alvarado* indicates that the *Jones* court was persuaded to follow a case which turned on a related but different premise, the right to "a fair possibility for obtaining a representative cross-section of the community."[44] In *Alvarado*, the defendant, a native Alaskan, was convicted of rape by a jury drawn from a population which excluded fifty-five native villages, including the scene of the offense. These villages contained 72 percent of the district's native population. In reversing the conviction the appellate court held:

> The narrow issue with which we are presented in this case, then, is whether in view of the . . . restriction on jury selection, Alvarado's jury panel was drawn from a fair cross section of the community. . . . Alvarado was not afforded an impartial jury as contemplated by the sixth amendment of the United States Constitution. . . . We . . . conclude that failure to provide Alvarado with an impartial jury constitutes a denial of his constitutional right to due process of law.[45]

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43. "[T]here would appear to be nothing in the federal Constitution to prevent a state from trying any criminal case anywhere within the state, with a state-wide jury or with a jury selected from residents of the jurisdiction in which the alleged offenses were committed. While there may be due process, equal protection, or other constitutional limitations on the power of a state governmental system arbitrarily to *exclude* from a jury panel residents of the jurisdiction in which the crimes have allegedly been committed, a defendant would seem to have no right to be tried by a jury which is selected from a population base which includes such residents if a fair and impartial jury cannot thereby be provided or if there are other sufficiently compelling reasons for excluding from the jury residents of that jurisdiction." 295 F. Supp. at 83.

44. Williams v. Florida, 399 U.S. at 100. *See* People v. Jones, 9 Cal. 3d 546, 510 P.2d 705, 108 Cal. Rptr. 345 (1972) (dissenting opinion). "[T]he term 'community' as used in cases discussing the issue of impartiality, is neither the geographical equivalent of, nor the lexical synonym of, a local inter-county district such as the Central District of Los Angeles. . . . [T]he appellant's jury panel did not exclude any 'significant element' or 'discernible class,' and consequently was not unreflective of a representative cross-section of the 'community.'" *Id.* at 562, 510 P.2d at 716, 108 Cal. Rptr. at 356 (dissenting opinion). *Cf.* United States v. Butera, 420 F.2d 564 (1st Cir. 1970).

45. 486 P.2d at 898-99.

While *Alvarado* did hold that the population from which the jury is drawn must encompass the location of the alleged offense, the court was really concerned with selecting a jury which represented a fair cross-section of the community. A jury which affirmatively excluded the defendant's ethnic group would not be a fair cross-section.[46] Moreover, unlike the defendant in *Jones*, Alvarado was able to show substantial prejudice as a result of the violation of his right to an impartial, representative jury.

In effect, the Alaska court in *Alvarado* adopted an approach which the United States Supreme Court had recognized earlier in *Williams v. Florida*:[47] "[T]he number on a jury should probably be large enough to . . . provide a fair possibility for obtaining a representative cross-section of the community."[48] The Court's analysis of a defendant's rights under the sixth amendment sought to insure treatment of the accused which would meet a standard of fundamental fairness.[49] On another occasion the Court held that the intentional and systematic exclusion of Negroes from grand jury service, solely on account of their race and color, denied a Negro defendant equal protection of the laws.[50] Read together the cases indicate that while a jury must be drawn from a fair cross-section of the community, no defendant may demand representatives of his racial or ethnic group on the jury before which he is tried.[51]

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46. *Id.* at 902. "Hence, we feel that in determining whether the source from which a given jury is selected represents a fair cross section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offense." *Id.*

47. *See* note 9 *supra*.

48. 399 U.S. at 100.

49. "The relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the trial." *Id.* at 99-100. *Cf.* Palko v. Connecticut, 302 U.S. 319 (1937).

50. Smith v. Texas, 311 U.S. 128 (1940); *See* Coleman v. Alabama, 389 U.S. 22 (1967); *Cf.* Glasser v. United States, 315 U.S. 60 (1942) which extended this right under the court's supervisory power over the federal courts to permit a defendant to challenge the arbitrary exclusion of his or any class from jury service. *See also* Peters v. Kiff, 407 U.S. 493, 500 n.9 (1972).

51. Hall v. United States, 168 F.2d 161, 164 (1948). *See* Williams v. Florida, 399 U.S. 78, 102 (1970) wherein the Court states: "Even the 12-man jury cannot insure representation of every distinct voice in the com-

In *Jones*, although petitioner was tried in the Central District where fewer Negro citizens resided, there was no claim or showing of systematic exclusion or the absence of a representative cross-section of the community. In *Alvarado*, the court held that it was unfair to exclude 72 percent of the district's native population for juror selection purposes since there were vast cultural differences between the people inhabiting Eskimo fishing villages[52] and those living in and near municipal Anchorage. The *Jones* court, by basing its decision on the right to a jury drawn from the district where the crime occurred, was clearly influenced by the right to an impartial representative jury. The right, however, had not been infringed since no significant cultural differences were shown which would require treating two adjacent districts of a single urban county as separate communities.[53] A different problem is raised when a black citizen commits a crime in an area populated almost exclusively by white citizens. In such a case the defendant may be eager to waive his constitutional right to a jury of the vicinage and rely on the discretionary remedy of a change of venue in order to secure a jury of his peers.

The difficulty faced by the California Supreme Court in *Jones* results from attempting to apply the term "district" in the sixth amendment on the state level. In *Jones*, Los Angeles County was divided into divisions for administrative convenience in a manner similar to that by which federal districts are divided into divisions by statute.[54] If such divisions within a federal district are not recognized as separate jurisdictions and vicinages, then the divisions of Los Angeles County should not be so recognized. In the event that county officials deliberately divide districts so that crimes committed by Negroes in predominantly Negro areas are tried in divisions

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munity, particularly given the use of the peremptory challenge." In New York use of the peremptory challenge is provided for by statute. *See* N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1971).

52. 486 P.2d at 894-895.

53. In *Alvarado*, the Eskimo village of Chignik and municipal Anchorage were divided by profound cultural differences in such areas as economy, language, religion and race. In *Jones* there were no such differences shown between the Central and Southwest Districts. 9 Cal. 3d 564, 557, 510 P.2d 705, 718, 108 Cal. Rptr. 345, 358 (dissenting opinion).

54. *See* note 20 *supra*.

populated solely by white citizens, relief could be afforded under the due process clause for either systematic exclusion or deprivation of a jury representing a fair cross-section of the community.[55] In *Jones*, the petitioner makes no claim of prejudice in his conviction, but simply asserts that he was denied a jury from the district wherein the crime was committed. In its holding the court agrees that no showing of prejudice is necessary. In a dictum, the court stated that even if the two judicial districts, one being the district where the alleged crime happened and the other being the district from which the jury was selected, had contained an identical proportion of Negroes, the defendant nevertheless would be entitled to a jury drawn from a panel including residents of the judicial district where the crime was committed.[56] This dictum is unsound since it advocates a blindly mechanical application of federal constitutional principles to the states without any regard for the policy upon which they are based—fairness for the criminal defendant.

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55. *See* note 44 *supra*.

56. 9 Cal. 3d at 555, 510 P.2d at 712, 108 Cal. Rptr. at 352.

CRIMINAL LAW—Multiple Jury Joint Trials—On the Joint Trial of Two Defendants, the Empanelling of Two Juries Simultaneously is Permissible. *United States v. Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973).

Sidman was indicted in federal court[1] on three separate counts of armed bank robbery in California. Counts 2 and 3 named two accomplices, Carroll and Clifford respectively.[2] The instant case dealt only with the trial on count 2 in which two juries were empanelled to try Sidman and Clifford simultaneously. When testimony probative as to Sidman, but prejudicial to Clifford was about to be admitted through cross-examination, the jury sitting in judgment of Clifford was excused. Upon completion of the prejudicial testimony, the Clifford jury was readmitted.[3] Both Sidman and Clifford were convicted by their respective juries. On appeal, Sidman's conviction was affirmed and Clifford's reversed.[4]

The concept of a jury trial originated in the English common law,[5] and was incorporated in principle into the United States Constitution.[6] In *Patton v. United States*,[7] the Supreme Court construed the

1. Because both banks were insured by the Federal Deposit Insurance Corporation, the federal courts had jurisdiction. 18 U.S.C. § 2113 (1970).

2. Carroll testified that he was also Sidman's accomplice on count 1, although he was not so charged. He plead guilty to count 3. United States v. Sidman, 470 F.2d 1158, 1160, 1161 (9th Cir. 1972). Carroll's testimony was significant in the separate trial and conviction of John Sidman for robberies one and three.

3. United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973).

4. *Id.* at 1163, 1171.

5. *See* M. J. BLOOMSTEIN, VERDICT: THE JURY SYSTEM (1968); F. H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT (1969).

6. U.S. CONST. art. III; *Id,* amend. VI, wherein the following provisions are noted: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," *Id.* art. III, § 2, cl. 3, and, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense," *Id.* amend. VI.

7. 281 U.S. 276 (1930).

phrase "trial by jury" to mean:

> a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . [t]hose elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.[8]

Today, the Federal Rules of Criminal Procedure outline the procedures to be followed in criminal proceedings:[9] Rule 23 permits trial with less than twelve jurors and trial without a jury in certain instances;[10] and Rule 43 requires the defendant be present at every stage of his trial.[11]

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8. *Id.* at 288; *See also* Coates v. Lawrence, 46 F. Supp. 414 (S.D. Ga.), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759 (1943), *citing the same definition* 46 F. Supp. at 423.

9. FED. R. CRIM. P. 1. "These rules govern the procedure in the courts of the United States and before the United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54." Rule 54 indicates geographic exceptions, limitation of "officer-ship" authority, removal proceedings, trials before commissioners and other non-substantive comments.

10. FED. R. CRIM. P. 23: "Trial by Jury or by the Court. (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government. (b) Jury of Less than 12. Juries shall be of twelve but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve. (c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein."

11. FED. R. CRIM. P. 43: "Presence of the Defendant. The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or

Although the basic right of trial by jury has been preserved throughout our history, certain procedural modifications, by necessity, have been adopted in judicial decisions. One such modification, of central importance to *Sidman*, concerns the limiting instruction. When two defendants are tried simultaneously, certain evidence may be admissible against one and not the other. In the past, this problem was overcome through the use of the limiting instruction. The judge would instruct the jury that the evidence is admitted only against the one defendant and is to be disregarded with respect to the other. During the *Sidman* pre-trial stages, it became evident that Carroll, Sidman's confessed accomplice in robberies one and three, would be delivering testimony that was potentially prejudicial to Clifford. In a conversation with Carroll, Sidman had stated that his associate in robbery number two was Clifford. Carroll's testimony was admissible against Sidman as an admission but inadmissible against Clifford due to the hearsay rule. In the past the limiting instruction would have been used in this situation.

As late as 1957, in *Delli Paoli v. United States*,[12] the Supreme Court held that the use of the limiting instruction in a joint trial was sufficient to enable the jury to disregard a co-defendant's extrajudicial post-conspiracy statement inculpating another co-defendant. *Delli Paoli* involved a joint trial of five defendants, during which Delli Paoli was inculpated by the confession of his co-defendant. The Supreme Court found that the confession was admissible against the co-defendant and that prejudice to Dell Paoli was avoided by the limiting instructions. The Court presumed that the jury was capable of following the instructions and found that no rights of the defendant had been infringed. The confession, which merely corroborated what the prosecution had previously established, was not introduced until the end of the government's case and there was no evidence of jury confusion.

The limiting instruction had been widely criticized before *Delli Paoli*. Judge Learned Hand had addressed the problem several

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both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."

12. 352 U.S. 232, 240, 241 (1957).

times. Such an instruction, he stated, is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's."[13] "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay."[14] "[I]t is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition."[15] Justice Frankfurter, dissenting in *Delli Paoli*,[16] described the limiting instruction as "intrinsically ineffective" and as a "futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell."[17]

In 1968, *Bruton v. United States*,[18] overruled *Delli Paoli*[19] when the Court found that the limiting instructions were insufficient to protect the defendant. Bruton and Evans were tried jointly and convicted of armed postal robbery. At the trial, a postal inspector testified that Evans had orally confessed that he and Bruton had committed the robbery. Since Evans did not testify, Bruton could not cross-examine him on the accuracy of his confession. The jury was clearly instructed[20] that, while the confession was admissible against Evans,[21] it was inadmissible and could not be considered as

13. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932).

14. United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948).

15. Delli Paoli v. United States, 229 F.2d 319, 321 (2d Cir. 1956).

16. 352 U.S. 232, 246 (1957).

17. *Id.* at 247.

18. 391 U.S. 123 (1968).

19. *Id.* at 126.

20. In regard to the confession of co-defendant Evans, the trial court instructed the jury that the confession, "if used, can only be used against defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay." The judge again instructed the jury at the trial's conclusion: "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way party to the confession. Therefore . . . you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton." *Id.* at 125 n.2.

21. Under the controlling view towards admissions being an exception to the hearsay rule, Evans' extrajudicial statements were admissible against him. *See generally*, Morgan, *Admissions as an Exception to the*

evidence against Bruton. On certiorari, the Court reversed. It held that due to the substantial risk that the jury had disregarded the trial judge's instruction and considered Evans' incriminating statements as evidence against Bruton, the admission of the Evans confession violated Bruton's right of cross-examination secured by the confrontation clause of the sixth amendment.[22]

In *Bruton*, the Court determined that a thought implanted in the minds of the jurors could not be removed by a mere instruction from the bench. Mr. Justice Stewart, in his concurring opinion in *Bruton*, succinctly summarized the decision: "A basic premise . . . is that certain kinds of hearsay are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give."[23]

Cautioned by the Court's holding in *Bruton* regarding the limiting instruction, the *Sidman* court faced what it termed "the Bruton problem"[24] by empanelling two separate juries to try Sidman and Clifford at the same time. When evidence inadmissible against one defendant but admissible against the other was to be presented, the jury for the former defendant would retire from the courtroom. One of the first questions addressed was the constitutional soundness of multiple jury joint trials. Generally, the concept of trying more than one defendant simultaneously is unusual in our jurisprudential tradition.[25] Nevertheless, the ubiquitous problems of burdened trial dockets, overworked courts, and the necessity of speedy disposition of criminal cases makes joint trials desirable. As the Supreme Court stated in *Kotteakos v. United States*,[26] "[t]here are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried

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Hearsay Rule, 30 YALE L.J. 355 (1921). *See also* C. MCCORMICK, EVIDENCE § 262 (2d ed. 1972).

22. The sixth amendment of the Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *See* note 6 *supra*.

23. Bruton v. United States, 391 U.S. at 138.

24. 470 F.2d at 1167.

25. *See* Kotteakos v. United States, 328 U.S. 750 (1946). "[T]he proceedings are exceptional to our tradition. . . ." *Id.* at 773.

26. 328 U.S. 750 (1946).

together. . . . [W]hen many conspire, they invite mass trial . . . ."[27]

At the *Sidman* trial, it was emphasized by the government that a multiple jury joint trial would serve to save the time of the witnesses, jurors and the courts.[28]

As previously noted, the sixth amendment guarantees the right of confrontation.[29] In any joint trial, the prosecution runs the risk of improperly admitting testimony prejudicial to one of the several defendants. Any method used to introduce that evidence in a non-prejudicial fashion, which sacrifices a defendant's right of confrontation, will be severely criticized and may lead to reversal. The joint trial method results in the desired speed and economy but it cannot be allowed to deprive the defendant of constitutionally guaranteed rights. As Justice Lehman noted in his dissent in *People v. Fisher*:[30]

> We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them. . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.[31]

Both Sidman and Clifford were convicted by their respective juries, and both appealed.[32] Sidman's appeal stressed that his trial was experimental, that certain procedures had stultified his counsel, that his right to public trial had been violated because the use of two juries resulted in public exclusion *pro tanto*, and that the *Sidman* jury was denied the right to hear the testimony of Clifford.[33] Clifford contended the *Bruton* rule had been violated in his case, despite the specific effort made to avoid the *Bruton* problem.[34] Both

27. *Id.* at 773.
28. 470 F.2d at 1170.
29. *See* note 22 *supra* and accompanying text.
30. 249 N.Y. 419, 164 N.E. 336 (1928).
31. *Id.* at 432, 164 N.E. at 341.
32. *See* note 4 *supra* and accompanying text.
33. 470 F.2d at 1168-70.
34. *Id.* at 1170. Clifford's theory was that testimony inapplicable to him was admitted in the presence of his jury over his hearsay objection, thereby causing irreparable damage. The balance of the evidence against

appeals were ordered consolidated and the court considered each appeal *seriatim*.

The court first answered Sidman's allegations. The challenge based on alleged experimentation was dismissed, because adequate safeguards were maintained. Fair new procedures which facilitated proper fact finding were allowable, despite any lack of precedent.[35] The criticism directed at the alleged stultification of Sidman's counsel was also dismissed. The court of appeals found that counsel "had the extraordinary advantage of cross-examining Carroll in front of the Clifford jury without the least danger of hurting his defense of Sidman, since the Sidman jury was not present, and, armed with what he learned, he cautiously and adroitly cross-examined Carroll before the Sidman jury . . . . Instead of stultifying counsel, it made him prudent and perspicacious."[36] Sidman's contention that the public was excluded *pro tanto* by having two juries hear his case simultaneously, thereby taking up more space, was held to be inaccurate, since the second jury took up very little room.[37] The fact that Sidman, as was his right, chose not to call Clifford as a witness, negated any merit in the charge that the Sidman jury did not hear Clifford's testimony.[38] Finding no error, Sidman's conviction was affirmed.[39]

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him was insubstantial and his conviction indicated that the limiting instruction from the bench had been disregarded.

35. *But see* Byrne v. Matczak, 254 F.2d 525 (3d Cir. 1958). In a civil wrongful death action prior to the reaching of the verdict, the jury was permitted to disperse after being admonished not to discuss the case with anyone. Upon being assembled the following day, they stated, that they had not discussed the case with anyone and reached a verdict seven hours later. It was held not to be an abuse of discretion and not prejudicial. *Id.* at 529. *See also* text accompanying note 12 *supra*. Different and complex trials may call for liberal use of the judge's discretion in managing the trial. In Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957), the trial court was held to have the discretion to permit a jury to separate after daily deliberations in a homicide case if the separation was attended with those precautions necessary to secure entire freedom from external influences. *Id.* at 612.

36. 470 F.2d at 1169-70.

37. *Id.* at 1170.

38. *Id.*

39. *Id.*

The Clifford conviction, however, despite the careful employment of safeguards, was reversed on appeal.[40] Although conspiracy was not alleged, Sidman and Clifford had been jointly charged with robbing the Valley National Bank and were being jointly tried for the crime. Testimony admitted against them collectively had to conform to the rules of evidence governing testimony admitted in a conspiracy. As was stated in *Kay v. United States*,[41] "[w]here, as in *Bruton*, the chief objective of the conspiracy has ended, either in success or failure, the extra-judicial statements of a co-defendant are not admissible."[42] There was no relationship or conspiracy between Carroll and Clifford.[43] Therefore, if Carroll were to offer admissible testimony about statements by Sidman implicating Clifford, such statements would have to have been made at a time prior to the termination of the Sidman/Clifford criminal venture. In terms of the admissibility of the evidence and the preservation of Clifford's rights, the time when the conspiracy ended became crucial.

During the prosecution's redirect examination of Carroll, (the government's witness), in the presence of the Clifford jury, the prosecutor asked Carroll: " 'What did Mr. Sidman tell you in regard to the robbery of the bank on February 20, 1970?' Defense counsel's hearsay objection was overruled and Carroll replied, '[h]e told me that him and Mr. Clifford robbed it.' "[44] Since the Sidman/Clifford relationship had terminated prior to the time of this conversation its admission proved fatal. Judge Murphy, writing for the majority of the appellate court, stated: "We cannot say that the *Bruton* error was harmless beyond a reasonable doubt. Other evidence linking Clifford to the robbery was not overwhelming."[45]

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40. *Id.* at 1171.

41. 421 F.2d 1007 (9th Cir. 1970).

42. *Id.* at 1010. *See also* 4 J. WIGMORE, EVIDENCE § 1079 (J. Chadbourn rev. ed. 1972); C. MCCORMICK, EVIDENCE § 267 (2d ed. 1972).

43. *See* note 45 *infra.*

44. 470 F.2d at 1170.

45. *Id.* at 1171. The appellate court's description of the admission of this fatal error continues: "Testimony by two eyewitnesses who identified Clifford as one of the robbers was not strong. The remaining evidence was Carroll's testimony that Clifford [*sic*] told him that he and Sidman [*sic*] robbed the bank. The jury's assessment of this evidence, had it not heard

It is ironic that, while the court attempted to obviate the Bruton problem through the multiple jury joint trial concept, error still occurred. However, this error could have been avoided with greater care. The testimony should have been admitted in the presence of the Sidman jury only. The reversal of Clifford's conviction indicates an evidentiary mistake rather than a basic flaw in the concept of multiple juries.

The court of appeals did note several theoretical problems not raised in the Sidman appeal. It is possible that the safeguards, such as concern for jury selection,[46] will overwhelm the economies of the approach. If concern over the economies of time is divided into three categories—jury, witness, and the court—the court's is of paramount concern. If the court must expend too great a time in providing safeguards the joint trial victory would be pyrrhic.

The appellate court further noted that the *Sidman* court did not place a limit on the number of juries which could be convened at the same time. The use of more than two juries could result in exclusion of the public, which might be considered a constitutional violation.[47] The possible unwieldliness in the administration of more than two juries should also be considered.

Related to the problems in the administration of the trial is a potential subtle advantage one defendant may gain over another. When a co-defendant's jury is temporarily excused due to prejudicial matter to be presented, his attorney may nevertheless cross examine the witnesses called. Armed with what he learns, the counsel may subsequently have the opportunity to question the sane witnesses before his client's own jury. This apparently occurred during the *Sidman* trial, yet the court merely commented on the prac-

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Carroll testify to Sidman's confession, is highly problematical." *Id.* The record is silent as to any such conversation. Carroll never had any relationship with Clifford. The record reveals it was Sidman who had the conversation with Carroll. *Id.* All references to this conversation, coupled with the spirit of the decision, make it difficult to avoid the conclusion that the statement of the court contains a typing error, i.e. the names have been transposed. Read the way it appears it is a meaningless statement.

46. *Id.* at 1168. The judge was forced to repeat his general voir dire when the panel of veniremen was exhausted before the selection of the Sidman jury, and more veniremen were required.

47. *See* note 33 *supra* and accompanying text.

tice,[48] and did not explain why Sidman's attorney had this extraordinary advantage. Since Sidman stood only to gain, his objection was misplaced. Any possible objection should have been made by Clifford, who did not receive the same advantage. Further, there is also the danger of permitting one defendant's counsel to glimpse the tactics of the prosecutor in the trial of the co-defendant.[49]

Although the procedure was upheld, the trial court set out no guidelines, an omission which was criticized by the court of appeals. Guidelines must be incorporated before the concept can be consistently relied on. Meticulous explanations by the judge during trial can be employed,[50] and attention should be paid to some of the points raised by this appeal.[51] Section 207 of the United States Code,[52] and Rules 57[53] and 50[54] of the Federal Rules of Criminal

48. 470 F.2d at 1169, 1170.

49. In the *Bruton* decision, Mr. Justice White's dissent noted "the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried." 391 U.S. at 143 (White, J., dissenting).

50. 470 F.2d at 1168. "The Judge was meticulous in explaining to the entire panel and to each jury that there would be two juries, one to try the guilt or innocence of Sidman and the other to try the guilt or innocence of Clifford, and instructed each jury not to talk to anyone about the trial and particularly not to talk to any of the other jurors in the other case. He even gave an appellation to each jury, that is, one he called the Clifford jury and the other the Sidman jury . . . . on oral argument . . . one jury sat in the regular jury box and the other jury in chairs immediately in front of the jury box."

51. *See* notes 35-38 *supra* and accompanying text.

52. 28 U.S.C. § 2071 (1970): "Rule-making power generally. The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

53. FED. R. CRIM. P. 57: Rules of the Court. "(a) Rules by District Court and Courts of Appeals. Rules made by district courts and courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules as provided

Procedure, all dealing with the court's rule making and administrative powers, must also be considered.

It is submitted that the multiple jury joint trial is not a panacea and to treat it as such will undoubtedly pervert its usefulness. It is a modification of the jury trial concept, much like numerous other modifications previously mentioned.[55] Given particular circumstances, it can be a smooth alternative to an unnecessary expenditure of time. The idea, however, desperately needs direction. It was for this reason that the appellate court, while upholding the conviction, did not endorse the procedure.[56] This "reserved" approval has apparently been accepted by the Supreme Court,[57] but acceptable guidelines must be promulgated if multiple jury joint trial are to be endorsed without qualifications.

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herein be published promptly and that copies of them be made available to the public. (b) Procedure not Otherwise Specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

54. FED. R. CRIM. P. 50: "Calendars. The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable."

55. *See* notes 5 - 9 *supra* and accompanying text.

56. 470 F.2d at 1170.

57. On January 15, 1973, the Supreme Court denied *certiorari*, 409 U.S. 1127.

ENVIRONMENTAL LAW—Statutory Interpretation—Factors to be Considered in Making a Threshold Determination that an Environmental Impact Statement Is Necessary Under the National Environmental Policy Act of 1969.

The National Environmental Policy Act (NEPA)[1] was passed by Congress in 1969 as part of an effort to protect the environment.[2] The purposes of NEPA are to declare a policy which will promote efforts to protect the environment, to stimulate the health and welfare of man, and to enrich the understanding of the natural resources important to the nation.[3] NEPA requires all federal agencies to develop decision making procedures that include an evaluation of factors the agency will consider in deciding whether a proposed agency action will significantly affect the "human environment."[4]

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1. 42 U.S.C. §§ 4321-47 (1970).

2. *Id.* § 4321. One of the purposes of NEPA is to "stimulate the health and welfare of man. . . ." *Id.* Therefore, the congressional power to enact NEPA is derived from its power to provide for the general welfare under U.S. CONST. art. I, § 8.

3. 42 U.S.C. § 4321 (1970). "The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation. . . ." *Id.* In section 101 of NEPA, Congress declares that it recognizes "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man. . . ." 42 U.S.C. § 4331 (1970).

4. *Id.* § 4332 (1970). The relevant portions of § 102 of NEPA provide: "The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-

The agencies are required to prepare an environmental impact statement whenever their "threshold determination" indicates that a proposed action will "significantly [affect] the quality of the human environment."[5] This "threshold determination" is important since it will determine whether a federal agency can immediately begin its proposed action or whether it will have to make a more detailed investigation and prepare an environmental impact statement. The statement must include a report on the unavoidable effects that a proposed action will have on the human environment,

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chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations; (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved . . . . (D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . . (G) initiate and utilize ecological information in the planning and development of resource-oriented projects. . . ." *Id.* Under NEPA, a federal agency contemplating an action must make a threshold determination of whether an environmental impact statement is required. This determination must be made before the federal agency considers the possible future impact of its proposed actions on the human environment. The deciding factor in the threshold determination is whether or not the proposed action is a "major Federal action significantly affecting the quality of the human environment. . . ." *Id.* Prior federal conservation laws are of no help in this area. None of them refer to the term "environment." 16 U.S.C. §§ 1-1021 (1970). The meaning of "significant" is also important. *See* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

5. 42 U.S.C. § 4332(2)(C) (1970).

the relationship between local short-term uses of man's environment and the maintenance of long-term productivity, and any irreversible commitments of resources resulting from the proposed action.[6] This note will examine a basic problem in the application of NEPA—what factors are to be considered in making a threshold determination that an action will significantly affect the quality of the "human environment."

The Council on Environmental Quality (CEQ),[7] a supervisory board established by NEPA to advise the President on environmental matters, has not specified the factors to be considered by a federal agency in making a threshold determination.[8] The President, in articulating the purpose and policy of NEPA, has also failed to define these factors.[9] Some commentators claim that by writing broad goals into NEPA and by not prescribing the factors to be considered in defining the concept of "human environment," Congress "invited ambiguity in the enforcement process and contradic-

6. *See* note 4 *supra* and accompanying text.

7. 42 U.S.C. § 4342 (1970).

8. 14 C.F.R. § 1204.1103(A)(2) (1973). "[T]he statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed [by agencies] with a view to the overall, cumulative impact of the action proposed (and to further actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment of a local area may be significantly affected, the statement is to be prepared. Proposed actions,the environmental impact of which is likely to be highly controversial, should be covered in all cases." *Id.*

9. Exec. Order No. 11514, PROTECTION AND ENHANCEMENT OF ENVIRONMENTAL QUALITY, 3 C.F.R. 285 (1973), 42 U.S.C. § 4321 (1970). In this Executive Order, the President sets out eleven responsibilities of the Council on Environmental Quality. One responsibility is to "[p]romote the development and use of indices and monitoring systems (1) to assess environmental conditions and trends, (2) to predict the environmental impact of proposed public and private actions, and (3) to determine the effectiveness of programs for protecting and enhancing environmental quality." *Id.* at 286. Another responsibility set out is that the Council on Environmental Quality (CEQ) shall "[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act." *Id.* Excerpts from the CEQ guidelines are reprinted in note 8 *supra*.

tions in the courts."[10] Federal agencies, unable to discern the meaning of "human environment," have had difficulty in deciding what factors to consider in making the threshold determination that an impact statement is required.[11] Are federal agencies, under NEPA, to consider only such things as pollution, population congestion, and similar items, *i.e.* "physical" factors; or must they also consider factors such as increased risk of crime[12] and other "social" factors?[13]

10. The Wall St. Journal, Aug. 23, 1973, at 16, col. 1. NEPA "is woefully ambiguous as it relates to the work of the independent regulatory agencies, and it is an invitation to litigation to which numerous 'public interest' intervenors in agency cases have already responded with alacrity." Voigt, *The National Environmental Policy Act and the Independent Regulatory Agency: Some Unresolved Conflicts*, 5 NATURAL RESOURCES LAW. 13 (1972) (footnote omitted).

11. *See, e.g.*, Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir.), cert. denied, 409 U.S. 990 (1972).

12. *See* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972).

13. It has been acknowledged that the federal agencies' task is "magnified further when the definition of 'environment' takes in physical, esthetic, social and cultural values." The Wall St. Journal, Aug. 23, 1973, at 16, col. 2. This distinction between so-called "physical" factors and "esthetic, social and cultural" factors is also important to ensure that federal agencies acting under NEPA do not encroach on local government's zoning powers. Closely akin to the environmental considerations required by NEPA are the determining factors of the zoning laws. Zoning is "a division of a municipality into zones or districts and the imposition of structural and use restrictions within the established zones or districts." Profett v. Valley View Village, 123 F. Supp. 339, 343 (N.D. Ohio 1953), *rev'd on other grounds*, 221 F.2d 412 (6th Cir. 1955); *see* 1 N. ANDERSON, AMERICAN LAW OF ZONING § 1.12 (1968). "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare." Nectow v. Cambridge, 277 U.S. 183, 188 (1928). "[O]ne of the purposes of zoning is to 'stabilize the uses of land' and to 'furnish a protection to residential neighborhoods which will cause them to maintain themselves in a decent and sanitary way for a longer time than they otherwise would. . . .'" Lewis v. District of Columbia, 190 F.2d 25, 28 (D.C. Cir. 1951) (footnotes omitted). The zoning power of any municipality originates from an enabling statute passed by the state legislature. E. YOKLEY, ZONING LAW AND PRACTICE § 14 (1948). The final decisions as to the zoning ordinance are

The legislative history of NEPA, although not as clear as one would hope, does give some guidance.[14] During the fall of 1969,[15] after a conference between NEPA's managers in both Houses of Congress, Senator Jackson, the floor manager of NEPA, commented on "the inadequacy of present knowledge, policies, and institutions for environmental management"[16] as follows:

> We see increasing evidence of this inadequacy all round us: haphazard urban and suburban growth; crowding, congestion, and conditions within our central cities which result in civil unrest and detract from man's *social and psychological well-being*; . . . critical air and water pollution problems; . . . the degradation of unique ecosystems . . . .[17]

While this statement might suggest that both social and physical factors should be considered in a NEPA determination, the Senator may also be suggesting that physical factors be considered in light of their impact on "man's social . . . well-being."[18] The latter interpretation is strengthened by Senator Jackson's statement made several months earlier than the one quoted above, that the purpose of NEPA is "to achieve a standard of excellence in man's relationships to his physical surroundings."[19]

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made by the legislative body of the local government that passes the zoning law. *Id.* at § 66. The purpose of a zoning ordinance is to promote the public health, safety, and general welfare. McMahon v. Dubuque, 255 F.2d 154, 160 (8th Cir.), *cert. denied*, 358 U.S. 833 (1958). It is contended here that if NEPA permits federal agencies to base their determinations on "morals" or "general welfare" considerations NEPA will be encroaching on local governments' zoning powers. Therefore, it is important to determine the scope of the term "environment" as used in NEPA.

14. *See* notes 16-35 *infra* and accompanying text.

15. *See* Note, *The National Environmental Policy Act of 1969 Saved From "Crabbed Interpretation,"* 52 BOSTON U.L. REV. 425, 436 (1972).

16. 115 CONG. REC. 40417 (1969) (remarks of Senator Jackson).

17. *Id.* (emphasis added).

18. *Id.*

19. *Id.* at 29056 (1969) (remarks of Senator Jackson). Senator Jackson stated: "What is involved is a declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the *health* of mankind. That we will not intentionally initiate actions which will do irreparable damage to the *resources which support life on earth.* An environmental policy is a policy for people. Its primary concern is with man and his future. The basic principle of the

In the Senate, NEPA was referred to the Senate Interior and Insular Affairs Committee,[20] which also seemed to define the human environment in terms of physical factors. The Committee stated that "[t]o provide a basis for advancing the public interest, a Congressional statement is required of the evolving national objectives of managing our physical surroundings, our *land, air, water, open space and other natural resources* and environmental amenities."[21] The Committee noted that the purpose of NEPA "is to establish, by Congressional action, a national policy to guide Federal activities which are involved with or related to the management of the environment or which have an impact on the quality of the environment."[22] By using the terms "land, air, water, open space,"[23] it would appear that the Committee intended to define environment in terms of physical factors.

Statements made by various members of the House of Representatives intimately connected with NEPA's passage are similar to Senator Jackson's statements. Congressman Dingell, a sponsor of NEPA, stated:

> [T]he passage of this legislation will constitute one of the most significant steps ever taken in the field of *conservation.* With the establishment of the Council on Environmental Quality, we can now move forward to preserve and enhance our *air, aquatic,* and *terrestrial* environments . . . .[24]

Congressman Dingell apparently viewed NEPA as a conservation bill. His observation regarding "our air, aquatic, and terrestrial environments,"[25] indicates that he too defined "environment" in terms of physical factors. This statement may be read to imply that the Act is concerned with physical factors such as air and water and is

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policy is that we must strive, in all that we do, to achieve a standard of excellence in man's relationships to his physical surroundings. If there are to be departures from this standard they will be exceptions to the rule and the policy. And as exceptions they will have to be justified in the light of public scrutiny." *Id.* (emphasis added).

20. S. REP. No. 296, 91st Cong., 1st Sess. 1 (1969).

21. *Id.* at 6.

22. *Id.* at 8.

23. *Id.* at 6.

24. 115 CONG. REC. 40924 (1969) (remarks of Representative Dingell) (emphasis added).

25. *Id.*

not concerned with social factors such as the possible increase in crime and drug traffic which might result from an agency action.

Congressman Garmatz,[26] a manager of the bill, gave support to this interpretation by defining the aspects of our environment in terms of "air, land, and water"[27] as the only factors within the scope of NEPA.[28] However, air, land, and water may simply be examples of aspects of the environment, and Congressman Garmatz may never have intended that the definition of environment be limited solely to these examples.

Prior to the enactment of NEPA, the various states had virtually no law concerning the environment as such.[29] Many states, including New York,[30] had enacted various conservation laws, which protected wildlife, waterways, and forests.[31] Since these state statutory laws dealt with specific conservation problems as distinct from the environment in general, they do not help clarify the meaning of human environment under NEPA.

Since the enactment of NEPA, a number of states have enacted environmental protection laws.[32] For the most part, these laws deal

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26. Congressman Garmatz was one of the five representatives of the House of Representatives at the conference between the two Houses. *Id.* at 40926.

27. *Id.* (remarks of Representative Garmatz).

28. *Id.*

29. *See, e.g.*, note 31 *infra.*

30. N.Y. CONSERV. LAW (McKinney 1967). The subject matter of the law was as follows: "AN ACT relating to conservation of land, forests, waters, parks, hydraulic power, fish and game. . . ." *Id.* Preamble art. 1 (McKinney 1967). The law is divided into the following Articles: Lands and Forests (art. 3); Oil and Gas (art. 3-A); Division of Fish and Game (art. 4); Water Resources Commission (art. 5); Division of Water Resources (art. 6); Water Compacts (art. 7); Division of Parks (art. 16); Gas, Oil, and Minerals (art. 20); N.Y. CONSERV. LAW (McKinney 1967).

31. Many states had conservation laws. *E.g.*, Arizona, ARIZ. REV. STAT. ANN. §§ 17.401-.421 (1956); Michigan, MICH. COMP. LAWS ANN. §§ 300.1-323.203 (1967), MICH. COMP. LAWS ANN. §§ 323.1-323.358 (1967); Missouri, MO. REV. STAT. §§ 244.010-257.490 (1963), MO. REV. STAT. §§ 261.010-280.130 (1963); Pennsylvania, PA. STAT. ANN. tit. 3, §§ 849-64 (1963); New York, *see* note 32 *supra.*

32. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 691.1201-07 (Supp. 1973); CAL. PUB. RES. CODE §§ 21000-21174 (West Supp. 1974); FLA. STAT. ANN. § 403.412 (1973); CONN. GEN. STAT. ANN. §§ 22a-1-45 (Supp. 1973).

with the protection of the air, water, land, and other natural resources.[33] These new state environmental laws are primarily concerned with physical factors—protecting the environment from pollution, not social factors such as increased risk in crime or use of drugs—problems common to the urban environment.

After the enactment of NEPA, case law dealing with the environment increased.[34] The vast majority of these cases did not prescribe the factors to be considered in defining "the human environment."[35] However, there have been several cases which have mandated the use of factors other than those denominated physical.

In *Arlington Coalition on Transportation v. Volpe,*[36] various interested citizens and groups sought to enjoin further construction of an interstate highway until an environmental impact statement was prepared pursuant to NEPA. The main issue in the case was whether or not NEPA was to be applied to a federal action commenced prior to the passage of the Act. The court found that the highway was a "major federal [action] significantly affecting the quality of the human environment."[37] Although it differentiated environmental considerations from social and economic effects,[38] the court held that all effects—environmental, social and economic—had to be considered[39] in the impact statement:[40]

> [T]he new hearing . . . must not only seek information about the social effects . . . its impact on the environment, and its consistency with the

33. *See* MICH. COMP. LAWS ANN. § 691.1203(1) (Supp. 1973); CAL. PUB. RES. CODE §§ 21000-01 (West. Supp. 1973); FLA. STAT. ANN. § 403.412 (1973); CONN. GEN. STAT. ANN. § 22a-1 (Supp. 1973).

34. *See generally* 1 ENVIRON. RPTR. CAS. (1970); 2 *id.* (1972); 3 *id.* (1972).

35. *E.g.*, Scherr v. Volpe, 336 F. Supp. 882 (W.D. Wis. 1971), concerned injunctive proceeding to prevent further construction of a federal highway; Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972), concerned an action to enjoin a Navy and Marine mock amphibious landing on the beaches of a state park; Environmental Defense Fund, Inc. v. Corps of Eng'r, 342 F. Supp. 1211 (E.D. Ark. 1972), concerned an action for injunctive relief against work on a dam.

36. 458 F.2d 1323 (4th Cir. 1972).

37. *Id.* at 1330.

38. *Id.* at 1327.

39. *Id.* at 1339.

40. *Id.* at 1337.

> community's urban planning goals, but also must seek information about . . . economic effects of the location in light of the proposed rapid rail service . . . .[41]

The court enjoined further construction, and acquisition of land for construction, until an impact statement had been prepared.[42] The decision does not, however, delineate what factors other than physical ones a federal agency must consider in deciding whether an impact statement must be prepared.

In *Groton v. Laird*,[43] the district court sustained the Navy's determination regarding the significance of a proposed housing project in the town; the Navy's assessment had taken "into account the following factors: health, safety, local socio-economic factors, transportation systems, . . . public services, and aesthetics."[44] *Save Our Ten Acres v. Kreger*[45] was an action to enjoin construction of a federal office building in downtown Mobile, Alabama. The General Services Administration (GSA), which had chosen the site, failed to write a detailed environmental impact statement as required by NEPA. The plaintiffs charged, *inter alia*, "that the construction of the building will create severe urban parking and traffic congestion problems, [and] will aggravate an already substantial air pollution problem. . . ."[46] Although the court did not hold that NEPA compelled consideration of these factors, they were nevertheless legally valid concerns. However, consideration of these factors was necessary to satisfy the mandate of GSA's own policy for implementing NEPA which required that urban congestion (including vehicular traffic, water supply, sewage treatment facilities, other public services, threats to health, noise pollution and undesirable land use patterns) be considered in determining environmental impact.[47]

Hanly v. Mitchell[48] involved the GSA construction of an annex to the United States Courthouse in Manhattan. Part of the annex, the Metropolitan Correction Center (MCC), was to be used as a deten-

41. *Id.*
42. *Id.* at 1339.
43. 353 F. Supp. 344 (D. Conn. 1972).
44. *Id.* at 349.
45. 472 F.2d 463 (5th Cir. 1973).
46. *Id.* at 466.
47. *Id.* at 466-67 n.6.
48. 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

tion center for persons awaiting trial or convicted and sentenced to a short term in prison. Space was to be provided not only for incarceration, but for diagnostic services, and medical, recreational and administrative facilities. A new program at the MCC would provide service for non-resident out-patients.

The plaintiffs, groups residing or having their businesses in the area where the MCC was to be constructed, sought an injunction barring the construction on the ground that the GSA had not considered all the relevant factors which might affect the environment. The GSA made a threshold determination that an impact statement was not required and issued a memorandum[49] which considered the following factors: "[available utilities], the adequacy of mass transportation, the removal of trash, the absence of a relocation problem and the intention to comply with existing zoning regulations."[50] The court held these factors inadequate in scope[51] and required the GSA to consider such environmental factors as the possibility of riots and disturbances in the jail which might expose the neighbors to noise,[52] and dangers of crime resulting from the treatment center,[53] and possible parking and traffic problems.[54] The court found that the Act required consideration of social factors in the urban environment: "[n]oise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban 'environment' and are surely results of the 'profound influences of . . . high-density urbanization [and] industrial expansion.' "[55]

As a result of the court's opinion, the GSA submitted an "Assessment of the Environmental Impact,"[56] which considered the following factors: size, location, and use of the MCC; its design, construction, and aesthetic relationship to the neighborhood; the extent to which its activities will be visible to the community; the estimated

49. *Id.* at 645-46.
50. Hanly v. Kleindienst, 471 F.2d 823, 827 (2d Cir. 1972). *See also* 460 F.2d at 645-46.
51. 460 F.2d at 645-46.
52. *Id.* at 646-47.
53. *Id.* at 647.
54. *Id.*
55. *Id.*
56. 471 F.2d at 827.

effects on traffic, public transit, and parking; its effect on noise, smoke, dirt, obnoxious odors, sewage, and solid waste removal; and its energy demands.[57] The plaintiffs contended that this did not comply with the court's instructions, and renewed their application for a preliminary injunction.[58] Once again the court held that the GSA had failed to make an adequate threshold determination.[59] The court held that the GSA should have made "findings with respect to the possible existence of a drug maintenance program at the MCC, [and] the increased risk of crime that might result from the operation of the MCC. . . ."[60]

In neither of these cases did the court set out the type of factors to be considered in defining the human environment in the urban setting. In both decisions, however, the court listed the factors which it believed should be considered in making a NEPA threshold determination as to whether the proposed action will significantly affect the environment. The courts held that such factors as possible increased risk of crime and drugs were to be considered in complying with NEPA. However, the court also noted that "psychological and sociological effects"[61] were not to be considered in a determination:

> For the most part their [the plaintiffs'] opposition is based upon a psychological distate for having a jail located so close to residential apartments, which is understandable enough. It is *doubtful* whether *psychological and sociological* effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement.[62]

However, the court stated that it was not deciding whether such factors had to be considered since there was already a prison in the area.[63]

In *First National Bank v. Richardson*,[64] the plaintiffs sought

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57. *Id.*
58. *Id.* at 828.
59. *Id.* at 836.
60. *Id.*
61. *Id.* at 833.
62. *Id.* (footnote omitted) (emphasis added).
63. *Id.*
64. 484 F.2d 1369 (7th Cir. 1973). *See also* Maryland-Nat'l Capital Park & Planning Comm'n v. United States Postal Serv., 487 F.2d 1029 (D.C. Cir. 1973), wherein the plaintiffs brought an action under NEPA to

to enjoin the GSA's construction of a parking garage and detention center pending preparation of an environmental impact statement. The GSA had determined that the statement was unnecessary. The district court agreed, stating that GSA had not erred in concluding that possible risk of crime " 'is not a significant environmental concern.' "[65] The court of appeals, in affirming the district court, quoted the CEQ to the effect that in urban areas many "environmental problems *interact* with social and economic conditions which the Nation is *also* seeking to improve."[66] Although the court points out that environmental, social and economic factors are to be balanced,[67] it is clear that they are viewed as being distinct from one another. The court flatly states that as to public sensibilities, it questions "whether such factors even if amenable to quantification, are properly cognizable in the absence of clear and convincing evidence that the safety of the neighborhood is in fact jeopardized."[68] *First National Bank* thus conflicts with the *Hanly* decisions as to the factors which constitute the environment in urban areas.

The decisions of the various courts fail to provide any clear-cut guidelines on whether non-physical factors should be considered in making a threshold determination of whether under NEPA the proposed action will significantly affect the environment. For example,

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enjoin the construction of the Washington Bulk Mail Center. The United States District Court for the District of Columbia denied the preliminary injunction. On appeal, the court of appeals remanded, holding that the defendants had considered the proper factors in making their threshold determination, but had not investigated those factors in sufficient detail. The factors that were considered were: (1) the esthetics, which related to the visual effects of the facility and the landscaping of the area (*Id.* at 1038); and (2) factors relating to health and the natural resources, which included consideration of storm-water run-off, oil run-off from the parking lot, and traffic (*Id.* at 1039). These factors appear to be what we have termed physical factors for consideration in a NEPA threshold determination.

65. 484 F.2d at 1376. The court held that no environmental impact statement was necessary since the GSA considered all pertinent factors in determining that the project did not "significantly affect the quality of the human environment." *Id.* at 1381.

66. *Id.* at 1377-78 (emphasis added).

67. *Id.* at 1378.

68. *Id.* at 1380 n.13.

can NEPA be applied to a new housing development simply because it may be proved that the lower classes live in a housing project, that the crime rate is higher among the lower classes and, therefore, the possible increased risk of crime should result in suspending the project on environmental grounds? It is doubtful that this was the intent of Congress in enacting NEPA. In one case, *Nucleus of Chicago Homeowners v. Lynn*,[69] a coalition of local community organizations brought an action to require the Department of Housing and Urban Development to file an environmental impact statement. Plaintiffs alleged that tenants of public housing have a higher propensity for criminal behavior, and that their presence will "significantly affect the quality of the human environment." The court held that an environmental impact statement was not necessary, stating that "although human beings may be polluters, they are not themselves pollution. Environmental impact in the meaning of NEPA cannot be construed to include a class of persons per se."[70]

The background of NEPA, its legislative history and its wording fail to disclose whether such factors are to be considered. There is nothing which states that NEPA is anything more than an environmental law or that anything other than environmental factors are within its purview.

Senator Howard Baker, presiding over the Joint Hearings before the Committee on Public Works and the Committee on Interior and Insular Affairs of the Senate on the operation of NEPA, underscored the problems which have been discussed in this note: "It may be that NEPA has had effects unintended by the Congress at the time of its enactment; it may be that the Congress will at some future time choose to make changes in NEPA."[71] Perhaps it is time for Congress to re-examine NEPA and define the terms of the Act so that it can be made workable.

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69. 42 U.S.L.W. 2306 (N.D. Ill., Nov. 21, 1973).

70. *Id.* at 2307.

71. *Joint Hearings Before the Comm. on Pub. Works and the Comm. on Interior and Insular Affairs, On the Operation of the National Environmental Policy Act of 1969*, 92d Cong., 2d Sess., at 1 (1972).

LANDLORD-TENANT LAW—Dependency of Lease Covenants—Covenant to Pay Rent is Dependent upon Landlord's Warranty of Habitability. *Berzito v. Gambino*, 63 N.J. 460, 308 A.2d 17 (1973).

In September, 1968, Lillias Berzito entered into possession of an apartment. There was no written lease and the rent was fixed at $140 a month. Before she entered, Vincent Gambino, the landlord, promised to make certain repairs that would make the premises "liveable." He never did.[1] The tenant terminated all rental payments in February, 1970 and on June 18, 1970 the landlord instituted a summary dispossess action against Berzito for nonpayment. The state district court held that Gambino was in violation of his express warranty of habitability and reduced the rent to $75 a month retroactive to the date the tenant stopped payments.[2] Berzito made no such payments and quit the premises on November 14, 1970.[3]

After vacating the premises, the tenant sought to recover the difference between the $140 a month rent agreed upon and the reduced rental value of $75 a month from the commencement of her tenancy until February, 1970 when the rental payments ceased. Such relief was predicated upon a theory of continuing breach of warranty throughout the entire tenancy. Gambino counterclaimed for the reduced rent set by the court in the summary dispossess proceeding.

The trial court ruled in the tenant's favor and rejected the landlord's contention that by remaining in possession the tenant had waived the failure to repair.[4] The appellate division reversed[5] and

1. The district court found that these representations had in fact been made. Berzito v. Gambino, 114 N.J. Super. 124, 129, 274 A.2d 865, 867 (Dist. Ct. 1971), *rev'd on other grounds*, 119 N.J. Super. 332, 291 A.2d 577 (App. Div. 1972), *rev'd*, 63 N.J. 460, 308 A.2d 17 (1973).

2. 63 N.J. at 463-64, 308 A.2d at 19.

3. *Id.* at 464, 308 A.2d at 19.

4. 114 N.J. Super. at 129, 274 A.2d at 868. The court held that the "[d]efendant would be entitled . . . to approximately one month to complete the repairs and improvements promised to make the premises habitable. *Id.* at 130, 274 A.2d at 868-69.

5. 119 N.J. Super. 332, 291 A.2d 577. The defects tenant complained about were classified as amenities and the tenant could have quit the

the tenant appealed to the New Jersey Supreme Court. In reversing the appellate division, the court found that the landlord had breached his covenant of habitability[6] and that the tenant's covenant to pay rent depended upon the fulfillment of the warranty of habitability.[7] The court went on to say that the tenant could either institute an action against her landlord to recover all or part of any deposits or rent paid or she could use the breach as a defense to a summary dispossess action.[8]

Prior to *Berzito*, courts in New Jersey recognized only two tenant remedies. The first, rooted in real property law,[9] attempted to ameliorate the principle of *caveat emptor*[10] by allowing the tenant to

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premises if she so desired. *Id.* at 337, 291 A.2d at 579-80.

6. The history of habitability covenants in New Jersey is traced to Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969) where the court recognized that all leases contained an implied covenant of habitability, noting that present day demands have made old notions of landlord-tenant law inadequate. *Id.* at 454, 251 A.2d at 273. *See* Annot., 33 A.L.R.3d 1341 (1969). One year later the court implemented this decision and held that the tenant could opt for relief under the warranty of habitability if breached. Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). *See* 40 A.L.R.3d 1356 (1970). This warranty applied only to latent defects. 56 N.J. at 144, 265 A.2d at 534. The next logical step was applying the warranty of habitability to patent defect situations. Samuelson v. Quinones, 119 N.J. Super. 338, 291 A.2d 580 (App. Div. 1972). The New Jersey Legislature has also recognized the increased rights of tenants to secure habitable premises. 52 N.J. STAT. ANN. §§ 2A:42-85 *et seq.* (Supp. 1973).

7. 63 N.J. at 469, 308 A.2d at 21.

8. *Id.*

9. For a history of landlord-tenant law from its English development, see Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past With Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) [hereinafter cited as Quinn & Phillips]; Van Walraven, *Landlord and Tenant: Caveat Emptor in Oklahoma—Need for Reform*, 8 TULSA L.J. 199 (1972).

10. At common law, the tenant takes the premises "as is." Today, this notion is considered antiquated. 56 N.J. at 141, 265 A.2d at 532. There have been movements in other states to reform *caveat emptor* and square it with a more modern approach. Van Walraven, *supra* note 9, at 200. In Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), the court held that *caveat emptor* "cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned . . . ." *Id.* at 1076-77.

vacate his premises when constructively evicted through the action or inaction of his landlord.[11] The second, recognized in 1969[12] and implemented in 1970,[13] grew from the belief that traditional common law relationships were ill suited to modern living conditions and should be relaxed.[14] This latter remedy, the warranty of habitability, gave relief to the tenant when his landlord failed to maintain the premises in a habitable condition.[15]

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11. If a landlord creates a nuisance or performs acts which preclude the tenant from beneficial enjoyment of his property, as a result of which the tenant abandons before the rent is due, the landlord will have no action for the rent. Dave Herstein Co. v. Columbia Pictures Corp., 4 N.Y.2d 117, 149 N.E.2d 328, 172 N.Y.S.2d 808 (1958). The breach of the covenant of quiet enjoyment permits the tenant to claim a constructive eviction. R. POWELL & P. ROHAN, ON REAL PROPERTY ¶ 225(3), at 99 (abr. 1968). *See* Reste Realty Corp. v. Cooper, 53 N.J. at 462, 251 A.2d at 277-78, where the landlord's failure to repair the cause of the flooding was held to breach the covenant of quiet enjoyment and justified the tenant's vacating under a constructive eviction. *Id.* Rather than quit the premises, a tenant could sue his landlord for a breach of the covenant of quiet enjoyment, although he would not be permitted to stop payments. 63 N.J. at 467, 308 A.2d at 20-21. *See also* Annot., 41 A.L.R.2d 1414, 1420 (1955). For a tenant to invoke a constructive eviction, two basic elements are traditionally required: the landlord must substantially interfere with the tenant's possession, and the tenant must abandon within a reasonable period of time. Ackerhalt v. Smith, 141 A.2d 187 (Mun. Ct. App. D.C. 1958). *See also* R. POWELL & P. ROHAN, *supra*, at 99. *But see* Majen Realty Corp. v. Glotzer, 61 N.Y.S.2d 195 (Mun. Ct. 1946) where abandonment was not necessary in face of the severe housing shortage. This rule, however, has not met with much success in most jurisdictions including New York. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519, 529-31 (1966).

12. 53 N.J. 444, 251 A.2d 268.

13. 56 N.J. 130, 265 A.2d 526.

14. At common law, for example, there was no duty resting on the landlord of an apartment building to repair the rooms demised. Golob v. Pasinsky, 178 N.Y. 458, 70 N.E. 973 (1904). His duty rested solely on those parts of the building which were common. Dollard v. Roberts, 130 N.Y. 269, 29 N.E. 104 (1891). New Jersey relaxed traditional common law notions through the warranty of habitability. *See* note 6 *supra*.

15. 63 N.J. at 466, 308 A.2d at 20. The court found that there "is . . . little comfort to a tenant in these days of housing shortage to accord him the right, upon a constructive eviction, to vacate the premises and end his

There are, however, grave shortcomings in both remedies. Serious consequences may result under a constructive eviction if "the conduct of the landlord is later found by the court not to have justified the tenant in vacating the premises [since] he will remain liable for the unpaid rent."[16] In addition, the tenant may find it difficult to secure suitable living quarters, and may be forced to incur additional moving expenses.[17]

The warranty of habitability fashioned by the court permitted the tenant to repair a defective facility and deduct the cost from his rent.[18] A prerequisite to relief, however, is that the facility repaired must be vital.[19] Since no guidelines exist, the tenant faces the possibility that the facility he repairs may not be adjudged vital, and the court will disallow a rent deduction.[20]

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obligation to pay rent. Rather he should be accorded the alternative remedy of terminating the cause of the constructive eviction . . . ." 56 N.J. at 146, 265 A.2d at 535.

16. 63 N.J. at 466, 308 A.2d at 20. The very purpose of a constructive eviction was to absolve the tenant from any lease obligation and allow him to remove to a more desirable location. Buoncristiani, *Partial Constructive Eviction: The Common Law Answer in the Tenant's Struggle for Habitability*, 21 HAST. L.J. 417, 427 (1970).

17. 56 N.J. at 146, 265 A.2d at 535.

18. *Id. But see* Green v. Superior Ct., ___ Cal. 3d ___, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) where the California Supreme Court recognized that "the limited nature of the 'repair and deduct' remedy, in itself, suggests that it was not designed to serve as an exclusive remedy for tenants . . . [and is meant] only to encompass relatively minor dilapidations . . . ." *Id.* at ___, 517 P.2d at 1177, 111 Cal. Rptr. at 713.

19. The answer as to what constitutes a vital facility was not set forth in *Marini*. The court merely held that "the landlord is required to maintain . . . facilities in a condition which renders the property liveable." 56 N.J. at 144, 265 A.2d at 534. In Academy Spires, Inc. v. Brown, 111 N.J. Super. 477, 268 A.2d 556 (Dist. Ct. 1970) an attempt was made to distinguish a vital facility from an amenity: "In a modern society one cannot be expected to live in a multi-storied apartment building without heat, hot water, garbage disposal or elevator service. Failure to supply such things is a breach of the implied covenant of habitability. Malfunction of venetian blinds, water leaks, wall cracks, lack of painting, [depending upon] the magnitude . . . go to what may be called 'amenities.' " *Id.* at 482, 268 A.2d at 559.

20. In *Javins* the court held that "[t]he jury should be instructed that

New Jersey has also extended the covenant of habitability to landlord dispossess actions.[21] In *Berzito*, the court recognized a tenant's right to allege the landlord's breach of the covenant as a defense to a summary dispossess action.[22] A rent abatement for the value of the unrepaired premises would be granted.[23] Thus the tenant has another available remedy; however, it may be illusory. Although the rent abatement provides monetary relief to a tenant, it does not directly compel a landlord to repair the imperfect condition. While the *Berzito* decision also permits a tenant to initiate his own suit, a tenant who sues under a breach of warranty theory can only recover if the defect is sufficiently material. Since court actions are expensive, a tenant may not opt for available relief where the outcome is uncertain.[24]

Berzito does not present a fact pattern fitting New Jersey's available remedies since "the tenant did not vacate the premises . . . nor did she undertake the needed repairs herself and then seek to offset the expense so incurred against her obligation to pay rent."[25] Although a prior decision held that"[t]he tenant has only the alternative remedies of making the repairs or removing from the prem-

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one or two minor violations standing alone which do not affect habitability are *de minimus* and would not entitle the tenant to a reduction in rent." 428 F.2d at 1082 n.63. *See, e.g.*, Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972) where the risk a tenant takes is evident. If the court finds the premises liveable, the tenant will be responsible for back rents.

21. 56 N.J. at 140, 265 A.2d at 531. *See also* Foisy v. Wyman, 515 P.2d 160 (Wash. 1973).

22. 63 N.J. at 469, 308 A.2d at 21; 56 N.J. at 140, 265 A.2d at 531.

23. 63 N.J. at 469, 308 A.2d at 21. Just how much of an abatement a court will allow is discussed in *Academy Spires* where the court agreed with the language of Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) which held that you never can have certainty: "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion . . . to deny all relief . . . [W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result be only approximate. 111 N.J. Super. at 487, 268 A.2d at 561-62.

24. A good example of this uncertainty is found in the court history of *Berzito*. *See* notes 1, 4 & 5 *supra*.

25. 63 N.J. at 467, 308 A.2d at 20.

ises upon . . . a constructive eviction,"[26] *Berzito* found that this "casual *dictum* will not shackle the Court to prevent a later exercise of its creative powers in fashioning new remedies as need and occasion demand."[27]

In extending existing remedies, the court adopted a contractual approach to leases.[28] This approach allows the tenant to

> initiate an action against his landlord to recover either part or all of a deposit paid upon the execution and delivery of the lease or part or all of the rent thereafter paid during the term, where he alleges that the lessor has broken his covenant to maintain the premises in a habitable condition.[29]

Essentially, the tenant is no longer limited to the establishment of defenses in a landlord's action; he can take the initiative.[30] The measure of damages, in both instances, would be a reduction in rent to "the reasonable rental value of the property in its imperfect condition during a period of occupancy."[31] Thus, the court in *Berzito* not only granted the tenant the relief requested, but established a

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26. 56 N.J. at 147, 265 A.2d at 535.

27. 63 N.J. at 469, 308 A.2d at 21.

28. The court did not hold a lease to be a contract, rather that certain covenants would be applied to each other on a contractual basis. *See* note 41 *infra* and accompanying text. The warranty of habitability has been applied through analogy to sales contracts. Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969) held that "[i]n the law of sale of chattels, the trend is markedly in favor of implying warranties of fitness and merchantability . . . . The manufacturer is also the one who knows more about the product and is in a better position to alleviate any problems or bear the brunt of any losses . . . . The same reasoning is equally persuasive in leases of real property." *Id.* at 432, 462 P.2d at 473-74 (footnote omitted). In *Reste* the court illustrates the problems of a prospective tenant: "Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects . . . which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them . . . . Nor should he be expected to hire experts to advise him." 53 N.J. at 452, 251 A.2d at 272.

29. 63 N.J. at 469, 308 A.2d at 22. In Ohio, a contractual approach is taken to leasehold agreements since it is mandated by state law. OHIO REV. CODE ANN. § 3709.21 (Baldwin 1971). *See* Glyco v. Schultz, 62 Ohio Op. 2d 459, 289 N.E.2d 919 (Mun. Ct. 1972).

30. 63 N.J. at 469, 308 A.2d at 22.

31. *Id.*

new remedy for tenants.[32]

Although the lease in *Berzito* contained an express covenant of habitability, the court held that it was irrelevant whether the warranty of habitability was express or implied[33] since "[a] lessor becomes liable to a lessee for any breach of this covenant."[34] Therefore, the covenant of habitability is applicable regardless of the landlord's intent. This reasoning is a complete rejection of the *caveat emptor* doctrine[35] since it imposes a responsibility upon the landlord to keep the premises in a habitable condition.[36]

In extending the scope of tenant remedies the court rejected a basic notion of landlord-tenant law when it stated that:

> the covenant on the part of a tenant to pay rent, and the covenant—whether express or implied—on the part of the landlord to maintain the demised premises in a habitable condition are for all purposes mutually dependent.[37]

Thus, the independence of the rent covenant—long a restraint on the tenant's bargaining power—was set aside,[38] and a major tenant disadvantage in actions against landlords was eliminated. Under the old common law principle a tenant was forced to continue rent payments when suing for a breach of another covenant.[39] Now, since

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32. An examination of the facts in *Berzito* and the resulting new remedy indicates the necessity for this. 63 N.J. at 469-73, 308 A.2d at 20-24. *But see* the reasoning of Justice Cardozo where he stated that "[e]very new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921).

33. 63 N.J. at 467, 308 A.2d at 21.

34. *Id.*

35. *Berzito* recognized that it had rejected *caveat emptor*. *Id.* at 471, 308 A.2d at 23.

36. *See* note 52 *infra* and accompanying text.

37. 63 N.J. at 469, 308 A.2d at 21.

38. The doctrine of independent rent covenants has been found constitutional, and states that wish to retain it may do so. Lindsey v. Normet, 405 U.S. 56, 65-69 (1972).

39. "It is obviously unsatisfactory to tell him [the tenant] that he may sue his landlord . . . but that at the same time he must make recurring rental payments as they fall due." 63 N.J. at 468, 308 A.2d at 21.

rent payments can be withheld,[40] the landlord is under a compulsion to settle the dispute quickly.

Dependency of covenants is the recognition of a contractual relationship. The court, however, did not extend its holding to all lease covenants. It is only the covenant to pay rent that is dependent upon the covenant of habitability. Therefore, New Jersey has yet to recognize a full contractual relationship in leases.[41]

The court left undecided the question of the landlord's exculpatory clause. Once landlords realize they are held to a covenant of habitability,[42] a rational escape would be to insert a clause in leases expressly denying a warranty of habitability.[43] One jurisdiction held that such clauses invalidate the entire lease,[44] others permitted exculpation,[45] while still other courts merely struck the clause from the lease on the grounds that it is contrary to public policy.[46] A lower

40. *Id.* at 469, 308 A.2d at 21-22.

41. *Berzito* says nothing about the other covenants in the lease. Presumably, where the covenant does not affect habitability, a tenant would not be allowed to stop rental payments.

42. Both *Marini* and *Berzito* have recognized the covenant. *See* note 6 *supra*.

43. While one could argue that by signing the lease the tenant has agreed to let the landlord exculpate himself, "in the landlord-tenant situations, more often than not, and especially with the lower-income tenant, freedom of choice, and therefore freedom of contract, is something markedly less than free." Note, 7 WILLAMETTE L.J. 516, 517 (1971).

44. Glyco v. Schultz, 62 Ohio Op. 2d 459, 289 N.E.2d 919 (Mun. Ct. 1972) held that in viewing a lease as a contract, the court must find that any clause which violates the existing statute will render the lease null and void.

45. A Michigan statute permits the parties to modify the lessor's covenant to keep the premises in reasonable repair where the lease has a current term of one year or more. MICH. COMP. LAWS § 554.139 (2) (Supp. 1973).

46. Tanella v. Rettagliata, 120 N.J. Super. 400, 294 A.2d 431 (Dist. Ct. 1972). *Cf.* Javins v. First Nat'l Realty Corp. 428 F.2d 1071, 1082 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971) held the Housing Maintenance Code of the City of New York to imply a warranty of habitability in all leases of houses it covers. *Id.* at 327, 323 N.Y.S.2d at 366. *But*

court in New Jersey followed the latter approach.[47]

A further consideration omitted by the court was a New Jersey statute providing for tenant relief.[48] The court declined to apply the statute because "it did not become effective until January 21, 1971 [and] it is not directly applicable to this case."[49] This statute provides that "at the instance of a designated public official (presumably the building inspector) or at the instance of an affected tenant, a petition may be filed with a court of competent jurisdiction . . . ."[50] If the court finds a breach of habitability, judgment can be entered "directing that the rents thenceforth be deposited with the clerk of the court to be used to remedy the improper conditions that have been found to exist."[51] While not loath to accept the statutory remedy, the court felt that its own remedy "will in the future afford a further remedy . . . to tenants of substandard dwellings."[52]

Tenants have not gained these added rights without some responsibilities. The New Jersey Supreme Court was emphatic in holding that "[a]s a prerequisite to maintaining . . . a suit, the tenant must give the landlord positive and seasonable notice of the alleged defect, must request its correction and must allow the landlord a reasonable time to effect the repair or replacement."[53] *Berzito* is in

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cf. Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (Ct. App. 1972) where minor housing code violations would not impose a breach of habitability. *See* note 20 *supra*.

47. Tanella v. Rettagliata, 120 N.J. Super. 400, 294 A.2d 431 (Dist. Ct. 1972) took notice that all statutes, whether for the landlord's or tenant's benefit, will be superimposed on the rights and duties of both parties as expressed in the lease. *Id.* at 411, 294 A.2d at 437. It is conceded that the warranty of habitability cannot be waived in New Jersey. Note, 4 SETON HALL L. REV. 714, 723 (1973).

48. N.J. STAT. ANN. § 2A:42-93 (Supp. 1973).

49. 63 N.J. at 471, 308 A.2d at 23.

50. *Id.* at 472, 308 A.2d at 23.

51. *Id.*

52. *Id.* at 473, 308 A.2d at 24.

53. *Id.* at 469, 308 A.2d at 22. *Accord*, Marini v. Ireland, 56 N.J. at 130, 265 A.2d at 526 (1970). "The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the faulty condition in order to accord him the opportunity to make the necessary replacement and repair." *Id.* at 146, 265 A.2d at 535.

this respect consistent with prior decisions which held that before a tenant could repair and deduct the cost, his landlord had to be given adequate notice[54] and a reasonable time in which to make repairs.[55] The rationale for a notice requirement is that if notice and a reasonable time are given, the landlord will repair rather than face the inevitable court action.[56] While failure to give notice may release the landlord from liability, it does not relieve the uninhabitable condition. The lessor may still be at fault for maintaining the premises in such a condition.

Assuming that the notice requirement is met, the court must determine whether a breach of the covenant of habitability has occurred. In *Berzito*, the court cited the criteria established in *Mease v. Fox*,[57] an Iowa case, to determine whether a particular defect constitutes a breach. The court looked to:

> [1.] whether the alleged defect violated housing laws, regulations or ordinances . . . . [2.] the nature of the deficiency or defect, [3.] its effect on safety and sanitation, [4.] the length of time for which it persisted, [5.] the age of the structure, [6.] the amount of the rent . . . .[58]

In addition, the tenant would be unable to succeed against his landlord

> [(1.) if the] tenant voluntarily, knowingly and intelligently waived the defects, or is estopped to raise the question of the breach, . . . [or if (2.)] the

54. *See, e.g.*, Boston Housing Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973) where Massachusetts law required written notice on the part of the tenant to withhold rent in order to avoid a constructive eviction. Since the tenant had given no notice, he was evicted.

55. The district court in *Berzito* held that one month would be sufficient time in which the landlord could effect repairs. 114 N.J. Super. at 130, 274 A.2d at 868-69.

56. Quinn & Phillips, *supra* note 9, at 242, indicate that new laws have given the tenant the right either to abate or withhold rent in many instances, and it is anticipated that this type of economic pressure would force the landlord to fulfill his service obligation. *See also* Comment, 53 CALIF. L. REV. 304 (1965) which sets forth the concise aspect of notice further where "[a] continued failure to comply with the standards set up in the housing codes after notice of the violation . . . constitutes a misdemeanor, subjecting the violator to a fine or imprisonment. *Id.* at 318 (footnote omitted).

57. 200 N.W.2d 791 (Iowa 1972).

58. *Id.* at 796-97.

> defects or deficiencies resulted from unusual, abnormal or malicious use by the tenant.[59]

Estoppel would be applied when the tenant knows of the defect and accepts the premises without objection. The second instance is analogous to "waste."[60] A landlord is free from liability where the condition was caused by the tenant's wrongful act or omission. These acts or omissions would then give the landlord a cause of action against the tenant.[61]

While the factors listed by the court provide a viable framework, they lack precision and fail to give sufficient guidance to a tenant proceeding under them. The tenant will be unable to determine whether the court views a particular defect as constituting a breach.[62] Perhaps the court recognized this problem when it noted

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59. *Id.* at 797.

60. In Whitehead v. Whitehead, 181 A. 684 (Orphans' Ct. 1935) the court, *quoting* from 27 RULING CASE LAW 1010, 1012 (1929), held waste to be "an unreasonable and improper use and abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in substantial injury thereto." *Id.* at 685.

61. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970) which adopted the equity principle that no one may benefit from his own wrong, and in fact, the landlord would be given a defense for the tenant's waste. *Id.* at 1082 n.62.

62. Other jurisdictions determine habitability from other factors. Thomas v. Roper, 162 Conn. 343, 294 A.2d 321 (1972) applied Connecticut statutes which provide that the tenant will not be liable for rent as long as the premises were unfit for occupancy. CONN. GEN. STAT. ANN. § 47-24 (1958). In Boston Housing Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973) the court looked to the Massachusetts statutes which disallowed recovery to the landlord where the premises were in violation of the standards for "human habitation . . . and if such violations may endanger or materially impair the health or safety of persons." *Id.* at 839. MASS. ANN. LAWS ch. 239, § 8A (Supp. 1972). Morbeth Realty Corp. v. Rosenshine, 67 Misc. 2d 325, 323 N.Y.S.2d 363 (Civ. Ct. 1971) held the Housing Maintenance Code implies a warranty of habitability into all leases it covers. *But see* State *ex rel.* Brown v. Sussman, 235 So. 2d 46 (3d Dist. Ct. App. Fla. 1970) which applied a nuisance approach to deciding a breach of habitability. The municipal housing code, if breached, is held to constitute a public nuisance. *See* Comment, 24 U. FLA. L. REV. 769 (1972). *See also* FLA. STAT. ANN. § 823.05 (1965). In Oklahoma, there are statutes which could be interpreted, as in other states, to give the tenant an implied warranty of

that "[e]ach case must be governed by its own facts. The result must be just and fair to the landlord as well as the tenant."[63]

The New Jersey Legislature has outlined a somewhat better framework for determining habitability. Under the statute, the tenant or a designated public official must

> [s]et forth material facts showing that there exists . . . one or more of the following: a lack of heat or of running water or of light or electricity or of adequate sewage disposal facilities, or any other condition or conditions in substantial violation of the standards of fitness for human habitation established under the State or local housing or health codes or regulations or any other condition dangerous to life, health or safety.[64]

The *Berzito* decision modified common law notions of property by rejecting the independency of lease covenants.[65] In support of its conclusions, the court listed ten other jurisdictions that had likewise established dependency of covenants in their leasehold agreements.[66] These decisions have not only expanded the lessors responsibility, but have increased the lessee's power by providing him with additional remedies.[67] By its own admission, the court in *Berzito* found that the prevailing legislative view not only influenced its

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habitability; however, the courts are simply unwilling to grant it. Van Walraven, *supra* note 9, at 200-04. In California, the "implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained." Green v. Superior Ct., ___ Cal. 3d ___, ___, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974) (footnote omitted).

63. 63 N.J. at 470, 308 A.2d at 22.

64. N.J. STAT. ANN. § 2A:42-90(a) (Supp. 1973).

65. *See* note 36 *supra* and accompanying text.

66. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Hinson v. Delis, 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972); Brown v. Southall Realty Co., 237 A.2d 834 (D.C. App. 1968); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Boston Housing Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1973); Glyco v. Schultz, 62 Ohio Op. 2d 459, 289 N.E.2d 919 (Mun. Ct. 1972); Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961), Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

67. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

holding,[68] but aided in its justification. In referring to the decision in *Shell Oil Co. v. Marinello*,[69] the court pointed out that a statute often reflects legislative concern over a long standing abuse, and may articulate a public policy predating the legislation.[70]

Clearly, the trend in legislation and court decisions has been for the tenant's benefit. The landlord's duty has changed dramatically over a relatively short period of time,[71] and the tenant is rapidly gaining equality in the landlord-tenant relationship.

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68. The introductory section of the statute reads as follows: "The Legislature finds: a. Many citizens of the State of New Jersey are required to reside in dwelling units which fail to meet minimum standards of safety and sanitation; b. It is essential to the health, safety and general welfare of the people of the State that owners of substandard dwelling units be encouraged to provide safe and sanitary housing accomodations for the public . . . ." N.J. STAT. ANN. § 2A:42-85 (Supp. 1973).

69. 63 N.J. 402, 307 A.2d 598 (1973).

70. *Id.* at 409, 307 A.2d at 602.

71. Tanella v. Rettagliata, 120 N.J. Super. 400, 294 A.2d 431 (Dist. Ct. 1972) recognized the movement in New Jersey to balance the scale in favor of the tenant. *Accord*, Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970). New York has not been loath to change existing common law notions where a statute has changed the common law rule. Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922). *But see* Note, 4 SETON HALL L. REV. 714 (1973) which indicates a problem which may result from increasing tenant rights. The landlord may opt to abandon, sell the premises, or enter into bankruptcy proceedings. *Id.* at 728.