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## USING NEPA TO EXCLUDE THE POOR

*By Carolyn Daffron\**

### I. INTRODUCTION

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA)<sup>1</sup> directs federal agencies to prepare detailed documents (called Environmental Impact Statements or EIS) describing the anticipated environmental effects of all "major federal actions significantly affecting the quality of the human environment." In 1973 a group of Chicago residents, the Nucleus of Chicago Homeowners Association (NO-CHA) sued the Department of Housing and Urban Development (HUD) and the Chicago Housing Authority (CHA) to enjoin construction of a public housing project in their neighborhoods.<sup>2</sup> The housing project was to consist of 84 units,<sup>3</sup> placed in buildings not exceeding three stories or eight apartments, constructed on 15 separate sites.<sup>4</sup> CHA, which was in charge of building the project, and HUD,<sup>5</sup> which was to fund much of it, were both under court order to build low-rent, scattered-site housing in predominately white neighborhoods in order to remedy civil rights violations they had committed in selecting tenants and sites for such projects in the past.<sup>6</sup> The project at issue in *NO-CHA* was the first to be built in compliance with the order.

In preparing for construction, HUD and CHA, following a procedure whose details are outlined below, considered the project's expected environmental effects and concluded that these effects did not bring the project within the ambit of the Section 102(2)(C) EIS requirement.<sup>7</sup> NO-CHA sought to enjoin construction until an EIS was prepared. NO-CHA did not dispute the procedures HUD and CHA followed or the conclusions they reached regarding those items—primarily sewage facilities, traffic patterns, and similar features of neighborhood infrastructure—actually included in their environmental study; but claimed that the agencies had neglected to consider one element of the environment so important that it required an EIS devoted to it alone. This element was the quality

of the tenants who would live in the project. More exactly, according to the *NO-CHA* complaint, "as a statistical whole", and "as compared to the social class characteristics of the plaintiffs", "low income families of the kind that reside" in CHA housing possess:

- (a) . . . a higher propensity toward criminal behavior and acts of physical violence than do the social classes of the plaintiffs.
- (b) . . . a disregard for the physical maintenance of real and personal property which is in direct contrast to the high degree of care with which the plaintiffs' social classes treat their property.
- (c) . . . a lower commitment to hard work for future oriented goals with little or no immediate reward than . . . the social classes of the plaintiffs [have].<sup>8</sup>

The District Court denied the injunction, with costs to the defendants; an appeal is now pending before the Seventh Circuit.<sup>9</sup>

The *NO-CHA* case is remarkable in that social class characteristics are the sole alleged "environmental impact" at issue. Since *NO-CHA* avoids complex questions of traffic and population density, sewage disposal, architectural nonconformity and the like, it is a useful heuristic device for exploring the limits of NEPA's applicability to issues based on social class considerations. As the trial court in *NO-CHA* indicates,<sup>10</sup> it is unthinkable that NEPA was intended to be used as a vehicle for preserving social class homogeneity;<sup>11</sup> nevertheless, it is extremely difficult to isolate the reasons why NEPA's admittedly broad concept of "environment", which clearly encompasses many aspects of urban life,<sup>12</sup> does not and should not include the *NO-CHA* plaintiffs' concerns. Using *NO-CHA* as a point of departure, this article will explore various means of limiting Section 102(2)(C) as applied to social rather than physical impacts, particularly the behavioral class characteristics of human beings. These means of limitation fall into three general categories:

- (1) statutory interpretation, in the light of NEPA's history, language, general policy and regulatory scheme;
- (2) evidentiary and jurisprudential considerations; that is, the propriety, and the difficulty, of administrative and judicial decisionmaking based on statistical, sociological, or predictive data; and
- (3) constitutional considerations.

However, before discussing means of limiting NEPA's EIS requirement, one must explain why such a limitation is of practical significance. On its face, NEPA is not a demanding law. Its relevant provisions have two general objectives: to assure the production and distribution by agencies of reports on the expected environmental

effects of projects they propose; and to force agencies to consider such effects in their decisionmaking processes.<sup>13</sup> The EIS is the device by which these objects are to be attained. But if NEPA is, as it appears, limited to extracting information and to requiring that this information be included in agency deliberations, why should HUD and CHA balk at preparing an EIS, and why should EIS preparation ever be discouraged?

The first answer is that NEPA may not be what it appears. The Eighth Circuit has held that NEPA restricts the scope of agency action as well as dictating consideration of various factors.<sup>14</sup> However, some courts reject this "substantive" interpretation of Section 102(2)(C) entirely;<sup>15</sup> and others apparently confine "substantive" review to instances where the defendant agency has acted "arbitrarily and capriciously" in pursuing a project which its own EIS has declared needlessly harmful to the environment.<sup>16</sup> Barring a major reversal in the Supreme Court, the idea seems to be established that NEPA gives courts the power to reconsider substantive agency decisions as well as agency procedures, although the details and limits of this power will be difficult to define.<sup>17</sup>

Second, as a practical matter procedural obligations have numerous substantive effects. The placing of facts before an agency creates bureaucratic, political, and public pressures to take these facts into account during the decisionmaking process. The delays caused by the EIS process are an obvious example of "procedure" affecting "substance". At least 90 days must pass between the publication of a draft EIS and the agency's decision to proceed with the project studied; another 30 days are required to entertain public and agency comment after the production of the final EIS.<sup>18</sup> To these four months must be added the time (often considerable) necessary to prepare a complete EIS. Additional delay may be incurred if public hearings are held—a practice encouraged by the influential guidelines of the Council on Environmental Quality (CEQ), at least where extensive and controversial projects are involved.

A third reason why an agency like CHA might resist implementing NEPA's EIS requirements is that, even when it does not result in abandonment or substantial modification of the proposed project, EIS preparation is itself enormously costly. In many instances, the cost of the necessary studies may run into the tens of thousands of dollars.<sup>20</sup> There is reason to fear that this expense may in many instances be borne by local housing project developers,<sup>21</sup> thereby decreasing the number of units eventually constructed. If citizen suits to block public housing on the basis of a "social impact" inter-

pretation of NEPA become common, the fiscal and manpower drain on local developers forced to defend such suits could be enormous.

This last possibility raises a fourth potential effect of requiring the consideration of social impacts of the *NO-CHA* variety in impact statements: the drain on judicial resources. The trial in *NO-CHA* took six weeks, and its transcripts indicate that most of that time was spent vainly attempting to define terms and to reconcile opposing experts whose views on the "class characteristics" of Chicago's poor radically diverged. At the end of the trial, Judge Hoffman noted that "the conclusions of the expert witnesses are difficult, if not impossible, to verify and substantiate."<sup>22</sup>

Fifth, and most generally: in deciding whether social class data should be included in impact statements, it should be stressed that NEPA is not only a decision-making aid in particular projects, but also the major statutory means of setting and debating general environmental policy and publicizing information considered environmentally relevant.<sup>23</sup> Individual statements are sent to "appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards";<sup>24</sup> and these statements become part of the information pool used by policymakers and interested members of the public.<sup>25</sup>

NEPA's policymaking role is one of the few clear concepts to emerge from the statute's legislative history. For example, the Senate Report on NEPA stresses the need for

the Nation's endorsement of a set of resource management values which . . . merit the support of all social institutions . . . Federal action must rest on a clear statement of the values and goals we seek: in short, a national environmental policy . . . It is necessary to move ahead to define the "environmental" desires of the American people in operational terms that the President, Governmental agencies at all levels, the courts, private enterprise, and the public can consider and rely upon.<sup>26</sup>

Whatever the merits of including data as to social classes or other "social impact" data in NEPA studies of individual projects, the question remains whether such data should become part of our "operational" definition of "environment". Surely social class homogeneity should not be incorporated, even indirectly,<sup>27</sup> in the policy goals of NEPA. It is also doubtful whether statistical studies purporting, as the *NO-CHA* studies did, to predict human behavior should become routine bases for interagency comment and decision-making, public scrutiny, or state statutes modeled on NEPA. Aside from the serious risks of inaccuracy and unfairness arising from such studies, the inclusion of class-based generalizations (especially

when negative and ascribed to the underprivileged) in the NEPA policymaking process may create the risk of further setting rich against poor, minorities against whites, and "middle class" environmentalists against the inadequately housed.

## II. STATUTORY AND REGULATORY LIMITS ON NEPA'S APPLICABILITY TO SOCIAL IMPACTS<sup>28</sup>

One needs a skeletal grasp of NEPA's administrative scheme in order to debate whether social class characteristics, or other social impacts, should be included in the system. Title II of NEPA creates the Council on Environmental Quality (CEQ) with duties, vaguely and broadly defined in the statute, concerning the collection and analysis of environmental data; the production of reports; and the supervision of agency procedures for drafting impact statements.<sup>29</sup> In March of 1970, CEQ was empowered by executive order to issue guidelines governing agency procedures for compliance with Section 102(2)(C).<sup>30</sup> HUD's regulations follow the system suggested by the guidelines, with a few embellishments. HUD uses three categories to sort projects according to their environmental effects. The first, called a Normal Environmental Clearance, is "a consistency check with HUD environmental policies and standards and a brief evaluation of environmental impact."<sup>31</sup> Its purpose is apparently to determine whether the project passes the threshold of environmental "significance" mentioned in NEPA and the guidelines.<sup>32</sup> The second, or Special Clearance, is for projects which appear to pass the threshold, and consists essentially of a preliminary and internal version of the EIS.<sup>33</sup> Finally, for projects which have already been judged significant (through either a Special or Normal Clearance investigation, or because there has never been any question), there is the EIS, which is produced in draft and final form.<sup>34</sup>

The basic concepts from which this complex system is derived are extremely broad. What, for example, constitutes a "major Federal action", what a "significant effect", and what "the human environment"? There now exists a large and intricate body of authority defining the first two of these terms, and indicating which institutions among those that may plausibly claim the right to define them actually have this right and responsibility in particular instances.<sup>35</sup> For example, "significance" is defined by HUD in terms of the number of housing units, project costs, or site dimensions;<sup>36</sup> by CEQ's guidelines as a vague potentiality;<sup>37</sup> and by the courts in various ways, depending upon how particular courts balance facts and values in particular cases.<sup>38</sup> Courts have also begun to develop

standards of review of agency determinations made at different stages of the Section 102(2)(C) process.<sup>39</sup>

These disputes about the meaning of various phrases, and who should have the last word in defining and applying them, are all relevant to the situation *NO-CHA* presents. For example, in the case of controversial projects, should the mere public dispute and excitement over a project be sufficient to classify the project as “significant”? The CEQ guidelines so intimate.<sup>40</sup> Or is HUD correct that the controversy must “raise substantial environmental issues” in order to trigger the Section 102(2)(C) process?<sup>41</sup> The trial decision in *NO-CHA* implicitly supports HUD’s interpretation.

In order to answer the questions whether class heterogeneity and its possible effects are “significant” and—probably more basic to the issue of “people pollution”—whether these effects were intended to, or should be, viewed as “environmental” within the meaning of Section 102(2)(C), we shall consult the language of NEPA and judicial interpretations of its terms; NEPA’s sparse legislative history; CEQ and HUD interpretations; and the relationship of NEPA to other Federal statutes and policies.

#### A. *Linguistic Analysis and Judicial Construction*

None of the broad terms which trigger Section 102(2)(C) are defined in NEPA itself; however, common sense linguistic analysis, and a few cases, have some bearing on the applicability of Section 102(2)(C)’s terms to situations of the *NO-CHA* variety.

First, it is arguable that class homogeneity and its possible effects do not “significantly affect” the environment because the alleged harm involved is too attenuated. For example, in *First National Bank of Homestead v. Watson*,<sup>42</sup> it was held that the granting of a bank charter would not “significantly” affect the environment because the harm plaintiffs alleged—increased local financing, which would cause increased urbanization, thereby degrading the urban environment in various ways—was too remote, and based on “mere speculation.” The chain of causation in *NO-CHA* and, no doubt, in many other class-based predictive arguments, is equally attenuated: from class membership, to possession of the average propensities of that class, to commission of the allegedly harmful actions.

It may be equally sensible, and far simpler, to admit that both *Homestead* and *NO-CHA* were concerned with “significant” harm, but that the plaintiffs simply did not prove that this harm was at all likely to occur. (As will be shown below, the *NO-CHA* trial court apparently adheres to this evidentiary approach.) However, the

*Homestead* decision points up a potentially useful distinction, similar to the notion of proximate versus factual causation in tort cases: an event may be almost certain to produce various effects, yet these effects may be extremely distant in time, and dependent on numerous subsequent (though also near-certain) events—as, for example, in the case of preliminary agency budgeting, or agency approval of a foolproof birth-control device. This temporal or causal remoteness affords a basis, distinct from evidentiary bases, for limiting Section 102(2)(C) in order to avoid its being held applicable to virtually all Federal activities.

Another possibility for limiting Section 102(2)(C)'s applicability to social class-based allegations is, of course, to demonstrate that the harm alleged, even if “significant”, does not constitute an effect on the “environment”. Accordingly, the trial court in *NO-CHA* noted “at the outset” that people can be polluters, but not pollution, and that “[e]nvironmental impact in the meaning of the Act cannot be reasonably construed to include a class of persons *per se*”.<sup>43</sup>

However, this “simple point of English usage”<sup>44</sup> has not been clearly and unqualifiedly recognized in those few cases whose facts or analytic modes resemble *NO-CHA*'s. There are five such cases: *Hiram Clarke Civic Club, Inc. v. Lynn*;<sup>45</sup> *Goose Hollow Foothills League v. Romney*;<sup>46</sup> *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service*;<sup>47</sup> and the *Hanly* cases (*Hanly v. Mitchell—Hanly I*—<sup>48</sup> and *Hanly v. Kleindienst—Hanly II*)<sup>49</sup>.

Of the five cases, *Hiram Clarke* superficially most resembles *NO-CHA*, largely on the basis of one phrase. The plaintiffs in *Hiram Clarke* alleged that HUD had failed to comply with its own regulations or NEPA in writing a negative threshold statement for a 272 unit low and moderate income housing project.<sup>50</sup> The court found simply that HUD had considered all pertinent environmental effects, and that none of its findings was unreasonable.<sup>51</sup> Among these effects was something called “deteriorating neighborhood influences”;<sup>52</sup> however, there is absolutely no indication of what HUD meant by this phrase, or whether failure to consider these “influences” would have affected the court's decision.

*Goose Hollow* concerned another HUD-financed project, this one a high-rise student apartment building which was to be constructed in an otherwise low-rise area.<sup>53</sup> HUD had endorsed without comment the builder's summary conclusion that the project would have no significant environmental impact. The court found HUD's examination inadequate because, *inter alia*, “the building will undoubt-



edly change the character of the neighborhood.”<sup>54</sup> This is obviously so, but the kinds of changes the court had in mind were the project’s structural nonconformity and its effects on population density, both of which were cited by the court.<sup>55</sup> The meaning of “neighborhood character” thus significantly differs from that assigned it by the *NO-CHA* plaintiffs.

The *Maryland* case involved the proposed construction of a large mail-sorting center just off an interstate highway. The case is relevant to the issues in *NO-CHA* in two respects. First, the court elaborated upon the idea, first presented as a major proposition in *Hanly II, infra*, that judicial vigilance in scrutinizing projects should depend on whether they depart from the prevailing modes of land use in their proposed areas. The *Maryland* formulation runs thus: when agency projects conform to local zoning specifications, the court’s superintendence of agency environmental review should be less stringent than in cases where the agency had used its superior power to overcome customary local requirements. The *Maryland* court states that zoning regulations embody important aesthetic, cultural and social preferences of the locality and that, so long as local zoning patterns are followed, reviewing courts need consider only such “hard” environmental factors as air and water pollution, building size, and other physical aspects in determining the adequacy of agency environmental studies.<sup>56</sup> Two implications of the *Maryland* formulation are important to the *NO-CHA* case. First, under the *Maryland* approach, *NO-CHA* should have been dismissed at the outset, since there was no dispute as to the project’s “hard” environmental features and the project conformed to local zoning specifications. Second, *Maryland* implies that cultural, aesthetic, and social issues should be subsumed in the law of land use planning, and subject to the constitutional and statutory restrictions which restrict this branch of local government.

More directly important, however, the *Maryland* court rejects the claim that class membership could ever be considered “environmental” within the meaning of NEPA. One of the reasons for contesting the building, the court writes,

was the prospect of an influx of low-income workers into the County. Concerned persons might fashion a claim, supported by linguistics and etymology, that there is an impact from people pollution on “environment”, if the term be stretched to its maximum. We think this type of effect cannot fairly be projected as having been within the contemplation of Congress.<sup>57</sup>

The *Hanly* cases concerned the construction of a large Federal jail facing two apartment buildings in Manhattan. *Hanly I* held that the General Services Administration (GSA) had failed to comply with Section 102(2)(C) in that its threshold report did not consider the "peculiar environmental impact of squeezing a jail into a narrow area directly across from two apartment houses".<sup>58</sup> The court directed GSA to consider as part of its environmental review the possibilities that the future prisoners might riot or create high noise levels, or that the drug treatment center to be attached to the jail might increase drug traffic or crime in the neighborhood.<sup>59</sup>

In its second report, GSA again found no significant environmental effect and hence no need to prepare an EIS.<sup>60</sup> This second report came before the court in *Hanly II*. The *Hanly II* court found the new report adequate in its treatment of the potential environmental threats of riot and noise. However, the court held that GSA's failure to consider the question whether crime might increase in the neighborhood constituted grounds for remand to GSA for findings on that subject.<sup>61</sup>

The *Hanly* courts apparently accept the principle that a group's future behavior may be accurately enough predicted, and is otherwise sufficiently relevant, to make its members' presence in a community a matter of environmental concern cognizable by administrative bodies and courts. The cases do not present an insurmountable problem if the inmates of the jail are alone considered: prisoners, unlike the low-income families in *NO-CHA*, have all been adjudged guilty of crimes, and a certain circumscription of their rights is recognized by present law as proper on that account. One such circumscription might conceivably be a power in administrative or judicial organs to make predictions of the inmates' future behavior based on their status as prisoners. However, though the language of the case is confusing on this point, it appears that the court's chief concern was not the prisoners' behavior, but that of the outpatients who would use the drug treatment center which the court believed was to be attached to the jail.<sup>62</sup> *Hanly II* thus seems to apply the principle the *NO-CHA* plaintiffs sought to establish: that people, many of whom will not have been convicted of any offense in a court of law, can constitute an "environmental" threat under NEPA simply because of what their presence (here merely transient) in the neighborhood might entail.

There are three means of limiting the scope of the *Hanly* cases. The first is technical: it appears that the project developers had

rejected their plans for a clinic before the *Hanly* cases were decided,<sup>63</sup> and that the court's remarks concerning outpatient behavior were therefore merely *dicta* directed to an issue already moot. A second point is that statutes vary; the rationale for using predictive methods when dealing with people who are physically addicted to drugs, may disintegrate in the case of people who are simply poor and seeking public housing, neither of which attributes is a crime or disease. The third and best response is that the *Hanly* court did not mean to enshrine the *NO-CHA* plaintiffs' theory, but got confused. In its best known passage, the *Hanly II* court stated that, unlike the real possibility of a rise in neighborhood crime rates due to the new jail's presence, the neighbors' "psychological distaste for having a jail located so close to residential apartments" is not a datum requiring inclusion in an EIS, because "psychological and sociological effects . . . do not lend themselves to measurement."<sup>64</sup> The court contrasted such effects with factors "such as noise, which can be related to decibels . . ." and crime, "for which crime statistics are available." But if the decision turns on the accuracy of measurement, crime statistics are no better than "psychological distaste": their precision comes from the fact that they tell us about the past rather than what a group will do in the future in a new place.<sup>65</sup>

It is difficult to draw any clear limiting principles from the *NO-CHA* trial decision and the five cases just discussed. However, assuming that the other cases can be distinguished as set forth above, it appears from *Maryland* and the *NO-CHA* trial decision that the Federal courts are likely to reject the claim that changes in class composition alone are properly cognizable as "environmental" under Section 102(2)(C).

#### *B. A Note on Research to Determine NEPA's "Legislative Intent"*

One should approach the question of the intent of NEPA's draftsmen with more than the customary skepticism. For one thing, NEPA's legislative history is sparse. For another, the documents that do exist are extremely general and vague; one court characterized NEPA as "opaque" and "woefully ambiguous",<sup>66</sup> and this evaluation applies equally to the reports and hearings on the statute.

The first step in analyzing NEPA's legislative intent and perhaps the most fruitful one in the context of social impact, is to recall the events and attitudes prevalent in the nation when Congress was considering the bill. NEPA was signed into law three and a half

months before the first Earth Day. The debate on the Alaska Pipeline was just beginning. One probable reason for the popularity of the environmental cause in 1969 is that environmental problems seemed to lack the controversy ignited by issues which placed classes or subcultures in conflict. Thus, analysis of the popular literature published while NEPA was being considered may provide the best means of understanding two phrases in NEPA which might otherwise be understood as directed toward the issue of class composition. The requirement that “presently unquantified environmental amenities and values” receive equal attention in agency deliberations with “economic and technical consideration” (Section 102(2)(B)) may simply mean that such externalities as clean air, which are not included in the GNP, must be considered. The requirement of Section 102(2)(A) that agencies use a “systematic, interdisciplinary approach” should also be viewed in this historical light.

Some of the testimony before committees, however, may arguably not be consistent with this interpretation. For example, Dr. DuBridg, the President’s Science Advisor, told the Senate Committee that:

[E]verything we live with is of course our environment, whether it is this beautiful room, this beautiful building, the streets we walk on, the hikes we take in the woods . . . everything is environment, and to improve everything in our environment is obviously, therefore, a very difficult task.<sup>67</sup>

However, the comprehensiveness of this definition is belied by Dr. DuBridg’s theory of environmental effects—which must, he says, be thought of as waste products of processes necessary to civilized human life—and by the examples he cites, which exclude any hint that a class of people may be within NEPA’s purview as polluting agents.<sup>68</sup>

The rest of the legislative record is similarly ambiguous. The closest the reports come to favoring the *NO-CHA* plaintiffs’ position is a reference to “conditions within our central cities which result in civil unrest and detract from man’s social and psychological well-being”.<sup>69</sup> These conditions might conceivably include ill-considered, unreviewed class-mixing; or the phrase may simply mean that the physical and aesthetic environment in the cities is such as to enrage its population.<sup>70</sup>

### C. *Administrative Interpretations*

The CEQ Guidelines do not define “environment”. However, they

do provide that, in drafting impact statements, agencies should consider, *inter alia*, "Land Use Changes, Planning and Regulation of Land Development"; "Redevelopment and Construction in Built-up Areas"; "Density and Congestion Mitigation"; and—particularly relevant to this article's subject matter—"Neighborhood Character and Continuity" and "Impacts on Low-Income Populations".<sup>71</sup> None of these categories is explained. However, this next-to-last rubric may include what NO-CHA had in mind; and while there is nothing else in the guidelines themselves to suggest that CEQ intended to trespass into the area of exclusionary zoning, CEQ's 1973 Annual Report indicates an interest in class composition. In its section on the urban environment, the report states that diversity of race, age, and wealth among a neighborhood's residents improves the local environment.<sup>72</sup> This statement clearly accepts the terms of NO-CHA's argument—that certain categorical characteristics of a group of people may properly be thought of as part of their neighbors' environment—but CEQ's conclusions differ from NO-CHA's allegations by 180 degrees.

HUD's Regulations define "environment" only by means of examples, none of which appears relevant to the issue of social class interaction.<sup>73</sup> However, HUD's "ECO-1 Form" (the document used in the agency's initial collection of raw data for purposes of projecting environmental effects) is more telling: among the desired data are figures on neighborhood racial and economic composition and the project's potential for furnishing "social interaction and privacy".<sup>74</sup> However, it appears that neither the Normal nor Special Clearance procedures contemplates the use of this raw data;<sup>75</sup> and nothing in the body of the regulations indicates that HUD has consciously included these factors as part of its view of the environment for NEPA purposes. The ECO-1 listing may thus simply be an information-gathering device, and not a representation that the data so gathered are relevant to the purpose of the document in which they appear<sup>76</sup>—although this apparent waste of effort and data seems peculiar.

#### *D. NEPA's Interaction with Other Statutes and Policies*

NEPA requires that its directives be followed "to the fullest extent possible".<sup>77</sup> The Conference Report on NEPA interprets this phrase to mean that an agency must comply "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible".<sup>78</sup>

CEQ's interpretation of this clause is identical,<sup>79</sup> and judicial decisions have reinforced this rather stringent interpretation.<sup>80</sup>

Any lawsuit alleging class heterogeneity as an adverse environmental effect under NEPA may have the effect of bringing that statute into conflict with various other statutes to which HUD is subject (including the HUD Acts of 1965 and 1968;<sup>81</sup> the United States Housing Act of 1937;<sup>82</sup> the Housing Act of 1949;<sup>83</sup> and the Civil Rights Acts of 1964 and 1968<sup>84</sup>), although arguably the declarations of policy they contain may be insufficiently prescriptive to bring them into conflict with NEPA's requirements.

The duties the housing statutes impose on HUD include providing low-income families with "decent, safe, and sanitary dwellings";<sup>85</sup> and ridding the nation of "unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings."<sup>86</sup> On first thought, both NEPA and the housing laws seem to be malleable enough to avoid clear conflict. However, if one follows the implications of such an accommodation to its logical conclusion when applied to a case such as *NO-CHA*, the reconciliation no longer seems possible. For (assuming that NEPA has even the slightest substantive effect) if it is required that HUD consider class attributes as "environmental", it must then be permissible to kill or relocate projects on the sole basis of predicted adverse consequences from mixing classes. To delay, deny, or restrict housing solely on the basis of class attributes—or, at least, lower class attributes—seems to conflict with the basic goals of the housing laws.<sup>87</sup>

When the racial overtones of housing location are considered (and they are rarely absent in public housing cases—for example, some 90% of *CHA*'s tenants were black when *NO-CHA* was brought)<sup>88</sup>, the possibility of conflict with the Civil Rights Acts arises. The 1964 Act forbids discrimination in any federally-financed program; the 1968 Act requires that HUD take affirmative action to provide fair housing.<sup>89</sup> When, as in *NO-CHA*, there is a history of past racial segregation, the Civil Rights Acts would clearly override any NEPA-based mandate to segregate classes and, hence, races. Indeed, any decision to segregate classes whose effects would include *de facto* segregation of races can hardly constitute the "affirmative action" envisioned by the 1968 Act. This possibility of conflict with constitutionally guaranteed rights of equal protection argues strongly, therefore, for an interpretation of NEPA which would avoid the conflict by eliminating from NEPA's purview the factor of class or racial homogeneity.

In addition, at least two sections of NEPA are inconsistent with

the NO-CHA plaintiffs' underlying premise that Section 102(2)(C) is applicable to social class issues. Section 101(a), the Declaration of National Environmental Policy, succinctly states the Congressional goal of "restoring and maintaining environmental quality" while "*fulfilling the social, economic and other requirements of present and future generations of Americans*" (emphasis added). The more specific environmental goals enumerated in § 101(b) are to be accomplished not absolutely and at any cost, but only by "all practicable means, *consistent with other essential considerations of national policy*" (emphasis added). This qualifying language indicates that balancing environmental factors with the nation's various social, economic and political goals is to take place before federal action occurs. The section makes clear that NEPA does not prohibit environmental degradation where compelling national policies exist which may entail some such damage. Where other policies of such importance exist, the provisions of § 102(2)(C) must yield.

In view of the forceful Congressional expressions in the housing enactments cited *supra*, providing decent dwellings for the people who do not now have them (the poor) must be categorized as an essential element of national policy. NEPA, accordingly, accommodates this national policy so long as a reasonable trade-off of environmental and non-environmental goals takes place.

This interpretation is further buttressed by § 105, which states that "The policies and goals set forth in this Act are *supplementary* to those set forth in existing authorizations of Federal agencies" (emphasis added). In HUD's case, such authorizations include those of the Housing and Civil Rights Acts which endorse affirmative action toward integrated housing. To adopt the NO-CHA plaintiffs' interpretation would tend to place NEPA in conflict with these other statutes, in spite of NEPA's own language that it is to be supplementary to them.

### III. EVIDENTIARY AND JURISPRUDENTIAL LIMITATIONS

The District Court's grounds for dismissal in *NO-CHA* are somewhat obscure. The court noted that "NEPA cannot reasonably be construed to include a class of persons *per se*",<sup>90</sup> from which one would infer a holding that, as a matter of statutory construction, class characteristics are never properly cognizable under NEPA. However, the decision appears to rest ultimately not so much on statutory interpretation as on evidentiary failure, for the court goes on to say:

The provisions of the Act concern actions which harm or affect the environment. Therefore, the social and economic characteristics of the potential occupants of public housing as such are not determinative . . . the relevant consideration is whether *acts or actions resulting from the social and economic characteristics will affect the environment*<sup>91</sup> (emphasis added).

The court found that NO-CHA had not proved that such actions would in fact result.<sup>92</sup>

The court's decision indicates a high degree of skepticism as to whether NO-CHA's predictions admit of judicial proof:

Prognosticating human behavior and analyzing its consequences on the human environment is an especially difficult, if not impossible task . . . Sociology, a discipline attempting such prediction, has not yet attained the stage of an exact science. By its very nature, it relies upon general conclusions drawn from average propositions based on sample data. The different expert conclusions that may be drawn from the same data is [sic] evident not only in the evidence before this court, but in the literature of the social sciences. As such, these conclusions are not very persuasive in a court of law.<sup>93</sup>

This section will explore, first and fairly briefly, various specific evidentiary insufficiencies which occurred in *NO-CHA*, or might be expected to occur in similar cases; and, second, the general questions whether sociological, or other statistical, predictive evidence of class behavior is jurisprudentially appropriate or sufficiently reliable for use in adjudicative proceedings.

#### A. *Specific Evidentiary Problems in a "Social Class Impact" Suit*

The necessary evidentiary elements of NO-CHA's claim, or any cause of action based on the alleged harmfulness of class heterogeneity, are more numerous than one would at first suppose. At the outset, the plaintiffs must define the classes involved. This can be an exceedingly complex task, as *NO-CHA* attests. For example, the NO-CHA complaint speaks of "low-income families of the kind that reside in housing provided by the CHA";<sup>94</sup> it was never entirely clear whether membership in the disfavored class—the class allegedly more statistically likely to harm the environment—was determined primarily by income, by other class indicia such as possession of "lower class values",<sup>95</sup> or by generalizations from some sample population (past CHA tenants, the Chicago poor, public housing applicants generally, etc.).<sup>96</sup>

As NO-CHA's reference to "low-income families of *the kind*" that



reside in CHA housing suggests, the definition of the classes involved may be vulnerable to attack as embodying hidden premises. That CHA tenants are a certain “kind” of poor people—or that all poor people, or significantly more poor than nonpoor people, are of this “kind”—is obviously the major evidentiary issue in litigation. It may be possible to defeat allegations such as NO-CHA’s simply by outlining the chain of inferences plaintiffs rely upon and pointing out inconsistencies or hidden, unsubstantiated assumptions in each link. One of the Chicago Housing Authority’s major arguments at both trial<sup>97</sup> and appeal<sup>98</sup> involved outlining a series of inferences it considered spurious, or unproven, in the chain purportedly linking the statistical income, family, etc., characteristics of the 1970 CHA tenant population with the antisocial characteristics cited in the NO-CHA complaint.

One of the most important inferential weaknesses alleged by the *NO-CHA* defendants was the plaintiffs’ experts’ frequent assumption that subgroups chosen from some larger group would possess the “average” characteristics of that group.<sup>99</sup> Several points are worth noting on the potential probative weaknesses of such averaging. First, its accuracy will probably decrease proportionally with the size of the subgroup. Second, in cases such as *NO-CHA*, which rest on comparisons between two groups of people, one should avoid confusing a significantly higher relative incidence of some characteristic with an absolutely high incidence. (That is, if the average incidence of some characteristic is twice as high in group A as in group B, the respective percentages may be so low—e.g., .2% and .1%—as to produce scant likelihood that any member of some subgroup, particularly a small subgroup, of B will possess the characteristic.) Third, in many cases it may be easy to screen out those characteristics which constitute, or allegedly lead to, the “environmental” harm at issue.<sup>100</sup> Predictions that 90% of a group will possess a characteristic are irrelevant if only those members who do not possess it will be chosen as tenants.

Once they have defined the disfavored class, proved its harmful characteristics, and somehow shown that these characteristics will be possessed by the tenants who will occupy the housing at issue, those opposing class heterogeneity have proved only half their case. They must repeat this process for the class they are trying to “protect”. If, as in *NO-CHA*, alleged harm derives from the introduction of a new element which will change neighborhood character, the plaintiffs must demonstrate that the neighborhood’s present inhabitants possess characteristics relevantly different from those of the

disfavored class.<sup>101</sup> According to the trial court, NO-CHA failed in this regard. Although evidence concerning middle- and working-class character in general was introduced, there was little showing that the evidence accurately described *these* plaintiffs' neighborhood, and no showing at all that it described *these* individual plaintiffs.<sup>102</sup>

### *B. General Evidentiary and Jurisprudential Considerations*

As the *NO-CHA* trial decision implies,<sup>103</sup> the unreliability of predictive, statistical sociological evidence makes it unsuitable for use in adjudicatory proceedings, especially in cases involving overall social class comparison. From the standpoint of technical evidentiary considerations, such evidence is likely to be unreliable, confusing, difficult to verify and so time-consuming as to outweigh whatever probative value it might have. For these reasons, any decision-maker, judicial or otherwise, would often do well to avoid this quagmire. Moreover, even ignoring questions of reliability and comprehensibility to nonexperts, predictive evidence based on social class characteristics is unsuited to the judicial forum on the jurisprudential ground that it runs counter to the voluntaristic view of human beings, and the ideal of individualized, rule-bound adjudication which characterize our tribunals.

During the course of the *NO-CHA* trial, Judge Hoffman stated:

I have had one sociologist . . . say from the witness stand, not in this case, that you can probably find a distinguished sociologist to take the opposite position in nearly every case.<sup>104</sup>

While differences in expert opinion occur in all sciences, especially when experts are recruited by advocates, sociology appears particularly dispute-ridden, at least in its present youthful stage.<sup>105</sup> And since large groups of complex human beings constitute the object of sociological study, such disputes are likely to continue:<sup>106</sup> the sociologist's data will always be incomplete and uncontrolled.

Despite these weaknesses, the sociologist's statistical data and expert conclusions often have the ring of authority. This authoritativeness may be dangerously misleading in some instances,<sup>107</sup> especially since the assumptions sociologists make are extremely difficult for nonexperts to isolate and verify. While experts are generally permitted to testify on the basis of assumptions, the law is clear that an expert opinion is "no better than the assumptions on which it is based."<sup>108</sup>

As yet, there have been few cases or articles dealing with the use

of social scientists as expert witnesses.<sup>109</sup> Evidence from social psychologists has been admitted in desegregation cases in order to demonstrate the psychological harm caused by segregation;<sup>110</sup> but the extent to which the courts have relied on such evidence is unclear. Evidence based on what might loosely be defined as "sociological" statistics has gained widespread acceptance in only one area, namely opinion surveys, where they are generally used to test consumer brand name identification in trademark or unfair competition cases.<sup>111</sup> However, opinion survey evidence is carefully screened for correctness in universe and sample selection.<sup>112</sup>

The two areas mentioned above are distinguishable from the predictive use of sociological class generalizations. Opinion survey evidence is the only practicable means of determining whether, and to what extent, the subject consumer class presently recognizes a particular trademark; the alternative would be polling the entire class. Similarly, the social psychology evidence used in the desegregation cases was of obvious relevance, whatever its reliability, to the issue of how students generally feel (assuming these feelings are material in segregation cases). Such evidence may in fact be the only means of demonstrating the nature and extent of such feelings.

By contrast, the evidence offered in *NO-CHA* attempted to *predict the future behavior*—not *describe the feelings or attitudes*—of small groups on the basis of generalizations from the past behavior and attitudes of a far larger group.

Policy considerations—and such considerations often determine the admissibility of evidence, as in the case of Fourth Amendment exclusions—afford another possible basis for distinguishing the desegregation cases from *NO-CHA* and cases like it; the school desegregation evidence was offered as an aid to understanding the effect of constitutionally doubtful practices, with the ultimate goal of enlarging the rights of an underprivileged group; while the plaintiffs' sociological evidence in *NO-CHA* was relied upon as the sole basis for restricting the rights of an underprivileged group.

Since sociological predictions of the *NO-CHA* variety effectively place the character of an entire class in issue, an analysis of the admissibility of character evidence may bear on the merits of admitting such evidence. All courts disallow use of character evidence, whether direct or by means of reputation, to establish the probability of guilt in criminal proceedings.<sup>113</sup> Evidence as to character or propensity is also often excluded when offered as evidence of civil negligence.<sup>114</sup> When the fact to be proved is not, as is customary, the past conduct of an individual in a specific instance, but the future

occurrence of antisocial practices on the part of members of a large group, the policy and reliability rationales for excluding "character" evidence become particularly compelling.

The case for social class homogeneity is based on *statistical* character evidence; it is therefore doubly suspect in practice. Statistical evidence is often viewed skeptically, when not completely excluded, by the courts. Although judicial factfinding is perforce based on probability—e.g., in civil cases, on a defendant's culpability being "more likely than not"—"the law refuses to honor its own formula when the evidence is coldly 'statistical'."<sup>15</sup>

The scholarly treatment of,<sup>16</sup> and leading cases on,<sup>17</sup> the use of statistics as evidence have all dealt with the identity or culpability of single defendants<sup>18</sup> on the basis of their possessing certain statistically relevant characteristics;<sup>19</sup> *NO-CHA* is novel in its attempted predictive use of statistics, and in its application of statistics to groups rather than individuals.

The fact that statistical inferences of the kind offered by *NO-CHA* concern *groups* might be cited as support for admitting, and heavily weighing, the statistical evidence involved. Assuming them to be free from mathematical and sampling errors, and the other pitfalls discussed above, statistical generalizations concerning groups are likely to be true of *some* members of the group. That is, there is less danger of arriving at an individualized conclusion (e.g., Jones assaulted Smith) which is completely incorrect. However, when the subgroup to whom the generalization purportedly applies is small, either absolutely or in relation to the size of the group concerning which the generalization is made, the situation obviously approaches that of a single defendant. Moreover, statistical generalizations concerning a group, even if overwhelmingly likely to apply to some of its members, are also likely *not* to apply to some other members. The rights and interests of those members should be borne in mind even in instances, if they exist, of demonstrably valid group statistics. (At the very least, these rights and interests should be weighed in any environmental policy decision.)

It might be objected that attacking the use of statistical analysis is an anachronistic approach to the problems *NO-CHA* presents: that courts, and the public, have mistrusted statistics for two reasons—fear of errors and confusion, and simple distrust of what, to courts and the general public, at least, is an innovation. Distrust of new methods simply because they are new is irrational (the argument continues) and fears of error and confusion must be dealt with on a case-by-case basis, with statistics the likely victor in a growing

number of cases due to the increasing sophistication and reliability of statistical analysis. Accordingly, (the argument concludes) those commentators who analyze, and thereby purportedly help create, legal “trends” should view statistical analysis as the wave of the future, pointing to the example of recent cases under Title VII of the Civil Rights Act.<sup>120</sup>

In several Title VII cases, courts have accepted statistical evidence as a means of proving discriminatory hiring, firing, and other employment practices:<sup>121</sup>

In most such decisions, courts have identified, and declared unlawful, patterns of systemic racial discrimination; that is, discrimination wherein apparently neutral criteria have the effect of perpetuating past racial discrimination.<sup>122</sup>

While one should use whatever means are necessary—and, perhaps, whatever means are even arguably helpful—to remedy past discrimination, the Title VII cases are a far cry from exclusionary suits under NEPA. As has been noted with reference to school desegregation, the policies behind the two uses of statistics are contradictory.<sup>123</sup> Moreover, the statutory authority for using NEPA as an exclusionary zoning device is hardly clear, and hence the court is under no requirement to fashion extraordinary judicial enforcement mechanisms. Perhaps most important, the kind of statistical generalizations employed by the NO-CHA experts are of dubious probative value, especially where tenant screening processes, if employed, provide a pragmatic alternative to such generalizations.

As the Housing Authority’s trial brief points out, proponents of lower-class exclusion who base their arguments on statistically projected effects, should not be allowed simultaneously to ignore or discount the effect of such exclusion on racial or other constitutionally projected minorities—which, after all, is the only statistical information (apart from surveys, *supra*) that courts have generally allowed. Racial composition is also the most easily verified prediction, since race is a constant and easily identified human characteristic, and one which cannot overtly be screened out in the tenant-selection process.

Apart from their evidentiary problems, statistics purporting to predict the behavior of groups present a serious jurisprudential concern. The *NO-CHA* decision was apparently based at least in part on the nature of the legal process; the court noted that:

The prospective tenants of public housing are individuals and their behavior may not be presumed to be identical, or even similar, to other

individuals in the same social or economic class. The law regards them as free, legally responsible individuals, not as sociological factors in deterministic formulae.<sup>124</sup>

Judge Hoffman's statement should not be viewed as an example of irrational fear of new evidentiary methods or of the behavioral sciences, but as the only response to *NO-CHA* which is consistent with our legal system. While the social sciences seek knowledge through discovering societal uniformities, the judiciary seeks its ends—which include not only knowledge of the truth, but also rational application of statutorily enunciated policy, procedural fairness, and the protection of individual rights—through an individualistic and non-deterministic view of human beings. As the Housing Authority maintained, human beings are viewed by the law

as free agents: whether or not psychological or sociological determinism is scientifically true, the law assumes that individuals, unless insane, are capable of free and rational choice and [does] not presume [them] to be persons who *will* choose antisocial behavior.<sup>125</sup>

#### IV. CONSTITUTIONAL CONSIDERATIONS

The evidentiary, jurisprudential, and ethical problems raised by *NO-CHA*'s claim that *NEPA* is usable to perpetuate class homogeneity are, it is submitted, so egregious as to present serious constitutional issues. While the *NO-CHA* trial court never reached these issues, it is likely that the numerous due process and equal protection claims raised by the defendants<sup>126</sup> were helpful in underscoring the unfairness and general ugliness of the *NO-CHA* allegations. For this reason, and because of their independent interest and plausibility, this section will briefly explore various possibilities for constitutional defenses to claims under Section 102(2)(C) based on social class considerations.

##### A. *Due Process*

The Due Process Clause of the Fourteenth Amendment, although rarely applied in cases other than criminal (or quasi-criminal)<sup>127</sup> procedure, might successfully be invoked in a case as unfair to an entire class as *NO-CHA*. It is well settled that the Due Process Clause covers more than deprivations of liberty or property through criminal procedures,<sup>128</sup> and there are various aspects of the *NO-CHA* theory which might upon detailed analysis be found suspect on due process grounds. The fact that there are no cases which apply due process standards in similar situations is neither surprising nor dis-

couraging, since NO-CHA's attempted use of class characteristics as a basis for abridging the interest of that class' members has no precedent.

Any determination of adverse environmental impact based solely on class characteristics creates an

irrebuttable presumption that individuals of a certain class are more likely to perform harmful actions . . . and would postpone, or perhaps deny altogether, such individuals' chance to live in decent housing on this sole ground.<sup>129</sup>

In *Leary v. U.S.*, the Supreme Court held that, in criminal prosecutions, statutory presumptions must fail on due process grounds unless the presumed fact is more likely than not to follow from the "basic" or actual fact.<sup>130</sup> A problematic but reasonable analogy might be drawn from *Leary* to the NO-CHA allegations, and the relationship between the "basic" fact in NO-CHA (class membership) and the various types of predicted behavior explored under the *Leary* test.

Another facet of *NO-CHA* which, while no more certain than the *Leary* comparison to trigger the Due Process Clause, raises similar possibilities for analogy, is the plaintiffs' reliance on propensity and behavioral prediction as a means of delaying or risking denial of government-sponsored benefits. Mere propensity to commit crimes or other harmful acts is very rarely considered a constitutional ground for governmental limitation of the rights of citizens. Two notable exceptions are parole revocation hearings and mental health commitments. However, in the former area some past adjudication of individual guilt and a sentence in excess of time already served are of course prerequisites for the hearing even to take place.<sup>131</sup> And mental health commitments are based on individual determinations, with the rationale for committing or treating unwilling patients, in the absence of proof of some past anti-social act, being questioned at the present time.<sup>132</sup>

Admittedly, delay or even outright denial of housing or other government benefits is a far cry from adjudications which may result in confinement by the state. However, it is clear that some opportunity for notice and hearing is required in certain public housing cases. For example, in *Thorpe v. Housing Authority of Durham*, the Supreme Court held that tenants in government-sponsored housing could not be evicted without an explanation of eviction grounds and some opportunity to be heard.<sup>133</sup> While the *NO-CHA* situation involves no similar denial of a vested property

right, since it deals with proposed housing for unknown tenants, this consideration may work both ways: these as-yet-unselected tenants may have less to lose, but they are subjected to losing whatever chance they may have before anyone has ascertained who they are, much less heard their case.

In sum: although the “property” rights involved in *NO-CHA*, like most other proposed benefits to the poor, are fairly attenuated, the process afforded the individuals involved is the most unfair one conceivable. The *NO-CHA* plaintiffs—and NEPA, if interpreted in accord with their allegations—are in essence stating that, no matter what screening process local housing authorities may employ, and no matter what proofs of past and likely behavior prospective tenants might individually produce, any group of such tenants will act so as to degrade the environment.

### B. Equal Protection

The Housing Authority maintained that, if construed to require an EIS on the basis of plaintiffs’ allegations, Section 102(2)(C) would violate the Equal Protection Clause.<sup>134</sup> (Although the Fourteenth Amendment applies only to state action, standards at least as stringent are imposed on Federal statutes and practices on the theory that the Fifth Amendment Due Process Clause binds the Federal government whenever the Fourteenth Amendment Equal Protection Clause would bind a state similarly situated.<sup>135</sup> “Equal protection” when used below will encompass this Fifth Amendment-guaranteed right.) Neither the *NO-CHA* court nor any other has considered the Equal Protection Clause in NEPA-based denials of public housing due to class characteristics; however, the Equal Protection Clause has been applied with some success in various types of exclusionary zoning cases,<sup>136</sup> and seems at least equally applicable to cases where NEPA is used by recipients of government subsidy to advance class or racial segregation.

Under the Equal Protection Clause, legislation which abridges a “fundamental” interest<sup>137</sup> or involves a “suspect” classification such as race<sup>138</sup> must undergo strict scrutiny. This scrutiny includes ensuring that the statute is narrowly drawn to accomplish its goals, that less burdensome alternative means are not available, and that the legislation or practice furthers a compelling, legitimate governmental purpose.<sup>139</sup> However, absent such a classification or interest, the statute or practice must undergo only a minimal scrutiny, which has been held to require only that legislation not be purely arbitrary, lacking any conceivable “rational” basis as a means of achieving the



end sought.<sup>140</sup> Until very recently, the rational basis test was invariably used as a judicial rubber stamp, while the strict scrutiny test invariably (except in one early case)<sup>141</sup> doomed the state activity.

On at least two occasions in the past few years, the Supreme Court has invalidated state action without expressly finding a suspect classification or a fundamental interest, stating in both instances that the state legislation involved "must rest upon some ground of difference having a fair and substantial relation to the object of the regulation".<sup>142</sup> However, it appears doubtful that the present court will reject its two-tier system and make a rule of this more rigorous rational basis test.<sup>143</sup>

The Housing Authority asserted that NEPA, as construed by *NO-CHA*, would violate the Equal Protection Clause "by any test":

the relief for which plaintiffs pray under NEPA must be strictly scrutinized on the ground of racial discrimination. The non-racial classifications plaintiffs explicitly draw in their complaint also warrant strict, or at least heightened, scrutiny. Moreover, plaintiffs' demands do not meet even the test of rationality.<sup>144</sup>

#### 1. *Race.*

Racial classifications, with the probable exception of those designed to remedy the effects of past discrimination,<sup>145</sup> are clearly "suspect". In the *NO-CHA* situation, the invocation of race is fairly straightforward, as regards NEPA's applicability to the particular projects in issue. The proposed project had been judicially ordered as a remedy for past *de jure* segregation,<sup>146</sup> the court first demanding that the Housing Authority use its "best efforts to increase the supply of dwelling units as quickly as possible",<sup>147</sup> and later imposing strict timetables and mandating that a specific number of scattered-site units be constructed in predominantly white neighborhoods.<sup>148</sup>

The Authority reasoned, cogently enough, that the earlier decisions' specific orders, and their call for "emergency treatment and drastic if not bizarre remedies"<sup>149</sup> to counteract past discrimination, should be read as providing ample ground for triggering strict scrutiny and defeating *NO-CHA*.<sup>150</sup> The Authority felt it could rely either on the theory that NEPA, if interpreted to require a result contravening the earlier (*Gautreux*) decisions, would be unconstitutional as applied; or on the similar theory that the *Gautreux* decisions enunciated a constitutional directive which overrode NEPA, much as it would any other conflicting statute. Equally

sensible, CHA pointed out that the interests of private individuals in protecting their neighborhoods from a few lower-class families was hardly a "compelling" governmental interest.<sup>151</sup>

The above theories are clearly correct. However, absent a directive such as that stemming from the *Gautreaux* series, the bearing of racial equal protection on NEPA's application is more complex. In a case identical to *NO-CHA*, but without any history of constitutional litigation, could the defendants allege past discrimination (largely their own!) and argue that EIS preparation which included social class mixing as a potential adverse effect, would violate the equal protection rights of prospective tenants by delaying or denying access to the defendants' remedial projects? While this scenario is admittedly bizarre, it is difficult to distinguish it analytically from the actual *NO-CHA* situation.

There remains the question whether, ignoring the past entirely, the defendants could successfully challenge a social class-based NEPA suit such as *NO-CHA* on the ground that the prospective tenant pool, and/or the allegedly undesirable social class generally, contained a statistically high proportion of black people; and that therefore any delay in construction due to EIS preparation, as well as any decision to halt or alter construction based on considerations of class homogeneity, would violate equal protection. This argument obviously resembles the discriminatory-impact arguments used in exclusionary zoning cases. It is presently unclear whether racially discriminatory effect, without a showing of discriminatory motive or purpose, is sufficient to trigger equal protection scrutiny in the area of exclusionary zoning; a few lower court cases have so held or implied.<sup>152</sup> However, of all possible suits in which racial impact might be raised, suits of the *NO-CHA* variety seem most promising, tactically if not logically. The explicit classification involved, social class, has little to recommend it. That is, if the court were to engage in any conscious or unconscious balancing of values and interests, the "benefit" of social class imbalance would be far less likely to outweigh the evil of racial imbalance than would, say, issues of population density or neighborhood services (sewage, power). Moreover, when plaintiffs' prayers for relief are based on explicitly singling out various class characteristics as undesirable, the link between race and class may be seen as more than a matter of happenstance if there is a striking degree of overlap between the two categories.

## 2. *Special Scrutiny on Non-racial Grounds*

It is also arguable that, racial aspects aside, social class distinctions of the kind and for the purpose employed by the *NO-CHA* plaintiffs should themselves be viewed as suspect, or at least trigger scrutiny of a stricter form than the rubber-stamp rationality test. While distinctions based on wealth are not invariably held suspect,<sup>153</sup> they have been struck down in some instances. In *San Antonio Independent School District v. Rodriguez*,<sup>154</sup> the Supreme Court, while upholding a school financing scheme based on local property taxes, whose effect was to create wide disparities in educational quality, stated that,

the precedents of this court provide a proper starting point. The individuals or groups of individuals who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecuniness they were completely unable to pay for some desired benefit, and, as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.<sup>155</sup>

The applicability of this distinction to the *NO-CHA* situation is unclear. On the one hand, the potential *CHA* tenants will doubtless live somewhere, however substandardly; on the other hand the best analog to public school may be not housing per se, but public housing.

The *NO-CHA* defendants maintained that the potential tenants met the *Rodriguez* test, and then some, in that the *NO-CHA* plaintiffs aimed at denying the tenants the right to the benefit (public housing) for reasons only marginally related to ability to pay, and on the basis of an explicit singling-out of poor people.<sup>156</sup> The distinction between explicit and *de facto* (buying power) restrictions on the poor may be thought sensible. However, the Supreme Court decision in *James v. Valtierra*<sup>157</sup> appears to reject the distinction between singling out the poor explicitly, regardless of their buying power, and merely tolerating economic inequalities. *Valtierra* held that a state constitutional provision,<sup>158</sup> which required a referendum before construction of publically-financed low-income housing, did not violate the Equal Protection Clause.<sup>159</sup> Moreover, the Court so held despite the fact that the article did not apply to other governmental projects or other types of government-financed housing,<sup>160</sup> and despite Justice Marshall's protestations that the referendum procedure invidiously discriminated against the poor "as such", not merely as a neutral effect of buying power.<sup>161</sup>

However, there are at least two grounds for distinguishing *Valtierra's* findings on the issue of equal protection and wealth from the *NO-CHA* situation. First, the *Valtierra* Court stressed the fact that a referendum was involved, noting the historic role played by referenda in the democratic process.<sup>162</sup> True, Section 102(2)(C) vaguely resembles the *Valtierra* referendum article in that one of the section's purposes is to encourage public participation in decision-making. However, EIS-based citizen suits, especially when based on a bizarre statutory interpretation which in turn depends on a broad generalization as to the relative merits of social classes, hardly possess the same historic gloss or democratic appeal as referendum procedures.

*Valtierra* and other recent wealth discrimination cases<sup>163</sup> might also be distinguished on the ground that classifications based on "social class characteristics" are far more serious than classifications based on wealth alone. Considerations of due process and equal protection merge almost completely in the *NO-CHA* model, which combines singling out an oppressed class (equal protection) with explicit predictive generalizations concerning the class (due process) as the basis for applying a statute in a manner likely to adversely affect that class. Although there are (fortunately) no other examples, and hence no decisions, on this sort of classificatory-predictive model, it is suggested that the model should be viewed as constitutionally unique and uniquely troubling.

### 3. *The Rational Basis Approach*

As stated earlier, it appears that the recently discovered "trend"<sup>164</sup> away from a two-tier equal protection and toward "a more flexible and equitable approach"<sup>165</sup> has ended. The recent decision in *Village of Belle Terre v. Boraas* not only restates the two-tier test,<sup>166</sup> but also indicates increasing reluctance to enlarge the interests or classifications triggering the stricter tier.<sup>167</sup> In *Belle Terre*, the Supreme Court upheld a zoning ordinance which excluded groups of three or more unmarried persons from single-family-zoned neighborhoods, declaring that it would respect legislative classifications "if the law be 'reasonable, not arbitrary' . . . and bears a 'rational relationship to a permissible state objective'."<sup>168</sup> True to the test of rationality, the Court quickly dispensed with the appellee's constitutional arguments after listing a few permissible zoning goals, apparently on the theory that these goals *could* have been those sought by the ordinance's framers.<sup>169</sup>

The *Belle Terre* case is troubling not only in its reaffirmation of the rationality test, but also in that its fact situation, superficially at least, bears analogy to that in *NO-CHA*. The local zoning power to which *Belle Terre* so summarily defers is of course similar to the federal government's power to protect the national environment, and the *Belle Terre* Court defines zoning power broadly:

it is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values [and] youth values . . . make the area a sanctuary for people.<sup>170</sup>

Nevertheless, despite its test, result, and general attitude toward innovative equal protection arguments in the housing area, the *Belle Terre* decision should not be viewed as constitutionally countenancing *NO-CHA*'s application of NEPA to social class characteristics. First and most obviously, the homogeneity *Belle Terre* sanctions is not that of social classes; as noted above, social class and the peculiar use *NO-CHA* makes of it are especially pernicious, even if not legally suspect. Second, the *Belle Terre* Court claims not to be countenancing any homogeneity whatever: the Court notes that the appellees' grounds for attack include the claim "that social homogeneity is not a legitimate interest of government", but states that "we find none of these reasons in the record before us".<sup>171</sup> The *Belle Terre* majority might have found such reasons, had it been willing to explore the actual purpose and effect of the ordinance in greater depth. However, the Court's finding that "social homogeneity" (by which it meant homogeneity in lifestyle and household compositions) was not in issue, even if based on incorrect factual or logical analysis, explicitly distinguishes *Belle Terre* from a suit whose sole basis is social class composition.

A more general basis for distinguishing *Belle Terre* from *NO-CHA* lies in the fact that, while numerous governmental goals utterly distinct from social exclusivity could be hypothesized as motivating (or resulting from) the *Belle Terre* ordinance, the aim of *NO-CHA* is clearly and *exclusively* class homogeneity; and the reasons why this homogeneity is sought, as well as the alleged effects sought to be avoided, are explicitly outlined by the plaintiffs.

This second distinction points up a major reason why, in the writer's opinion, social class characteristics are especially vulnerable to equal protection attack when used in a NEPA-based suit. Complainants who urge a novel, debatable statutory interpretation, unlike litigants who attempt to enforce or uphold a clear statutory mandate, do not have the benefit of judicial presumption of legitimate state goals.

In the customary equal protection case, the court has before it a statute which clearly mandates the protested result (or a state practice or statutory application which undoubtedly occurred). The Madisonian jurisprudential theory behind the rationality test is presumably that, absent some trigger of strict scrutiny, the court should assume that the legislature or officer acted constitutionally, and should seek a legitimate motivation for the statute, application, or practice. Indeed, absent statutory provisions, the courts have a self-proclaimed duty to avoid constitutional doubts,<sup>172</sup> unnecessary constitutional decisions, and hypothetical reasoning.

A Section 102(2)(C) case based on social class characteristics lies somewhere between the extremes described above: a statute is invoked, but its mandate to consider social class characteristics, or to espouse class homogeneity as a goal, is far from clear. Instead of hypothesizing goals justifying an admitted governmental classification, the court hearing a suit like *NO-CHA* must accept and enforce the claim that, for various factual (nonhypothetical) reasons, a goal and a classification should be seen as statutorily required. Thus, if the court in *NO-CHA* had found that the proposed tenant's "social class characteristics" were such as to create a likelihood of, e.g., increased crime, (assuming this to be provable) it would then have had to ask whether preventing this effect through preventing class mixing was an intended goal of NEPA and, if so, whether such a goal and such a classification are constitutionally permissible. There would be no question of hypothesizing additional reasons favoring class homogeneity, since the very reason for invoking Section 102 would be the particular harm alleged to result from interfering with this homogeneity.

Note also that, once valid doubts as to constitutionality are raised by either litigant, courts must go further than mere limitation to specifically alleged goals. They must also avoid, wherever possible, statutory interpretations or applications which give rise to constitutional doubts. A statute "must be construed with an eye to *possible* constitutional limitations, so as to avoid doubts as to its validity."<sup>173</sup> Thus, in *NO-CHA* or any future case invoking NEPA in the frontier areas of class-based generalization and prediction, the test of rationality should be applied rigorously.

To wit: the end sought by *NO-CHA*, social class homogeneity, has never expressly been found legitimate, or even permissible; the closest precedent being *Valtierra, supra*. And even if class homogeneity is offered merely as a means of achieving the goals of safety, beauty, a healthy moral climate, etc., an EIS outlining competing sociologi-

cal theories and collecting data on all poor people, or even all Chicago poor people who might be selected for the housing project, is a uniquely irrational means of achieving these ends. The only relevant data is that which will bear on the characteristics of the tenants of the proposed housing, since they and not the poor generally will presumably be creating the predicted neighborhood havoc and degradation. Yet these individuals cannot be screened or evaluated with reference to a particular neighborhood until housing has been built for them and they are selected for it. If housing cannot be built until a study is made, then study of the families who will actually reside in the housing is impossible.<sup>174</sup> Unless one assumes that a staggering percentage of low-income families possess the alleged adverse characteristics—so many that the low income population would not contain enough people worthy of filling the available slots—or that there is no way to distinguish between potentially harmful poor people and other poor people, the statistical EIS route makes little sense.

One of the cases favorably cited by the *Belle Terre* Court was *Reed v. Reed*, in which the Court struck down a probate rule favoring male over female relatives for estate administration.<sup>175</sup> While refusing to declare sex classifications suspect, the Court found the *Reed* classification arbitrary and irrational in that many women did not fit the “less businesslike” stereotype imposed on them.<sup>176</sup> Surely many poor people (and very surely enough to fill available housing slots, after careful tenant selection) do not fit the NO-CHA stereotype. Add to this the fact that *Reed*, unlike NEPA suits based on class, involved a regulation whose provisions were clear, thereby requiring constitutional decision rather than leaving open the avenue of construction to avoid constitutional doubt,<sup>177</sup> and the equal protection attack on explicitly exclusionary NEPA suits is compelling.

#### CONCLUSION

We have seen that the use of NEPA to preserve social class homogeneity, especially when attempted on the basis of predicted class behavior, is subject to attack on many grounds—so many, indeed, and so often interrelated, that litigants and theorists may find it difficult to isolate and “rank” them. A concluding summary of the arguments explored above may be of some help.

(I) The most obvious general area of limitation is statutory construction. It is arguable (1) that as a matter of statutory construction NEPA does not encompass social class characteristics; or (2),

more narrowly, that even if these characteristics may (or must) be considered in the NEPA system for some purposes—perhaps, *e.g.*, to foster class *heterogeneity*—these purposes do not include that of preserving existing class composition. (3) Even assuming that NEPA standing alone permits or requires the disputed construction, such a construction may conflict with other statutes (notably in the areas of housing and civil rights) so as to require that NEPA be narrowly interpreted in this context or, if a narrow reading is impossible, overridden.

(II) Whatever NEPA's language or history otherwise requires, various evidentiary considerations may defeat claims of the *NO-CHA* variety. (4) The simplest argument in litigation is failure of proof in the particular case at issue: that the predicted harms have not been shown to be so likely as to trigger NEPA. (In most cases this argument will be inseparable from questions of statutory interpretation, since the decisionmaker must determine the level of likelihood necessary for § 102(2)(C) review.) (5) One may dispute the probative reliability of sociological, statistical or predictive evidence generally, as well as the truth of the specific allegations and inferences raised.

Predictive sociological evidence may also be attacked on grounds other than lack of probative value. (6) These grounds include specific considerations of judicial policy, such as that disfavoring character evidence. (7) Policy questions may become especially compelling as they approach the area of basic jurisprudence: for example, the nature of the theories and evidence put forward may conflict with the judiciary's view of human beings as unique and self-determined.

(III) (8) The breadth, unfairness and irrationality of the generalizations and goals advanced may go beyond the level even of jurisprudence, and may be so egregious as to violate constitutional due process. (9) Lastly, the explicit, and in some cases the implicit (*e.g.*, race) classifications drawn may also violate constitutional equal protection.

It is difficult to pick and choose, tactically or analytically, among the nine arguments or three general categories listed above. The most straight forward method of obtaining dismissal of *NO-CHA*-type lawsuits is probably the sweeping statutory interpretation approach: that changes in class composition are not "environmental" effects within § 102(2)(C). Such an approach avoids the logical complexities and tactical pitfalls of constitutional litigation, as well as the confusion and ugly, insulting overtones of sociological debate



over the relative merits of social classes. However, it would be tactically unwise to rely solely on NEPA's intended meaning. NO-CHA's interpretation of NEPA, though bizarre, is not demonstrably outrageous as a matter of history, logic or linguistics; for this reason, constitutional and evidentiary defenses should also be raised.

It is doubtful that any court would reach the constitutional issues advanced in this article, because courts will probably take pains to avoid reaching them. The canons of avoiding unnecessary constitutional decision and constitutionally doubtful statutory interpretation (and, perhaps, their psychological analogue, the desire to avoid reversal on constitutional grounds) increase the likelihood of a favorable ruling on construction or evidentiary grounds.

In any case based on "factual" allegations similar to NO-CHA's, evidentiary defenses (specific and general, reliability- and policy-based) should be raised. Evidentiary considerations may bolster a decision based on statutory interpretation; for example, the decision that NEPA could not have been intended to cover harms so unlikely, causally remote or difficult to measure. Or a court might frame its decision in terms of "pure" failure to prove the allegations before it. In theory at least, evidentiary insufficiency is the narrowest possible holding, one which limits itself to factual questions. However, it is hoped that courts—and administrative bodies and legislatures, for that matter—will prefer not even to consider the truth or falsity of class-based behavioral predictions, but will reject both the concept of ranking social classes, and the goal of segregating these classes, on the ground that debate of this sort runs counter to national policy, "environmental" or otherwise.



## FOOTNOTES

\* Office of the Solicitor, U.S. Department of the Interior. While affiliated with the Chicago Law firm of Mayer, Brown and Platt, Ms. Daffron drafted the legal portions of the Chicago Housing Authority's trial memorandum in the case. The views expressed in this article, however, are personal and not those of any party or counsel in the case, nor of the Interior Department.

<sup>1</sup> 42 U.S.C. § 4332(2)(C) (1970), Pub. L. 91-190, Title I, § 102(2)(C).

<sup>2</sup> *Nucleus of Chicago Homeowners Association v. Lynn*, 372 F. Supp. 147 (N.D. Ill. 1973). Appealed, 7th Cir. No. 74-1206 (1974). (Hereinafter cited as *NO-CHA*).

<sup>3</sup> Since reduced to 63. Brief for the Federal Appellees (HUD), *NO-CHA*, at 11.

<sup>4</sup> *Id.*, 11-12.

<sup>5</sup> For a general survey of the questions involved in the relation between NEPA and HUD's activities, see Durchslag and Junger, *HUD and the Human Environment*, 58 IOWA L. REV. 805 (1973).

<sup>6</sup> *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969) (original findings); 304 F. Supp. 736 (N.D. Ill. 1969) (injunction requiring affirmative action), *aff'd* 436 F.2d 306 (7th Cir. 1971), *cert. den.* 402 U.S. 922 (1971); 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom. Gautreaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Gautreaux v. Romney*, 332 F. Supp. 366 (N.D. Ill. 1971), *rev'd* 457 F.2d 124 (7 Cir. 1972); *Gautreaux v. Romney*, 363 F. Supp. 690 (N.D. Ill. 1973), *rev'd sub nom. Guatreau v. Chicago Housing Authority*, 7 Cir. Nos. 74-1048 and 74-1049 (August 26, 1974). This last decision remanded "for consideration in the light of this opinion, to wit: the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the city of Chicago . . . but will increase the supply of dwelling units as rapidly as possible." (Slip opinion at 15).

<sup>7</sup> The study was published as a 156 page negative impact statement (i.e., a determination that a full scale EIS was unnecessary). Statement for Project Ill. 2-85, described by HUD in Federal Appellee's Brief 10-13.

<sup>8</sup> Complaint at 11-12, ¶ 13, Counts I and II (Civil No. 72-C-1197, filed May 12, 1972).

<sup>9</sup> No. 74-1206.

<sup>10</sup> At least one commentator agrees. Ackerman, *Impact Statements and Low Cost Housing*, 46 SO. CAL. L. REV. 754, 758 (1973). Although written before *NO-CHA* was decided at trial, this article is an excellent source of ideas and information on the problems raised by *NO-CHA* as well as more sophisticated exclusionary suits.

<sup>11</sup> 372 F. Supp. at 150. See, text at n. 103 *infra*, for a discussion of the trial court's reasoning.

<sup>12</sup> See e.g., the comments in the legislative record cited *infra*, at nn.67-70.

<sup>13</sup> NEPA, § 102(2)(C), 42 U.S.C. 4332(2)(C) (1970).

<sup>14</sup> *Environmental Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972); see also *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972).

<sup>15</sup> E.g., *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971).

<sup>16</sup> See cases cited in n. 14, *supra*; and *Environmental Defense Fund v. TVA*, 371 F. Supp. 1004, 1014-15 (D. Tenn. 1973). Cf. *Conservation Council v. Froehlke*, 473 F.2d 664, 665 (4th Cir. 1973), which quotes the Corps of Engineers case concerning the propriety of substantive review but makes no mention of the "arbitrary and capricious" standard as a limit on the scope of review.

<sup>17</sup> See Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 UNIV. PA. L. REV. 509, 527-29 (1974); and the discussion in F. Anderson, *NEPA IN THE COURTS* 258-65 (1973).

<sup>18</sup> CEQ GUIDELINES, 40 C.F.R. 1500.9(d), 1500.7(d) (1974), and Preliminary Statement, 38 Fed. Reg. 20550 (1973).

<sup>19</sup> See, e.g., 40 C.F.R. 1500.9(d), 1500.7(d) (1974), and Preliminary Statement, 38 Fed. Reg. 20550 (1973).

<sup>20</sup> See Ackerman, *supra* n. 11 at 761-765, for numerous examples of the costs, pecuniary and otherwise, of EIS preparation for low-income housing.

<sup>21</sup> Ackerman, *supra* n. 11 at 761, cites examples, and notes that California's NEPA analogue expressly allows such a cost allocation.

<sup>22</sup> 372 F. Supp. at 150.

<sup>23</sup> Accordingly, it has been stated that § 102(2)(C) has a threefold function: guiding individual project developers; informing the public of the proposed project; and advising and soliciting comment from other interested agencies. *Calvert Cliffs' Coordinating Comm'n v. AEC*, 449 F.2d 1109, 1114 (D.C. Cir. 1971), *cert. den.* 404 U.S. 942 (1972).

<sup>24</sup> NEPA, § 102(2)(C), 42 U.S.C. 4332(2)(C) (1970).

<sup>25</sup> NEPA, § 102(2)(C), following the procedures of § 552 of the Administrative Procedure Act, 5 U.S.C. 552 (1970), on release of public information.

<sup>26</sup> S. REP. NO. 91-296, 91st Cong., 2d Sess. 13 (1969).

<sup>27</sup> The substance-procedure question aside, (*see text at n. 14 supra*) it is logically and practically inconsistent to maintain that factors (*e.g.*, possible adverse effects of class interaction) should, or may be, considered by agencies, but shall in no case affect their decision whether to proceed with a proposed project.

<sup>28</sup> James Rohwer, J.D. Harvard '74, is responsible for many ideas, much research, and some drafting in this section.

<sup>29</sup> NEPA, § 204, 42 U.S.C. 4344 (1970).

<sup>30</sup> Exec. Order 11514, March 5, 1970, 3 C.F.R. 271 (1974); 35 Fed. Reg. 4247 (1970).

<sup>31</sup> HUD Circular 1390.1, § 5b, 38 Fed. Reg. 19182, 19186 (1973).

HUD has proposed new regulations, 39 Fed. Reg. 6816 (1974), which do not appear relevantly different from the earlier ones.

<sup>32</sup> 40 C.F.R. 1500.5(c).

<sup>33</sup> See HUD Circular 1390.1, ch. 2, 38 Fed. Reg. 19184-86 (1973).

<sup>34</sup> HUD Circular 1390.1, Sec. 5d, 6, 38 Fed. Reg. 1986-88 (1973). HUD has proposed rules, 39 Fed. Reg. 36554 (1974), to implement Title I of the Housing and Community Development Act of 1974, Pub. L. 93-383. These rules would transfer to local developers the Secretary's Circular 1390.1 responsibilities for preparing environmental studies of proposed projects undertaken pursuant to that Act. The Secretary retains responsibility for final review of the environmental determination (§ 58.1(a)(2)), and the developer must comply with the same standards and procedures that the Secretary follows under Circular 1390.1.

<sup>35</sup> See the analysis in Anderson, *supra* n.17, at 73-105.

<sup>36</sup> HUD Circular 1390.1, App. A-1, 38 Fed. Reg. 19188 (1973).

<sup>37</sup> 40 C.F.R. 1500.6(a) (1974).

<sup>38</sup> See Anderson, *supra* n.17, at 74-89, 96-105.

<sup>39</sup> See Leventhal, *supra* n.17, at 519-29, and Anderson, *supra* n.17, at 96-105, 246-57.

<sup>40</sup> 40 C.F.R. 1500.5(a) (1974).

<sup>41</sup> HUD Circular 1390.1, § 5a(3), 38 Fed. Reg. 19185 (1973).

<sup>42</sup> 363 F. Supp. 466 (D.D.C. 1973).

<sup>43</sup> 372 F. Supp. at 149.

<sup>44</sup> CHA Trial Memorandum at 54.

<sup>45</sup> 476 F.2d 421 (5th Cir. 1973).

<sup>46</sup> 334 F. Supp. 877 (D. Oregon 1971).

<sup>47</sup> 487 F.2d 1029 (D.C. Cir. 1973).

<sup>48</sup> 460 F.2d 640 (2d Cir. 1972), *cert. den.* 409 U.S. 999 (1972).

<sup>49</sup> 471 F.2d 823 (2d Cir. 1972), *cert. den.* 412 U.S. 908 (1973).

<sup>50</sup> 476 F.2d at 422-23.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 334 F. Supp. at 879.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 487 F.2d at 1036-37.

<sup>57</sup> 487 F.2d at 1037. The court cites *Town of Groton v. Laird*, 353 F. Supp. 344 (D. Conn. 1972) in support of this proposition; the court was probably referring to the passage at 353 F. Supp. 349, n. 6.

<sup>58</sup> 460 F.2d at 646.

<sup>59</sup> 460 F.2d at 646-68.

<sup>60</sup> 471 F.2d at 827-28.

<sup>61</sup> 471 F.2d at 834, 836.

<sup>62</sup> *Id.*

<sup>63</sup> 471 F.2d at 836.

<sup>64</sup> 471 F.2d at 833, n.10.

<sup>65</sup> For further analysis of the Hanly cases, see NEPA, *Environmental Impact Statements and the Hanly Litigation*, 48 N.Y.U. L. REV. 522 (1973).

<sup>66</sup> Hanly II, *supra* n. 60, at 823.

<sup>67</sup> *Hearings on National Environmental Policy before the Senate Committee on Interior and Insular Affairs*, 91st Cong., 1st Sess. 69 (1969).

<sup>68</sup> *Id.* at 69-72.

<sup>69</sup> S. REP. No. 91-296, 91st Cong., 1st Sess. 4 (1969).

<sup>70</sup> There are several other ambiguous references to social factors in NEPA's legislative record. See, e.g., S. REP. No. 91-296, 91st Cong., 1st Sess. at 5, 8-9, 10, 13, 18; H. REP. No. 91-378, 91st Cong., 1st Sess. (1969), U.S. CODE CONG. ADMIN. NEWS 2751, 2753 (1969) ("inter-personal problems" referred to as environmentally relevant).

<sup>71</sup> Appendix II to the GUIDELINES, following 40 C.F.R. 1500.14 (1974).

<sup>72</sup> CEQ, ENVIRONMENTAL QUALITY at 24 (1973).

<sup>73</sup> HUD Circular 1390.1, Sec. 2(a), 38 Fed. Reg. 19183 (1973).

<sup>74</sup> 38 Fed. Reg. 19191, item I (1973).

<sup>75</sup> See 38 Fed. Reg. 19192-93 (1973).

<sup>76</sup> See Brief for the Federal Appellees (HUD) at 19-20.

<sup>77</sup> NEPA, § 102, 42 U.S.C. 4332 (1970).

<sup>78</sup> CONF. REP. No. 765, 91st Cong., 1st Sess. (1969) reprinted in U.S. CODE CONG. ADMIN. NEWS 2770 (1969).

<sup>79</sup> 40 C.F.R. 1500.4(a) (1974).

<sup>80</sup> See, e.g., Calvert Cliffs, *supra* n.23, at 1115, and the discussion in Anderson, *supra* n.17, at 49-55.

<sup>81</sup> 42 U.S.C. 1401 *et seq.* (1970) amend. (Supp. II 1972).

<sup>82</sup> 42 U.S.C. 1401 (1970).

<sup>83</sup> 42 U.S.C. 1441 (1970).

<sup>84</sup> 42 U.S.C. 2000d (1964), *et seq.*, and 3601 (1968), *et seq.*, respectively.

<sup>85</sup> 42 U.S.C. 1402(1) (1970) amend. (Supp. II 1972).

<sup>86</sup> 42 U.S.C. 1401 (1970).

<sup>87</sup> These goals have been defined in Shannon v. HUD, 436 F.2d

809, 816 (3d Cir. 1970), as follows:

Read together, the Housing Act of 1949 and the Civil Rights Acts 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. . . . By 1964 he [the Secretary of HUD] was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing.

*Atlanta Gas and Light v. F.P.C.*, 476 F.2d 146 (5th Cir. 1973) presents an example of a strong, general statutory policy overriding the EIS requirement. The Atlanta court held that an FPC interim suspension order did not require EIS preparation, since the delay resulting from such preparation would violate the Commission's statutory duty to act quickly in order to prevent gas shortages.

<sup>88</sup> *Gautreaux v. CHA*, 296 F. Supp. 907, 909 (N.D. Ill. 1969).

<sup>89</sup> See n. 84, *supra*.

<sup>90</sup> 372 F. Supp. at 149.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 149-50. NO-CHA might thus be interpreted as supporting, by negative implication, the proposition that the actions NO-CHA predicted would constitute "environmental" harm within the meaning of § 102(2)(C).

<sup>93</sup> 372 F. Supp. at 150. Citation omitted.

<sup>94</sup> Complaint, ¶ 11, 12; Counts I and II.

<sup>95</sup> See, e.g., Transcript page R. 1143, where possession of "middle class values" is stressed by one of NO-CHA's experts. Oddly enough, possession of "middle class values" appears more dependent on race than on income level. Tr. R. 1142.

<sup>96</sup> The characteristics of past CHA residents seemed to be the central issue at one point in the trial. Tr. R. 1159, 1187-88. At other times, the experts spoke in terms of the characteristics of poor people generally, as derived from a number of sociological studies, each presumably based on different samples. Tr. R. 1141, 1143.

<sup>97</sup> Trial memorandum at 20-22.

<sup>98</sup> Appellate brief at 11-12.

<sup>99</sup> Trial memorandum at 20-22; appellate brief at 12. (This assumption sometimes took a somewhat different form: that two subgroups—*i.e.*, past and future CHA tenants—would resemble each other because both would possess the "average" characteristics of the lower classes.)

<sup>100</sup> Note, however, such screening may itself be similarly unfair

and irrational if the characteristic screened for is not itself inherently harmful, but only statistically related to harm (or purportedly so), as in the claim that "on the average, members of broken families are more prone to violence".

<sup>101</sup> This raises an interesting standing issue: could lower-class plaintiffs protest the placing of other lower-class families in their neighborhoods? Presumably so, on the NO-CHA theory, provided such plaintiffs had a prima facie case that further lower class influx would further "degrade" their particular neighborhood by increasing crime, etc. If NO-CHA's theory and allegations of fact had been accepted, it appears that low-income project development would in theory be limited to areas so dangerous and ugly that no further "environmental harm" would make a significant difference.

<sup>102</sup> 372 F. Supp. at 150.

<sup>103</sup> See text at nn. 123, 124 *infra*. Recall, however, that the precise rationale of the trial decision is unclear, and that it may be read as resting on a finding of evidentiary insufficiency. 372 F. Supp. at 149.

<sup>104</sup> Tr. R. 4454.

<sup>105</sup> See e.g., Smelser, *Sociology and the Other Social Sciences*, in Lazarsfeld, ed., *THE USES OF SOCIOLOGY* 3, 8 (1967).

<sup>106</sup> See e.g., Robert Lynd, *KNOWLEDGE FOR WHAT? THE PLACE OF SOCIOLOGY IN AMERICAN CULTURE* 39 (1953).

<sup>107</sup> See e.g., Chan, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 166 (1955).

<sup>108</sup> *United States v. Cooper*, 277 F.2d 857, 860 (5th Cir. 1960), quoting *Int'l Paper Co. v. United States*, 227 F.2d 201, 205 (1955). See also, *Bohus v. Board of Election Comm'rs*, 477 F.2d 821 (7th Cir. 1971) and cases cited therein.

<sup>109</sup> See Rose, *The Social Scientist as Expert Witness*, in Lazarsfeld, *supra* n. 105, at 103.

<sup>110</sup> See Chan, *supra* n. 107, for an exhaustive analysis of the use of social psychology in the school cases. Recall that Hanly II, discussed at n. 64 *supra*, stated that the distaste of neighbors and other psychological factors should not be included within NEPA's ambit.

<sup>111</sup> See e.g., *Zippo v. Rogers Imports*, 216 F. Supp. 670 (S.D.N.Y. 1963).

<sup>112</sup> See Note, *Public Opinion Surveys as Evidence*, 66 HARV. L. REV. 488, 499 (1953), and Note, *Consumer Polls as Evidence*, 20 GEO. WASH. L. REV. 211 (1951).

<sup>113</sup> See e.g., *Michaelson v. United States*, 335 U.S. 469, 471 (1948) and cases cited therein.

<sup>114</sup> See e.g., McCORMACK ON EVIDENCE § 189 (1972 ed.), and note FED. R. EV. 404. See also 1 WIGMORE, EVIDENCE § 65 and U.R.E. 48.

<sup>115</sup> Hart and McNaughton, EVIDENCE AND INFERENCE IN THE LAW 54 (1958).

<sup>116</sup> The leading article in this area is Tribe, *Trial by Mathematics*, 84 HARV. L. REV. 1329 (1971).

<sup>117</sup> The most famous are *People v. Collins*, 68 Cal.2d 319, 438 P.2d 33 (1968); and *Smith v. Rapid Transit, Inc.*, 58 N.E.2d 754, 317 Mass. 469 (1945).

<sup>118</sup> Or a pair, as in *Collins*, *supra* n. 117.

<sup>119</sup> For example, the court in *Collins*, *supra* n. 117, overturned a conviction based on evidence that the set of characteristics shared by the defendants and the observed wrongdoers (race, color and style of hair, type of vehicle, etc.) were statistically rare. The court cited numerous errors in the prosecution's statistical analysis of these characteristics. See Tribe, *supra* n. 116, for an analysis of these and other errors in statistical courtroom reasoning.

<sup>120</sup> 42 U.S.C. 2000 *et seq.* (1970) (Supp. II 1972).

<sup>121</sup> Notably *United States v. Hayes Int'l Corp.*, 415 F.2d 1038 (5th Cir. 1969); and the leading case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See, Montlack, *Using Statistical Evidence to Enforce the Laws against Discrimination*, 22 CLEVELAND STATE L. REV. 259 (1972), for a systematic treatment of these and dozens of other cases.

<sup>122</sup> Montlack, *supra* n. 121, at 260, citing numerous cases.

<sup>123</sup> CHA in its trial memorandum (pp. 42-44) elaborates on this distinction between statistics as a means of enforcing minority rights and statistical studies whose effect would be to restrict such rights, and cites *Griggs*, *supra* n. 121, at 429-433, in support of the proposition that statistics are judicially acceptable only in the former case.

<sup>124</sup> 372 F. Supp. at 150.

<sup>125</sup> Trial memorandum at p. 30. Emphasis in original.

<sup>126</sup> CHA concluded its trial memorandum with a detailed presentation of constitutional arguments. Pp. 68-84.

<sup>127</sup> Among the quasi-criminal areas are juvenile delinquency proceedings; see, *In Re Gault*, 386 U.S. 1 (1967); and civil mental health commitments; see n. 133, *infra*.

<sup>128</sup> See, *Bolling v. Sharpe*, 347 U.S. 497 (1954); and *Boddie v. Connecticut*, 401 U.S. 371 (1971).

<sup>129</sup> CHA trial memorandum at 69.

<sup>130</sup> 395 U.S. 6 (1969). See also *U.S. Dept. of Agriculture v. Murry*,



413 U.S. 508 (1973) (imputed irrebuttable presumptions of fraud based on class membership struck down as basis for denial of food stamps). Note that the interest involved in *Murry* was government benefit, as in *NO-CHA*; but the presumption involved, unlike that in *Leary*, was irrebuttable. See generally Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

<sup>131</sup> And once parole has been granted—that is, once the prisoner has been given grounds to rely on a reduction of his confinement period—he is afforded numerous procedural safeguards. See *Morrissey v. Brewer*, 408 U.S. 471, 499 (1972) for an extensive treatment of the procedural rights of parolees.

<sup>132</sup> See, *Developments in the Law—Civil Commitments of the Mentally Ill*, 87 HARV. L. REV. 1190, 1265-1316 (1974), which outlines the procedural safeguards and substantive rights afforded the mentally ill. Perhaps the most lucid and thorough judicial treatment of the issue is *Lessard v. Schmidt*, 349 F. Supp. 1078 (D.Wisc. 1972).

<sup>133</sup> 386 U.S. 670 (1967).

<sup>134</sup> Trial memorandum at 68.

<sup>135</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>136</sup> See e.g., *Kennedy Park Homes v. Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. den. 401 U.S. 1010 (city ordered to issue variance for low-income project for predominately black tenants); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291 (9th Cir. 1970). See generally Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge*, 81 YALE L.J. 61 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971); Note, *Segregation and the Suburbs*, 56 IOWA L. REV. 1298 (1971).

<sup>137</sup> These include, e.g., the right of interstate travel, *Shapiro v. Thompson*, 394 U.S. 618 (1968); the right to vote, *Donn v. Blumstein*, 405 U.S. 535 (1972); personal privacy, *Roe v. Wade*, 410 U.S. 113 (1973); first amendment rights, *Williams v. Rhodes*, 393 U.S. 23 (1968); and the right to appeal from a state court criminal conviction, *Griffin v. Illinois*, 351 U.S. 12 (1956). Housing, although a matter of special judicial concern (*Jones v. Alfred Mayer Co.*, 392 U.S. 409, 441 (1968)), is apparently not a fundamental interest. See *Belle Terre v. Boraas*, discussed at n. 166 *infra*.

<sup>138</sup> E.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). Wealth classifi-

cations are "suspect" only in certain instances. See n. 153 *infra* and accompanying text.

<sup>139</sup> See e.g., *Dunn v. Blumstein*, 405 U.S. 330, 342-352 (1972).

<sup>140</sup> E.g., *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911).

<sup>141</sup> *Korematsu v. United States*, 323 U.S. 214 (1944) (wartime internment of Japanese) is the sole exception.

<sup>142</sup> *Reed v. Reed*, 404 U.S. 71, 76 (1971); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972), quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415.

<sup>143</sup> See discussion of *Belle Terre* at n. 166; and see generally Note, *Boraas v. Village of Belle Terre: The New, New Equal Protection*, 72 MICH. L. REV. 508 (1974).

<sup>144</sup> Trial memorandum at 71.

<sup>145</sup> For cases in which explicit racial classifications favoring minorities have been seriously challenged, see Note, *Benign Quotas*, 20 WAYNE L. REV. 1109 (1974); and Flaherty and Sheard, *Defunis, the Equal Protection Dilemma: Affirmative Action and Quotas*, 12 DUQUESNE L. REV. 745 (1972).

<sup>146</sup> *Gautreaux* cases, *supra* n. 6.

<sup>147</sup> *Gautreaux v. CHA*, 304 F. Supp. 736, 741 (N.D. Ill. 1969).

<sup>148</sup> *Gautreaux v. CHA*, 436 F.2d 306 (7th Cir. 1970), *cert. den.* 402 U.S. 977 (1971).

<sup>149</sup> *Gautreaux v. Romney*, 457 F.2d 124, 138 (7th Cir. 1972).

<sup>150</sup> Trial memorandum at 72.

<sup>151</sup> *Id.* at 73.

<sup>152</sup> See e.g., *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Kennedy Park Homes v. Lackawanna*, 436 F.2d 108 (2d Cir. 1970); cf. *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 295-6 (1970). See generally the articles cited in n. 136 *supra*, especially 81 YALE L. J. at 68-69.

<sup>153</sup> Nor is there any reason to foresee that wealth classifications will be invariably so held in the future. Compare, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 628-31 (1969) and *Douglas v. California*, 372 U.S. 353, 355 (1963) with the later decisions in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *James v. Valtierra*, 402 U.S. 137 (1971) (discussed *infra* at n. 157).

<sup>154</sup> 411 U.S. 11 (1973).

<sup>155</sup> 411 U.S. at 25. See Note, *supra* n. 143 at 537-547 for a detailed analysis of the Rodriguez reasoning.

<sup>156</sup> Trial memorandum at 75.

<sup>157</sup> 402 U.S. 137 (1971).

<sup>158</sup> Art. XXXIV, California Constitution.

<sup>159</sup> 402 U.S. 141-143.

<sup>160</sup> 402 U.S. at 139. Also note that referenda are rarely required in California. 402 U.S. at 142.

<sup>161</sup> 402 U.S. at 144.

<sup>162</sup> 402 U.S. at 141-142. This is not to say that this sort of majoritarian argument should be invoked as relevant to the question of constitutionally protected rights, but only that the Court did so.

<sup>163</sup> Notably Dandridge, *supra* n. 153.

<sup>164</sup> The best analysis of this "trend", and probably the major cause of its existence, is Gunther, *The Supreme Court, 1971 Term—Forward, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972).

<sup>165</sup> *Boraas v. Village of Belle Terre*, 476 F.2d 806, 816 (2d Cir. 1973), *rev'd* 416 U.S. 1 (1974).

<sup>166</sup> 416 U.S. at 8.

<sup>167</sup> 416 U.S. at 7-8.

<sup>168</sup> 416 U.S. at 8, quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971).

<sup>169</sup> 416 U.S. at 9.

<sup>170</sup> *Id.* The "it" referred to is the state's "police power," which includes zoning powers.

<sup>171</sup> 416 U.S. at 7.

<sup>172</sup> See n. 173 *infra* and accompanying text.

<sup>173</sup> *Lucas v. Alexander*, 279 U.S. 573, 577 (1929). See also *U.S. v. Rumely*, 345 U.S. 41, 47 (1953) (this canon of construction referred to as "a principle of wisdom and duty"); and *Cross v. Harris*, 418 F.2d 1905 (D.C. Cir. 1969).

<sup>174</sup> *Compare Male v. Crossroads Associates*, 496 F.2d 616 (1972), which rejected a somewhat similar double-bind on the rationality test. In *Male*, defendant denied subsidized housing to welfare recipients on the basis that their rent allowances made the housing unaffordable, despite the fact that rent subsidies were available—but only once housing was secured.

<sup>175</sup> 404 U.S. 71 (1971).

<sup>176</sup> 404 U.S. at 76.

<sup>177</sup> See n. 173 *supra* and accompanying text.