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DISCRIMINATION AGAINST FAMILIES WITH CHILDREN AND HANDICAPPED PERSONS UNDER THE 1988 AMENDMENTS TO THE FAIR HOUSING ACT

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The 1988 Amendments to the Fair Housing Act extend protection to families with children and to handicapped persons. Although these groups had been given some limited protection under the United States Constitution and under federal law when the discrimination involved publicly owned or financed housing or certain exclusionary zoning practices, no federal law protected these groups from discrimination in private housing prior to the passage of these amendments. The Fair Housing Act now sets up a comprehensive scheme to protect persons from discrimination on the basis of handicap or their having children, as well as on the basis of race, color, religion, sex, and national origin.

In promulgating regulations under the new amendments, the Department of Housing and Urban Development ("HUD") has extended the same protections to families with children, and to the handicapped, as are extended to classifications based on race and sex.¹ Critics argued against using the same standard on the ground that families with children and persons with handicaps, both mental and physical, are different in terms of their housing requirements and the impact of their presence on a community from persons who are considered on the basis of race or sex.² Commenters suggested to HUD that the appropriate standard for evaluating differential treatment given families with children and the handicapped should be that developed under the equal protection clause of the fourteenth

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1. Implementation of the Fair Housing Amendments of 1988, 54 Fed. Reg. 3231, 3236 (Jan. 23, 1989) [hereinafter Fair Housing Regulations].

2. Robert D. Butters (General Counsel, National Ass'n of Realtors), remarks at the Fair Housing-Fair Lending Legal Seminar for Attorneys and Officials of Lending Institutions (January 25-26, 1989) (available in the John Marshall Law School Library).

amendment — differential treatment could be justified by a rational relationship to legitimate interests.³ However, HUD noted that the underpinnings for the Fair Housing Act are rooted in the Commerce Clause, as well as in the fourteenth amendment, and that the legislative history of the Act and the development of fair housing law supported "the position that persons with handicaps and families with children must be provided the same protection as other classes of persons."⁴

I. *Discrimination Against Families with Children*

A. *History of and the Need for Federal Legislation*

The House Report favoring the extension of the Fair Housing Act to families with children cites statistics to show the serious impact of this form of discrimination on the housing market:

In the latest national survey of discrimination based on familial status, HUD found that 25 percent of all rental units did not allow children; 50 percent were subject to restrictive policies that limited the ability of families to live in those units; and almost 20 percent of families were living in homes they considered less desirable because of restrictive practices.

In another survey HUD found that 99 percent of respondents reported numerous problems related to housing discrimination against children. Of these respondents, 55 percent had searched for housing for over 9 weeks; 47 percent reported living in substandard conditions; 22 percent had been forced to move; 39 percent lived in overcrowded conditions; and 19 percent said that family members had to live apart during the past year.⁵

Until the Fair Housing Amendments took effect in March 1989, no federal law provided comprehensive protection to families with children who suffered discrimination in housing.

Numerous Supreme Court decisions extended constitutional protection to the fundamental right to procreate and raise children,⁶ but there was little development of that right in housing cases. In *Moore v. City of East Cleveland*,⁷ a sharply divided Supreme Court held that a zoning ordinance which prohibited an orphaned grandson from living with his grandmother violated due process. The Court of Appeals for the Ninth Circuit further indicated that refusals to rent to families with children might violate the fundamental

3. Fair Housing Regulations, *supra* note 1, at 3236.

4. *Id.*

5. H.R. REP., No. 171, 100th Cong., 2d sess. 19, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 2173, 2180 n.33 [hereinafter House Report].

6. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

7. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

right to privacy;⁸ however, the Second Circuit found a university regulation forbidding children from living in a housing project for married students to be constitutional.⁹

Nonetheless, further development of the constitutional right of families with children to be free from discrimination in housing would have had limited impact. The first, fifth and fourteenth amendments, from which such a right is derived, all require governmental action; purely private discrimination cannot be reached directly under these amendments. Furthermore, the Supreme Court had held that the mere fact that a private home receives governmental funds does not create a sufficient nexus to convert the private action into governmental action.¹⁰ Therefore, although development of the constitutional right would have been helpful in cases where government action was involved, such as in exclusionary zoning or in public housing cases, it would not have been helpful in reaching private discrimination. In addition, because a fourteenth amendment violation, unlike a violation of the Fair Housing Act, requires proof of "purposeful" discrimination, the Fair Housing remedy is decidedly preferable to the constitutional remedy in combating more subtle forms of discrimination.¹¹

Discrimination against families with children can have a disparate impact on the availability of housing for racial or ethnic groups, especially for blacks and hispanics who are more likely to have children.¹² In addressing the need for the new amendments, Senator Dominici cited a HUD study that found that:

Units in predominantly white neighborhoods restricted children at a rate of 28.9 percent compared with 17.5 percent in predominantly black neighborhoods, and also found that restrictions are greater in recently built units.¹³

Where adult-only requirements operated to exclude minorities from rental housing, courts had previously found that an action could be maintained under the prohibitions against racial discrimination in the Fair Housing Act;¹⁴ however, with the new amendments, fair housing advocates can have these requirements invalidated without proof of such a racially discriminatory impact.

8. *Halet v. Wend Inv. Co.*, 672 F.2d 1305 (9th Cir. 1982).

9. *Bynes v. Toll*, 512 F.2d 252 (2d Cir. 1975).

10. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

11. Compare *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (Equal Protection) with *Metropolitan Housing Dev. Corp. v. Arlington Heights*, 558 F.2d 1283, 1289-90 (7th Cir. 1977), (Fair Housing Act), *cert. denied*, 434 U.S. 1025 (1978).

12. House Report, *supra* note 5, at 21.

13. Cong. Rec. S10553 (daily ed. Aug. 2, 1988).

14. *Betsey v. Turtle Creek Association*, 736 F.2d 983 (4th Cir. 1984); *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982).

At the time Congress considered the Fair Housing Amendments in 1988, sixteen states had laws prohibiting discrimination against children in housing.¹⁵ Congress was not satisfied, however, that these laws provided sufficient protection to families with children. Many of these laws contained broad exemptions from coverage, and the House Report cited studies that showed that even in those states that had broad coverage, discrimination against children continued to be a serious problem.¹⁶ The House Report further stated that in those states without laws prohibiting discrimination, the situation was equally serious.¹⁷

The Fair Housing Act now puts the machinery of the federal government behind eliminating discrimination against families with children; and federal enforcement should send a strong message to the public that people with children are entitled to housing the same as everyone else, and on the same terms.

B. Coverage

The new amendments broadly define the categories of persons included in the protection given families with children. A "family" may consist of only a single individual.¹⁸ "Familial status" means one or more individuals (who have not attained the age of 18 years) who are domiciled with a parent or a person having legal custody of the individual or who are domiciled with a person designated by the parent or other person having such custody, with the written permission of such parent or other person.¹⁹ "Familial status" also extends to any person who is pregnant or who is in the process of securing legal custody of an individual who has not attained the age of 18 years.²⁰

While the new amendments do not prohibit discrimination on the basis of marital status,²¹ they clearly prohibit discrimination against single parents or those who have a child born out of wedlock.²² They also clearly prohibit discrimination against single fa-

15. House Report, *supra* note 5, at 19.

16. *Id.* at 20.

17. *Id.*

18. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (to be codified at 42 U.S.C. §§3601-3619) [hereinafter 1988 Act]. This Act amends the Fair Housing Act of 1968, 42 U.S.C. §§3601-3619 (1982).

19. 1988 Act, *supra* note 18, §802(k), at 1620.

20. *Id.*

21. House Report, *supra* note 5, at 23.

22. *Cf.* Thomas v. Housing Authority of Little Rock, 282 F. Supp 575 (E.D. Ark. 1987) (holding that a public housing project cannot automatically exclude or evict a low income family or a member thereof on the grounds that a member of the family has had a child born out of wedlock). *See also* McKenna v. Peekskill Housing Authority, 647 F.2d 332 (2d Cir. 1981); Atkinson v. Kern City Housing Authority, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976).

thers, as well as single mothers, who have custody of their children.²³

The new Act states that reasonable local, state, or federal regulations on the maximum number of occupants permitted to occupy a dwelling are lawful.²⁴ The HUD regulations explain that reasonable governmental limitations on occupancy can continue as long as they are applied to all occupants and do not discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin.²⁵ Significantly missing from this section is any mention of restrictions placed upon the number of occupants by private landlords or by private developers or property managers; therefore, the clear language of the Act is to make such restrictions unlawful.

A number of commenters asked HUD to develop an occupancy standard that private owners or managers could use in the absence of a state or local occupancy code. Alternatively, the commenters asked HUD to promulgate a rule to enable owners and managers of rental housing to be considered to be in compliance with the Act if they implemented occupancy standards no less stringent than those currently used in connection with HUD-assisted housing programs.²⁶ HUD refused to promulgate such rules on the ground that the legislative history of the Act showed opposition to the development of a national occupancy code.²⁷ HUD did acknowledge that owners or managers could develop and implement reasonable occupancy requirements based on factors such as the size and number of sleeping areas or bedrooms, and the overall size of the dwelling unit. HUD emphasized, however, that it would carefully examine any such non-governmental restriction to determine whether it operated to unreasonably limit or exclude families with children.²⁸ In light of the express intent of the Act to open up housing to families with children and the absence of any mention of private occupancy rules, the burden should be placed on the owner or manager to show that the standard does not unreasonably restrict housing for families with children. Any doubt should be resolved against the landlord.²⁹

The amendments specifically exempt "housing for older persons" from the prohibitions against familial discrimination. While Congress intended to open the housing doors in America for families with children, it did not intend to do so at the expense of older

23. Cf. *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that the custody rights of an unmarried father cannot be severed without proof that he is unfit).

24. 1988 Act, *supra* note 18, § 807(b), at 1623.

25. Fair Housing Regulations, *supra* note 1, at 3237.

26. *Id.*

27. *Id.*

28. *Id.*

29. Such a result was recently imposed in Chicago where the federal district court ordered mediation where a landlord refused to consider a family's housing application because of the children. *Chicago Sun-Times*, Apr. 21, 1989, at 7, col.4.

Americans who may have special housing needs.³⁰ "Housing for older persons" under the Act is of three different types:

- A) Housing provided under any State or Federal program specifically designed and operated to assist the elderly, as defined in the particular program;
- B) Housing intended for, and solely occupied by, persons 62 years or older;
- C) Housing intended and occupied by at least one person 55 years of age or older and which meets certain regulations promulgated by HUD which require (1) the existence of "significant facilities and services" designed for the physical and social needs of older persons, (2) at least 80% of the units to be occupied by at least one person 55 years or older, and (3) the publication and adherence to policies demonstrating an intent to provide housing to persons 55 years or older.³¹

The Act also has a grandfather clause that provides that as to categories B and C, housing will qualify even if there are persons in the units as of the date of the enactment of the Act who do not meet the age requirements, or if there are unoccupied units, so long as *new* occupants are required to meet the age requirements of these sections.³² Senator Kennedy explained that this clause was inserted in the Act so as not to impose liability on any elderly housing due to pre-existing age restrictions which were lower than those in the Act and which were recorded prior to its enactment and so long as these pre-existing age restrictions are not enforced in a manner inconsistent with the Act.³³

The Senate debate makes clear that mobile home parks are eligible for the same exemptions as other "housing for older persons."³⁴

The HUD regulations state that as to sixty-two or over housing, all persons must meet the sixty-two or over requirement, including the spouses of those sixty-two or over.³⁵ However, units can be occupied in sixty-two or over housing by employees who are under sixty-two and who perform substantial duties directly related to the management or maintenance of the housing.³⁶ Thus, housekeepers who are under the age of sixty-two could be allowed to occupy units in the sixty-two and over community. The rules do not state that nurses would qualify for this exemption, and one could argue that they are not related to the management or maintenance of the housing as such. However, persons over sixty-two sometimes require full-time nursing, and a case could be made that Congress did not intend

30. 134 CONG. REC. S10552 (daily ed. Aug. 2, 1988)(remarks of Senator Dominici).

31. 1988 Act, *supra* note 18, §807(b)(2), at 1623.

32. 1988 Act, *supra* note 18, §807(b)(3), at 1623.

33. 134 CONG. REC. S10549 (daily ed. Aug. 2, 1988).

34. 134 CONG. REC. S10551 (daily ed. Aug. 2, 1988).

35. Fair Housing Regulations, *supra* note 1, §100.303, at 3290.

36. *Id.*, §100.303(a)(3), at 3290.

to exclude qualified nurses or nurse's aides who are under the age of sixty-two but might be required to live in the sixty-two or older community to take care of patients.

The regulations also state what will qualify as "significant facilities and services" in fifty-five or older housing. These facilities and services may include social and recreational programs, educational programs, homemaker services, an accessible physical environment, emergency and preventive health care, congregate dining facilities, and transportation,³⁷ so long as they are "significant."³⁸ If it is not practicable to provide "significant facilities and services," housing may still qualify if it is necessary to provide important housing opportunities to the elderly.³⁹ To meet this latter exception, the owner or manager must demonstrate "through credible and objective evidence [as spelled out in the regulations] that the provision of significant facilities and services designed to meet the physical or social needs of older persons would result in depriving older persons in the relevant geographical area of needed and desired housing."⁴⁰ Some commenters had suggested that HUD establish a "precertification" procedure to establish that a facility meets the requirements of the Act, but HUD decided it would be premature to do so at the time.⁴¹

C. Application

The protection given to families with children under the new amendments is comprehensive, and the Act and regulations promulgated by HUD leave little doubt that exemptions will be carefully scrutinized. Zoning restrictions that have the effect of excluding families with children are clearly illegal under the new amendments, unless they are for the purpose of establishing communities for the elderly that meet the requirements of Section 807(b)(2).⁴² The Act allows states and local governments to set reasonable restrictions on the maximum number of occupants of a dwelling,⁴³ but the HUD regulations state that this power cannot be used to discriminate against families with children.⁴⁴

The new amendments clearly prohibit the type of zoning found offensive under the due process clause of the fourteenth amendment

37. *Id.*, §100.304(b)(1), at 3290.

38. *Id.*, at 3256. The comments indicate that merely installing a ramp at the front entrance of a housing facility or putting a couch in a laundry room and labeling it a recreation area will not be considered "significant."

39. *Id.*, §100.304(b)(2), at 3290-91.

40. *Id.*

41. *Id.* at 3256.

42. 1988 Act, *supra* note 18, § 807(b)(2), at 1623.

43. *Id.* § 807(b)(1), at 1623.

44. Fair Housing Regulations, *supra* note 1, at 3237.

by the Supreme Court in *Moore v. City of East Cleveland*.⁴⁵ The East Cleveland ordinance limited occupancy to members of a single family, but recognized as a "family" only a few categories of related individuals. The ordinance prohibited a woman from living with her son and her two grandsons, who were cousins rather than brothers. The ordinance's narrow description of a "family" conflicts with the broader protection given to "familial status" in Section 802(k) of the new Act.⁴⁶

The occupancy restrictions upheld under a due process analysis in *Village of Belle Terre v. Boraas*⁴⁷ may also be invalid under the new Act. The ordinance restricted land use to one-family dwellings. "Families" included one or more persons related by "blood, adoption, or marriage." Two persons who lived and cooked together as a single housekeeping unit, though not related by blood, adoption or marriage, were also included in the definition of "family" under the ordinance. The Supreme Court held that the ordinance was not unconstitutional because it prohibited six unrelated, adult college students from living together. Similarly, the six adult, unrelated college students would not qualify for "familial status" under the Fair Housing Act. However, the ordinance could prohibit a family consisting of several unrelated foster children or several unrelated children who are residing with a person with the written permission of their parents, and in such a case, the ordinance would violate the Act.

The Fair Housing Amendments may invalidate zoning rules that prohibit the building of multi-family dwellings if the purpose or effect is to discriminate against families with children. HUD has made clear that restrictions preventing families with children from obtaining housing are to be judged under the same standards as those applying to exclusions based on race.⁴⁸ Zoning restrictions that have the impact of denying housing opportunities to a minority home seeker in a discriminatory manner have been held to violate the Fair Housing Act.⁴⁹

In considering whether a rezoning denial for a multi-family project had a racially discriminatory impact in violation of the Fair Housing Act, in *Metropolitan Housing Dev. Corp. v. Arlington*

45. 431 U.S. 494 (1977).

46. 1988 Act, *supra* note 18, § 804(c), (d), and (e), at 1622.

47. 416 U.S. 1 (1974).

48. Fair Housing Regulations, *supra* note 1, at 3236.

49. See, e.g., *Metropolitan Housing Development Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974). See also *Town of Huntington v. Huntington Branch, NAACP*, 109 S. Ct. 276 (1988) (appellants conceded applicability of impact test and the Supreme Court was satisfied that the record showed a disparate impact).

Heights,⁵⁰ the Court of Appeals for the Seventh Circuit identified four critical factors:

(1) how strong is the plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [426 U.S. 229 (1975)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing.⁵¹

The court of appeals identified two kinds of effects that a racially neutral decision about housing can produce. The first occurs where the decision has a greater impact on one racial group than on another. The second refers to the impact on the community itself. It was the second kind of effect - where the zoning decision would necessarily perpetuate racially segregated housing - that the court of appeals found to be determinative in *Arlington Heights*.⁵² The court found a discriminatory effect because the village was "overwhelmingly white" and because the construction of a multi-family project would have been "a significant step toward integrating the community."⁵³

Families with children, which are excluded because of restrictive zoning ordinances, may also argue that the new amendments should be applied whenever a municipality fails to provide a "reasonable opportunity for an appropriate variety and choice of housing . . . to meet the needs, desires and resources"⁵⁴ of families with children. This argument is based upon the famous *Mount Laurel* decisions of the New Jersey Supreme Court that interpret the New Jersey Constitution.⁵⁵ The *Mount Laurel* decisions protect low in-

50. 558 F.2d 1283 (7th Cir. 1977).

51. *Id.* at 1290.

52. *Id.* at 1290-91.

53. *Id.* at 1291.

54. *South Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 179, 336 A.2d 713, 728 (1975).

55. In *Mount Laurel*, the Supreme Court of New Jersey held that a municipality could not enact restrictive land use policies that make it physically or economically impossible for low income housing to be built within its limits. The court held such restrictions to violate the New Jersey Constitution regardless of the intent of the municipality. In so holding the court recognized that "there cannot be the slightest doubt that shelter, along with food, are [sic] the most basic human needs." 67 N.J. at 178, 336 A.2d at 727.

The New Jersey Supreme Court re-examined its *Mount Laurel* opinion and expanded it in *South Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983). See also N.Y. Times, Jan 22, 1983, at 9, col. 1. The court framed its order in affirmative rather than in negative terms. The court held that all municipalities have a positive legal duty to provide a realistic opportunity for the construction of their numerical fair share of the region's lower income housing need as determined by the state development guide plan. The opinion specified precisely how this objective is to be accomplished and the role the courts should play in effect-

come persons, a category not protected by the Fair Housing Act. However, the Fair Housing Act does protect families with children and the *Mount Laurel* decisions may be helpful in framing an argument that municipal zoning restrictions may not be used to exclude families with children.⁵⁶ Even if the courts refuse to accept the *Mount Laurel* affirmative obligation analogy, if one can show some evidence of a discriminatory intent to exclude families or a strong case of a discriminatory impact, as in *Arlington Heights*, the zoning restrictions will be illegal under the Act.⁵⁷

Another question directly addressed in the regulations is whether families with children can be restricted from the upper floors in high-rise buildings. Commenters argued that allowing children to occupy upper floors of high-rises could result in increased tort liability.⁵⁸ HUD has ruled, however, that while landlords or building managers can pass reasonable health and safety regulations, they cannot exclude families with children from the upper floors of a high-rise based on the assertion that there is a per se risk to health or safety.⁵⁹ Commenters also pointed to Section 201 of the Housing and Community Development Act,⁶⁰ which directed HUD to "prohibit high-rise elevator projects for families with children unless there is no practical alternative." However, HUD concluded that Congress did not intend to limit the ability of families to rent high-rise units, nor did it think that the Housing and Community Development Act supported an exemption under the Fair Housing Act.

Similar concerns apply to one-room efficiency apartments. The HUD comments state that construction of a building with small units will not itself violate the Act, but refusals to rent units to fam-

ing this objective.

Finally, in 1985, in response to the two *Mount Laurel* opinions, the New Jersey legislature enacted a new Fair Housing Code (N.J. Stat. Ann. §52:27D-301-29 (West 1986 & Supp. 1988)), that also established a Council on Affordable Housing. The Act allowed suburban areas to transfer half of their housing obligation to a city, which would receive payment to help it build low-income housing there rather than in the suburbs. The Act instituted comprehensive state-wide planning and charged the Council with determining the need for lower-income housing, the regional proportion of that need, and the standards for allocating to each community its fair share. The Act effectively transferred the determination of whether the *Mount Laurel* standards were satisfied from the courts to the Council. The constitutionality of the Act was upheld by the New Jersey Supreme Court in *Hills Development Co. v. Bernards*, 103 N.J. 1, 510 A.2d 621 (1986). See N.Y. Times, May 1, 1988, at §8, p.1, col.2, for an analysis of progress made in New Jersey under the *Mount Laurel* doctrine.

56. See generally Anderson & Steinhoff, *Housing for Disabled Persons: A Case Waiting to Happen*, 21 CLEARINGHOUSE REV. 578 (Nov. 1987).

57. This analysis would, of course, fail in communities for the elderly. See 1988 Act, *supra* note 18, §807 (b)(2), at 1623.

58. Fair Housing Regulations, *supra* note 1, at 3236.

59. *Id.*

60. 42 U.S.C. §1437f(c)(1) (1982).

ilies with children will be considered on an individual basis.⁶¹

Nothing in the Act or regulations requires landlords or communities to provide special facilities or recreational areas for children. Also, nothing in the Act prohibits non-discriminatory noise or property damage regulations. A landlord or manager cannot refuse a dwelling to a family with children, however, based on the assumption that children ordinarily cause damage to property or make noise. The HUD comments do state that a housing provider can consider for *all* applicants such concerns as past rental history, violations of rules and laws, or a history of disruptive, abusive, or dangerous behavior.⁶² Decisions may not be made on the basis of overbroad stereotypes.

Similarly, a landlord or building manager may not require special security deposits for families with children. This would conflict with Congress' intent to provide the same protection to families with children as to other classes.⁶³ HUD has also stated that it will determine on a case by case basis whether charges for the provision of water, electricity, refuse collection, and other services, based on the number of persons who occupy a unit, discriminate against families with children.⁶⁴

II. DISCRIMINATION AGAINST THE HANDICAPPED

A. *History of and the Need for Federal Legislation*

Handicapped persons, like so many other discrete and insular minorities, began a major push for civil rights in the early 1970's. The movement resulted in the passage of a number of state and federal laws protecting the handicapped, the most important being the Rehabilitation Act of 1973.⁶⁵ Section 503 of the Rehabilitation Act prohibits federal contractors from discriminating against the handicapped,⁶⁶ and Section 504 forbids discrimination against the handicapped in any program receiving federal money.⁶⁷

Despite Congressional efforts to protect the handicapped, handicapped persons have not fared particularly well with the United States Supreme Court. The Supreme Court has held that for purposes of equal protection analysis mentally retarded persons are not a suspect class. Hence, legislation specially affecting the retarded

61. Fair Housing Regulations, *supra* note 1, at 3239.

62. *Id.* at 3245 (referring particularly to handicapped applicants but emphasizing the word "all").

63. *Id.* at 3239.

64. *Id.*

65. 29 U.S.C. §§790-796 (1982).

66. *Id.* § 793.

67. *Id.* § 794.

will be presumed to be valid and will be sustained if the classification is rationally related to a legitimate state interest.⁶⁸

The Supreme Court has narrowly construed legislation which Congress passed intending to benefit handicapped individuals. In *Pennhurst State School v. Halderman*,⁶⁹ the Court held that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act,⁷⁰ which provides that "persons with developmental disabilities have a right to appropriate treatment, services, and rehabilitation for such disabilities," does not create any substantive rights enforceable in the courts. Similarly, in *Southeastern Community College v. Davis*,⁷¹ the Court held that Section 504 of the Rehabilitation Act did not impose any requirement on an educational institution to lower or substantially modify its standards to accommodate a handicapped person.⁷² In *Atascadero State Hospital v. Scanlon*,⁷³ the Court held that the Rehabilitation Act did not abrogate a state's eleventh amendment immunity, and refused to allow an individual to sue a state hospital which denied him employment solely because of his physical handicap.⁷⁴ In *Bowen v. American Hospital Association*,⁷⁵ the Supreme Court held that Section 504 of the Rehabilitation Act did not authorize the Department of Health and Human Services to promulgate regulations prohibiting the withholding of nourishment and medically beneficial treatment from newborn handicapped infants.

On the positive side, in *School Board of Nassau County v. Arline*,⁷⁶ the Supreme Court interpreted Section 504 broadly. The Court held that an individual with an impairment resulting from the

68. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-42 (1985). In the criminal justice area, the Supreme Court has held that mentally ill persons need not be accorded any greater protections than those accorded the general public to determine the voluntariness of their confessions. *Colorado v. Connelly*, 107 S. Ct. 515, 519-22(1986).

69. 451 U.S. 1, 18-27 (1981).

70. 42 U.S.C. §6010(1) (1982).

71. 442 U.S. 397 (1979).

72. In *Honig v. Doe*, 108 S. Ct. 592 (1988), the Supreme Court held that the Education of Handicapped Act, 20 U.S.C., §1415(e)(3) (1982), prohibited a school from excluding a handicapped child based on his disruptive or dangerous behavior.

73. 473 U.S. 234 (1985). Congress changed this result by passing the Rehabilitation Act Amendments of 1986. 29 U.S.C. §701(1982).

74. In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), the Court, while leaving open the question of whether the Rehabilitation Act creates a private right of action, did hold that a suit could be maintained against an employer even if the federal funds he received were not primarily intended to promote employment. However, in *Dep't of Transportation v. Paralyzed Veterans of America*, 106 S. Ct. 2705 (1986), the United States Supreme Court held that an airline could not be sued for discrimination under § 504 because it benefited only indirectly from funds given by the federal government to airport authorities used by the airline.

75. 106 S. Ct. 2101 (1986).

76. 107 S. Ct. 1123 (1987).

contagious disease of tuberculosis was "otherwise qualified" for employment based upon reasonable medical judgments that the disease was not easily transmitted, and that the employer could easily accommodate the employee.⁷⁷

In 1980, the House of Representatives voted to extend the Fair Housing Act to protect handicapped persons, but the bill failed to pass the Senate.⁷⁸ The 1988 Amendments use the same definitions and concepts from the Rehabilitation Act of 1973 to protect handicapped persons from discrimination in housing.⁷⁹ Therefore, there is an already established body of law to aid in interpreting these Amendments. The House Report on the 1988 Amendments states that:

*The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.*⁸⁰

As with families with children, Congress found that widespread stereotyping of persons with handicaps resulted in their frequent exclusion from housing. The House Report noted that:

For example, people who use wheelchairs have been denied the right to build simple ramps to provide access, or have been perceived as posing some threat to property maintenance. People with visual and hearing impairments have been perceived as dangers because of erroneous beliefs about their abilities. People with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently. People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others.⁸¹

B. Coverage

The Fair Housing Amendments adopt the same definition of a

77. However, in *Traynor v. Turnage*, 108 S. Ct. 1372 (1988), the Supreme Court held that, despite Section 504, it was not unlawful for the Veteran's Administration to create a conclusive presumption that alcoholism not motivated by mental illness is necessarily "willful" and therefore to cut off benefits to a veteran who claimed he was disabled by alcoholism.

78. House Report, *supra* note 5, at 14.

79. *Id.* at 17.

80. *Id.* at 18. (emphasis added).

81. *Id.*

handicapped person as the Rehabilitation Act of 1973.⁸² "Handicap" with respect to a person means:

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such an impairment; or (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))."⁸³

Coverage under the Act is broad. It is unlawful to refuse to rent or sell housing not only when the buyer or renter himself is handicapped, but also when a person residing in or intending to reside in the home is handicapped, and also when any person associated with the buyer or renter is handicapped.⁸⁴ Thus, for instance, it is unlawful to refuse to rent to a tenant because he or she has a mentally retarded relative, who will not live with the tenant, but who may visit the tenant from time to time.

The Act protects not only those persons who have a physical or mental handicap or who have a history of having such a handicap, but also those persons who are perceived to have such a handicap. Thus a landlord who refused to rent to someone because he "regarded" him as being mentally retarded, or a landlord who refused to rent to a gay man because he thought he might have AIDS, would be in violation of the Act.⁸⁵

The Act not only protects persons who are regarded as having AIDS but also those actually infected with the AIDS virus (HIV).⁸⁶ The Act thus parallels the provision added to the Civil Rights Restoration Act of 1988⁸⁷ and is in accord with the Supreme Court's decision in *School Board of Nassau County v. Arline*,⁸⁸ which holds

82. 29 U.S.C. §706 (8)(b)(1982).

83. 1988 Act, *supra* note 18, §802(h), at 1619.

84. *Id.* §804(f), at 1620.

85. See *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 979 n. 5 (9th Cir. 1984) (school "regarded" certain students as retarded when they claimed not to be); *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261, 262-63 (5th Cir. 1984) (same). Discrimination based on sexual preference as such is not prohibited by the Act. 1988 Act, *supra* note 18, at 1622.

86. Civil Rights Restoration Act of 1987, P.L. 100-259, 1029 Stat. 28 (1987) (codified at 29 U.S.C. §706).

87. Senator Cranston emphasized that the new amendments protect persons with all AIDS-related conditions, including AIDS, AIDS-related complex, and asymptomatic infection with the AIDS virus unless the health or safety of another is directly threatened. 134 CONG. REC. S10557 (daily ed. Aug. 2, 1988). In June of 1989, the American Civil Liberties Union filed a suit on behalf of Charles Baxter against the City of Belleville, Illinois. The Chicago Daily Law Bulletin, June 14, 1989, at 3, col. 5. Mr. Baxter wants to open "Our Place," a shelter to house up to seven Aids patients. *Id.* Reportedly, the City Council voted to deny Mr. Baxter's request to open the house "because of concerns about the transmission of the disease and the location of the home, which is across from a school." *Id.*

88. 107 S. Ct. 1123, 1130 (1987).

that "the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under §504."

The Supreme Court also stated in *Arline*, however, that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."⁸⁹ The House Report states that the same standard is to be applied in the context of housing.⁹⁰ A landlord must establish that there is a nexus between the fact of the individual's tenancy and a direct threat and significant risk of harm to the health or safety of others. If a reasonable accommodation will eliminate the risk, then the landlord must engage in such an accommodation.⁹¹

The Act specifically requires a landlord or seller to make "reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford [handicapped persons] equal opportunity to use and enjoy a dwelling."⁹² The Supreme Court addressed the issue of what is a "reasonable accommodation" in an educational setting in *Southeastern Community College v. Davis*.⁹³ *Southeastern* was an action under Section 504, brought against a college by a licensed practical nurse who, because of a hearing disability, was denied admission into the college's nursing program. The Court found that good hearing was a necessary qualification for being a nurse and that the college's refusal to make "major adjustments" in its nursing program did not constitute discrimination. The Court noted, however, that refusals to modify an existing program might become unreasonable and discriminatory where the modifications would not impose "undue financial and administrative burdens."⁹⁴ Similarly, in *Trans World Airlines v. Hudson*,⁹⁵ the Supreme Court held that an airline did not engage in illegal religious discrimination for failing to accommodate the schedule of an employee who refused to work on Saturdays. The airline had first permitted the steward to seek a swap of shifts or days off, but no other employees were willing to accommodate him and the union seniority system made an involuntary shift impossible. The Court found that the airline had made a reasonable effort to accommodate. It noted that an employer could not be expected to accommodate one employee by violating the contractual rights of other

89. *Id.*

90. House Report *supra* note 5, at 29.

91. *Id.*

92. 1988 Act, *supra* note 18, §804(f)(3)(b), at 1621.

93. 442 U.S. 397 (1979).

94. *Id.* at 412-13. See also *Alexander v. Choate*, 469 U.S. 287, 300-1 (1985).

95. 432 U.S. 63 (1977).

employees.⁹⁶ Other alternatives, such as allowing the employee a four-day work week, or replacing him on weekends with other available employees, would have involved costs to the airline, either in the form of lost efficiency in other jobs or in higher wages.⁹⁷

These cases indicate that the Supreme Court is not likely to interpret "reasonable accommodation" so as to impose major costs or administrative burdens on landlords or sellers. This interpretation is reflected in the implementing regulations adopted by HUD. HUD noted that:

A number of commenters were concerned that this language [reasonable accommodation] could be interpreted as requiring that housing providers provide a broad range of services to persons with handicaps that the housing provider does not normally provide as part of its housing. The Department wishes to stress that a housing provider is not required to provide supportive services, e.g., counseling, medical, or social services that fall outside the scope of the services that the housing provider offers to residents. A housing provider is required to make modifications in order to enable a qualified applicant with handicaps to live in the housing, but is not required to offer housing of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can live in the housing that the housing provider offers; not whether the applicant could benefit from some other type of housing that the housing provider does not offer.⁹⁸

Examples provided by HUD where a "reasonable accommodation" must be made are where a blind person needs to live in a dwelling with a seeing eye dog or where a parking space can be arranged so as to accommodate someone whose mobility is impaired.⁹⁹

A rare case dealing with what constitutes a reasonable accommodation in a housing case is *Schuett Investment Co. v. Anderson*.¹⁰⁰ A landlord of a federally subsidized housing project brought an action to terminate a tenant's lease "for cause." The landlord claimed that she had accumulated boxes of papers in her apartment which constituted a fire hazard. The tenant argued that she had a back injury which prevented her from moving the boxes and that the landlord had failed to accommodate her by having its employees help her to get rid of the boxes. After the eviction action was filed, she did have some children remove the boxes. The trial court found that the tenant was handicapped and that the landlord could have taken modest affirmative steps without undue hardship on its operations to reasonably accommodate her. The court of appeals held that

96. *Id.* at 81.

97. *Id.* at 84.

98. Fair Housing Regulations, *supra* note 1, at 3249.

99. *Id.* §100-204, at 3289. *Cf. Majors v. Housing Authority of County of DeKalb, Ga.*, 652 F.2d 454 (5th Cir. 1981)(seeing eye dog).

100. 386 N.W.2d 249 (Minn. App. Ct. 1986).

this ruling was not clearly erroneous.

Even if an accommodation would be costly or burdensome, Section 804(f)(3)(A) states that a landlord or seller cannot refuse "to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises[.]"¹⁰¹

Stereotypes about retarded persons or about those who are mentally ill will not be tolerated under the new Act. In *City of Cleburne v. Cleburne Living Center*,¹⁰² the Supreme Court held that the city's refusal to grant a zoning variance to permit the construction of a group home for the mentally retarded violated the equal protection clause of the fourteenth amendment. The city first argued that it was concerned with the negative attitude of property owners and especially with the fears of elderly residents of the neighborhood. But the Court held that this was not a permissible basis for treating a home for the mentally retarded different from other homes.¹⁰³ The Court also rejected as valid concerns the arguments that: the home would be across from a junior high school and the students might harass the residents; that the site was on a "five hundred year flood plain," when other group homes were allowed to be built on the same site; and that the home might be overcrowded, although the home met the occupancy standards for other dwellings.¹⁰⁴ These, or similar justifications, will fare no better under the Fair Housing Act than they did under the fourteenth amendment.

A landlord may ask a retarded person or a person who is mentally ill for references, as he would for any other occupant.¹⁰⁵ He may consider for *all* applicants past rental history, violations of rules and laws, and a history of disruptive, abusive or dangerous behavior.¹⁰⁶ However, he cannot infer that a recent history of mental illness constitutes proof that an applicant will be unable to fulfill his or her tenancy obligations.¹⁰⁷

Alcoholism will frequently qualify as a "handicap" under the Fair Housing Act.¹⁰⁸ However, alcoholics can be required to meet the

101. 1988 Act, *supra* note 18, §804(f)(3)(A), at 1620. The section does allow a landlord, where it is reasonable, to require that the renter agree to restore the interior of the premises to the condition that existed before the modifications, reasonable wear and tear excepted.

102. 473 U.S. 432 (1985).

103. *Id.* at 478.

104. *Id.* at 449-50.

105. House Report, *supra* note 5, at 30.

106. 54 Fair Housing Regulations, *supra* note 1, at 3245.

107. House Report, *supra* note 5, at 30.

108. Fair Housing Regulations, *supra* note 1, at 3245. *But cf.*, *Traynor v. Turnage*, 108 S. Ct. 1372 (1988), which allows the Veteran's Administration to dis-

same behavior standards as are applied to others, even if the behavior problem stems directly from the alcoholism.¹⁰⁹ The alcoholic's past history of disruptive behavior may also be considered in denying him or her a dwelling.¹¹⁰

Current illegal users of or addicts of controlled substances, as defined by the Controlled Substances Act,¹¹¹ are not protected by the new amendments. Landlords or sellers can properly inquire into illegal use of drugs and can reject applicants or buyers on that basis.¹¹²

C. Application

Purposeful discrimination against handicapped persons is definitely prohibited under the new amendments. As in the case of familial status discrimination, requiring handicapped tenants to post special security deposits,¹¹³ excluding them from the top floors of high rises,¹¹⁴ or requiring them to meet special application procedures¹¹⁵ is illegal under the new amendments.

Also, decisions having a discriminatory impact on handicapped persons may violate the Act. In *Alexander v. Choate*,¹¹⁶ the United States Supreme Court considered whether actions which have a discriminatory impact may violate Section 504. The Court held that a state's reduction from ten to fourteen of the number of in-patient hospital days that would be paid for by medicaid did not violate the Rehabilitation Act of 1973, despite the fact that the reduction had a disproportionate impact on handicapped individuals.

The Supreme Court rejected the state's argument that the Rehabilitation Act only proscribed intentional discrimination against the handicapped.¹¹⁷ It noted that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."¹¹⁸ Also, the Court noted the pragmatic reason that "much of the conduct Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a

criminate against alcoholics who are not also mentally ill.

109. Fair Housing Regulations, *supra* note 1, at 3245.

110. *Id.*

111. 21 U.S.C. §802 (1982).

112. House Report, *supra* note 5, at 30.

113. Fair Housing Regulations, *supra* note 1, at 3239.

114. *Id.* at 3236.

115. *Id.* at 3245.

116. 469 U.S. 287 (1985).

117. *Id.* at 294.

118. *Id.* at 295.

discriminatory intent.”¹¹⁹ Nonetheless, the Court found that to interpret Section 504 to reach all action that has a disparate impact on the handicapped would also be troubling because the handicapped are typically not similarly situated to the non-handicapped.¹²⁰

Trying to keep both of these considerations within manageable bounds, the Supreme Court held that at least some conduct that has a disparate impact upon the handicapped is forbidden by Section 504.¹²¹ The Court relied on *Southeastern Community College v. Davis*:¹²²

Davis thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make “fundamental” or “substantial” modifications to accommodate the handicapped, it may be required to make “reasonable” ones. . . .

The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.¹²³

The Court upheld the Medicare restriction because the state provided equal coverage to both handicapped and non-handicapped persons. The state was not required to provide handicapped persons with more coverage than non-handicapped persons.¹²⁴

Under the Fair Housing Act, while not every decision that has a disproportionate adverse effect on handicapped persons will violate the Act, decisions that operate to deny the handicapped equal access to housing will be illegal. The House Report adopts this understanding of the new amendments:

Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.¹²⁵

119. *Id.* at 296-97.

120. *Id.* at 298.

121. *Id.* at 299. For a further discussion of disparate impact see, *supra* notes 49-53 and accompanying text.

122. 442 U.S. 397 (1979).

123. *Alexander*, 469 U.S. at 300-1.

124. *Id.* at 309.

125. House Report, *supra* note 5, at 24. The Report cites as an example City of

Zoning decisions that have the purpose or effect of excluding handicapped persons will violate the Act. The House Report specifically notes that:

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. Under H.R. 1158, land use and zoning cases are to be litigated in court by the Department of Justice. They would not go through the administrative process.¹²⁶

The HUD regulations do not expressly address the issue of zoning because individual cases are to be referred to the Justice Department rather than resolved by HUD.¹²⁷

Municipalities should not be able to rely upon Section 807(b)(1)¹²⁸ of the new Act, which permits regulations concerning the number of occupants permitted to occupy a dwelling, to justify discriminatory zoning regulations. HUD has made clear that such regulations are lawful only so long as they are equally applied to all occupants and do not discriminate on the basis of handicap.¹²⁹

Advocates for the handicapped should also argue the *Mount Laurel* cases¹³⁰ to establish that municipalities cannot pass zoning laws that have the effect of denying housing to the handicapped. The argument that a community can zone out group homes and other facilities that serve the handicapped, under the guise that these people can go elsewhere, is clearly counter to the Congressional intent to protect this class of individuals.¹³¹

A clear example of what should be held to violate the new

Cleburne v. Cleburne Living Center, 473 U.S. 435 (1985).

126. House Report, *supra* note 5, at 24.

127. Fair Housing Regulations, *supra* note 1, at 3246.

128. 1988 Act, *supra* note 18, §807(b)(1), at 1623.

129. Fair Housing Regulations, *supra* note 5 at 3237.

130. See *supra* notes 53-55 and accompanying text.

131. See House Report, *supra* note 5, at 23-24.

amendments is provided by the City of Chicago Heights, Illinois. A private company asked that city for a special use permit to build a home for fifteen mentally retarded persons in a district zoned for two-family residences. Some 330 persons petitioned against the permit, and local residents were quoted as being fearful about the problems a home for the mentally retarded would create in their community.¹³² Meetings concerning the permit were described as "heated."¹³³ The city's corporation counsel was quoted as stating that uses allowed by special permit include "rest homes, nursing homes, hospitals and sanitariums," as well as "institutions for the aged and for children" or "schools—day or nursery, public or private."¹³⁴ He did not, however, see a home for the mentally disabled as being comparable to any of these.¹³⁵ The zoning board finally denied the request on the ground that a home for retarded adults did not qualify as a nursing home, hospital, nursery school, or institution for the aged or children under the zoning code.¹³⁶

Institutions such as nursing homes attempting to exclude the handicapped raises a serious question under Section 804(f) of the Act. Nursing or other group homes are clearly "dwellings" which are "occupied as, or designed or intended for occupancy as, a residence by one or more families."¹³⁷ One can argue that Section 807(b)(1) exempts "housing for older persons" from the prohibitions against "familial status" discrimination but not against discrimination against the handicapped, and therefore, "housing for older persons" cannot exclude handicapped persons. If a handicapped person is excluded because of a neutral age restriction and not because of his or her handicap *per se*, however, there is no violation of the Act be-

132. The Chicago Heights Star, Feb. 26, 1989, at 1, col. 2, and April 9, 1989, at 1, col. 5.

133. The Chicago Heights Star, April 2, 1989, at 1, col. 5.

134. *Id.*

135. *Id.*

136. The Chicago Heights Star, April 9, 1989, at 1 col. 5. The Chicago Heights City Council subsequently accepted the recommendation of the zoning board. In explaining the decision, the mayor stated that, "The Zoning board did not turn this down because of mentally retarded people . . . Anyone asking for 15 people living in one house in that neighborhood would be turned down by the Zoning Board." The Chicago Heights Star, May 4, 1989, at 1, col. 2.

In June of 1989, the United States Justice Department filed suit against Chicago Heights. Chicago Tribune, June 21, 1989, at 1, col. 2. Anton Valukas, the U.S. attorney for the Northern District of Illinois, said "Filing this action against the city of Chicago Heights signals the refusal of this office to tolerate discrimination against individuals or groups based on their status as mentally or physically handicapped." *Id.*

137. 1988 Act, *supra* note 18, §802(b), at 1619. A "Family" may consist of a single individual. *Id.* §802(k), at 1620. Dwellings in which the owner lives that are occupied by no more than four families and dwellings owned by religious organizations or private clubs for their own members' use are excluded under the Act. *Id.* § 803(b), at 1619.

cause age classifications are not illegal under the Act.¹³⁸

A home for the elderly that excludes the elderly who are handicapped would stand on different footing. Exclusion of the elderly handicapped would appear to be illegal unless the owner could not "reasonably accommodate" the handicapped individual. This might be the case if the individual required special nursing care which the owner would not normally provide and that would be expensive and administratively burdensome for him to provide.¹³⁹ A similar argument could be made that a home could not discriminate between persons with different types of handicaps. Lower courts have interpreted Section 504 to permit homes to admit the mobility impaired but to exclude the mentally impaired.¹⁴⁰ However, the mere act of differentiation itself without further justification should be held to be illegal. The owner should be required to make the minimum showing that he provides particular services for the mobility impaired and cannot "reasonably accommodate" the mentally impaired.

In some instances, landlords and owners may be required to do more than "reasonably accommodate" handicapped persons. They must permit tenants or occupants to make reasonable modifications to premises at the tenant's own expense. However, a landlord may require the tenant to restore the premises when the lease is ended if it is reasonable to do so.¹⁴¹ The regulations permit a landlord to require the tenant to pay into an interest bearing escrow account a reasonable amount of money over a reasonable period to ensure that funds will be available for the restoration.¹⁴² The regulations make clear that a landlord may not routinely require these escrow payments; he must make a case-by-case determination based upon such factors as the extent and nature of the modifications, the expected duration of the lease, and the credit and tenancy history of the tenant.¹⁴³

As examples of what are reasonable modifications, the regulations state that a tenant may install grab bars in a bathroom, but that a landlord can require him to remove them at the end of the tenancy and to restore the wall to its original condition. It may be

138. Cf. *Brecker v. Queens B'nai B'rith Housing Dev.*, 798 F.2d 52 (2d Cir. 1986); *Knutzer v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987).

139. See *supra* notes 91-100 and accompanying text for a discussion of what is a "reasonable accommodation."

140. See *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343, 1352 (10th Cir. 1987); *Dempsey by and through Dempsey v. Ladd*, 840 F.2d 638, 641 (9th Cir. 1987).

141. 1988 Act, *supra* note 18, §804(f)(3)(A), at 1620.

142. Fair Housing Regulations, *supra* note 1, §100.203, at 3288.

143. *Id.* at 3248.

unreasonable, however, for the landlord to require the tenant to remove the blocking securing the grab bars, as it will not interfere with a future tenant's use of the bathroom. Also, a tenant may widen a door for a wheelchair, but under normal circumstances the landlord cannot insist that the door be narrowed again at the end of the lease.¹⁴⁴

The regulations require the tenant to seek the landlord's approval before the modifications are made and the landlord may require the tenant to give a reasonable description of the modifications as well as reasonable assurances that the work will be done in a workmanlike manner. If the tenant believes the landlord is unreasonably withholding permission, or is unreasonably requiring an escrow, his remedy is to complain to HUD.¹⁴⁵

The Act also requires that covered multifamily dwellings designed or constructed for first occupancy after March 13, 1991 must meet certain design and construction requirements so as to make them accessible to handicapped persons.¹⁴⁶ Covered multifamily dwellings are those buildings that consist of four or more dwelling units if the building has one or more elevators, and also "ground floor" dwelling units in other buildings consisting of four or more dwelling units.¹⁴⁷ The regulations specify that a building may have more than one ground floor.¹⁴⁸ HUD has interpreted the Act to cover single-story townhouses where there are four or more units. The Act also covers more-than-one story townhouses if they have elevators and there are four or more units. If a multi-floor townhouse does not have an elevator, the entire townhouse is exempt so that the "ground floor" does not have to meet the March, 1991 accessibility standards.¹⁴⁹

These standards state that at least one building entrance in a covered building must be on an accessible route, unless it is impractical because of the terrain or unusual characteristics of the building site.¹⁵⁰ The burden is on the designer or builder to establish the impracticality.¹⁵¹ If a building has more than one floor on an accessible route, then the units on each floor with an accessible route must

144. *Id.* §100.203(c), at 3289.

145. *Id.* at 3249.

146. 1988 Act, *supra* note 18, § 804(f)(3)(c), at 1621. The House Report notes that "readily accessible and usable by" are terms of art used in other statutes and regulations and that these terms are to be given the same meaning in the Fair Housing Act. *E.g.*, Architectural Barriers Act of 1968, 42 U.S.C. §§4151-4157; Dept. of Health and Human Services, 45 C.F.R. §84.12.

147. 1988 Act, *supra* note 18, §804(f)(7), at 1622.

148. Fair Housing Regulations, *supra* note 1, at 3244.

149. *Id.*

150. *Id.* §100.205(a), at 3289.

151. *Id.*

satisfy the Act's accessibility requirements.¹⁵²

The Act requires not only that the covered dwelling units be accessible but that public use and common use areas also be accessible.¹⁵³ HUD's examples of common use areas include: hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas, and passageways among and between buildings.¹⁵⁴ Doors must be sufficiently wide to allow passage by handicapped persons in wheelchairs.¹⁵⁵ Also, light switches, electrical outlets, thermostats and other environmental controls must be within easy reach, bathroom walls must be reinforced to allow the installation of grab bars, and kitchens and bathrooms must have sufficient space to allow a person in a wheelchair to maneuver.¹⁵⁶

Compliance with the American National Standard requirements will satisfy the latter requirements,¹⁵⁷ provided they also satisfy state and local standards.¹⁵⁸ However, the regulations make clear that the determination of compliance or non-compliance with state or local requirements is not conclusive of compliance with the federal standards.¹⁵⁹

A major concern of Congress when enacting the design and construction requirements was cost. For instance, in opposing the amendments, Senator Symms argued that the requirements "will inescapably increase the cost of multifamily rental housing in this country."¹⁶⁰ However, Senator Weicker noted that:

Yet the expense associated with accessibility features for new housing are relatively small. Estimates are that at most, such requirements would entail less than 1 percent of construction costs. We are told by the National Association of Home Builders that they can build in features to ensure accessibility at very little cost—and that cost can be expected to decline even further once such modifications become standard in the housing industry.¹⁶¹

The legislative history makes it clear that Congress did not intend to establish a national building code.¹⁶² HUD may encourage, but not require, states and local governments to enforce design and construction requirements that are at least as stringent as the re-

152. *Id.* at 3244.

153. 1988 Act, *supra* note 18, §804 (f)(3)(c)(i), at 1621.

154. Fair Housing Regulations, *supra* note 1 §100.201, at 3287-88.

155. 1988 Act, *supra* note 18, §804(f)(3)(c)(ii), at 1621.

156. *Id.* §804(f)(3)(c)(iii), at 1621.

157. *Id.* §804(f)(4), at 1621 (commonly cited as ANSI A117.1).

158. House Report, *supra* note 5, at 27.

159. Fair Housing Regulations, *supra* note 1, §100.205(h), at 3290.

160. 134 Cong. Rec. S10546 (daily ed. Aug. 2, 1988).

161. *Id.* at S10552.

162. *Id.* at S10545 (Statement by Sen. Simpson), S10553 (Statement of Sen. Weicker).

quirements in the Act.¹⁶³ However, HUD is not required to review or approve the plans, designs, or construction of all covered multifamily dwellings to see whether they conform to the Act.¹⁶⁴

III. LIMITATIONS OF THE NEW AMENDMENTS

The new amendments to the Fair Housing Act substantially increase the number of persons protected by the Act, but they do not address the problem faced by many low income persons who are denied access to housing. The amendments address certain forms of discrimination, but they do not go forward and declare that there is a *right* to housing under federal law. As such the Fair Housing Act will not be of benefit to large numbers of homeless persons or to those forced to live in substandard housing.

For many poor families, decent housing is unaffordable and unavailable.¹⁶⁵ Recent studies show that because there is a shortage of housing for poor persons, poor persons are forced to pay a larger percentage of their income for housing. Also, one in five poor persons is forced to live in housing classified as substandard by HUD.¹⁶⁶ The result is that millions of poor families have been driven into homelessness and many more are threatened by homelessness.¹⁶⁷

The Universal Declaration of Human Rights declares that everyone has a right to a standard of living sufficient to enable him and his family to have housing.¹⁶⁸ In 1944, President Roosevelt declared that it was the right of every family to have a decent home, and he called upon Congress to explore the means of implementing this and other economic rights.¹⁶⁹ The constitutions of a number of western-style democracies direct the state to ensure that all citizens have suitable and adequate shelter.¹⁷⁰

The United States Supreme Court has refrained from interpreting the Constitution so as to create a right to decent, safe, and sanitary housing.¹⁷¹ The Court has also declined to hold that discrimina-

163. 1988 Act, *supra* note 18, § 804(f)(5)(c), at 1621.

164. *Id.* § 804(f)(5)(d), at 1621.

165. See Calmore, *To Make Wrong Right: The Necessary and Proper Aspirations of Fair Housing*, THE STATE OF BLACK AMERICA (1989)(published by the National Urban League).

166. N.Y. Times, Apr. 18, 1989, at 14, col. 1.

167. Chicago Tribune, Apr. 19, 1989, §1, at 12, col.1. Compare HUD, A REPORT TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS 18-19 (1984), with HOMBS & SNYDER, HOMELESSNESS IN AMERICA: A FORCED MARCH TO NOWHERE, xvi (2d ed. 1983).

168. United Nations' Universal Declaration of Human Rights, Art. 25(1)(1948).

169. Roosevelt, An Economic Bill of Rights (1944), reprinted in W. LAQUEUR & R. RUBIN, THE HUMAN RIGHTS READER 269-70 (1979).

170. See FED. REPUBLIC OF NIG. CONST., ch. II, §16(2)(d) (1979).

171. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (due process); *James v. Valtierra*, 402 U.S. 137 (1971) (equal protection).

tion against poor persons is suspect under equal protection.¹⁷² Congress has not included wealth as a prohibited classification under the Fair Housing Act. Thus, unless a decision can be linked to one of the prohibited categories under the Act, landlords are free to discriminate against poor persons,¹⁷³ and municipalities may pass zoning regulations that effectively exclude low income families.¹⁷⁴

By expanding the groups who can claim protection under the Fair Housing Act to families with children and to the handicapped, Congress has taken a giant step forward in insuring that decent, safe, and sanitary housing is available to all persons in the United States. Housing advocates cannot rest, however, until Congress or the courts go further and declare that decent, safe, and sanitary housing is the *right* of every person living in the United States.

172. See *Dandridge v. Williams*, 397 U.S. 471 (1970); *Maher v. Roe*, 432 U.S. 464 (1977).

173. If one of the prohibited classifications is a factor in a landlord's decision not to rent, he may be sued under the Fair Housing Act even though the landlord's expressed reason is the economic undesirability of the tenant. See *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970). Nonetheless, the Court of Appeals for the Second Circuit upheld a landlord's rule that required tenants to have a weekly net income equal to at least 90 percent of their monthly rent or to furnish a co-signer or guarantor who met even stricter standards, although the rule had a discriminatory impact on welfare recipients, of whom 77% were either black or Puerto Rican. *Boyd v. Lefrak Organization*, 509 F.2d 1110 (2d Cir. 1975), *cert. denied*, 423 U.S. 896 (1975).

174. Municipal zoning decisions that exclude low income persons have been found to violate the Fair Housing Act if their purpose or effect is to discriminate against persons for any of the reasons enunciated in that Act. See *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Kennedy Park Homes Association v. City of Lackawanna*, 318 F. Supp. 669, 694 (W.D. N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

In *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), low-income black residents sued the town and its officials, complaining that the town's withdrawal from a multi-municipality low-income housing authority was racially motivated. The court of appeals held a finding that the town's actions had a racially disproportionate impact in violation of the Fair Housing Act and were racially motivated in violation of the fourteenth amendment. However, the court held that the trial court acted improperly when it ordered the town to construct units from its own locally generated funds. The court noted that a town has no independent duty to construct low-income housing for its residents, and that the remedy was disproportionate to the wrong committed. The court stated that a proper remedy would be to require the town to reinstate the procedures and plans in place prior to the withdrawal and to require it to pursue those plans aggressively and in good faith.