LEGAL CONTROL OF BLOCKBUSTING

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As black and other non-white populations have increased in American cities, outward pressures for space and housing have led, not to the dispersion and diffusion of minority groups, but to racial annexation of neighborhoods next to the ghetto. As ghettos move outward, adjacent and previously all-white neighborhoods are first invaded by non-white families, and then annexed to the ghetto as invasion is followed by total racial succession. One of the factors allegedly influencing the total racial turnover of neighborhoods is blockbusting, usually defined as a form of pressurized activity by real estate brokers which is aimed at influencing the total racial turnover of a neighborhood. To the extent that blockbusting leads to neighborhood transition and segregation, it arguably runs counter to other programs working toward racial diffusion and desegregation. This note examines the nature of blockbusting practices, their effects on the housing supply, and the legal controls, if any, which should be applied to achieve the regulation if not the suppression of blockbusting practices.

I. The Nature of Blockbusting

Blockbusting is a drama enacted on the block or in the neighborhood, and the synopsis varies little from community to community. The blockbuster, the principal actor, induces panic in white homeowners by means of harassment meant to induce a rapid racial turnover of residences at greatly distressed prices. In its mild form, blockbusting may consist merely of excessive solicitation of sales, which may engender panic. More severely, blockbusting can be an intensive campaign to disseminate the rumor, based on half truths, that blacks have purchased or will purchase a residence and that, as a result, the neighborhood will become inundated by blacks with an accompanying decline in property values and quality of housing. To substantiate his propaganda and to heighten fear, the blockbuster may hire black

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welfare mothers to parade up and down the block[1] or vandals to throw bricks through windows,[2] in order to foster the impression of a black invasion.

The blockbusting saga typically opens in a white neighborhood lying in the path of an expanding black ghetto. On the whole, local realtors abstain from disrupting the homogeneity of a white neighborhood by the introduction of the first black family,[3] so the racial integrity of the neighborhood is generally preserved and neighborhood turnover stagnated[4] until several blacks enter as purchasers through outside realtors not subject to community pressures. The blockbuster comes on the scene with prophecies of neighborhood doom, communicated to homeowners by repeated telephone calls, post cards, and door-to-door visits. In these communications he preys upon latent fears of white homeowners, falsely representing that many neighbors have already sold to blacks or are contemplating doing so—evidenced by "sold" and "for sale" signs placed throughout the neighborhood by the blockbuster without the owners' consent[5] or he may claim that prop-

1. Vitchek, *Confessions of a Blockbuster,* 235 SATURDAY EVENING POST 15, 16 (1962).

2. R. HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 68 (1969) [hereinafter cited as HELPER]; Richey, *Kenwood Foils the Blockbusters,* 227 HARPER'S MAGAZINE 42, 43 (1963) [hereinafter cited as Richey].

3. Although the Real Estate Code of Ethics advocated by the National Association of Real Estate Boards and its state affiliates has been revised to eliminate reference to race, most realtors continue to feel bound morally and pragmatically to preserve the interests of white homeowners by excluding blacks from the neighborhood. The original Code of Ethics stated that "[a] realtor should never be instrumental in introducing into a neighborhood a character or property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in that neighborhood." *Quoted in* E. GRIER & G. GRIER, DISCRIMINATION IN HOUSING: A HANDBOOK OF FACT 15 (1960); in 1950 this code was altered to proscribe merely the introduction of a character of property or use detrimental to property values in the neighborhood, but realtors continue to abide by the original code. *Id.;* HELPER at 39, 109, 160, 201; C. TILLY, W. JACKSON, & B. KAY, RACE AND RESIDENCE IN WILMINGTON, DELAWARE 42 (1965).

Realtors feel strongly that policies of racial exculsion are on the highest ethical plane because realtors are thereby preserving the American way, avoiding racial disharmony and preventing economic and social harm to white homeowners in the community. HELPER at 117, 140. Furthermore, the white homeowners constitute potential future customers and the realtor must act to protect his reputation. Many realtors have expressed personal as well as business reasons in opposition to integration. *Id.* at 130.

4. HELPER at 35.

5. *E.g.,* M. Price, Southern Regional Council Neighborhoods—Where Human Relations Begin 30 (1967) (Urban Planning Project no. 4 of So. Reg. Council) [hereinafter cited as Southern Regional Council].

erty values are plummeting, and that the property owner should sell quickly before it is "too late."[6]

In the earlier years of blockbusting, the blockbuster reaped substantial gain, especially if he took a house for resale rather than as a mere listing. The ready cash[7] offered by the blockbuster induced many desperate howeowners to sell, even at greatly depressed prices, in order to avoid further loss.[8] Yet, in resales to blacks who were eager to escape the ghetto, the blockbuster received amounts exceeding the fair market value of the residences. Moreover, sales were frequently made to poor blacks,[9] who accumulated funds for housing payments by subdividing residences into units leased on a room basis, clearly in violation of local zoning laws,[10] and contributing to the decline of the neighborhood. Inevitably, no funds would remain for maintenance purposes, thus leading to further deterioration of buildings.[11]

Current blockbusting practice relies less on flagrant harassment and

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6. In reality, prices may actually rise following black entry because of the willingness of blacks to pay a premium to escape the ghetto. HELPER at 86; E. Smolensky, S. Becker, & H. Molotch, *The Prisoner's Dilemma and Ghetto Expansion*, 44 LAND ECON. 419 (1968).

7. Financial institutions generally consider changing neighborhoods as bad credit areas, so that potential purchasers are unable to secure financing for purchases there. Because the blockbuster could recoup his expenses from payments by the black purchaser, he was willing to pay a premium for heavy mortgaging on these risky properties. By doing so he was able to keep his money out of the dealings, and thereby had capital to offer the desperate sellers when no one else was able to make similar financial arrangements. Gannon, *Spotlight on Blockbusting*, 120 AMERICA 563, 564 (1969); Richey at 46; H. Sanoff, M. Sawhney, K. Burgwyn, & G Ellinwood, Residential Patterns of Racial Change: A Study of a Southern City, July 1970. For an analysis of mortgaging practices of blockbusters see W. Lehman, Mortgage Availability in Racially Transitional Areas, Report of Chicago Commission on Human Relations, Aug. 2, 1962.

8. Of course, loss is not actually experienced until the sale is made for less than the fair market value. If the homeowner were willing to wait for property values to stabilize he might suffer no loss at all.

9. Alternatively, the blockbuster may subdivide the residences himself and rent to poor blacks on a weekly basis.

10. The blockbuster retains title so that if a payment is missed he may repossess the house for "resale" on a contract basis to another illiterate black. Richey at 44; Southern Regional Council at 2, 30. These long-term sales contracts may include provisions allowing the contract holder (the blockbuster) to remodel or repaint at any time, adding the cost thereof to the contract cost.

11. This inability properly to maintain the property reinforces the stereotype that blacks always let their property run down and are poor housekeepers. *See* Southern Regional Council.

speculation and more on subtler tactics,[12] predominantly representations regarding the "changing neighborhood," often without reference to race. To insure the turnover of the neighborhood, the blockbuster also discourages potential white purchasers, showing available listings only to blacks.[13] Although the profits are not as great as on resales, the high turnover rate assures substantial earnings in the form of commissions.[14] Each sale accelerates the turnover rate by giving credence to a prophecy which has become self-fulfilling. The blockbusting campaign ends with the annexation of the neighborhood to the ghetto, continued segregation, the involuntary relocation of former white residents, and the infusion of new life into stereotypes and prejudices about racial minorities.

II. Reasons for the Control of Blockbusting

Because blockbusting has such a negative impact on cities, many governmental bodies—at the federal, state, and local levels—have adopted anti-blockbusting measures through legislation and administrative regulations. These controls usually have one or more of the following purposes: (1) preventing discrimination and the creation of ghettoes;[15] (2) promoting fairness in real estate transactions;[16] and (3) promoting community stability and interracial harmony.[17] These

12. Note, *Blockbusting*, 59 Geo. L.J. 170, 171 (1970) [hereinafter cited as *Blockbusting*]; Interview with Hedy Epstein, Greater St. Louis Committee for Freedom of Residence, in St. Louis, Missouri, January 1971 [hereinafter cited as Epstein interview].

13. C. Rapkin & W. Grigsby, The Demand for Housing in Racially Mixed Areas—A Study of the Nature of Neighborhood Change 46 (1960) [hereinafter cited as Rapkin & Grigsby]; Southern Regional Council at 30.

14. Even in the absence of speculation gross profits on sales to blacks have been known to be double that of sales to whites. Rapkin & Grigsby at 112. During a blockbusting episode in Chicago, resale prices exceeded fair market value by 28.5 to 118 per cent. Note, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 Yale L.J. 1171, 1208 (1965).

15. A number of fair housing laws include anti-blockbusting provisions. *E.g.*, Kan. Stat. Ann. § 44-1016 (Supp. 1971); Alexandria, Va., Code § 17A-4 (1969). Some laws refer specifically to the association between blockbusting and the creation of ghettos. *E.g.*, Md. Ann. Code art. 56, § 230B (Supp. 1970); Teaneck, N.J., Ordinance 1274 (1966).

16. *E.g.*, Md. Ann. Code art. 56, § 230B (Supp. 1970); Laws of N.Y. ch. 493, tit. C, § C 1-1.0 (May 8, 1970). *See* 112 Cong. Rec. 18177 (1966) (remarks of Congressman Bingham, who introduced the anti-blockbusting amendment).

17. Laws of N.Y. ch. 493, tit. C, § 1-1.0 (May 8, 1970); Teaneck, N.J., Ordinance 1274 (1966).

purposes and their relation to blockbusting practices will be examined briefly.

It has been shown that blockbusting converts a potentially integrated neighborhood into a ghetto, and may be condemned for furthering the cause of discrimination. However, it may be that the onus on blockbusters is misplaced. Instead, it is possible that the neighborhood never had a potential for stable integration, and that resegregation would occur even in the absence of intervention by the blockbuster, in response to white prejudices or other factors.

Racial prejudice may be a dominant operative factor in resegregation, yet evidence from observation of transitional neighborhoods indicates that it is not the sole determinant of neighborhood racial transformation. Whites may choose to move from a neighborhood because of race or class prejudice against their new black neighbors or because of changes in community services resulting from changes in the composition of the population.[18] Alternatively, whites may move for reasons wholly unrelated to race or race prejudice.[19]

If, in the course of normal neighborhood mobility, whites move out and blacks begin to fill resultant vacancies, the neighborhood will eventually become all black without the intervention of a blockbuster.[20] The absence of blockbusting, however, does not signify that real estate operators are not engaged in a policy of selective showing,[21] which might be the cause for the filling of vacancies by blacks only. That is, real estate brokers to whom whites normally turn for assistance may simply not show homes in racially changing neighborhoods. Technically, this practice is not blockbusting, but it assists the forces

18. RAPKIN & GRIGSBY at 19; Marcus, *Racial Composition and Home Price Changes: A Case Study*, 32 J. AM. INST. PLANNERS 334 (1968).

19. Fishman, *Some Social and Psychological Determinants of Intergroup Relations in Changing Neighborhoods: An Introduction to the Bridgeview Study*, 40 SOCIAL FORCES 42, 45 (1961). The "mobility wish" evidenced by "for sale" signs, was equal in integrating and non-integrating neighborhoods. Even the occurrence of a racial incident did not accelerate turnover in the integrating neighborhood. Molotch, *Racial Change in a Stable Community*, 75 AM. J. SOCIOLOGY 226 (1969).

20. M. GROZINS, THE METROPOLITAN AREA AS A RACIAL PROBLEM 6 (1958); Molotch, *Racial Change in a Stable Community*, 75 AM. J. SOCIOLOGY 226, 227 (1969).

21. Realtors show listings in changing areas only to blacks and refuse to show them to whites. Concurrently, listings in non-changing neighborhoods are shown only to whites and not to blacks. This selective showing often occurs despite explicit requests by the potential buyer to see residences in the particular area. Epstein interview.

working toward total racial secession. Real estate operators contend that whites are disinterested in purchasing in changing areas, so that selective showing only avoids wasting time.[22] Contrary to this assessment, there is evidence that whites will purchase in mixed areas, attracted by considerations of location, design, and economy,[23] although it is true that purchases by whites may not be made adjacent to residences owned by blacks.[24]

The proximity factor may offer explanation for the operation of the "tipping mechanism." The "tipping point" of a neighborhood constitutes that number of black entries to the neighborhood which overcomes the tolerance of white homeowners for black neighbors and causes them to move away. Whether the white exodus reflects the operation of such a "tipping mechanism" or whether white departures merely increase with an increasing rate of black entries,[25] it is clear that after the entry of a substantial number of black families propinquity is unavoidable and fewer whites will enter.[26]

It might then be concluded that the mass exodus of whites prerequisite to neighborhood racial change does not ordinarily occur upon the mere entry of several blacks. In most cases, significant inertia must be overcome before a homeowner will act rather than remain passive.[27] Unless a homeowner has already begun to feel dissatisfaction with his neighborhood or residence, he is most likely to remain upon the entry of blacks, at least until the forces holding him to that

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22. Even where these predictions of prejudice are contradicted by requests for listing in the mixed area, realtors are likely to continue to refuse to show such listings. Realtors, then, are quite prominent in directing the influx of purchasers into any neighborhood. *See* Detroit Comm'n on Community Relations, A Preliminary Report on the Public Hearings to Evaluate the Effectiveness of the FNPO [Fair Neighborhood Practices Ordinance] in Dealing With the Continuing Process of Neighborhood Resegregation 4, April 21, 1966 [hereinafter cited as Detroit Comm'n on Community Relations]. Many real estate firms dealing predominantly with whites may cease dealing in a changing neighborhood. *Id.*

23. A. Pascal, The Analysis of Residential Segregation 26, Oct. 1969; The Potomac Institute, Housing Guide to Equal Opportunity, 1968.

24. RAPKIN & GRIGSBY at 46.

25. M. GRODZINS, THE METROPOLITAN AREA AS A RACIAL PROBLEM 6 (1958); Stinchcombe, McDill, & Walker, *Is There a Racial Tipping Point in Changing Schools?*, 25 J. SOCIAL ISSUES 127 (1969).

26. A. TAEUBER & K. TAEUBER, NEGROES IN CITIES; RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE 100 (1965). The authors indicate that resegregation is often seen as an irreversible process, that once blacks begin to enter a neighborhood, it will continually become more and more black.

27. RAPKIN & GRIGSBY at 19.

place of residence diminish substantially.[28] Moreover, when affirmative steps have been taken to attract whites to mixed neighborhoods, stable integration patterns have resulted.[29] In the absence of such action, black entry has only foreshadowed resegregation; this may be a natural phenomenon reflecting white prejudice. Blockbusting only hastens its occurrence, and should not bear all the blame for that process. However, inasmuch as blockbusting does help lead to segregation patterns, the prevention of discrimination is a legitimate justification for anti-blockbusting measures.[30]

A second purpose advanced for anti-blockbusting measures is the prevention of economic exploitation in real estate dealings. The motivation of the blockbuster is simply to maximize profits regardless of social consequences. That white homeowners are often victimized by their own prejudice[31] and ignorance does not justify the enrichment of the blockbuster at their expense. What happens is that the blockbuster artificially inflates the supply of residences on the market. When the blockbuster is a speculator he purchases at distressed prices, and then resells to blacks at inflated price levels. Both the white homeowner and the black purchaser are economic losers—receiving too little and paying too much. Even if the blockbuster does not purchase for resale, his activities have the purpose of churning the market for his own benefit. Patterns of activity leading to market manipulation are also arguably subject to public control.

Finally, blockbusting controls are advocated for the purpose of avoiding community instability and racial tension. A particularly destructive, though intangible, consequence of blockbusting is its perpetuation of the myth that the entry of blacks automatically deflates property values and deteriorates the social fabric of the neighborhood. Although effect on property values is highly controverted by

28. *Id.*

29. *E.g.*, The Potomac Institute, Housing Guide to Equal Opportunity, 1968; Molotch, *Racial Change in a Stable Community*, 75 AM. J. SOCIOLOGY 226, 227 (1969).

30. In discussing the federal anti-blockbusting provision, Senator Mondale related blockbusting prevention to open housing in that price declines constitute a major argument against fair housing legislation and blockbusting is a cause of property value decline. 113 CONG. REC. 22841 (1967).

31. Households vary in bigotry level and their resultant housing decisions. A. Pascal, The Analysis of Residential Segregation 22, Oct. 1969; *Blockbusting* at 175.

social scientists,[32] the activities of the blockbuster transform the stereotype into a self-fulfilling prophecy. Few whites realize they are being manipulated by the blockbuster,[33] because the realtor is the acknowledged expert on property values and it is, therefore, reasonable to give credence to his assessment.[34] As events corroborate the blockbuster's prediction, his statements assume increasingly greater validity; the stereotype becomes fact. Families and individuals who move under pressure from transitional areas may take stereotyped attitudes toward non-whites with them. On the other hand, the black again feels rejected and denied his individual worth; he resents being put back into the ghetto once again.[35] Not only is community unrest created, but the opportunity for successful integration is further postponed by intensifying fears and the resistance to open housing.

Apart from the effects on individual neighborhoods, the impact of blockbusting on social attitudes and community tension also constitute sufficient reason to impose negative sanctions on blockbusting practices.

III. Control of Blockbusting

While informal controls in the form of community resistance through neighborhood organizations have been effective in many instances,[36] this paper focuses on formal controls imposed by govern-

32. L. Laurenti, Property Values and Race; Studies in Seven Cities (1960); A. Pascal, The Analysis of Residential Segregation 23-25, Oct. 1969; Marcus, *Racial Composition and Home Price Changes: A Case Study,* 32 J. Am. Inst. Planners 334 (1968); Ladd, *The Effect of Integration on Property Values,* 52 Am. Econ. Rev. 801 (1962); E. Smolensky, S. Becker, & H. Molotch, *The Prisoner's Dilemma and Ghetto Expansion,* 44 Land Econ. 419 (1968).

33. H. Singer, *How We Beat the Blockbusters,* 241 Saturday Evening Post 50 (1968).

34. The average citizen knows little about real estate despite the fact that in most families the residence is the largest household investment. His lack of expertise compels the homeowner or potential homeowner to rely heavily upon the opinions and evaluations of the realtor. D. Hempel, The Role of the Real Estate Broker in the Home Buying Process 24, in Real Estate Reports No. 7, 1969 (Univ. of Conn. Center for Real Estate and Urban Economic Studies); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade,* 70 Colum. L. Rev. 1325, 1327 (1970).

35. Individually, the black homeowners in a changing neighborhood have more at stake than the white homeowners: "When white people are forced out by slums, they have a choice of places to go. We don't. We can only keep moving just ahead of the slum . . . ." Richey at 45.

36. For a description of some of the successful neighborhood organizations and the techniques used see Southern Regional Council.

mental bodies. Substantively, formal anti-blockbusting measures fall within three major classifications: (1) control of representations, (2) control of solicitations, and (3) control of conduct.

A. Control of Representations

1. Federal Control

The most common legal treatment of blockbusting proscribes specified representations which comprise an essential component of the practice. The federal anti-blockbusting provision, section 3604 (e) of the 1968 Civil Rights Act,[37] adopts this approach in declaring it to be unlawful

> [f]or profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.[38]

To be actionable under the statute, the representations need not be successful in inducing sales or rentals, for the statute equally proscribes representations made in attempts to induce with those made in successful inducements.[39] As one court has pointed out, "The conduct condemned and the responsibility placed by the statute on the agent is to refrain absolutely from any such representations."[40]

Upon the occurrence of a violation under section 3604 (e), a private citizen may initiate the control process by (1) filing a complaint with the Department of Housing and Urban Development (HUD) under section 3610 (a);[41] or (2) bringing a civil action against the blockbuster in court under section 3612 (a).[42] The individual choosing to proceed through HUD must be a "person aggrieved"—defined as a person who has suffered injury or who anticipates irrevocable injury due to the unlawful blockbusting practices.[43] There is no similar re-

37. 42 U.S.C. §§ 3601 *et seq.* (1970). The exemption in the Fair Housing title for single-family residences sold or rented by the owner has been held inapplicable to the blockbusting provision because the exemption would enervate that section. United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969).

38. 42 U.S.C. § 3604(e) (1970).

39. Brown v. State Realty Co., 304 F. Supp. 1236, 1241 (N.D. Ga. 1969).

40. *Id.*

41. 42 U.S.C. § 3610(a) (1970).

42. *Id.* § 3612(a).

43. *Id.* § 3610(a).

striction on plaintiffs who may bring a civil action under section 3612. The definition of "person aggrieved" is sufficiently broad to afford relief to both homeowners and prospective purchasers, black and white. However, the requirement of actual or potential personal harm greatly constricts the class which may file complaints.[44] Relief has been granted despite the absence of actual harm to the plaintiffs or actual profit to the blockbusters[45] when the case was instituted under section 3612, but it is unlikely to be given in a proceeding under section 3610 because of the definition of "person aggrieved." This difference in the required showing of harm results in a variance in proof problems which is likely to affect the individual's choice of procedure.

Under the section 3610 procedure, HUD must investigate the complaint and notify the complainant within thirty days as to what course of action, if any, it intends to undertake.[46] When state or local law provides substantially equivalent remedies, HUD must first refer the complaint to a state or local authority; HUD's thirty-day investigative period does not begin until the state or local authority has had thirty days in which to respond and has failed to do so.[47] During this period, the complainant is barred from bringing suit against the blockbuster,[48] although the blockbuster is not barred from continuing his activities because HUD lacks the power to issue either temporary restraining or cease and desist orders.[49]

If HUD finally decides to proceed with the complaint, it must obey a statutory preference for informal settlement and attempt to resolve the complaint through conference, conciliation, and persuasion.[50] Failure to secure voluntary compliance by the end of the thirty-day period (voluntary compliance is unlikely to be obtained from the blockbuster) [51] revives the complainant's right to institute a civil ac-

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44. Harm may often be indirect such as the disadvantages resulting from segregated housing. *See Blockbusting* at 176. The likelihood of a court recognizing such harm is slight.

45. Brown v. State Realty Co., 304 F. Supp. 1236, 1241 (N.D. Ga. 1969).

46. 42 U.S.C. § 3610(a) (1970).

47. *Id.* § 3610(c).

48. *Id.* § 3610(d).

49. The bill originally granted these powers to HUD, but they were removed by the Dirksen amendment. *See Blockbusting* at 177 & n.60.

50. 42 U.S.C. § 3610(a) (1970).

51. "It is impossible that one who knowingly violates the law for profit will be dissuaded by moralizations unaccompanied by the threat of economic or criminal sanction." *Blockbusting* at 178. Rather, it is argued, unlike the person discriminating against a black without awareness of the illegality of his action who

tion.[52] This right does not carry with it as many benefits as the right to bring suit without first proceeding through HUD under section 3612. Relief in a successful suit following HUD investigation is limited to injunction and "such affirmative action as may be appropriate."[53] In a suit brought without HUD intervention under section 3612 the court may grant temporary injunctions, permanent injunctions, temporary restraining orders, actual damages, punitive damages up to $1,000, and court costs and reasonable attorney fees.[54] In addition, although the complainant under the HUD provision is barred from federal court if "substantially equivalent" rights and remedies exist at the state or local level,[55] under section 3612 he is unaffected by provisions in other legal systems. In light of the great discrepancy in protection and relief between the two actions, the choice of any complaining party appears to be predetermined. Why the drafters incorporated a statutory preference for avoidance of the administrative procedure is far from clear.

Litigants under section 3610 are not disadvantaged with respect to jurisdiction; both sections 3610 and 3612 confer federal court jurisdiction without regard to the amount in controversy. In a federal district court proceeding under section 3612, the statutory basis for federal jurisdiction was challenged.[56] Both the commerce clause and the fourteenth amendment of the United States Constitution were rejected as support, the court relying on the thirteenth amendment as interpreted by *Jones v. Alfred H. Mayer Company*,[57] a United States Supreme Court case. In this case it was held that private as well as public discrimination with respect to the sale or rental of real property is barred by the Civil Rights Act of 1866, which was in turn upheld as a statutory implementation of the thirteenth amendment.[58] Accordingly, inasmuch as blockbusting activities interfere with the rights

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may cooperate to avoid the embarassment of litigation, the blockbuster knows his actions to be illegal and cherishes the notoriety which bestows greater fear value to his presence in a neighborhood. *Id.*

52. 42 U.S.C. § 3610(d) (1970).

53. *Id.*

54. *Id.* § 3612(c).

55. *Id.* § 3610(d).

56. Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969).

57. 392 U.S. 409 (1968).

58. 42 U.S.C. § 1982 (1970).

granted by the 1866 Civil Rights Act,[59] it constitutes a federal question amenable to resolution in a federal court.

As an additional remedy under the federal statute, the United States Justice Department may seek injunctive relief against persons believed to be engaged in the practice of blockbusting.[60] The Department must have reasonable cause to believe that unlawful blockbusting is occurring, but the basis for that finding need not be specified.[61] Although the additional requirement that there be evidence of a "pattern or practice" of blockbusting may be difficult to fulfill,[62] proof of blockbusting patterns should not be too difficult in most instances.

All but one[63] of the cases filed under the federal law have been filed by the Justice Department. This trend most probably reflects the greater familiarity of the Justice Department with the anti-blockbusting provision.[64] Public discussion concerning the enactment of the Fair Housing Law centered on the conflict between property rights and fair housing policies,[65] so that few members of the general public may be aware of the existence of the anti-blockbusting provision in that statute. Possibly for that reason, few private actions have been brought, even under section 3612.

In the cases which have considered what forms of blockbusting are actionable under the statute, it has been held that the representations need not (1) be false,[66] (2) be successful in inducing sales or ren-

59. *But see Blockbusting* at 183. This article points to the difficulty of sustaining the anti-blockbusting provision under the thirteenth amendment when actions are brought by white plaintiffs.

60. 42 U.S.C. § 3613 (1970). Because of the resources and the continuing interest in compliance of the Justice Department, that department is more likely to supervise compliance than an individual homeowner whose interest wanes as soon as the blockbusting ceases to pose a threat to him personally.

61. United States v. Mitchell, 313 F. Supp. 299 (N.D. Ga. 1970).

62. What activity suffices to constitute a "pattern or practice" has not been fully determined. "Pattern or practice" has been determined to consist generally of repeated, routine, regularly engaged-in acts. United States v. Gray, 315 F. Supp. 13 (D.R.I. 1970). But a more specific standard has not been expounded. "The number of incidents necessary to show a pattern or practice depends on the nature of the right protected and the nature of the ordinary violations of such right." United States v. Mintzes, 304 F. Supp. 1305, 1314 (D. Md. 1969).

63. Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969).

64. Action by the Justice Department avoids the prohibitive cost of civil actions and the ineffectiveness of conciliation in cases like these. United States v. Mintzes, 304 F. Supp. 1305, 1314 (D. Md. 1969).

65. *See* 113 CONG. REC. 22841 (1967).

66. United States v. Mintzes, 304 F. Supp. 1305, 1309 (D. Md. 1969).

tals,[67] or (3) refer directly to blacks or other minorities.[68] Although the statute makes no reference to the truth or falsity of the statements, a federal district court in *United States v. Mintzes* did state that "representations, whether true or false" are prohibited.[69] If truth is not a defense[70] to an action under the statute, there may be constitutional protests on the basis of the first amendment right of freedom of expression. However, the requirement that statements be made "for profit" activates the commercial exception to first amendment protection,[71] for where speech is regulated in a commercial context, the Supreme Court has held the protections of the first amendment inapplicable.[72] The first amendment does not provide the same degree of protection to activity which is purely commercial,[73] because "it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not . . . a form of individual self-expression."[74]

Not only is commercial expression not highly valued, but one federal district court has exalted the prevention of discrimination to the preferred position generally occupied by first amendment freedoms.[75] Despite the explicit statutory proscription of representations, this court held that the statute regulates conduct, the inhibiting effect on

67. Brown v. State Realty Co., 304 F. Supp. 1236, 1241 (N.D. Ga. 1969).

68. *See* United States v. Mintzes, 304 F. Supp. 1305, 1311 (D. Md. 1969).

69. *Id.*

70. Truth has been held a defense in several state proceedings under similar provisions. *See* Abel v. Lomenzo, 25 App. Div. 2d 104, 267 N.Y.S.2d 265 (1966). There, in annulling a license suspension for representations to prospective white purchasers regarding the racial composition of the area, the court held that the sole purpose of the blockbusting rule is to prevent cheating the homeowner by inducing him to sell. Conveying accurate information for the purpose of transforming the racial composition of the neighborhood apparently did not violate the rule. The truth of his statements was held to insulate the broker's free speech right. *See* H. Singer, *How We Beat the Blockbusters,* 241 SATURDAY EVENING POST 50 (1968).

71. *See* United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969).

72. Breard v. City of Alexandria, 341 U.S. 622 (1951).

73. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 424 F.2d 25 (1st Cir. 1970). Although the veracity of political, social, or religious communications does not affect protection by the first amendment, exception is made for misleading or fraudulent commercial representations because they are deemed to be, like obscenity, utterly without redeeming social value. Note, *Freedom of Expression in a Commercial Context,* 78 HARV. L. REV. 1191, 1197 (1965).

74. Banzhaf v. FCC, 405 F.2d 1082, 1101-02 (D.C. Cir. 1968).

75. United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870 (N.D. Ga. 1970). However, this was not a final disposition of the case, but only a judgment on motions and therefore a different interpretation might be elicited by treatment on the merits.

speech being merely incidental thereto and justifiable because of the purposes of the statute in preventing discrimination. Similarly, courts have denied protection to speech forming an integral part of conduct which is otherwise illegal[76] or constituting propaganda against religious or racial groups.[77]

What constitutes commercial activity triggering the commercial exception has not been clearly resolved. Although one district court excluded evidence of honest representations made in response to questions as falling outside the commercial exception and therefore protectable by the first amendment,[78] another court held that agents must absolutely refrain from making representations regardless of whether inquiry by the property owner provoked the response.[79] Apparently one court regards only the communication itself as determining the applicability of the commercial exception, while the other regards the relationship between the agent and the potential seller as determinative. Blockbusting predominantly involves the making of uninvited representations; therefore, even if the stricter conceptualization of commercial context prevails, most cases against blockbusters will fall within the commercial exception.

Although the representation must be "for profit" in order to be outside constitutional immunity, it need not actually yield a profit through the successful inducement of sales or rentals. The statute proscribes both representations made in attempts to induce sales or rentals and those made in successful inducements.[80] "The conduct condemned and the responsibility placed by the statute on the agent is to refrain absolutely from any such representations."[81]

There are some other substantive elements in the federal statute. For example, the prohibited representations need not refer directly to blacks or other minority groups. They may consist of comments

76. Blockbusting has been termed the "handmaiden" of other illicit discriminatory practices. *See, e.g.,* Chicago Real Estate Bd. v. City of Chicago, 36 Ill. 2d 530, 553, 224 N.E.2d 793, 807 (1967). *Cf.* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

77. Beauharnais v. Illinois, 343 U.S. 250 (1952).

78. United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969).

79. Brown v. State Realty Co., 304 F. Supp. 1236, 1241 (N.D. Ga. 1969). *Accord,* 69 OP. ATT'Y GEN. 263 (Cal. 1970). The state attorney general concluded that furnishing information about the racial background of a prospective purchaser to an owner, whether or not in response to a question by the owner, is an unlawful discriminatory practice.

80. *See* 42 U.S.C. § 3604(e) (1970).

81. Brown v. State Realty Co., 304 F. Supp. 1236, 1241 (N.D. Ga. 1969).

on the "changing neighborhood," "undesirable elements," fear of crime in the neighborhood, and declining property values, which are but thinly veiled remarks on the racial transition and are intelligible both to speaker and listener.[82] Although these subtle communications do not technically fall within the ambit of a prohibition of representations regarding racial change, one district court enlarged the applicability of the statute to include them.[83]

2. Non-federal Controls

Like the federal government, the majority of states, municipalities, and regulatory commissions attempting to curb blockbusting proscribe representations made to induce neighborhood change, often describing more specifically than does the federal statute the representations prohibited. These statutes generally proscribe one or more of the following representations about a specific neighborhood: (1) a decline in property values, (2) a change in its racial, ethnic, or religious composition, (3) an increase in crime and anti-social behavior, or (4) a decline in the quality of schools and other public facilities.[84] Provisions of this kind appear in several state statutes and a variety of municipal ordinances.[85] In addition, regulations of state real estate agencies may prohibit blockbusting practices, though some of these may do so only through a generalized prohibition of deception and misrepresentation.[86]

Although the federal statute clearly limits its applicability to individuals making such representations with an expectation of financial gain, a slight majority of the state statutes and municipal ordinances recognize that other persons or organizations may be instrumental in activating the resegregation process.[87] Under such statutes and ordi-

82. Blockbusters today resort to these subtler communications. *See* note 12 *supra* and accompanying text.

83. United States v. Mintzes, 304 F. Supp. 1305, 1311 (D. Md. 1969).

84. Several states expressly prohibit indirect as well as direct references to neighborhood transition. *See, e.g.*, MICH. STAT. ANN. § 26.1300(203) (1970).

85. *E.g.*, MINN. STAT. ANN. § 363.03(2)(4) (Supp. 1971); OHIO REV. CODE ANN. § 4112.02 (Supp. 1970).

86. Such conduct generally forms grounds for license suspension or revocation. *See, e.g.*, MASS. ANN. LAWS ch. 112, § 87AAA (1965); MO. REV. STAT. § 339.100(1) (1966). Provisions relating to unfair or dishonest dealings may be held applicable to blockbuster realtors. Letter from John Ball, Director, Kansas Real Estate Commission, to author, October 14, 1970.

87. Realtors assert that black militants are instrumental in blockbusting campaigns, in that these groups want the neighborhoods to "turn" and accordingly send workers into the white community in order to disrupt it. HELPER at 172.

nances, which prohibit representations by "any person,"[88] not only the realtor but even black action groups or simply malicious individuals may be subject to sanctions. Although representations by individuals made without an expectation of profit fall outside the commercial exception to the first amendment, regulation of these representations is not necessarily precluded by the first amendment because of an additional exception for racial propaganda and speech connected to illegal behavior.[89] Furthermore, a broad interpretation of the commercial context exception might encompass utterances made for the purpose of inducing sales or rentals of residential real estate, even in the absence of profit.

State and local prohibitions of blockbusting representations also differ from the federal statute in the type of sanctions imposed. An administrative procedure closely parallel to the federal procedure is found in the State of New York, except that there is no provision for intervention on its own motion by the state attorney general.[90] Although under the federal statute the injunction has been the most frequently relied upon remedy (and is probably the most effective), reliance on injunctive relief has not been typical at state and local levels.[91]

Unlike the federal scheme, the provision of civil remedies is uncommon at the state or local level. Only New York State provides injured parties a cause of action against the blockbuster,[92] and this statute is limited to New York City. Under the New York statute recovery extends to all gains, including profits and commissions, realized by the blockbuster on the sale of the plaintiff's property, or, in the

88. ILL. ANN. STAT. ch. 38, § 70-51(b)-(c) (Smith-Hurd Supp. 1971); MD. ANN. CODE art 56, § 230A (Supp. 1970); OHIO REV. CODE ANN. § 4112.02 (H)(9) (1970); WIS. STAT. ANN. § 101.60(2m) (Supp. 1971); ANNAPOLIS, MD., CITY CODE § 8-3(a)(5) (1970); BUFFALO, N.Y., ORDINANCE § 350 (1970); DETROIT, MICH., CODE § 39-1-13.1 (1970); EVANSTON, ILL., CODE § 25-1/2-6 (1970); GREEN BAY, WIS., CODE OF GEN. ORDINANCES ch. 32.05 (1968); Oklahoma City, Okla., Ordinance 11,848 (1969); Teaneck, N.J., Ordinance 1274 (1966).

89. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

90. N.Y. EXEC. LAW § 297 (McKinney Supp. 1970); *see also* ANNAPOLIS, MD., CODE § 8-6 (1970).

91. However, injunctive relief is provided in some municipalities and states. *See, e.g.*, KAN. STAT. ANN. § 44-1022 (Supp. 1971); N.Y. EXEC. LAW § 297(6) (McKinney Supp. 1970); ALEXANDRIA, VA., CODE § 17A-4 (1969); GREEN BAY, WISC., CODE OF GEN. ORDINANCES ch. 32.05 (1968).

92. LAWS OF N.Y. ch. 493, tit. C (May 8, 1970).

absence of such gains, the difference between the price for which the plaintiff sold his property and its fair market value at the time of the sale or at the time of the suit, whichever is greater.[93] The basis for suit is the previous occurrence of blockbusting activities, primarily representations made both to induce sales and to discourage purchases.[94] Since the principal objective of the blockbuster is to maximize profits, taking that profit away from him (and even taxing him court costs as well) should inhibit his motivation to engage in blockbusting activities,[95] particularly since under the New York scheme he may face criminal charges also.[96] The practice simply becomes unprofitable and too costly for him to pursue. The civil remedy, therefore, has a dual impact: (1) it provides a meaningful deterrent by eliminating the profit from blockbusting, and (2) it provides restitution to the victim. The effectiveness may be questioned, however, in light of the experience with private action under the federal statute.

In most jurisdictions, relief is limited either to criminal sanctions, real estate license regulation or both, neither of which is available at the federal level. Criminal prosecution may result in a sentence of imprisonment up to a year and/or a fine up to a maximum of $1,000 in several states.[97] Although the threat of incarceration might have

93. This second measure of damages is particularly significant in light of the current trend of blockbusters not to engage in speculation.

94. A similar cause of action is provided the purchaser of real property which was sold in response to blockbusting. The statute does not prohibit damages against the blockbuster by both the seller and the purchaser; however, it is to be anticipated that the gain will be split between them in the case of joint action against the blockbuster. There is no record at this time of civil actions under this statute.

95. Jerris Leonard, assistant attorney general for civil rights, has been quoted as regarding the key to blockbusting control to lie in squeezing the profit out of it by giving relief to blockbusting victims. Los Angeles Times, February 22, 1969. 42 U.S.C. § 3612(c) (1970) authorizes punitive damages in addition to actual damages and punitive damages of $750 were awarded in Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969). The value of specific monetary damages as distinguished from punitive damages is questioned in *Blockbusting* at 180 because of the difficulty in ascertaining for proof purposes the fair market value and the deviation therefrom. It is predicted that (1) courts will be reluctant to give damage awards, and (2) blockbusters will regard the damages as a minor contribution to overhead expenses. *Id.*

96. LAWS OF N.Y. ch. 493, tit. C, § C1-7.0 (May 8, 1970).

97. *E.g.*, MD. ANN. CODE art. 56, § 230A (1968) ($500/1 year); WIS. STAT. ANN. § 101.60(6) (Supp. 1971) ($10-$200). Michigan doubles the fine for the second offense. MICH. STAT. ANN. § 26.1300 (412) (1970). For the second of-

some impact on the blockbuster's behavior, the prospect of paying even a $1,000 fine can have little significance in view of the substantial profits to be expected. In any event, criminal prosecutions have been difficult to obtain because of the requirement that the offense be proved beyond a reasonable doubt.[98] In addition to a higher standard of proof than that required for civil and administrative actions, the subsiding interest of homeowners subsequent to removal of the threat, coupled with the inconvenience of court delay, serves to curtail criminal prosecutions.[99] Furthermore, the absence of an appreciable number of prosecutions may reflect reluctance to prosecute white-collar crime.[100] Although criminal sanctions may offer a modicum of deterrence, they have little direct effect.

Another method of controlling blockbusting representations is through licensing, either at the state or local level. Under this method, real estate licenses would be subject to revocation or suspension if the agent is engaged in blockbusting practices. However, these sanctions do not seem effective when blockbusters act as speculators and buy properties for resale. Moreover, real estate commissions are generally not appropriate policing agents because the personnel of most commissions is composed principally of members of the real estate industry or individuals dependent thereon, all of whom are understandably reluctant to act aggressively, if at all.[101] In most cases access to the commission by the general public is limited,[102] so there may be little incentive for a commission to act in a manner antagonistic to its real constituents, the realtors.

B..Control of Solicitations

An alternative and frequently complementary approach to blockbusting control consists of restraining uninvited solicitation. Realtors, like peddlers and hawkers, often rely upon aggressive solicitation of homeowners as a principal means of acquiring listings. Whether or not it forms part of a larger pattern of blockbusting, frequent solicita-

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fense in Illinois, the blockbuster is subject to imprisonment five times as long, and a fine ten times as great, as for the first offense, up to $10,000 and/or five years. ILL. STAT. ANN. § 70-52 (Smith-Hurd Supp. 1971).

98. Letter from James A. Bush, Detroit Commission on Community Relations, Detroit, Mich., to author, January 6, 1971.

99. *Id.*

100. *Blockbusting* at 174.

101. *Id.* at 173.

102. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 853 (1966).

tion constitutes an invasion of the sanctity of the home, an annoyance raising the need for state or local regulation. Regulation of uninvited real estate solicitation may be imposed under an ordinance applicable to all local door-to-door solicitors[103] or under an anti-blockbusting measure applicable only to real estate solicitors.

The Green River ordinances, so-called because of the first such ordinance to be judicially tested and upheld, in Green River, Wyoming,[104] generally prohibit all soliciations made without the prior consent of the homeowner. A typical ordinance reads:

> [T]he practice of going in and upon private residences in the city of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited to do so by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise and or disposing of and or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.[105]

This ordinance was sustained by the United States Supreme Court against constitutional objections in *Breard v. City of Alexandria.*[106]

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103. Solicitation is generally deemed to be a matter of local concern because different population densities yield different concentrations of solicitation efforts, obviously more profitable in areas of greater density. However, in addition to municipal controls, the federal government and the states have recently enacted home solicitation laws, concerned not with the nuisance factor but with the consumer protection aspect. The homeowner in the blockbusting episode can be analogized to the consumer protected under these laws. In both situations the victim succumbs to high pressure tactics employed against him in his own home. However, the remedies under blockbusting statutes would be inadequate for the homeowner because (1) the one-day grace period to rescind the contract would be meaningless in light of the duration of a blockbusting episode and the fact that a residence is generally not sold upon the first approach of the blockbuster, *i.e.*, there is time to reflect upon the contemplated sale; and (2) the unique nature of real property would prohibit rescission where it has already been resold. *See, e.g.*, CONN. GEN. STAT. ANN. ch. 740, §§ 42-134-42 (Supp. 1969); ILL. ANN. STAT. ch. 121 1/2, § 262B (Smith-Hurd Supp. 1971); WASH. REV. CODE ANN. § 63.14.154 (Supp. 1970). The Federal Trade Commission also has proposed regulation of "deceptive invasions of privacy through high pressure tactics." 16 C.F.R. 429 (1970). *See also* Meserve, *The Proposed Federal Door-to-Door Sales Act: An Examination of its Effectiveness as a Consumer Remedy and the Constitutional Validity of its Enforcement Provisions,* 37 GEO. WASH. L. REV. 1171 (1969).

104. Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933).

105. Alexandria, La., Penal Ordinance No. 500, *quoted in* Breard v. City of Alexandria, 341 U.S. 622, 624-25 (1951).

106. 341 U.S. 622 (1951).

Since other methods of solicitation such as radio, periodicals, mail, and local agencies remained open, and only one particular manner of conducting business was prohibited, the court held that there was no violation of due process by virtue of an unreasonable restraint on the right to pursue a lawful occupation.[107] If the scope of such a law is so limited, however, it is questionable how effectively it can curb blockbusting. True, it prevents face-to-face contact, which is probably the blockbuster's most effective weapon, but it leaves the homeowner unprotected from the deluge of phone calls and mailings commonly associated with blockbusting campaigns. Yet, measures adopted to combat blockbusting which purport to prohibit all modes of solicitation may be of dubious constitutionality because they might be construed to restrain entirely the conduct of a lawful business.

Some Green River ordinances do not prohibit solicitation but require that solicitors obtain a municipal permit before engaging in solicitation.[108] No doubt such ordinances would meet the due process test propounded in *Breard*. Presumably all applicants are not granted permits; if permits are awarded indiscriminantly, the ordinance serves little function beyond the meager revenue that may be collected. However, in the absence of specified criteria, denial of a solicitation permit might very well yield a successful equal protection challenge.[109]

Outside the realm of constitutionality, Green River ordinances have met a mixed fate in state courts in challenges to their validity.[110] Primary issues contested relate to the authority of municipalities to enact such ordinances, and the possible existence of state preemption, to be discussed below.

In light of the checkered acceptance of Green River ordinances, they may be a poor choice as a means to curb real estate solicitation comprising blockbusting patterns. In addition, courts have varied widely in the classes of solicitors to be included under the proscription. Although one court held such an ordinance applicable to realtors,[111] other courts have construed the ordinances strictly to exclude even

107. *Id.* at 632. Other constitutional objections rejected were based on the commerce clause and the first amendment. The case involved the conviction of a door-to-door salesman of nationally circulated magazines.

108. *See, e.g.*, Mogolefsky v. Schoem, 50 N.J. 588, 236 A.2d 874 (1967).

109. Equal protection cases in the past have focused on the advantages contended to accrue to local merchants by virtue of these ordinances. *See* Annot., 35 A.L.R.2d 355, 366 (1954).

110. *Id.* at 359.

111. Mogolefsky v. Schoem, 50 N.J. 588, 236 A.2d 874 (1967).

insurance contracts, on the ground that they are not commodities sold by merchants.[112] It is not at all apparent that most courts would hold Green River ordinances applicable to real estate brokers.

Usually, measures applicable only to real estate solicitation are adopted to combat blockbusting; they appear in a variety of forms. One municipal ordinance,[113] upheld in *Summer v. Township of Teaneck*,[114] requires the prospective solicitor to file a notice of intention to solicit, indicating both the blocks to be canvassed and the dates on which canvassing will take place. The validity of this ordinance was challenged as exceeding the municipality's power to enact ordinances because (1) the subject matter required uniform statewide treatment, and (2) the subject matter had been preempted by the state. Inasmuch as the practice of blockbusting and the consequences thereof vary from community to community, the court held it an appropriate subject of municipal regulation.[115] On the issue of state preemption, the court held that state licensing of realtors does not operate to immunize realtors from liability for misconduct, and does not preclude municipalities from adopting measures to protect local inhabitants from the misconduct of licensees.[116]

Similar to the notice of intent to solicit requirement is the requirement of record-keeping of all solicitation efforts. Apparently such ordinances were designed for the purpose of creating evidence for potential blockbusting litigation or disciplinary proceedings rather than to deter undesirable solicitations. However, it is likely that realtors thus put on notice of government surveillance will forego improper solicitation efforts, and deterrence may be a by-product.[117] It is

112. Gregory v. Clausen, 78 S.D. 208, 99 N.W.2d 883 (1959).

113. Teaneck, N.J., Ordinance 1274 § II (1966). As is true of the permit ordinances, this ordinance is silent as to the consequences of such filing of notice, *i.e.*, whether permission to solicit might in certain instances be denied or whether blanket permission is automatically awarded.

114. 53 N.J. 548, 251 A.2d 761 (1969).

115. *Id.* at 553, 251 A.2d at 764.

116. *Id.* at 555-56, 251 A.2d at 765-66. *Accord,* Mogolefsky v. Schoem, 50 N.J. 588, 236 A.2d 874 (1967). An earlier ruling by a lower court had held that municipalities are barred from regulating state licensees. State v. Stockl, 85 N.J. Super. 591, 205 A.2d 478 (Super. Ct. 1964). However, in *Stockl,* the municipality had required realtors to obtain a municipal license and it is this activity which was held to have been preempted by the state real estate commission. *But see* Comment, *Intergovernmental Conflict in the Regulation of Blockbusting Activities,* 1971 URBAN LAW ANN. 212.

117. This assumption is implicit in Arizona Real Estate Board Regulation 30, May 1, 1961, which declares that the use of high pressure tactics will subject the realtor to strict surveillance.

clearly within the competence of the real estate commission as the licensing body to issue such a regulation, even though the authority of the court to regulate the conduct of state licensees might be problematic outside the context of a consent decree.[118] The power of a municipality to mandate the maintenance of records by realtors may be limited where the municipality is precluded from regulating state licensees, although this particular problem has not arisen in the cases.

Another measure directed specifically to the problem of real estate solicitation involves the prohibition of continued uninvited solicitation after receipt of a request from the property owner to cease,[119] or a list from a designated government agency of property owners who do not wish to be solicited.[120] Similarly, the anti-blockbusting law for New York City establishes zones of non-solicitation for a period of one year upon proof of the consistent occurrence of statutorily proscribed representations in that area.[121] Solicitation efforts by each realty firm may actually be far from excessive. However, in a changing neighborhood the homeowner is likely to experience excessive solicitation, because the urgency of black demand for housing creates intense competition among realtors to secure listings from the limited supply.[122]

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118. MICH. STAT. ANN. § 26.1300 (411)(c) (1970); N.J. Real Estate Commission Rule 26, December 1, 1963. In a consent order, a United States district court ordered a realty company accused of blockbusting to record for all solicitation attempts in the following year, the type of solicitation, the name, address, and race of each homeowner solicited, the date, and the individual realtor involved. In addition, for each sale or listing of residential property, the company was directed to record the name, address, and race of both the seller and purchaser and to indicate whether the sale or listing resulted from solicitation efforts of the company. United States v. Stewart, Civ. No. 3-3589-A (N.D. Tex. 1970) (consent decree).

119. ILL. ANN. STAT. ch. 38, § 70-51(d) (Smith-Hurd Supp. 1971); MICH. STAT. ANN. § 26.1300(203)(b) (1970); DETROIT, MICH., CODE § 39-1-13.1(k) (1968); Teaneck, N.J., Ordinance 1274 § III(h) (1966).

120. The Illinois scheme provides for notice to realtors by means of personal notice by the homeowner and by the mailing of lists of homeowners who do not wish to be solicited by the local Human Relations Council. ILL. ANN. STAT. ch. 38, § 70-51(d) (Smith-Hurd Supp. 1971).

121. LAWS OF N.Y. ch. 493, tit. C, § C1-4.0 (May 8, 1970). In addition to proof of illegal blockbusting practices, proof must also be presented to the human rights commission that (1) belief in the representations commonly propounded by blockbusters is thereby fostered; and (2) a temporary prohibition of solicitation is necessary to prevent a material turnover in the area. The result of such an order is similar to the effect of an injunction issued under the federal statute. *See* United States v. Stewart, Civ. No. 3-3589-A (N.D. Tex. 1970) (consent decree).

122. Detroit Comm'n on Community Relations. Since this report was made, the 1968 Federal Housing Law, 42 U.S.C. §§ 3601 et seq. (1970), was en-

Because a number of realtors may be engaged in solicitation within a particular neighborhood, the periodic issuance of lists to realtors[123] is preferable to a system of personal notification inasmuch as the obligation to notify all involved or potentially involved realtors may place a substantial burden upon the homeowner.

Those absolute prohibitions of solicitation, applicable to mail, telephone, telegraph, and other forms of contact as well as door-to-door solicitation,[124] may fail to meet the due process test of *Breard* since they appear to restrain all forms of seeking business. This constitutional objection may have been anticipated by the New York legislators because a proviso excludes "advertising in newspapers of general circulation, magazines, radio, television, or telephone directories"[125] from the definition of solicitation that may be prohibited. Whether leaving these forms of solicitation available to the realtor is sufficient to comply with due process in this context is yet to be seen, but clearly the right to seek clients is not absolutely restrained under the New York law.

As verbal communication comprises the essence of solicitation, first amendment challenges to restraints on solicitation may be anticipated under these laws because of the almost total denial of an opportunity to communicate.[126] A recent case held that proscribing solicitation by lawyers as nonprofessional conduct violates the first amendment.[127]

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acted, so that the supply of housing available to blacks is ostensibly expanded and the pressure thereby lifted from selected "changing neighborhoods." However, realtors continue to be reluctant to "break" white neighborhoods and the pressure on changing neighborhoods remains.

123. Reliance on the issuance of such lists presupposes the involvement of an administrative agency.

124. The New York law definition of solicitation includes but is not limited to:
(a) going in or upon the property of the person to be solicited, except when invited by such person;
(b) communicating with the person to be solicited by mail, telephone, telegraph or messenger service, except when requested by such person;
(c) cavassing in streets or other public places;
(d) distributing handbills, circulars, cards or other advertising matter;
(e) using loudspeakers, soundtrucks, or other voice-amplifying equipment;
(f) displaying signs, poster, billboard, or other advertising devices other than signs placed upon a real estate office for the purpose of identifying the occupants and services provided therein.

LAWS OF N.Y. ch. 493, tit. C., § C1-2 (May 8, 1970).

125. *Id.* The Michigan statute can be construed to exclude by implication these forms of solicitation because it prohibits only solicitation by telephone, mail, or personally. MICH. STAT. ANN. § 26.1300(203)(b) (1970).

126. *See* D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 852 (1966).

127. NAACP v. Button, 371 U.S. 415 (1963).

Although this prohibition applied to interference with the "right to assist persons seeking legal redress for infringements of constitutional rights,"[128] it is unlikely that interference with freedom of expression would be treated differently, particularly in light of the preferred position accorded first amendment freedoms in general. However, the conduct of NAACP attorneys and that of blockbusters is distinguishable in that the former is regarded as socially useful whereas the latter is viewed as socially dysfunctional. Again, the constitutional objections raised by the realtor can be met successfully by the exception for commercial expressions.

Limiting or prohibiting the display of "for sale" or "sold" signs on residential property by realtors in order to prevent the aura of panic sales[129] is, if not part of an outright prohibition of solicitation, a restriction of alternative methods of communication, and thus within the due process context of solicitation restrictions. However, resistance to these measures has been most forceful.[130] There is some hint of equal protection issues inasmuch as established, usually white, realtors are able to maintain channels of communication with the community for business purposes whereas less established realtors, including the greater number of black realtors, lack the contacts and therefore are significantly disadvantaged by their inability to use such signs.[131] Furthermore, because of the advantaged position of the established brokers, restraints on signs may tend to foster rather than retard discriminatory housing patterns.

C. Control of Conduct

Legal restraints on representations and solicitations may fail to penalize the more blatant blockbuster because the more vicious practices of hiring blacks to frighten whites and of subdividing homes into boarding houses are, in effect, immunized from control in that they involve neither solicitations nor representations. Although less problematic, constitutionally, than regulation of solicitations and representations, very few measures reach these practices. Perhaps the most inclusive measure has been incorporated in the anti-blockbusting ordinance of Buffalo, New York, which prohibits inciting or

128. *Id.* at 428.

129. BUFFALO, N.Y., ORDINANCE ch. VII, art. XVIII, § 351(e) (1970); DETROIT, MICH., CODE § 39-1-13.1(g)-(h) (Supp. 1968).

130. Letter from James A. Bush, Commission on Community Relations, Detroit, Mich., to author, January 6, 1971.

131. *Id.;* Epstein interview.

> leading to the incitement of neighborhood unrest, community tension or fear of racial, religious, nationality or ethnic changes in any street, block, neighborhood or other area or otherwise resort to or engage in any harassment, intimidation, threats or practices as part of a process or pattern to induce or promote the sale, listing for sale, leasing, assignment, transfer or other disposition of real property.[132]

The Pennsylvania real estate regulation is not quite as broad; it prohibits solicitation amounting to clear harassment of the homeowner and "panic selling."[133] Other measures forbid inciting community tension or creating a state of alarm with respect to neighborhood transition.[134]

However, inasmuch as blockbusters have become more sophisticated, relying on subtler techniques, it may be that conduct control is no longer as important as it might have been at an earlier time. In place of overt acts of harassment, blockbusters employ veiled representations and selective showings. Although regulation of representations is widespread where blockbusting is controlled, legal concern with selective showing has not begun to emerge on a large scale. Selective showings involving the diversion of potential black purchasers from white neighborhoods may be restricted by anti-discrimination laws, particularly by provisions prohibiting representations that property is unavailable when it is available;[135] however, it is unlikely to be held that potential white purchasers are protected by anti-discrimination laws. Furthermore, these statutes do not encompass the realtor who makes no representations but fails to make the potential purchaser aware of particular listings or who dissuades potential white purchasers on the basis of neighborhood change.

Only a small number of laws have directed specific attention to these problems.[136] A unique, probably unconstitutional, solution has recently been adopted in a small community in St. Louis County, Missouri, requiring brokers to show each listing in that community to at least one black and one white.[137] Even if upheld, its effectiveness

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132. BUFFALO, N.Y., ORDINANCE ch. VII, art. XVIII, § 351(a) (1970).

133. Pa. Real Estate Comm'n Regulations 15.9, 15.10, September 22, 1966.

134. *See* ILL. ANN. STAT. ch. 38, § 70-51(c) (Smith-Hurd Supp. 1971); ANNAPOLIS, MD., CODE § 8-3(a)(5)(b) (1970).

135. *E.g.*, KAN. STAT. ANN. § 44-1016 (Supp. 1971); Wash. Dep't of Licenses Regulation 308-124-170(e), April 16, 1968.

136. *See* MICH. STAT. ANN. § 26.1300(201)(e) (1970); BUFFALO, N.Y., ORDINANCE ch. VII, art. XVIII, § 351(d) (1970).

137. St. Louis Post-Dispatch, April 11, 1971, § A at 7, col. 1.

seems limited because it can be so easily subverted by hiring whites for a nominal fee to look at a residence.

IV. Summary and Conclusions

Blockbusting continues to be a reckless form of profiteering at the expense of individuals and of society. Unfortunately, it has not been made moot by the enactment of the federal Fair Housing Law and other anti-blockbusting provisions at state and local levels. Although compliance with these laws has in some places been substantial,[138] realtors continue to devise new means to accomplish their purposes. A segregated housing market allows for the exaction of premiums[139] for desirable housing with consequent inflated commissions for the realtor. By selling only to blacks in a white neighborhood, blockbusters stimulate the "tipping point" to induce a rapid exodus of whites and an acceleration of commissions. Because of these financial gains, compliance with regulatory measures has been only formal; conforming behavior has tended to constitute a refinement of technique rather than an abandonment of the practice. The ingenuity shown by blockbusters in evading anti-blockbusting laws indicates that these laws must be constantly re-evaluated and refashioned to encompass all the evolving variants of this destructive process.

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138. *See, e.g.,* letter from James A. Bush, Commission on Community Relations, Detroit, Mich., to author, January 6, 1971.

139. According to one view, blacks pay a premium to escape the ghetto and move into white neighborhoods. Another view holds that whites pay a premium commensurate with distance from blacks. *See* A. Pascal, The Analysis of Residential Segregation, Oct. 1969.