The most beneficial result that might follow from *Tax Analysts & Advocates* is the public scrutiny of the occasional Service rulings which affect millions of dollars of tax revenue. Without public hearings for major tax rulings,[89] disclosure will come only after the ruling has issued. Nonetheless, the Service will no doubt become more reluctant to rule favorably unless it is certain that it can answer any ensuing public criticism. The public needs the assurance that it can review and criticize the Service more than the Service needs to be reviewed and criticized. Public scrutiny will strengthen confidence in the Service, a necessity for a successful, self-assessing tax system.

CONSTITUTIONAL LAW—FAIR HOUSING ACT OF 1968—Anti-blockbusting provision held to be a valid congressional exercise of thirteenth amendment enforcement power.—*United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574).

The Department of Justice, pursuant to 42 U.S.C. section 3604(e),[1] the Fair Housing Act of 1968,[2] alleged that Bob Lawrence Realty, Inc., and four other real estate brokers had engaged in prohibited blockbusting activities. The Government sought injunctive relief in accordance with section 3613.[3] The United

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[89] *See* Stone, *Public Hearings for Private Rulings—Four Recommendations*, in TAXATION WITH REPRESENTATION, COMPENDIUM ON THE PUBLIC AND THE RULING PROCESS, 72-143 (1972), *cited in* Reid, *Public Access*, *supra* note 24, at 24.

[1] 42 U.S.C. § 3604 (1970) reads in pertinent part:

> [I]t shall be unlawful—
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> . . .
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> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin.

[2] *Id.* §§ 3601-19.

[3] Section 3613 reads as follows:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this

States Court of Appeals for the Fifth Circuit in *United States v. Bob Lawrence Realty, Inc.*,[4] affirmed the trial court's injunction which prohibited certain types of solicitation[5] and affirmed the constitutionality of section 3604(e). The court also held that the Attorney General need not allege the existence of a conspiracy or concerted action in order to have standing under section 3613.

The Government complaint alleged that prohibited statements were made by agents of Bob Lawrence Realty, Inc., and four other real estate brokers during the period from January to June 1969.[6] The alleged blockbusting activity occurred when the agents made statements relative to the changing racial composition of a transitional southeastern Atlanta neighborhood in an attempt to induce the sale of homes. The Government complaint specifically alleged that agents of Lawrence Realty engaged in prohibited activities on a single afternoon but contained no allegation of subsequent illegal

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

[4]474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574).

[5]In pertinent part the decree reads:

> [T]he defendants and their agents, employees, successors, and all those acting in concert or participation with them . . . are hereby permanently enjoined from inducing or attempting to induce any person to sell or rent any dwelling by any explicit or implicit representations regarding the entry into the neighborhood of a person or persons of a particular race, color, religion, or national origin;
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> . . .
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> [T]he defendants shall conduct all solicitation effort in such a manner so that the type and amount of solicitation activity shall be essentially similar in all areas in which the defendants conduct business and the defendants shall not conduct a greater amount or a different type of solicitation in areas which are inhabited by Negroes, or partially inhabited by Negroes, than in areas which are not so inhabited . . . .

United States v. Mitchell, 335 F. Supp. 1004, 1007 (N.D. Ga. 1971).

[6]United States v. Bob Lawrence Realty, Inc., 327 F. Supp. 487, 490 (N.D. Ga. 1971).

activities;[7] however, the other defendants were charged with repeated violations during the six month period.[8]

Section 3613 authorizes an action for preventive relief by the Attorney General when he has reasonable cause to believe that a pattern or practice of discrimination exists or when the occurrence of discriminatory activity raises an issue of general public importance. The Government's complaint, which contained no allegation of any agreement or formal business connection among the defendants, included three claims. First, it was alleged that the acts of the several defendants, when considered together, constituted a group pattern or practice of resistance to rights granted under section 3604(e). Second, the Government alleged that the acts of several defendants, considered individually, constituted a prohibited individual pattern or practice on the part of each of the defendants.[9] Finally, the complaint alleged that the defendants' acts had denied to a group of homeowners rights granted by section 3604(e) and that such denial raised an issue of general public importance.[10]

Shortly before the trial, consent decrees were entered against two of the original defendants and the action against a third dismissed.[11] The suit against defendant Lawrence was then joined

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[7]The agents were engaged in the practice of making "cold calls"—asking homeowners if they wished to list their houses for sale—a practice which, although not uncommon in the real estate industry, was not a common practice with the agents of Bob Lawrence Realty, Inc. Brief for appellants, Bob Lawrence Realty, Inc., and Bobby L. Lawrence, at 6-7, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973) (No. 1574) [hereinafter cited as Appellant's Brief.]

[8]327 F. Supp. at 490-91.

[9]The first two claims are based on the so-called "first alternative" of section 3613 which allows the Attorney General to bring an action for injunctive relief when he "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of rights" granted by the Civil Rights Act of 1968.

[10]The third claim is based on the "second alternative" of section 3613 which allows the Attorney General to bring an action when he has reasonable cause to believe that "any person or group of persons has been denied any rights granted by this subchapter and such denial raises an issue of general public importance."

[11]474 F.2d at 118. The remaining codefendant, Stanley Realty Co., was alleged to have made prohibited statements through its agents in the same neighborhood and during the same time period as defendant Lawrence. The government complaint alleged that the activities of the two remaining defendants when considered along with the activities of other nondefendant real

with a companion action *United States v. Mitchell.*[12] The district court found that the evidence established a group pattern or practice of prohibited activities as alleged in the Government's first claim. The trial court also found that each of the agents knew of the transitional nature of the neighborhood and attempted to capitalize on the emotional environment; accordingly, the trial court deemed such findings sufficient to support the injunctive relief requested by the Attorney General.[13]

On appeal, defendant Lawrence challenged the constitutionality of section 3604(e) by alleging that Congress lacked authority to enact such a statute and that the statute violated the first amendment.

Citing *Jones v. Alfred H. Mayer Co.*,[14] in which the Supreme Court revitalized the thirteenth amendment[15] after nearly one hun-

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estate companies constituted a group pattern or practice of prohibited activities. 335 F. Supp. at 1006.

The district court denied a motion by defendant Lawrence for jury trial since only equitable relief was sought. The trial court also denied a motion for severance and noted that "in view of the nature of this action, the relief sought, and the fact the case will not be tried to a jury it [did] not appear that separate trials [were] necessary to avoid prejudice to the defendants." United States v. Bob Lawrence Realty, Inc., 313 F. Supp. 870, 871 (N.D. Ga. 1970). On a later motion for summary judgment, the district court, in granting a partial summary judgment to defendant Lawrence, concluded that the government allegations with regard to the second claim were inadequate to establish an individual pattern or practice on the part of the defendant. 327 F. Supp. at 490. Summary judgment on the other claims was denied. *Id.* at 494.

[12]335 F. Supp. 1004 (N.D. Ga. 1971). The *Mitchell* case involved similar section 3604(e) allegations against the Mitchell Realty Co. The alleged illegal activity occurred in an area in southwest Atlanta and the facts in the *Mitchell* case had no relation to those in the *Lawrence* case. However, since the legal issues were the same, the trial court issued a common decree. *Id.* at 1007-08.

[13]*Id.* at 1006. The court noted that it was not impressed with the gravity of the individual transgressions and stated, "[I]n fairness to the defendants and in amelioration of the injunction to be entered the court cannot omit an observation that at least in some instances the agents were more sinned against than sinning." *Id.* The court then noted that one of the complaining witnesses admitted she was out to "get" the agent's license because the purchaser he produced had backed out on the purchase contract. The court also noted that some of the homeowners in the neighborhood were affiliated with a neighborhood organization which advised its members to "encourage agents to make racial representations." *Id.* at 1007.

[14]392 U.S. 409 (1968).

[15]This amendment provides:

dred years of inactivity, the court of appeals held that the enactment of the Fair Housing Act of 1968 was authorized by the thirteenth amendment enabling clause. The Court in *Jones* held that the thirteenth amendment "by its own unaided force and effect . . . abolished slavery, and established universal freedom."[16] It reasoned that the enabling clause empowered Congress to pass laws necessary and proper for abolishing all "badges and incidents of slavery"[17] within the United States. The only limitation placed on Congress was that it rationally determine what are "badges and incidents" of slavery and translate such determinations into effective legislation.[18]

The court of appeals felt it to be the clear mandate of *Jones* that courts give great deference to the determinations of Congress in its efforts to effectuate the purpose of the thirteenth amendment. This reasoning is consistent with the liberal standard of constitutional review established in *Katzenbach v. Morgan*[19] with regard to congressional enforcement powers. *Morgan* upheld the constitutionality of the Voting Rights Act of 1965 as a valid exercise of congressional power under the enforcement section of the fourteenth amendment and stated that a court in reviewing the constitutionality of the statute need only "perceive a basis upon which the Congress might resolve the [conflicting interests] as it did."[20]

To establish a rational basis for the congressional action, the court of appeals adopted the reasoning of an earlier district court decision *Brown v. State Realty Co.*[21] The district court found that section 3604(e) was a valid exercise of thirteenth amendment congressional power; furthermore, the Act was held to be a reasonable means of accomplishing the legislative purpose to provide fair

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Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[16] 392 U.S. at 439.

[17] *Id.*

[18] *Id.* at 440.

[19] 384 U.S. 641 (1966).

[20] *Id.* at 653.

[21] 304 F. Supp. 1236 (N.D. Ga. 1969).

housing throughout the United States.[22] The district court in *Brown* reasoned that blockbusting was a fundamental element in the perpetuation of segregation and therefore a "badge" of slavery which Congress was authorized to eliminate.[23] Similar reasoning was utilized in *United States v. Mintzes*[24] which also upheld the constitutionality of section 3604(e).

Finding section 3604(e) valid under the thirteenth amendment, the court of appeals avoided discussion of congressional authority to enact the Fair Housing Act of 1968 under either the commerce clause or the fourteenth amendment.[25] The thirteenth amendment analysis is adequate so long as the Fair Housing Act prohibitions are limited to discrimination against Negroes. Such was the situation presented in *Lawrence*. However, the thirteenth amendment deals solely with the rights of freed Negro slaves and problems arise when an attempt is made to justify the Act's prohibition of discrimination based on religion or national origin. These types of discrimination seem more appropriately dealt with under the commerce clause or fourteenth amendment. Indeed, such was the congressional intent.[26] Moreover, it must be remembered

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[22]42 U.S.C. § 3601 (1970).

[23]304 F. Supp. at 1240.

[24]304 F. Supp. 1305, 1313 (D. Md. 1969).

[25]474 F.2d at 121 n.9.

[26]*Hearings on S. 1358, S. 2114 and S. 2280 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 13-14, 256-59 (1967) [hereinafter cited as 1967 *Hearings*].

[27]NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), approved federal regulation of intrastate activities which have such a "close and substantial relation to interstate commerce that their control is essential or appropriate to protect commerce from burdens and obstructions." *Id.* at 37. *Jones & Laughlin* cleared the way for a vast expansion of federal regulation of commerce. Since 1937 when *Jones & Laughlin* was decided, no federal legislation has been struck down by the Supreme Court as beyond the scope of the commerce clause power. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 116 (1964).

The Supreme Court in United States v. Darby, 312 U.S. 100 (1940), held that Congress may regulate intrastate activities so long as the regulated activities fall within a class of activities which affect interstate commerce. *Id.* at 120-21.

[28]Katzenbach v. McClung, 379 U.S. 294 (1964).

> [T]he mere fact that Congress has said [a] particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for

that at the time of the Act's passage, the thirteenth amendment had not been "revitalized" by *Jones*.

Although the court of appeals did not deal with the commerce clause or fourteenth amendment authorization for the Fair Housing Act, had it elected to do so the court might well have reasoned that Congress, under the commerce clause, has plenary power over commerce among the several states and the scope given to such power by the Supreme Court has been exceptionally broad.[27] The commerce clause has provided the basis for other civil rights legislation. Affirming the public accommodation provisions of the Civil Rights Act of 1964, the Supreme Court stated that the outer constitutional limits of the commerce clause power are established by a "rational basis" test.[28] When the Court finds that Congress, in light of the information available to it, had a rational basis for finding a particular regulatory scheme necessary for the protection of commerce, the legislation will be affirmed.[29] In view of the historically liberal interpretation given the commerce clause, the validity of the Fair Housing Act of 1968 as an exercise of congressional power seems apparent.[30]

The validity of an alternative constitutional foundation for the Fair Housing Act of 1968 in the fourteenth amendment enabling clause is less certain. However, it has been argued[31] that the expansive interpretation given to the fourteenth amendment enabling clause in *Katzenbach v. Morgan*[32] justifies such reasoning. In this context *Morgan* has been viewed as an attempt to establish clear cut congressional power to enforce the fourteenth amendment and partially relieve the courts of the burden of achieving equal protection.[33] It is reasoned that after such a clear call for legisla-

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finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Id. at 303-04.

[29]A future court might reason that the rational basis for the Fair Housing Act of 1968 was the interstate character of the residential construction and real estate industry. Congress relied heavily upon statistical data showing a considerable interstate movement of residential construction materials and financing. The statistical information also showed a significant interstate mobility of purchasers and lessees. 1967 *Hearings* 13-14, 256-59.

[30]*Contra*, Brown v. State Realty Co., 304 F. Supp. 1236, 1239-40 (N.D. Ga. 1969); United States v. Mintzes, 304 F. Supp. 1305, 1312 (D. Md. 1969).

[31]Cox, *The Supreme Court, 1965 Term—Forward:—Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

[32]384 U.S. 641 (1966).

[33]Cox, *supra* note 31, at 122.

tive leadership, the courts will certainly accord great deference to the congressonal determination of the most appropriate means to accomplish the goal of equal protection.[34]

Morgan involved state action in the form of state voting requirements which denied the franchise to non-English speaking voters. However, in the typical blockbusting case the absence of even indirect state involvement would block the application of the *Morgan* reasoning.[35] Furthermore, it should be noted that the Supreme Court in *Jones* based its holding on the thirteenth amendment[36] and avoided the fourteenth amendment rationale presented by the petitioner.[37]

Although the court of appeals in *Lawrence* limited its discussion of constitutional authorization to the thirteenth amendment, future decisions dealing with the constitutionality of the Fair Housing Act of 1968 would be strengthened by recognition of the additional constitutional basis provided by the commerce clause.

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[34] *Id.* at 121.

[35] *But see id.* Archibald Cox proposed that *Morgan* might provide the formula for authorizing congressional action under the fourteenth amendment without direct state action. As an example he suggested that:

> [A] law prohibiting discrimination against Negroes in the sale and rental of housing could well be viewed as a means of bringing about the break-up of urban ghettos which are serious obstacles to the states' performance of their constitutional duty not to discriminate in the quality of education and other public services.

Id. at 102.

[36] 392 U.S. at 413 n.5.

[37] A more radical argument can be made that in United States v. Guest, 383 U.S. 745 (1965), six members of the Supreme Court, in two separate opinions, *id.* at 762 (Clark, J., concurring, joined by Black & Fortas, J.J.), and *id.* at 775 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., & Douglas, J.), rejected the state action requirement as a prerequisite to federal legislation under the fourteenth amendment. However, this seems to overstate the import of the two separate opinions. The statements supporting such argument were clearly dicta. *Guest* involved private interference with the use of public facilities. The better reading of the case seems to be that the two separate opinions abandoned the requirement of positive state action but retained the requirement of indirect state involvement before federal action under the fourteenth amendment is authorized. *See* Note, *Fourteenth Amendment Congressional Power to Legislate Against Private Discrimination: The* Guest *Case*, 52 CORNELL L.Q. 586, 589 (1967). In *Guest* the indirect state involvement occurred when an individual was denied use of a public highway by the private conspirators. However, in the typical blockbusting case the absence of any such public facility would defeat the applicability of this reasoning.

To do so would give recognition to the congressional intent expressed at the time of enactment of the Fair Housing Act. However, the alternative justification based on the fourteenth amendment seems far more doubtful due to the absence of even indirect state action and is less likely to receive judicial acceptance.

Rejecting the appellant's second constitutional challenge, the court of appeals held that section 3604(e) was a permissible attempt to regulate commercial activity and not a prior restraint of free speech. The court noted that section 3604(e) deals only with statements made for profit[38] and that in certain situations the government may prohibit purely commercial speech in connection with conduct which the government may regulate. The court viewed any limitation of speech as justified by the government's overriding interest in preventing blockbusting activities.[39]

The distinction made by the court of appeals between commercial speech and speech of a social or political nature has been approved by the United States Supreme Court. *Valentine v. Chrestensen*,[40] the first of an unbroken line of cases, affirmed enforcement of an ordinance which prohibited the distribution of commercial handbills. The Court held that while the freedom to communicate information and disseminate opinion enjoys the fullest protection of the first amendment, the Constitution imposes no such restraint on the government with respect to purely commercial advertising.[41] In the commercial context, advocate rights are not involved.[42]

The illegal statements made by the agents of Lawrence Realty occurred during uninvited solicitation for listings. Each listing acquired carried the potential of a commission and therefore clearly fulfills the "for profit" requirement of section 3604(e). The court of appeals reasoned that such representations were of a commercial

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[38]474 F.2d at 121-22.

[39]*Id.* at 122.

[40]316 U.S. 52 (1942).

[41]*Id.* at 54.

[42]Beard v. Alexandria, 341 U.S. 622, 641 (1951). *Accord,* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972) (affirming the Federal Communication Commission's prohibition of cigarette advertising on television).

nature and not afforded blanket first amendment protection; therefore, such statements may be proscribed by proper legislation.[43]

It should be noted that the injunction affirmed by the court of appeals was not a complete prohibition of solicitation. It merely prohibited the use of certain types of statements in an effort to induce listing or sale of homes.[44] In order to identify prohibited representations, the district court utilized a "reasonable man test." A representation is illegal if a reasonable man, in light of the circumstances, would regard the words and acts of the defendant as constituting an inducement to sell his home because members of a minority group are moving into the neighborhood.[45] Such representations were proscribed only if made for profit. Section 3604(e) in no way limits the discussion of the racial composition of a given neighborhood in a social or political context. The district court noted that because of the emotional atmosphere in a transitional neighborhood,[46] direct mention of a particular racial or minority group is not required to accomplish the blockbuster's objective. Therefore, utilization of a reasonable man test gives the court the flexibility required for effective enforcement.

Utilization of the reasonable man test also eliminates a conflict more apparent than real between two earlier district court decisions construing section 3604(e). *Brown v. State Realty Co.*[47]

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[43]*Beard* upheld the validity of an ordinance prohibiting commercial door-to-door solicitation against a due process attack by holding that even legitimate occupations may be restricted or prohibited in the public interest. The problem was held to be legislative when there is a reasonable basis for legislative action. 341 U.S. at 632-33. *Accord*, Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (affirming a state statute which prohibited all advertising of the sale of eyeglasses).

[44]*See* note 5 *supra*.

[45]327 F. Supp. at 489.

[46]Commenting on the atmosphere in a transitional neighborhood, the trial court stated:

> In this maelstrom the atmosphere is necessarily charged with Race, whether mentioned or not, and as a result there is very little cause or necessity for an agent to make direct representations as to race or as to what is going on. On the contrary both sides already know, all too well, what is going on. In short, for an agent to get a listing or make a sale *because* of racial tensions in such an area is relatively easy, whereas the direct *mention* of race in making the sale is superfluous and wholly unnecessary.

335 F. Supp. at 1006.

[47]304 F. Supp. 1236 (N.D. Ga. 1969).

imposed an obligation on realty agents to "refrain absolutely" from prohibited representations even if the subject of neighborhood transition is first raised by the homeowner.[48] *United States v. Mintzes*,[49] on the other hand, would impose no liability for an honest answer given in response to a question raised by the homeowner.[50] Since *Brown* speaks only of prohibited representations, presumably no liability would attach if a reasonable man would interpret the agent's statement as an honest and accurate response to the homeowner's question made without an intent to induce panic sale. Thus, the approach adopted in *Mintzes* seems more in keeping with the purpose of the Act, namely to protect the homeowner from unsolicited representations tending to induce panic sale and not inconsistent with the better reading of the *Brown* decision.

In the second major part of the opinion, the court of appeals upheld the Attorney General's standing to sue the participants in a group pattern or practice of prohibited activities without the necessity of alleging concert or conspiracy among the group members. Previous authority established that the words pattern or practice[51] were to be used in their generic sense, not as words of art,[52] and that the number of violations would not be determinative.[53] The legislative history of the term indicates that it was intended to connote activity of a repeated, routine, or generalized nature and not merely isolated or sporadic incidents.[54] However,

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[48] *Id.* at 1241.

[49] 304 F. Supp. 1305 (D. Md. 1969).

[50] *Id.* at 1312.

[51] Simliar terminology is used in other civil rights legislation to authorize action by the Attorney General. *See* 42 U.S.C. § 2000a-5 (1970) (public accommodations); *id.* § 2000e-6 (equal employment).

[52] United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969). "The words pattern or practice were not intended to be words of art. No magic phrase need be said . . . ." *Id.* at 1314.

[53] United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971) "[N]o mathematical formula is workable, nor was any intended. Each case must turn on its own facts." *Id.* at 227.

[54] The Civil Rights Act of 1968 was passed immediately following the assassination of Dr. Martin Luther King. The fair housing provisions, originally S. 1358, were added by the Senate to H.R. 2517, a house passed antiriot bill. The legislative history reveals no discussion of the pattern or practice terminology. *See* 1967 *Hearings*. *See also* Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969). However the legislative history of a similar provision in 42 U.S.C. § 2000e-6 (1970), dealing with employment discrimination is enlightening. Concerning the Attorney General's standing, Senator Humphrey stated:

in *Lawrence* the court was required to define group pattern or practice as a question of first impression. All previous authority dealt with an allegation of a pattern or practice by a single labor union,[55] employer,[56] motel,[57] apartment,[58] or realty company.[59]

Although not specifically mentioned by the court of appeals the legislative history of similar provisions indicates a desire to limit the Attorney General's participation only with regard to the magnitude or frequency of the prohibited acts and not with regard to the character of the acts.[60] It was clearly intended that the litigation of isolated discriminatory acts be left to private parties under sections 3610 or 3612.[61] On the other hand, the Attorney General's participation was contemplated when the prohibited acts were more frequent and widespread.

In determining the magnitude of the allegedly illegal activities, the court was confronted with two alternative approaches. The

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> [A] pattern or practice would be present only when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies or persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination throughout all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute.
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> . . . The issue would then be whether, as a matter of fact, there was a refusal of service or employment amounting to a pattern or practice, not whether the companies acted in concert or in a conspiracy. And the bill would authorize the Attorney General to join all or some of the several defendants in the same action.

110 CONG. REC. 14270 (1964).

[55]United States v. Ironworkers, Local 1, 438 F.2d 679, 680 (7th Cir. 1971) (pattern or practice under 42 U.S.C. § 2000e-6(a) (1970)).

[56]United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971) (pattern or practice under 42 U.S.C. § 2000e-6(a) (1970)).

[57]United States v. Gray, 315 F. Supp. 13, 22 (D.R.I. 1970) (pattern or practice in public accommodation under 42 U.S.C. § 2000a-5 (1970)).

[58]United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir. 1971) (pattern or practice in apartment rental under 42 U.S.C. § 3613 (1970)).

[59]United States v. Mintzes, 304 F. Supp. 1305, 1314 (D. Md. 1969) (pattern or practice in the sale of real estate under 42 U.S.C. § 3613 (1970)).

[60]*See* note 54 *supra* & accompanying text.

[61]42 U.S.C. §§ 3610, 3612 (1970) authorize litigation by a private party to enjoin the occurrence of a single prohibited act.

activity could be viewed from the perspective of the homeowner as argued by the Attorney General or from the perspective of the realtor as argued by the defendants. If the perspective of the realtor was adopted, a showing of coordinated effort would be required to establish a group pattern or practice. After some initial reluctance at the trial court level, the homeowner's perspective was adopted.[62]

The court of appeals held that the homeowner's perspective must be adopted in an attempt to eliminate the blockbusting syndrome. The court reasoned that the sociological phenomenon of a transitional neighborhood is enough to attract numerous real estate agents intent on reaping the available profits.[63] Because a transitional neighborhood is already ripe with racial tension the constant solicitation by real estate agents has the same effect on the individual homeowner as more explicit racial representations.[64] Furthermore, the very essence of blockbusting is the fierce competition between individual realtors for the available homes in the area. To require a showing of concert or conspiracy in this context would

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[62]The district court dealing with preliminary motions initially rejected the homeowner's perspective and stated:

> We conclude that 'pattern or practice' must be approached from the point of view of the persons allegedly violating the Act. . . . If the meaning of a group pattern or practice is to be approached from the defendant's point of view it is not sufficient merely to allege a coincidence of similar section 3604(e) representations by several realty companies in a particular geographical area. While this might be a pattern or practice from the homeowner's point of view, it is not a pattern or practice when viewed from the defendant's standpoint. The pattern or practice must be one on the part of the group acting as a unit. This would require at the very least, a showing of some coordination of effort on the part of the defendants. Any less standard would provide the Attorney General with enforcement powers over the isolated acts of individual defendants acting independently of each other, merely because these persons' acts coincide in time and place with the acts of other violators.

327 F. Supp. at 493.

However, after the trial, the court adopted the homeowner's perspective. The district court held "that by a group pattern or practice the neighborhoods involved were, because of the racial transition thereof, harassed beyond endurance and that each of the defendants in some measure participated therein." 335 F. Supp. at 1007.

The court of appeals explicitly adopted the homeowner's perspective and rejected any requirement of conspiracy or concerted action. 474 F.2d at 124.

[63]474 F.2d at 124.

[64]*See* note 46 *supra*.

be totally unrealistic.[65] The purpose of section 3604(e) is to stop the economic and social damage caused by the panic sale of homes in transitional neighborhoods, regardless of whether such sales are caused by excessive solicitation conducted by numerous independent agents or the result of a coordinated scheme.

The Supreme Court has stated that civil rights statutes are to be accorded broad construction in accordance with their purpose.[66] Only a liberal construction of section 3613 will give substance to the antiblockbusting provision of the Act.[67] To date all but one of the actions filed under section 3604(e) have been brought by the Justice Department.[68] It would be unrealistic to expect that effective enforcement can be achieved through private litigation in view of the widespread public ignorance of the statutory provisions[69] and the expense of private litigation.[70]

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[65]Rejecting the requirement of a concert or conspiracy, the court of appeals stated:

> Blockbusting by its very nature does not require concerted action or a conspiracy to wreak its pernicious damage. There is, for example, no need for XYZ Realty to conspire with ABC Homes to set off a pattern or practice of activities violating the act. The sociological phenomenon of a transitional area is enough to attract blockbusters intent on culling all the profits that can be derived from the area. The very essence of the phenomenon is that a large number of competitors individually besiege an area seeking to gain a share of the market.

474 F.2d at 124.

The solicitation activity of individual agents may not be harmful per se, but becomes so when undertaken simultaneously by a great many agents in a transitional neighborhood. *See generally* Note, *Blockbusting: A Novel Statutory Approach to an Increasingly Serious Problem*, 7 COLUM. J.L. & SOC. PROB. 538 (1971).

[66]Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). "A narrow construction of the language . . . would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded . . . ." *Id.* at 237.

[67]Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). With regard to 42 U.S.C. § 3610(a) (1970) which provides for private litigation, the Court stated, "We can give vitality to [§ 3610(a)] only by a generous construction . . . ." 409 U.S. at 212.

[68]Brown v. State Realty Co., 304 F. Supp. 1236 (N.D. Ga. 1969). In a private suit based on 42 U.S.C. § 3612, the plaintiff alleged that the defendant realtor made representations prohibited by section 3604(e) and the court granted injunctive relief. 304 F. Supp. at 1241.

[69]Glassberg, *Legal Control of Blockbusting*, 1972 URBAN L. ANN. 145, 156.

[70]Although section 3612(b) provides that a court may at its discretion "appoint an attorney for the plaintiff and may authorize the commencement of

The court of appeals also rejected the defendants' allegation that in order for the Attorney General to have standing based on a group pattern or practice, each member of the group must be engaged in an individual pattern or practice.[71] The court held that to so construe the statute would be to make the phrase "group of persons" totally superfluous and ignore its clear statutory purpose. The court reasoned that the statute provides an either/or situation and if either a person or group is involved in a pattern or practice, the Attorney General has standing to sue.[72]

Having upheld the constitutionality of section 3604(e) and the Attorney General's standing, the court of appeals then reviewed the propriety of the trial court injunction. Pursuant to its finding of illegal activity the trial court enjoined the defendants from any attempt to induce the sale of homes by statements prohibited by section 3604(e). Furthermore, the defendants were ordered to conduct any future solicitation in a uniform manner and were prohibited from conducting concentrated solicitation in transitional neighborhoods.[73]

The court of appeals rejected the appellant's contention that the injunctive relief was inappropriate.[74] The court reasoned that an injunction is appropriate so long as there remains the possibility

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a civil action upon proper showing without the payment of fees, costs, or security," the legislative history of the provision indicates that only indigent plaintiffs were considered financially eligible. 114 CONG. REC. 5514 (1968) (remarks of Senator Mondale). Although section 3612(c) authorizes the award of court costs and reasonable attorneys' fees to a prevailing plaintiff, the average homeowner is not in a position to take such a gamble. For a comparison of the alternate means of private enforcement, see Note, *Blockbusting*, 59 GEO. L.J. 170, 179 (1970).

[71] Appellant's Brief at 17.

[72] The court also held the Attorney General had standing to sue under the Government's third claim and reversed the trial court's holding that the Attorney General must provide evidence to support his allegation that an issue of general public importance is raised. 474 F.2d at 125 n.14. The Government's third claim was based on the so-called "second alternative" of section 3613. *See* note 10 *supra* & accompanying text.

[73] *See* note 5 *supra*.

[74] Appellant's Brief. In part the appellant requested:

[1.] A finding that injunctive relief is inappropriate to Bob Lawrence,
[2.] A finding that Bob Lawrence committed no prohibited act,
[3.] A finding that Bob Lawrence has not engaged in any "pattern or practice" designed to deny to a person his civil rights.

Id. at 26.

of future wrongs.[75] In determining the likelihood of future violations, the court felt it appropriate to consider expressed intent to comply with the law, the effectiveness of any discontinuance of the illegal acts, and the character of past violations.[76] The court of appeals held that the defendant's refusal to admit that his agents had engaged in prohibited activity, in spite of the trial court's finding to the contrary, precluded a finding that repetition of the prohibited activities was unlikely. The court of appeals also noted that the decree was tailored to minimize interference with the defendant's business activities and sought merely full compliance with the law.[77] In this context the court found that the decree was an appropriate exercise of the trial court's discretion.[78]

The *Lawrence* decision is significant in that it represents the first circuit court interpretation of section 3604(e). In affirming the constitutionality of section 3604(e) and sustaining the Attorney General's standing to seek injunctive relief under section 3613, the *Lawrence* decision has given vitality to the Fair Housing Act and will enable effective future litigation to eliminate the plague of blockbusting.

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[75]The court of appeals cited Swift & Co. v. United States, 276 U.S. 311 (1928), which held that "an injunction deals primarily, not with past violations, but with threatened future ones . . . an injunction may issue to prevent future wrongs, although no right has yet been violated." *Id.* at 326.

[76]474 F.2d at 126. *See* United States v. W.T. Grant Co., 345 U.S. 629 (1953). In denying the requested injunction, the Court stated, "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.'" *Id.* at 633.

[77]It should be noted that the trial court "was not overly impressed with the gravity of the individual transgressions of the defendants" but felt the potential injury to the homeowners from any repetition of past acts justified the injunctive relief. 335 F. Supp. at 1007.

[78]The court of appeals rejected the appellant's request for attorney's fees as utterly frivolous. 474 F.2d at 127.