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# Law Review Summaries

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# Law Review Summaries

*This section will summarize recent law review articles on a topic chosen for its social significance which will vary in each issue.*

## MODERN SOCIAL WELFARE LEGISLATION

N. Dorsen and S. D. Ross, T. I. Emerson, P. A. Freund, P. B. Kurland, P. Murray, *Equal Rights For Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 215 (1971).

This symposium consists of six articles which closely explore the proposed constitutional amendment which was recently passed by the House of Representatives which reads:

Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have the power, within their respective jurisdictions, to enforce this article by appropriate legislation. H. R. J. Res. 264, 91st. Cong., 1st Sess. (1969).

The articles composing the symposium were written by several of the distinguished law professors who testified before the Senate Committee on the Judiciary in September, 1970. Hearings on S. J. Res. 61 and S. J. Res. 231 before the Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970).

N. Dorsen and S. D. Ross, *The Necessity of a Constitutional Amendment*.

Noting that there is a wide new commitment to equal treatment of the sexes and to the eradication of unjust laws that have exploited women or prevented them from realizing their full potential, both economically and personally, the authors state that there is still resistance to an amendment on equal rights for women. They note recent changes as well as contemporary examples of discrimination in the public schools and universities. While boys are channeled into college preparatory curricula to become future managers and professionals, girls are tracked into commercial courses to become future secretaries or typists. The authors offer as a prime issue of consideration the point of whether the Supreme Court would treat sex discrimination supported by state action as "invidious" and therefore

conditionally justifiable only if a compelling governmental interest can be demonstrated. The concept is reiterated that both courts and legislatures have been unable or unwilling, in the present legal context, to cope with the complex barriers that continue to confront women. The passing of an Equal Rights Amendment would provide a powerful impetus for legislative efforts as well as for individual re-examination of behavioral patterns that result in sexual bias. Rather than providing for sudden legislation partial to one sex, the authors point out that present legislation, as for example, Department of Labor regulations pursuant to the Federal Labor Standards Act and the 1963 Equal Pay Act, require extension of minimum wage and overtime pay requirements of one sex to the other. Alimony and support laws would not be wholly abrogated, rather it would require a neutral and reciprocal approach to alimony and support based on individual capacities. The amendment would not mean the end of the draft, but would instead require conscription of both men and women insofar as each individual meets physical qualifications. The amendment would have an additional salutary effect not achievable by legislation or litigation alone; its adoption would be a final resolution of the fundamental policy question in favor of strict equality of the sexes.

Recognizing that there could be public furor in that the amendment would cause vast changes in many features of national life, the author stresses that such transitions will occur only if they are absolutely necessary; also, the courts must be entirely capable of laying down the rules for a transitional period in a manner which will not create excessive uncertainty or undue disruption.

P. A. Freund, *The Equal Rights Amendment Is Not The Way.*

The author warns that the nation should not look to the proposed constitutional amendment as the panacea for equal rights for women. The effectiveness of such an amendment must be juxtaposed to the mandate created by judicial decision and Congressional legislation. Rather than imposing a simple standard of sameness on the sexes in all the multifarious roles regulated by law, the alternative legal course is to achieve changes in the relative position of women. This could be brought into being by using paramount federal standards to overcome invidious classifications on the ground that they are presently unconstitutional.

The author offers some alternative suggestions, exploring the possibility of using the regular legislative process in Congress. For example, concrete guidelines are set forth in the April, 1970 Report of

the President's Task Force on Women's Rights and Responsibilities. Among these suggestions are that the Civil Rights Act of 1964 be amended to empower the EEOC to enforce the law, and to extend coverage to state and local governments and to teachers. Also suggested is that Title IV and IX be amended to authorize the Attorney General to assist in cases involving discrimination; even further, that Title II of the Civil Rights Act be amended to prohibit discrimination because of sex in public accommodations. Recommendations are made for liberalized provisions for child care facilities, and the Fair Labor Standards Act be amended to extend coverage of its equal pay provisions to executive, administrative and professional employees.

It is noted that a few significant decisions of the Supreme Court in well-chosen cases using the fourteenth amendment would have a highly salutary effect. Decisions under Title VII of the Civil Rights Act will clarify the role of state laws regulating employment in light of the statutory concept of bona fide occupational qualifications. The author concludes that the real issue is not the legal status of women but the integrity and responsibility of the law-making process itself.

P. B. Kurland, *The Equal Rights Amendment: Some Problems of Construction.*

The author approaches the subject with certain stated biases; he believes that the use of an amendment is clearly the best and exclusive means of bringing about changes in governmental structure. It would be the necessary means for protecting minorities from being discriminated against by the majority, for protecting the unenfranchised against discrimination by the enfranchised. Yet women are neither a minority nor an unenfranchised group. The author's solution is appropriate legislation rather than a constitutional amendment.

Believing that women suffer from unreasoned discrimination, he is of the view that this unjustified discrimination does not derive primarily from governmental action, except insofar as the government, as an employer, behaves like other employers. The author notes a certain amount of indecisiveness in the proposed amendment. He believes that the amendment's aims and purposes should be clearly delineated in its legislative history. Congress should particularly indicate whether it is fostering a "unisex" approach or one that bars only invidious discrimination against women.

The conclusion is that a more appropriate solution would be effectively administered legislation, directed to specific evils in lieu of a broadly directed amendment. Congress and the States already possess

sufficient power to alleviate much of the very real discrimination now suffered by women in American society. The Equal Rights Amendment would add little, if any, to this power. A protracted struggle for its adoption, however, could tax the public energies needed to effect the exercise of this power; only martyrs enjoy Pyrrhic victories.

P. Murray, *The Negro Women's Stake in the Equal Rights Amendment.*

The author stresses that Negro women as a group have the most to gain from the adoption of the Equal Rights Amendment because all that has been said about the deprivations and frustrations of women generally applies with special force to black women, who have been doubly victimized by the twin immoralities of racial and sexual bias.

Noted is the position of the black woman as a mere breeder a "brood mare" during the period of slavery; even today, despite the achievements and the fortitude which black women have displayed in the face of unmitigated oppression, they remain the lowest and most vulnerable social and economic group in the United States. Negro women don't enjoy either the advantages of the idealization of "womanhood" and "motherhood" which are implicit in our American mythology, or the "protections" women possess which critics of the Equal Rights Amendment are so zealous to preserve. The movement for black liberation has not substantially improved their situation; they still must contend with prejudice based on their sex.

Expanding upon these views, using historical background and statistics, the author states that the adoption of the Equal Rights Amendment would have certain advantages for black women not realizable by other means. The affirmation of equal rights without regard to sex would permit them to enjoy a constitutional status not accorded them under the Civil War amendments. The psychological gain from this constitutional recognition would be tremendous, reinforcing their rights cognizable under the fourteenth amendment. This would prevent a shift in the basis of discrimination from race to sex.

The article concludes that the Equal Rights Amendment strikes a blow at the powerlessness which all women share but which Negro women experience in intensified form. The full implementation of it will enable women to achieve equal power with men in societal decision-making. The presence of women in a more equitable proportion to their numbers, in the legislatures, on the courts, and in leadership positions throughout society, is the best guarantee that their rights will be protected. Women also represent a vast untapped resource, the utilization of which may accelerate progress toward the

solution of such problems as war, poverty, racism, and pollution. The adoption of the Equal Rights Amendment would be an important step toward a new era of human relations.

*"A Little Dearer Than His Horse:" Legal Stereotypes and the Feminine Personality.*

This article delves into some striking factual background material in order to justify the need for the Equal Rights for Women Amendment. Economically, a woman is "protected" from exerting herself beyond her limits at her job. At common law she had been literally incorporated into her husband's identity. This concept has not aided women in their constant attempt to assert their individuality and independence; federal income tax regulations explicitly exhort women to be fruitful child bearers—the more children the more exemptions.

Psychologically, it is contended that men themselves fear women, either patently or subconsciously. Witness the witchcraft trials during which almost all the victims of these purges were female. Perhaps the belief that women possess greater sexual potency than men or their primary role as progenitors of our species or their disciplinary effect upon their children's personalities brings about this fear. Women suffer more from mental illnesses than men. Circumstances which induce this condition are: (1) emotional isolation of women at home; (2) hostility exuded by men who she competes against; (3) the fear of women that they aren't loved, and; (4) a feeling of powerlessness due to their non-aggressive ideological indoctrination.

The legal structure of our society intrinsically fosters a cycle of feminine dependence on men; since the law dictates that the male must support the female, it follows that there is no necessity for any female independence. There is also a "fear of success syndrome" in women which is devastating in its inherently warped logic; a woman desires to be successful but she is inhibited by the threat that such success will manifest in her an image of not being feminine.

The article concludes its feminine study by admitting that the proposed Equal Rights Amendment is necessary not to inject womanhood into its rightful status in society, but rather to merely insure that the legal process itself will no longer thwart the objective of equality of the sexes. Such hindrances as employment impediments and marital disabilities are the crucial issues involved in the female's drive towards equality. It will take good faith on the part of those who can discriminate against women to fully implement the realization of equal rights. Such an awesomely theoretical defender of women's equality as the Equal Employment Opportunity Commission has been remiss in its

stated objectives. Society's talent deficiencies can and will be alleviated with the dawning of an enforced legal equality status for women.

R.A. Musgrave, A.M. Polinsky, *Revenue Sharing: A Critical View*, 8 HARV. J. LEGIS. 197 (1971).

Emphasis is placed on the shift away from the preoccupation with federal financing toward a more comprehensive view of the fiscal structure, encompassing the federal, state and local levels. It is noted that the fiscal plight of the cities and the need for expanded social problems are the crux of the problem. Reference is made to the early role and purpose of revenue sharing as espoused by Walter Hell in 1964. At that time, economists were concerned with countering a slackening economy and averting the repetition of stagnation by fiscal drag that had occurred during the late fifties. The outlook was for a steadily rising full-employment surplus and widespread fiscal deficiencies at the state and local level. Rather than an optimistic outlook with a speculated \$45 billion surplus there has been premature tax reduction, less than hoped for cutbacks in defense spending, along with increases in programs of both the Johnson and Nixon administrations.

The article notes that a budget surplus of \$10 billion will be needed if the Administration's housing goals are to be implemented. With projected expenditures at the state and local level exceeding those of 1971 by \$84.6 billion (projected 1971 state and local expenditures will be \$96.8 billion, 1975 expenditures are estimated as \$191.4 billion), there is a need for increased taxes at the state level. It is significant that in place of the 1964 outlook for a large and freely available dividend, combined with a widespread deficiency at the state-local level, that only a limited federal surplus is available. State and local resources will keep approximately in step with rising costs of existing programs, and new programs oriented toward poverty and disadvantaged groups will be called for. It is projected in "no strings" revenue sharing that the federal function will cost between \$10 and \$15 billion. This alone might well absorb the available slack in the federal budget to include such urgent problems as rehabilitation of slums. Arguments are put forth for "Black versus categorical transfers," as well as "outright versus matching grants." Consideration is given to "tax credits" and "transferring expenditure functions." A thorough look is aimed at "horizontal imbalance and equalization" as they specifically relate to dealing with more adequate social programs relating to poverty. One of the major conclusions noted by the report is the existing imbalances among the states.

Approaching the problem of need, the report notes that 50 per cent of the poor are outside metropolitan areas. Within metropolitan areas the incidence of poverty is not a core city phenomenon; about 60 per cent of the poor are located in central cities while 40 per cent are located in suburbia. The report concludes that revenue sharing modified by an income-type capacity variable would do little to solve the problem. It recommends a fiscal system where the distribution is from the federal government to localities in line with their share of such national needs. Although a more complicated system than has been proposed, the objective could be met more effectively by federal assumption of responsibility for the financing of the welfare system, coupled with a partial federal financing of minimum levels of primary and secondary education.

H. J. Daniels, *Judicial and Legislative Remedies for Substandard Housing: Landlord-Tenant Law Reform in the District of Columbia*, 59 GEO. L. J. 909 (1971).

This article, written by the draftsman of the Landlord-Tenant Regulations enacted in 1970 by the District of Columbia City Council, analyzes the panoply of rights now available to tenants in the District and concludes that the District's experience in this area is applicable to any urban jurisdiction. Housing code enforcement, both through governmental and more recently, through tenant action, has emerged as the primary weapon in halting further expansion of slum conditions until federal housing subsidy programs become more effective. Most ordinances rely solely on governmental efforts to gain compliance due to the negative attitudes which exist toward tenant involvement in the enforcement of housing standards. The article reviews the trends toward greater tenant involvement in code enforcement and the related judicial and legislative reform of traditional landlord-tenant law; the indications are that the point of departure is the code enforcement experience of the District of Columbia and the recently adopted amendments to the Housing Regulations of the District of Columbia. The analysis of the D.C. situation should provide useful guidelines to draftsmen of municipal housing codes and proponents of tenants' rights legislation.

Extensive public hearings held by the District of Columbia City Council in the spring of 1969 generated concern over the city's inability to secure compliance with code standards. As a result, the Council decided to draft municipal regulations to strengthen tenant rights and remedies in two ways;



1. by imposing economic sanctions to stimulate landlord compliance with housing standards; and
2. by reforming unfair leasing arrangements thrust upon tenants as a partial consequence of the unequal bargaining power between landlord and tenant.

These efforts ultimately produced the District of Columbia Landlord-Tenant Regulations which passed the Council in June, 1970, D.C. Housing Reg. §§ 2901-14 (1970). These regulations build upon recent landmark cases decided in the District of Columbia, in which courts applied contract principles to a lease, extended the warranty of habitability doctrine to leases involving low income urban tenants, and finally, circumscribed a landlord's interfering with tenant efforts to secure decent housing. Briefly, the regulations provide that the lease or rental agreement for an "unsafe or unsanitary" dwelling unit is void, whether the conditions existed at the inception of, or arose during, the tenancy. The regulations create by operation of law, in every lease or rental agreement, an implied warranty that the dwelling unit is in compliance with the housing code. The regulations also prohibit retaliatory actions taken by the landlord in reprisal for specified tenant actions and treat such diverse problems as exculpatory clauses and security deposits.

E. J. Morris, *Lawyers Mobilize for Housing and Urban Renewal*, 57 A.B.A.J. 158 (1971).

The author states that the development of housing and urban renewal projects, through a combination of government aid and private enterprise, is a relatively new phenomenon in the field of real estate law. This trend is likely to intensify and create an increasingly expanded area of activity for lawyers, whether private practitioners or government employees. In view of this, the American Bar Association created the Special Committee on Housing and Urban Development Law in 1967; three years later a pilot program was begun to stimulate the development of more law. Moderate-income housing and urban development was the general aim of the program; specifically, the goal was to train more lawyers in the field.

The Committee decided to set up pilot programs in each of the cities where its members practiced law. This was to be done jointly with the local bar associations and other local groups active in the field. The article describes the operations of each of the various city projects and their particular problems and accomplishments, emphasizing that in each of these activities cooperation is carefully maintained with the local bar association and the local attorney handling the project.

The author concludes by stating that the Committee's national office will make available its resources to help local groups organize similar local offices. This approach, it is hoped, will open up a socially important and lucrative area of the law to practitioners throughout the United States, in accordance with the objectives as set forth in the resolution of the Board of Governors setting up the Committee.

*Restitution for Benefits Voluntarily Conferred Upon Government: A Poverty Law Remedy*, 49 TEXAS L. REV. 515 (1971).

Noting that disabilities of the poor spring not from want of a legal remedy, but from their inability to obtain these remedies, the article is concerned with providing not new rights nor new agencies to enforce the rights of the poor, but a revival of the venerable remedy of restitution for necessities supplied by a volunteer. By adopting this remedy to modern needs, benefactors could be compensated in proper circumstances for supplying the poor with essential benefits wrongfully withheld by government. It is emphasized that the general rule denying restitution to one who voluntarily confers a benefit upon another has exceptions. There is the example of the grocer who supplies food to a deserted wife being entitled to restitution from the husband for the benefit he has conferred by discharging the husband's legal duty to support his wife; also, the available remedy for necessities furnished to infants, insane persons and paupers. *These benefits are conferred upon a defendant by the discharge of his legal duty, not the benefit to the recipient of the goods or services themselves.* If the defendant is the government, such reasons for denying the validity of this solution is that restitution is never permitted for benefits conferred voluntarily; also, recovery has been denied on the ground that the proper remedy is a mandamus action requiring the government to discharge its duty.

The article considers that restitution usually has been granted only after the government has failed or refused to act despite requests that it do so; also, a failure to notify the government of the intention to provide necessities has barred recovery. This notice requirement serves two useful functions; it protects the government from unexpected claims and it assures the government an opportunity to correct its own errors. Examples are given which show that frequently the notice requirement has been applied too mechanistically. Problems of statutory language and contract requisites are shown as well as examples of applied self-interest. The intricate question of sovereign immunity is explored; reference is made to those states which have and have not consented to

be sued; the United States has surrendered its immunity by the Tucker Act, 28 U.S.C. §1346(a) (2) (1964), whereby consent has been given to be sued on contracts express and implied. An action for restitution against government may succeed if it is viewed as a suit for compensation, but fail if it is considered as an attempt to compel government action. As an alternative, an analysis of equitable subrogation is offered, as when a volunteer responds to the government's failure to provide necessities to a poverty victim. In this situation the benefactor's role is analogous to that of an equitable assignee of the victim's claim.

Restitution would be most easily applied when a government withholds necessities from a relatively small group of persons without claim of right. For example, when an agency withholds public assistance payments from welfare rights activists because they have demonstrated against the agency's practices, the agency is able to withhold benefits without claiming a right to do so; it knows the victim has no effective remedy. The consequences of liability are not likely to be awesome because the government is required only to pay for necessities it was obliged to provide originally. If there has been previous litigation in the claimants favor no legitimate discretionary function remains and courts feel no reluctance to permit restitution if the default continues after the final judgment. Generally, the government's default is neither conceded nor established by previous litigation; the government either denies that it had a duty, claims that it fulfilled its duty, or contends its failure to do so was justified. When the existence or scope of the government's duty is determined after the fact by a court, the threat of large and unexpected claims becomes credible. If the government is held liable for defaults of a duty it did not know existed, unexpected claims are entirely possible.

The article suggests that modern governments, operating under an intricate web of constitutions, statutes, charters, regulations and judicial decisions rarely find their duties stated in a single explicit command. To concede the unavailability of the remedy when duties are inexplicit is to make it inapplicable to some of our most persistent social problems, such as racial discrimination and exploitation of disadvantaged workers. The ultimate conclusion is that a modest expansion of the original concept, encompassing situations in which the government's breach of duty is less blatant but equally indisputable, would make this remedy available in the numerous instances in which the poor have been deprived of benefits solely because their poverty prevents them from pursuing traditional legal remedies.

*The Implied Warranty of Habitability in Landlord-Tenant Relations: A Proposal for Statutory Development*, 12 WM. & M. L. REV. 580 (1971).

At early common law, there were no implied warranties between landlord and tenants; the landlord could only be held responsible if he was guilty of purposely concealing a defect by fraud, deceit, or misrepresentation, or if the defect was latent. The tenant was charged with full responsibility for the condition and repair of the property so that even in the case of total destruction, the obligation to pay rent continued. The doctrine of *caveat emptor* prevailed unscathed and strictly applicable. When it was determined that *caveat emptor* was too harsh, this slight deviance was brought about by the fact that in cases of short term leases there is no time for inspection, immediate possession being of paramount importance. Relief has been extended to tenants when a structure was unfinished and a lease had been executed prior to the completion of the structure or if it was determined that a structure was uninhabitable a legal fiction was employed by the court to offer relief to the tenant called constructive eviction; this doctrine equates the deplorable conditions to an actual physical eviction.

The article states that as of the date of its writing the common law rules continue to represent the clear majority holding. However, a trend away from strict adherence to the rules of the past is perceivable. For example, the covenant of possession implies not only that the tenant will be able to physically occupy the premises on the date of delivery of possession, but that he will also be able to use the premises for its intended purpose. Furthermore, the facilities should remain in a condition which renders the property usable during the entire term of the lease. It is clear that the common law is on the side of the landlord, but passage of time and a change in society have made necessary the rights of a tenant; neither should totally prevail over the other, there must be equity.

A compromise solution is proposed since the increase in the rights and protection of the tenant offered by the warranty of habitability could mushroom to the point of suppressing the rights of the landlord. Initially, a housing code should specifically indicate the defects which will be deemed material, stating the defects that a landlord will be liable for if left uncorrected. It should be provided that the tenant is not allowed to take any action except that specified by statute and if a defect is certified then the landlord is given a specified period of time in which to make repairs. A failure to repair would allow the tenant to vacate the premises absolving him from rent; or he may pay rent into escrow or use a portion of the rent to make necessary repairs. The

option would depend on the extent of the defect. The only solution, according to the article, is a comprehensive housing code with completely equitable standards and strict compliance to it by both landlords and tenants.

G. Lefcoe, *HUD'S Authority to Mandate Tenants' Rights in Public Housing*, 80 YALE L. J.463 (1971).

The case is presented that there are sensible statutory limits on the discretion of the Secretary of the Department of Housing and Urban Development even when it comes to trying to protect those in public housing from harsh treatment. This contention is based upon the congressional design of the public housing program with its strong preference for localized management control. The author presents the limitations on HUD's authority, pointing out that if neither a state enabling statute nor a local government need is present, federal law stops HUD from meeting out funds in the locality.

The article states that after examining the various statutes only a few scraps can be found to support HUD's practice of treating grievance procedures or lease provisions; even further it suggests that Congress' intention was that the tasks of tenant-management relations be resolved on a local level, that tenants share fully in working out these relationships, and that HUD serve mainly as a financier of this accommodation where funds are necessary. The author specifically proposes: (1) mandatory lease forms arrived at as the result of negotiations between representatives of tenants' organizations and management; and (2) that the Uniform Commercial Code's implied warranties of fitness and merchantability be extended to leases.

A discussion of the constitutional basis for HUD's authority through a presentation of the case law in this area is presented. The author points out in particular, the insignificant distinction between public housing and Interest Subsidy Programs for the purposes of a constitutional adjudication. The Residential Segregation cases are presented as a model for assessing HUD's responsibility to guard the constitutional rights of tenants. The conclusion is that HUD has some specific base of authority, derived from either the housing statutes or recent constitutional decisions, for mandating many, although not all of the negotiators' agreements. However, HUD can probably not take the next logical step and impose its own lease and grievance models upon local authorities.

E. S. George, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971).

The author describes low-income housing as one of our most pressing domestic problems, contending that denial of low-income housing is a denial of equal protection as evidenced by a number of recent cases. Proceeding on this theory, the right to equal housing opportunities can be interpreted in two different ways; it can mean either a right not to be excluded from areas in which low-income housing units can be built or an unqualified right to have such units built. Usually, equal protection requires only that the legislation bear a reasonable relation to a legitimate governmental objective. The equal protection decisions evince a sliding scale approach to the determination of the invidiousness of a particular discriminatory practice; the less suspect the classification or the less important the interest, the less likely it is the court will make a finding of discrimination. In suspect classification cases, the courts have indicated that apart from the nature of classification, voting, the right to earn a living, housing, marriage and education are fundamental interests. The Supreme Court held in *Block v. Hirsh*, 256 U.S. 135, 156 (1921), that "housing is a necessary of life." The author states here that this fundamental right to housing extends to zoning practices that would tend to be exclusionary in nature.

The court, in evaluating a housing situation, looks to the historical background in a neighborhood to determine the potential impact or effect of legislation in light of this background. In view of the historical and social setting, the courts must determine whether the measure's ultimate impact will be to perpetuate residential segregation. Thus, even if the evidence is insufficient to demonstrate the inevitable perpetration of discrimination, it may be sufficient to prove authorization or encouragement and hence establish a violation of equal protection. Where the zoning classification of a relatively restricted area is in issue, the courts need only adjudicate the discriminatory effect of that classification. It is maintained that most housing cases under consideration have arisen in situations when a particular housing project has been blocked. The most suitable remedy, therefore, is to enjoin defendants from prohibiting the construction of the project on the ground of a zoning violation.

The article points out that not only is a person entitled to equal housing, but also to a right to decent housing. Although the author indicates that no specific case in point has confronted the courts, this issue has been presented in the context of public housing in other cases. The conclusion is that the equal protection clause provides an important vehicle for alleviating problems in the area of public housing

and in bringing about an integrated neighborhood environment. Furthermore, it is suggested that since the courts have previously assisted minority groups attain their rights they can extend this helping hand to cover the poor as a class, on the theory that they have been deprived of an equal opportunity.

R. H. Olson, Jr., *Employment Discrimination Litigation: New Priorities in the Struggle for Black Equality*, 6 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 20 (1970).

Primarily, all litigation activity of civil rights organizations has been focused upon achieving equal educational opportunities; little improvement has been made in the housing, income and employment levels of blacks. The central obstacle in the struggle for black equality is an economic one, brought about by the disparity between black and white incomes, approximately one third of which is attributable to illegal racial discrimination in employment. This article centers not upon education but rather on litigation strategy in the areas of job and residential discrimination.

Income and job strategy would enable blacks to purchase better housing, food and health services, improve the stability of black families, and decrease the number of central city blacks requiring income supplements. It would also free local governmental funds for other needed improvements. By obtaining employment for those who are able to work, the arguments for income support are made more compatible with the work ethic, which is still the socially accepted norm even by those without adequate job opportunities. The author notes the inequality of economics whereby the family income of the non-white has remained approximately fifty-five percent of that of whites since World War II. With black families numbering larger by number of family members, twenty-nine percent of all black families were below the "poverty" level and thirty-five percent of all black persons were classified as poor. The disproportionate concentration of non-whites in low-paying occupations is a greater factor in the low level of non-white income than is unemployment. The failure of education has also played a major role in the inability of the black to market himself. In 1959, the non-white male college graduate earned less than the white male who never attended high school. Fantastically, a Department of Labor analysis made in 1966 indicated that the income of a non-white man decreased relative to that of his white peer as their education increased.

Discrimination is studied in the employment area. Such areas are covered as the firing or non-hiring of a black worker comparable in

terms of economic productivity to the white worker, occupational discrimination whereby a qualified black worker is refused the opportunity to hold a higher status-pay position and discrimination of wage levels meted to black and white workers of comparable productivity in the same occupation. Discrimination is fostered by the black worker receiving a smaller return of his investment of time and money invested in his schooling. Consequently, the incentive to complete high school and acquire higher education is significantly reduced for blacks. Efforts to improve the level of education and job experiences among blacks will have little effect on black income if job discrimination is not eliminated.

The author also covers the topic of residential segregation and provides statistics showing the rise in black population centered within twelve central cities. Blacks do not live in ghettos because they cannot afford to live elsewhere; racial discrimination restricts residential choices of blacks to the central city. The effects of residential segregation and center city concentrations result in a decrease in employment opportunities for center city residents with a corresponding increase in the cost of center city services, such as education, transportation, housing and health care. With employers discriminating for a variety of reasons in addition to the mistaken belief that the white is a more productive worker, the answer to alleviate the problems holding back opportunity and economic betterment for the nation's blacks is litigation. The author states why public litigation is necessary; the success of anti-job discrimination litigation is measured by the extent to which it opens up equal employment opportunities. One of several examples given is the availability of injunctions against public agencies which contract with discriminatory employers who are establishing *de facto* racial quotas. Thus, whites who contend they are victims of racial discrimination would have no constitutionally-protected interest in the continued enjoyment of employment advantages based on past discrimination, rather than on skill.

Particular targets for litigation strategy, such as large national firms and employment agencies, both in the public and private realms are pointed out. Also, the Labor Department has been notoriously lax in enforcing the nondiscrimination requirements of the programs it administers. The author also covers low priority targets of discrimination, such as attacks against the craft unions and high priority attacks against residential discrimination, offering appropriate solutions. The author concludes that since legal resources available to eliminate discrimination against black Americans are limited, they must be used to their maximum effectiveness. He notes that if school segregation were eliminated and the educational opportunities for black



children were improved, black youths would still be unable to enter the labor market on comparable terms with white youths. The traditional priorities must be reassessed; a job-oriented, rather than an education-oriented litigation strategy is now required.

*Property Insurance and the American Ghetto: A Study in Social Irresponsibility*, 44 S. CAL. L. REV. 218 (1970).

The initial premise is that citizens living in ghettos and surrounding neighborhoods do not have available to them property insurance, or that is is offered to them at unreasonable rates. If fire destroys a ghetto dwelling, disaster ensues because of the total obliteration of the resident's lifetime accumulation of worldly goods. This article deals with this as yet unsolved problem affecting the poor. It is noted that the present system of property insurance discriminates against the growth of ghetto owned and operated businesses, contributes to the deteriorating physical structure of residences in the area, impedes the free flow of capital into the ghetto and leads to an inadequate availability of insurance in the ghetto market. Even further, it is suggested that racially oriented discrimination plays a significant role and that this form of discrimination violates the equal protection clause of the fourteenth amendment, the Civil Rights Act of 1866, and the anti-trust laws.

This premise is followed through by describing the fire and casualty market structure, the probability of loss, market division and statistics affecting company profit margins. Statistics indicate that the average rate of return of the twenty largest property insurers is 14.0% compared with average rate of return of 11.7% reported by Fortune Magazine's Top 500 Companies in 1968. The article further covers rationales and means of segregating ghetto risks. The average suburban resident may purchase coverage beyond fire protection to include damage caused by windstorms, hail, explosions, vandalism, malicious mischief, riot, riot attending a strike, civil commotion, aircraft vehicles and smoke. Yet the ghetto property owner, be he a businessman or resident owner, can only buy fire and extended coverage protection. He is denied any extended protection whether or not he could afford it, which would be available to the suburbanite. Examples are given by geographic divisions represented by race as well as economics; specifically, the Watts area, an economically sub-standard area in Los Angeles, is compared to the Crenshaw district, an adjacent middle class black area. Further examples are given of selective selling of "the package policy" as a means of segregation. Also examined are subsidiary

regulations which when applied to ghetto residents relegates their risk insurance into a separate secondary-risk subsidiary corporation, resulting in higher rates.

Other examples are shown which separate ghetto risks from the normal market areas including "redlining" and the insistence on the installation of expensive new safety devices which are prohibitively expensive for many small businesses. "Redlining" is a process by which entire areas will be subject to a blanket refusal to underwrite higher deductibles. Industry explanation is given in that the insurance companies had experienced unprecedented underwriting losses in ghetto areas. Insurance companies felt this uncertainty could not be recouped through a nationwide spreading of the risk since only ghetto areas should properly pay and that the industry could not subsidize these problems since it had been suffering heavy losses throughout the country.

The article describes in detail "The Fair Plan" (Fair Access to Insurance Requirements) enacted by the HUD Act of 1968. This plan covers reinsurance as well as encourages industry participation. This plan is described in depth as regards its initiation in California and Ohio. The problems which the plan has encountered are noted, along with solutions to these problems and present day limitations. Alternatives are given as well as suggested means for implementing the present 1968 HUD Act. The article concludes that the insurance structure is a socially counter-productive structure and its socially deleterious results must be modified to assure equality of commercial opportunity and property transferability in ghetto areas. It is not only unfair to deny a man insurance coverage because he lives in an area privately designated to be "undesirable"—it is nothing less than a form of social suicide.

*The Central City Insurance Crises: Experience Under the Urban Property Protection and Reinsurance Act of 1968*, 38U. CHI. L. REV. 665 (1971).

Insurance for property owners became an issue of major concern after the urban riots of the mid 1960's. Insurers were reluctant to write policies for property owners in ghetto areas; even at exorbitant rates insurance protection could not be obtained. The rise in premium rates, according to this article, would eventually price the insurer out of the low risk market, thus forcing him to raise rates even more due to the higher loss ratio. Furthermore, the insurance industry gradually divided itself into two categories: standard companies competed for better risks, thereby excluding most ghetto areas, and second line companies

insured at increased rates the high risk properties major companies refused to insure. To prevent disaster, insurance companies insuring the central city areas used methods called "redlining" which in effect redlined certain areas of the city which were forbidden territory, and insurance agents were forbidden to write policies. Establishments such as liquor stores, cleaning establishments, and drug stores, main targets of rioters, found it virtually impossible to get coverage.

The article points out two problems which are a result of not being able to obtain insurance. First, when shop owners continued to operate without insurance, the customer ended up paying more for the products, and secondly, the physical surroundings deteriorated at an accelerated rate. In 1968, to contribute to the alleviation of this problem, Congress passed the Urban Property Protection and Reinsurance Act, 12 U.S.C. §1749 bbb (Supp. V, 1965-69), which provided the incentive that the federal government was financially backing the program. The reinsurance provisions applied only to riot-caused damages, not to all losses. The Act is committed to the elimination of "environmental hazards" as a relevant criterion in determining the rates at which insurance premiums will be written. An "environmental hazard" is defined in the act as "any hazardous condition that might give rise to loss under an insurance contract, but which is beyond the control of the property owner," 12U.S.C. §1749 bbb-2 (a) (1).

The Illinois FAIR plan is used as a case study to look at the program. This plan authorizes the establishment of an all industry placement facility and provides for free inspection of all properties sought to be insured under it. The facility accepts applicants and determines which company is to provide the insurance. Policies are written for one year and become effective upon full payment of the year's premium. Although insurance coverage is usually offered under the plans, rates have skyrocketed. The plan has not been the answer to the problem. It has not provided the required assistance to its intended beneficiaries, the inner cities, rather it has been a boon to the insurance companies.

There have been proposals that have been offered for reform. The Crime Insurance Amendment of the Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1770 (1970), provided insurance at "affordable rates" purchased directly through the federal government. The problem with this amendment is that "affordable rates" were never defined. The need is to define precisely what these rates will be and make the insurance available to all property owners. There are of course, outcries against federal intervention and interference, but it has become a necessity in this area.

A solution to be considered is to make insurance a public utility with the insurance companies carrying the financial burden of the public-utility-type operation. The conclusion is on a pessimistic note; the

Federal Reinsurance Act has failed to eliminate insurance unavailability in urban areas and to rehabilitate the central cities. This protection is absolutely necessary and the Crime Insurance Amendment is a step in the right direction, yet it must be carried even further.

*The Landlord's Emerging Responsibility for Tenant Security*, 71 COLUM. L. REV. 275 (1971).

The article declares at the outset that the duty owed by a landlord to his tenant is one of a contractual nature and also one grounded in tort — a logical extension of the landlord's control of common areas. With the rash of crimes in recent years, it has been widely accepted that the unauthorized entrance of criminal intruders was foreseeable, and that the landlord was under a duty to protect tenants from criminal acts perpetrated by such intruders. Traditionally, the owner or occupier of land has been held to owe an affirmative duty of reasonable care to his or her invitees and the recent trend has been to extend the scope of this landowner's duty to licensees and trespassers as well.

In tort law the landlord was held liable: (1) for concealed dangerous conditions which existed from the inception of the lease and of which the landlord knew or had reason to know; (2) for conditions that might pose a danger to persons outside the premises; (3) in the case of premises leased for public use, for conditions that might pose an unreasonable risk of harm to those who might enter; (4) throughout the term of the lease, for conditions in parts of the premises, such as entrances and hallways, which are available for common use and over which the landlord retains control; (5) in a minority of jurisdictions, for injuries, whether to tenants or others arising out of conditions which the landlord should have corrected in fulfilling either a contractual agreement or a statutory duty to repair. It is under these last two items that there arises a duty of care to protect tenants on the part of the landlord. At common law, there was no duty on the part of the landlord, but his economic position has so improved over the years as to put him in a position to assume the responsibilities of protection.

Now a contractual duty is placed upon the landlord; the traditional view of the lease has been changed by treating it as a contract rather than as a means to convey a piece of property. By applying the doctrine that clauses can be implied in contracts wherever public policy so demands, protection of tenants can be implied. It is by this developing scheme that there seems to be an implied warranty of habitability with all it entails. The tenant was finally given some consideration in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, No. 23, 401 (D.C. Cir.,

Aug. 6, 1970), in which it was held that a duty of protection arose from the logic of the landlord-tenant situation itself. An intervening criminal act should not cut off the landlord's duty to protect in modern urban multiple dwellings, because he was deemed to be best suited to take the necessary protective precautions. The case shed new light on exculpatory clauses, used by landlords to absolve their liability, putting a tenant in a "take it or leave it" situation. The tenant's position was enhanced and the *Kline* case left ambiguities which may benefit the tenant; at least it leaves room for implication. The courts can use *Kline* to invoke a warranty of protection which could break the stranglehold the landlord has traditionally had in his favor in litigation.

For the protection deemed necessary by *Kline*, the court felt that the increase in rents, which is inevitable with the addition of a service, will help defray the cost of protection and keep insurance rates down. In concluding, the article states that *Kline* in utilizing alternative tort and contract theories has passed a powerful tool into the hands of the apartment dweller; yet the process by which the decision was reached leaves an area of ambiguity with regard to its application. The most valuable potential utility of the decision is that it may impel legislative action to begin to deal with problems of crime and urban decay that permeate our society.

*Rent Withholding for Minnesota: A Proposal*, 55 MINN. L. REV. 82 (1970).

The stated purpose of the article is to determine whether the adoption of a rent withholding statute is necessary for the welfare of the people of Minnesota. This is determined by examining the housing situation in Minnesota and in initially deciding whether public welfare considerations of that state call for legislative action to alleviate problems in the sphere of housing. If the housing problem of our cities can be solved we will need an adequate supply of relocation housing; this encompasses more housing for the poor coupled with loans, grants and other incentives to low income homeowners, landlords and tenants. Any program should allow property to be repaired and maintained according to redefined housing code standards without merely increasing housing costs for the poor. At present the remedies available to a tenant against his landlord (with whom there is a contractual relationship) are inadequate, especially when compared to the remedies available to a tenant against his neighbor (*e.g.*, he can bring an action in equity to have a nuisance abated).

The inadequacy of housing codes as a device for compelling the proper maintenance of dwellings has been attributed to the lack of

remedies available to punish a landlord's violations and to inadequately staffed inspection departments. The efficient enforcement of housing codes is also retarded by the lack of coordination between inspecting departments and prosecuting departments; further, there exists ambiguities within the language of housing codes themselves.

The article raises the question of who is best able to bear the burden of repair. It is noted that the landlord generally has no duty to repair in the absence of an express covenant; even if there is an express covenant which the landlord fails to keep, the tenant's only practical remedy is to vacate the premises unless he wants to sue the landlord for damages—an improbable alternative for the alienated poor. Since the only other alternative, housing code enforcement, has failed to provide the tenants with the tool they need to secure decent housing, something more is needed. One possibility is a rent withholding statute that places the burden of repair upon the landlord and provides the tenant with a quick, effective remedy in the event of a landlord's non-compliance with the housing code. Rent withholding statutes are of two basic types: under one type, the withholding action is instituted by a public agency (*e.g.*, a welfare department or by the building or housing department); in the other, action is initiated by the tenant either individually or jointly with others. Under either statute, the kind of violation necessary before rents will be withheld is usually one which is certified as causing the building to be "unfit for human habitation," or "dangerous, hazardous or detrimental to life or health." The conclusion is that there is no doubt that housing codes strictly enforced can help prevent decent housing from deteriorating into a slum and that a rent withholding statute would be the harbinger of efficacious code enforcement if coupled with adequate financial assistance.

S. F. Gold, *The Failure of the Work Incentive (WIN) Program*, 119 U. PA. L. REV. 485 (1971).

The Work Incentive Program (WIN) appeared doomed from its inception as another ill-conceived program designed to counter poverty in America. WIN was established as a "service program" so that it could be distinguished from those programs solely providing monetary aid to the poor. This was intended to "dress up" the concept of welfare and to instill in it a respectability heretofore lacking. The original bill was entitled, "Grants to States for Aid to Dependent Children" (ADC), and was made a part of the amendments to title IV of the Social Security Act, 42 U.S.C. 601 (Supp. V, 1970). Its purpose was to enable each state to furnish financial assistance, as far as practicable under the

conditions in such state, to needy dependent children. Social Services to the family and financial support of the parents of ADC children were intended to improve the home environment of needy children. Further, it boosted adult ADC recipients toward economic independence; by supporting dependent children it enabled a parent to work. It was felt that the working parent is a good example to the child and will gain the respect of the child more easily than a non-working parent.

WIN is administered by HEW and the Department of Labor, participants are selected on the basis of the caseworker's evaluation of the individual's potential to succeed in the program. Participants are classified as immediately employable, or as one who may need special training, and lastly, those who cannot benefit from special training are placed in "special work projects." All of those selected are "educated" until they are employable in some capacity. Ideally, the article suggests, the program shows possibilities of solving some sociological problems connected with the welfare recipients family reactions. However, the result of the program has not been encouraging, and the dropout rate of WIN enrollees has been extremely high, supporting the assertion that many dropouts had been inappropriately referred. The Department of Labor has adopted the policy that WIN training must be oriented toward jobs in the "demand occupations" either in the long or short run, and toward "career ladder" jobs.

The WIN program is not altogether conducive toward inspiring participants either a serious interest in, or respect for, work. Mothers are claiming they are forced to leave their children for a substantial part of the day and that this is detrimental to the child. The "dignity, self-worth, and confidence" assumed by Congress to flow from being recognized as a worker will in fact never manifest in a mother unhappy with her mandatory job and the loss of supervision over her children. Were the WIN program simply a well-intentioned failure to provide jobs for the country's indigent, that would be cause enough for lament; but WIN may indeed result in unfairness to all the welfare working poor, in that a WIN participant working at a job paying the same wage as a non-participant receives an incentive payment in addition to this wage. The program made too many erroneous assumptions about welfare recipients and about the causes of poverty. WIN intervenes in the poverty cycle at the locus of the individual rather than the labor market. So long as poverty is viewed as simply a manifestation of personal failure, congressional anti-poverty programs will be a waste of bureaucratic energy.

W.B. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971).

Until recently the complaints of prisoners about conditions of life in prison were ignored by the courts. Judicial review was avoided; the courts reasoned that the handling of persons convicted of crime was a difficult task requiring considerable expertise that they did not possess. Constitutional protections afforded the accused before and during the trial process abruptly stopped at the point of sentencing. What happened to the convicted after sentencing was neither a matter for judicial nor public concern. Upon release, the experience of inmates while in prison will largely determine their chances of becoming productive and law-abiding citizens. The article deals with the rights of prisoners while incarcerated; it is not concerned with sentencing, probation, parole, or post-release civil disabilities. The area of concern is the internal prison problems most frequently raised and litigated by prisoners. Prison conditions are considered because jail inmates awaiting trial theoretically enjoy the presumption of innocence and this may be their argument for better treatment than convicted inmates.

Unlike officials of long-term prisons, jailkeepers generally do not pretend that their detention facilities exist to rehabilitate those committed to their custody. Noting the squalid conditions of the jails, the conclusion is that it is crucial to litigate the rights of jail inmates. This part of the corrections system affects more people than any other, including first-timers as well as hardened criminals. Litigation on behalf of jail inmates presents an opportunity to compel the legislature or the public to devote attention and resources to the problem of alleviating these oppressive conditions.

The author raises the issue of censorship, delay, and confiscation of legal pleadings and correspondence, relating their progressive history since 1941, when the Supreme Court held that prison officials could not screen prisoners' writs of habeas corpus to ascertain whether they met the prisoners' standards, *Ex parte Hull* 312 U.S. 546 (1941). It is shown that censorship still exists, effectively estopping the prisoner from appealing for assistance, from judges or other public officials. The place, position and need for freedom of action is covered as it relates to the jailhouse lawyer. Other problems are raised concerning freedom of religion, censorship of reading material and correspondence, political activities, medical care and racial discrimination and segregation.

The author considers problems of disciplinary punishments; the limits, if any, on the kind and degree of punishment the prison administration can inflict. Corporal punishment has been declared "cruel and unusual punishment," *Jackson v. Bishop*, 404 F. 2d 571 (8th Cir. 1968), as have tortures and other inhuman measures being in



violation of the eighth amendment, *Robinson v. California*, 370 U.S. 660, 675 (1962). Since punishments for prison infractions are so closely related to the maintenance of prison discipline, the courts have been reluctant to impose standards thereby subjecting administrative decisions to judicial review, except in the most outrageous cases. The article examines solitary confinement, punitive segregation, and maximum security, juxtaposing the result of these disciplinary proceedings and the right to rehabilitative opportunities.

Federal jurisdiction and standards of judicial review are examined, particularly noting the "hands off" doctrine has raised issues that are not being resolved in the state courts. These issues will most certainly have to be resolved in the federal court system. Examination is made as to habeas corpus and the civil rights acts as the two principal means of seeking judicial review of internal state prison practices. The author offers suggestions for litigation strategy. He considers prior pleadings, the need for substantial pre-trial discovery and the problems of the trial itself. Remedies are explored, including injunctive relief, damages, costs, expenses and attorneys' fees. The author's conclusion is that what happens in prison is of critical importance not only to the relatively few offenders who are caught and convicted of crimes but also to the nation, which faces a general crisis of crime control.

J. I. Newman & P. H. O'Donnell, *A Poor Man in the Billion Dollar Wasteland: Proposals for a National Linkage System, Poor People's Bond, National Lottery, and Judibank*, 59 GEO. L. J. 1015 (1971).

The authors criticize the federal government's failure to employ new innovative techniques in financing high priority social programs. The article claims that the government's reluctance to explore and promulgate new programs has resulted in a veritable wasteland in which bankrupt fiscal operations and program funding devices have failed to tap numerous sources of public and private sources that could be utilized to stimulate and initiate the economic development of low-income communities. The authors claim that unutilized funds are available in the neighborhood of five to ten billion dollars. The article is supported with an Appendix noting present and proposed sources of funds and existing models for the Federal Bonding and Linkage Insurance Corporation.

The article's purpose is to construct a series of models for fiscal management which, without significant supplemental congressional appropriation, can be used to generate billions of dollars for new programs and for existing financially handicapped programs aiding the

socially and economically disadvantaged. Several potential solutions are offered to alleviate the federal fiscal plight; a National Linkage System to facilitate the secondary program making use of idle federal, state and local government funds; a Poor People's Bond and a National Lottery for the Poor. The proposed National Linkage System suggests the depositing of all federal funds would be "linked to," or conditioned upon, a bank's participation in programs designed to assist minority enterprises, consumer borrowing and education, ghetto redevelopment, and other high priority domestic programs. The authors reason that the placement of public money in banks no longer would be determined solely by partisan politics and geographic considerations; rather through tax and other incentives, state and local governments, private citizens, corporations, labor unions, foundations and educational institutions would be encouraged to deposit their funds in linkage banks.

The Poor People's Bond would be a special purpose U.S. Savings Bond with the proceeds earmarked for specific social welfare programs including the establishment of low-income credit unions and the strengthening of legal services for the poor. The bonds would be issued and guaranteed by a newly created Federal Bonding and Linkage Insurance Corporation (FBLIC). The National Lottery for the Poor is offered as a pragmatic approach toward existing gambling practices and ghetto realities, to be administered by the FBLIC. The proceeds from the lottery would be reserved for programs administered by the linkage banks.

Uniquely, the article suggests that the responsibility of federal, state and local courts should be enlarged, not only as the guardian of the laws, but to include a more direct promotion of economic and social justice. This would be accomplished by the courts acting not only as trustees for millions of dollars in escrow and registry funds, but in conjunction with the judibank concept. Money would be deposited in linkage banks; in those inner-city communities not serviced by a bank or its branch, courts would establish mechanisms by which these funds could be made available for residents of the community. Thus the FBLIC would be a hybrid among government organizations, it would be nothing more than a public interest government corporation with the special task of converting a multibillion dollar wasteland into a resource for helping to solve the credit needs of the nation's poor and near poor.

D. F. Fontaine, *The Constitutional Law of Remedies in Welfare Litigation*, 23 ME. L. REV. 41 (1971).

The author considers whether a federal court may award retroactive payments in a class action by welfare recipients against state officers,

when a state regulation or statute has been declared unconstitutional, *without regard to the question of whether the defendants acted in bad faith*. It is maintained that the result required, in light of the supremacy clause and the equal protection clause, is a retroactive order of payment to the injured class.

Not treated is the liability of subordinate governmental units, either under respondeat superior, or for directed constitutional wrongs, nor is the personal liability of state officials who commit tort-like wrongs under color of their authority dealt with. Rather, the thesis of this article is that welfare plaintiffs who have prevailed on their constitutional merits are entitled to an order of retroactive benefits from a federal court against the pertinent state agency. It is reasoned that this order is required not only as a matter of sound judicial administration because 42 U.S.C. §§ 1983, 1988 (1964) intended to create it, but also as a matter of constitutional right whenever the decision on its merits is based upon a constitutional infringement.

Included is a brief exposition of the alternatives that courts have chosen using a wide selection of examples. The most noteworthy of these is the case of *Baxter v. Birkins*, 311 F. Supp. 222 (D. Colo. 1970) (three-judge court), in which the court granted retroactive benefits, concluding that any other result would violate the spirit of the supremacy clause.