HERE COMES THE NEIGHBORHOOD—*VIRGINIA V. HICKS* AND HOW THE NEW YORK LEGISLATURE SHOULD EMPOWER LAW ENFORCEMENT WITH MORE POWERFUL TRESPASS-BARMENT STATUTES AS A TOOL TO COMBAT CRIME IN PUBLIC HOUSING PROJECTS

By David G. Lazarus[*]

TABLE OF CONTENTS

[*] B.A., History, Colgate University (2000); Candidate, J.D., Seton Hall University School of Law, May 2005. My thanks to Lawrence Lee, Assistant District Attorney, New York City Office of Special Narcotics, who provided tremendous insight into long-term public housing narcotics operations.

I. Introduction

Public housing projects are notorious for the presence of criminal activity.[1] To combat this problem, states have enacted controversial statutes allowing privatization of public housing communities and have enforced criminal trespass statutes in these communities and surrounding areas.[2] This note begins with a discussion of *Virginia v. Hicks*, focusing on the constitutionality of Virginia's criminal trespass statute, crime rates in the public housing communities as a result of the Court's decision, and the impact of *Hicks* on the residents of those communities.[3] Next, the note forecasts the effects of the Court's decision in Virginia.[4] The note then highlights New York City's approach to deal with crime in public housing projects and briefly surveys the methods employed by other states.[5] The note concludes with a recommendation to the New York City council and other legislative bodies with jurisdiction over large public housing communities on how to best handle the effects of privatization and crime in those areas.[6]

II. Virginia v. Hicks—*Trespass and the Overbreadth Doctrine*

In *Virginia v. Hicks*, the U.S. Supreme Court unanimously reversed the ruling of Virginia Supreme Court and restored the conviction of a person who trespassed on privatized streets of a Richmond housing project.[7] This section will examine *Virginia v. Hicks*, including the events leading up to the decision, and will conclude with a look at what

---

1 *See infra* Part III.

2 *See infra* Part II.

3 539 U.S. 113 (2003). *See infra* Part II and Conclusion.

4 *See infra* Part II.

5 *See infra* Part III.

6 *See infra* Conclusion.

7 539 U.S. 113, 124 (2003). The conviction was based on VA. CODE ANN. § 18.2-119 (Michie 2003), which makes it a class one misdemeanor when:

> [A]ny person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons . . . .

Id.

the decision will mean for Virginia.[8]

A. *Background – Privatization*

In 1997, following the passage of a Richmond City Council Ordinance,[9] the City of Richmond deeded Whitcomb Court ("Whitcomb"), a housing project in downtown Richmond, to the Richmond Redevelopment and Housing Authority ("RRHA").[10] RRHA then posted signs and warnings alerting everyone that Whitcomb was no longer open to the public.[11] Through a written policy, RRHA notified the Richmond police that Whitcomb property was subject to trespass laws and that the police should monitor and enforce such laws.[12] The policy required that police give notice to any person who failed to demonstrate a "legitimate business or social purpose" for being at Whitcomb.[13] The RRHA also asked the police to arrest any person who previously trespassed and had notice of the private status of Whitcomb before returning to the property.[14]

The ultimate purpose of the city's trespass ordinance was to combat open-air drug markets and restore proper dominion and control of the neighborhood to the residents of Whitcomb.[15] According to the RRHA, nearly all of those arrested for drug-related crimes on RRHA property were non-residents.[16] Before enactment of the ordinance, law

---

[8] *See infra* Part II for a discussion of the effects of *Virginia v. Hicks* in New York. *See also infra* Part III for a discussion of its effects nationwide and the resulting tool it has become for law enforcement and state legislatures.

[9] Richmond City Council Ordinance No. 97-181-197 (1997). The ordinance provides that the streets of Whitcomb are no longer public, are closed as thoroughfares, and are abandoned by the city. *Id.*

[10] *See Hicks*, 539 U.S. at 116. Shortly after the ordinance was passed, the city conveyed the streets to the RRHA. *Id.*

[11] Brief for Petitioner at 5, Virginia v. Hicks, 539 U.S. 113 (2003)(No. 02-371). "The closed streets were those with no use other than to provide entrance and egress to the residential units on the property. None are through streets that continue beyond the Housing Authority property to other parts of the city." *Id. See also* Joint Appendix at 79-80, *Hicks* (No. 02-371), for a map and plat of the area.

[12] *Hicks*, 539 U.S. at 116.

[13] VA. CODE ANN. § 18.2-119 (Michie 2003) (requiring a person to be given notice before an arrest for "[t]respass after having been forbidden to do so").

[14] *See Hicks*, 539 U.S. at 113.

[15] *See* Jerry Kilgore, *Residents Win Peace of Mind*, RICHMOND TIMES DISPATCH, June 25, 2003, at A9. Kilgore is Virginia's Attorney General. *Id.*

[16] *See* Joint Appendix, *supra* note 11, at 45. RRHA Housing Manager Gloria Roberts testified that at the time of the privatization, the authority believed that of those arrested,

enforcement was often unable to investigate suspected drug activity when suspects stepped off the RRHA's property and onto public streets.[17] Through the ordinance, Richmond empowered the RRHA and expanded the reach of its zone of privacy.[18]

B. *The Facts – Kevin Lamont Hicks*

In 1999, Kevin Lamont Hicks was arrested for trespassing, after being forbidden to do so, in violation of Virginia's criminal trespass statute.[19] This was Hicks' third arrest for trespassing at Whitcomb.[20] While details of the arrest are vague, it is apparent that an officer on routine patrol of the area recognized Hicks as being unauthorized, proceeded to stop him, and issued a summons.[21] Hicks told the officer that he was at Whitcomb to deliver diapers to his child.[22] Hicks was previously notified, twice orally and once in writing, that he was considered unauthorized at Whitcomb and would be subject to arrest if he returned.[23]

At trial, Hicks unsuccessfully argued that the Virginia statute violated both the First and Fourteenth Amendments because it was an overbroad restraint on freedom of speech and violated the vagueness doctrine.[24] Hicks appealed his conviction, and the appellate court reversed.[25] The original Virginia Court of Appeals' three-judge panel affirmed the conviction, but after an en banc hearing, however, the Court of Appeals overturned its decision based on the view that

---

"not one in ten were residents" and "[e]ven now, eight of ten persons are not residents." *Id.*

17 *Id.* A pamphlet distributed to residents of Whitcomb cited the problem officers had with "unauthorized persons who in the past would step off the curb to prevent arrest for trespassing." *Id. See infra* notes 131 and 135 for a discussion of the legal ramifications of stopping a suspected trespasser.

18 *See* Kilgore, *supra* note 15.

19 VA. CODE ANN. § 18.2-119.

20 Joint Appendix, *supra* note 11, at 72-73.

21 *Id.* at 51-59 (testimony of Officer Laino).

22 *Id.* At trial, Hicks' defense attorney told the Court that Hicks was there to visit his mother, his children, and the mother of his children. *Id.*

23 *Id.* at 38. The housing manager spoke with Hicks twice in her office after police found him on the premises. *Id.* Additionally, after one of his arrests for trespassing at Whitcomb, Hicks was served with a written notice by the housing manager in the district courtroom. *Id.*

24 Brief for Respondent at 20, Virginia v. Hicks, 539 U.S. 113 (2003) (No. 02-371).

25 *Hicks*, 539 U.S. at 116-17.

Whitcomb was a traditional public forum.[26] The Virginia Supreme Court affirmed the en banc ruling on the grounds that the statute was overbroad and gave the housing manager too much discretion to preclude protected conduct.[27] The U.S. Supreme Court granted certiorari.[28]

C. *The Arguments*

As petitioner, the State of Virginia offered two main arguments for overturning the lower court.[29] First, it urged the Court to announce limits on overbreadth standing.[30] One of the motivating forces behind the evolution of the overbreadth doctrine is the chilling effect overbroad statutes have on speech.[31] According to the petitioner, the Court should impose such limits to prevent the frustration of governmental policy by defendants like Hicks who, at the time of arrest, are "not engaged in expressive activity" and whose "conduct [is] not prohibited by that portion of the policy that [was] challenged."[32] The State cited the dangerous precedent this might set in preventing enforcement of trespass statutes in various other places.[33] In addition, it noted that Hicks was essentially using the overbreadth doctrine as an inappropriate tool to avoid prosecution for trespassing, which is not protected by the First Amendment.[34] Virginia noted that the repercussions would be drastic if he were permitted to argue overbreadth.[35]

Virginia also argued that the Court should recognize the ability of state government to act as landlord in one situation and as sovereign in another.[36] The State noted that in *Department of Housing & Urban*

---

26 *Id.* at 117. *See also infra* Part I.C. for further discussion.

27 *Hicks*, 539 U.S. at 117.

28 *Id.*

29 Brief for Petitioner, *supra* note 11, at 14-16.

30 *Id.* at 14.

31 *Id.*

32 *Id.*

33 *Id.* at 23. The State cited the following examples of places where enforcement of the trespass statute may be prohibited if the Court upheld the Virginia Supreme Court's decision: state universities, public schools, baseball stadiums, military bases, courts, post offices, and government property of every sort. *Id.*

34 *Id.*

35 Brief for Petitioner, *supra* note 11, at 14-15.

36 *Id.* at 15.

Development v. Rucker,[37] the Supreme Court recognized that such a distinction is constitutional.[38] Specifically, the Court recognized that when the government acts as landlord, it may take measures that the Constitution would forbid if it were acting as sovereign.[39] Virginia then argued that where the government acts as landlord, the overbreadth doctrine does not apply because it "has only been applied to the conduct of the government in its role as a regulator, not as a proprietor."[40] The State further noted that the government as landlord will not control prosecution, only the enforcement of existing laws.[41] Alternatively, the State argued that even if the overbreadth doctrine applied, it had a legitimate governmental purpose to justify its actions.[42]

Respondent Hicks proffered two main arguments in support of the Virginia Supreme Court's decision overturning his conviction.[43] First, he argued that the criminal trespass law was unconstitutionally overbroad and vague because it lacked defined guidelines and led to inadequate informed notice.[44] Thus, those who sought to engage in protected conduct would not have had a clear understanding of what might lead to their arrest.[45] This would compel them to abstain from all protected conduct at Whitcomb.[46] Second, Hicks argued that the conveyance of Whitcomb by Richmond to the RRHA was an ineffective method of circumventing the public nature of the streets.[47]

Hicks then argued in support of the overbreadth challenge.[48] He pointed out that in order to engage in any conduct or speech at Whitcomb, a person must first seek the housing manager to get permission.[49] It followed, according to Hicks, that the lack of defined

---

[37] 535 U.S. 125 (2002). The Court ruled there was no due process violation where a statute permits eviction of public housing tenants when they or their guests engage in drug activity, whether or not the tenant had any knowledge of such activity. *Id.*

[38] Brief for Petitioner, *supra* note 11, at 33.

[39] *Id.*

[40] *Id.* at 14 (quoting Lebaron v. Amtrak, 69 F.3d 650, 659 (2d Cir. 1995)).

[41] *Id.* at 14.

[42] *Id.* at 14-15.

[43] *Hicks*, 539 U.S. at 117-18.

[44] *See* Brief for Respondent, *supra* note 24, at i. This language was taken from the respondent's "Question Presented."

[45] *Id.*

[46] *Id.* at 12.

[47] *Id.* at 25-32.

[48] *Id.*

[49] *Id.*

guidelines placed too much power in the hands of the housing manager and the police department.[50] He argued that "[t]he inherent ambiguity of the 'legitimate purpose' standard gives government officials free reign to decide who may use streets and sidewalks, [which may consequently] lead to the suppression of speech disfavored by these officials."[51] Citing testimony by the housing manager, Hicks argued that there was no discernable standard, written or unwritten, and that the power to limit speech rested entirely at the whim of a handful of city officials.[52]

Hicks next discussed the property conveyance issue. He challenged the effects of the quit-claim deed from the City of Richmond to the RRHA.[53] Hicks urged that Richmond did not possess the power to transform the traditional public forum of a sidewalk into a private forum.[54] He noted that the RRHA was a government actor, and as such, was not entitled to claim the same rights as a private landlord.[55]

D. *The Case for Privatization*

To understand the rational for privatization, several amicus curiae briefs submitted to the Court in *Virginia v. Hicks* are helpful.[56] Richmond drafted a very compelling policy argument for upholding trespass-barment laws.[57] In its amicus brief, Richmond noted that the

---

[50] Brief for Respondent, *supra* note 24, at i.

[51] *Id.* at 17.

[52] *Id.* at 17-19.

[53] *Id.* at 25-33. See also Joint Appendix, *supra* note 11, at 81 for a review of the deed.

[54] Brief for Respondent, *supra* note 24 at 25-26.

[55] Brief for Respondent, *supra* note 24, at 29-30. Hicks argued in his brief:

> Of course, petitioner is a government agency, not a private actor, and thus it is limited by the Constitution in ways that private owners are not. In any case, petitioner can point to no example of a private apartment owner being allowed to exclude the public from numerous streets and sidewalks throughout a city . . . as the Housing Authority has attempted to do.

Id.

[56] *See Hicks*, 539 U.S. 113. In all, there were 11 amicus briefs submitted to the Court from a diverse group of state representatives and civil libertarians. *Id.* Five amicus briefs, authored by the ACLU, Watchtower Bible and Tract Society of New York, Inc., Richmond Tenants Organization, DKT Liberty Project, and the Thomas Jefferson Center for the Protection of Free Expression, supported Hicks' challenge. *Id.* For Virginia, the six amicus briefs were submitted by The Criminal Justice Legal Foundation, a group of states including Alabama, Alaska, Delaware, Florida, Hawaii, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, and the Commonwealth of Puerto Rico, The National League of Cities, the United States, the City of Richmond and the RRHA, and the Council of Large Public Housing Authorities. *Id.*

[57] Amicus Brief submitted by City of Richmond at 5, Virginia v. Hicks, 539 U.S. 113

city is recognized not only as "the murder capital of Virginia" but "one of the nation's murder capitals."[58] Richmond presented empirical data illustrating the high levels of violent crimes both before and during the privatization of Whitcomb.[59] It also noted the twenty percent increase of violent crimes in Whitcomb after the en banc reversal halted enforcement of the criminal trespass statute.[60] According to Richmond, "[between] January [and] June [of] 1990, only 6 [percent] of Richmonders lived in public housing, but 41 [percent] of homicides committed in the city occurred there."[61]

The American Civil Liberties Union ("ACLU"), writing in conjunction with the National Association of Criminal Defense Lawyers, drafted a brief in support of Hicks.[62] The ACLU restated Hicks' arguments and emphasized that Hick's actions constituted intimate associations.[63] According to the ACLU, Hicks was bringing diapers to his family, a constitutionally-protected activity.[64] The ACLU said, "[t]he Constitution protects these intimate associations and the government cannot—as it has here—arbitrarily interfere with those interests."[65]

(2003) (No. 02-371).

[58] *Id.* (quoting Gary Robertson, *For the Media: 'A Feeding Frenzy'; Reaction Soon Overshadowed Event*, RICHMOND TIMES DISPATCH, June 21, 1998, at A1).

[59] *Id.* at 12. Richmond's amicus brief contained the following chart and explanation: "Statistical evidence compiled by the Crime Analysis Unit of the Richmond Police Department demonstrates that overall monthly crime rates declined in Whitcomb Court after the trespass-barment policy was implemented." *Id.*

01/01/96-07/31/97	08/01/97-12/31/98	01/01/99-06/05/02
(17 months before policy)	(19 months after policy)	(last 42 months of policy)
[No. per month]	[No. per month]	[No. per month]
Violent:2.4	2.1	1.9
Property: 5.6	4.1	4.2
Total: 8.0	6.2	6.1

Id.

[60] *Id.* at 9-18.

[61] *See id.* at 5 (quoting Gordon Hickey, *Homicides Found to Occur Mostly in Housing Projects*, RICHMOND NEWS LEADER, Aug. 11, 1990, at 17).

[62] Amicus Brief submitted by the ACLU at 1, Virginia v. Hicks, 539 U.S. 113 (2003) (No. 02-371).

[63] *Id.* at 9-10.

[64] *Id.*

[65] *Id.*

The Watchtower Bible Tract Society of New York ("Watchtower") also supported Hicks. Watchtower's main concern was the effect of trespass-barment statutes on Jehovah's Witnesses.[66] According to Watchtower, Jehovah's Witnesses and other groups who distribute literature or information are effectively barred from the Whitcomb premises; this is the result of a policy that does not allow them to approach the entryway to the building or stand safely on nearby sidewalks without being stopped by law enforcement officers.[67] Watchtower explained that although permission could be granted by the housing manager, such permission is too discretionary and lacks guidelines designed to ensure fair access to all groups.[68]

Finally, a group of states writing together put forth an amicus brief in support of Virginia.[69] These states reiterated Virginia's arguments and noted that "[t]hose who suffer most from the invalidation of the trespass laws or other public safety laws . . . should not be burdened with more crime."[70] The states explained that the people who lose protection as a result of this invalidation are those who cannot afford to live "in [private] luxury condominiums or apartment complexes."[71] In essence, the states argued that those who live in public housing rely on the state for a place to live, but that under the Supreme Court of Virginia's ruling that place can no longer be effectively kept free of

---

[66] Amicus Brief submitted by the Watchtower Bible and Tract Society of New York, Inc. at 3-5, Virginia v. Hicks, 539 U.S. 113 (2003) (No. 02-371)[hereinafter *Watchtower Brief*]. Watchtower's first argument in its brief is entitled "The scheme's impact on Jehovah's Witnesses and others' freedom to disseminate information is both real and substantial." *Id.* at 3.

[67] *Id.*

[68] *Id.*

[69] Amicus Brief submitted by the States of Alabama, Alaska, Delaware, Florida, Hawaii, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, and the Commonwealth of Puerto Rico at 1, Virginia v. Hicks, 539 U.S. 113 (2003) (No. 02-371).

[70] *Id.* at 19. The brief further reads:

> If this Court approves of the low threshold set by the Virginia Supreme Court, more and more trespass policies will be invalidated. And more and more criminal trespassers will go free. The drug-dealer at the public housing complex who seeks to ensnare new victims cannot be tossed out or arrested unless caught in the act. The plotting burglar can case a residence with impunity. The potential assailant can sit and wait indefinitely for a former girlfriend to emerge from her residence.

Id.

[71] *Id.* at 19-20.

crime.[72]

E. *The Supreme Court Decision – Overbreadth Challenge Fails*

In a unanimous decision written by Justice Scalia, the Supreme Court reversed the Virginia ruling and upheld Hicks' conviction.[73] The Court began its analysis by explaining the overbreadth doctrine as arising "out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally-protected speech—especially when the overbroad statute impose[s] criminal sanctions."[74] An overbroad law, the Court said, could frighten speakers who fear criminal punishment, leading them not to speak or engage in constitutionally-protected conduct.[75] Drawing from *Broadrick v. Oklahoma,*[76] the Court cited a need to balance the legitimate governmental interest against the likelihood of substantial interference with protected speech.[77]

Hicks claimed that a substantial interference was possible because the housing manager could preclude all leafleting, demonstrations, and gatherings.[78] The Court disagreed and explained that the conduct leading to Hicks' arrest was his re-entry after barment and was not the

---

[72] *Id.* at 19-21.

[73] *Hicks,* 539 U.S. at 117.

[74] *Id.*

[75] *Id.*

[76] 413 U.S. 601, 615-18 (1973). Section 818 of Oklahoma's Merit System of Personnel Administration Act limited the political actions of civil service employees. *Id.* Specifically, it precluded membership committees within a political party and greatly limited many other political activities. *Id.* The Court upheld Section 818 because the state had a "plainly legitimate sweep" and there was no substantial impact on conduct. *Id.*

[77] *Hicks,* 539 U.S. at 118. Elaborating on *Broadrick,* the Court in *Hicks* said:

> For there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications . . .before applying the 'strong medicine' of overbreadth invalidation.

Id. (internal citations omitted).

[78] *Id.* at 118. *See also* Brief for Respondent, *supra* note 24, at 16. "The inherent ambiguity of the 'legitimate purpose' standard gives government officials free rein to decide who may use streets and sidewalks, and therefore may lead to the suppression of speech disfavored by these officials." *Id.*

result of any constitutionally-protected conduct.[79] According to the Court, the record reveals no evidence that the housing manager would serve notice on anyone who engaged in protected conduct.[80] The Court determined that the policy requirement of a "legitimate business or social purpose" clearly included leafleting and demonstrating.[81]

The Court also dismissed Hicks' argument that the notice policy was overbroad.[82] According to Justice Scalia, the strict liability enforcement of arresting those who return after barment is not a threat to protected speech.[83] The Court analogized the policy to arresting a vandal barred from entering a public park who then re-enters that park in order to participate in a protected demonstration.[84] Justice Scalia explained that Hicks' "non-expressive conduct" violated the statute.[85]

Finally, Justice Scalia pointed to the power of the overbreadth doctrine and affirmed the Court's reluctance to employ it in all but the most extreme situations.[86] The Justice noted that the danger of chilling expressive conduct is low in this situation because the rule applies to, and is enforced for, everyone who enters Whitcomb, not only those who seek to enter for the purposes of protected conduct or speech.[87]

The U.S. Supreme Court remanded the case to the Virginia Supreme Court to decide whether any Fourteenth Amendment arguments had merit.[88] On remand, the Supreme Court of Virginia overturned the Virginia Court of Appeals and upheld the trespass conviction.[89] The Supreme Court of Virginia found that there was no

---

79 *Hicks*, 539 U.S. at 121-22.

80 *Id.* According to the testimony of RRHA Housing Manager Gloria Rogers, conduct such as leafleting, church meetings, and the occasional religious gathering had been permitted so long as the organizer of such conduct informed the housing manager in advance. *Id.* Ms. Rogers explained that as long as the conduct sought was related to what she or her immediate supervisor considered a business or social purpose, permission was seldom refused. *Id. See also* Joint Appendix, *supra* note 11, at 36-38. Ms. Rogers further explained that when someone seeks to hold religious services, the "community council . . . the board . . . and the residents" meet and agree whether to allow such conduct based on community interests. *Id.* at 38.

81 *Hicks*, 539 U.S. at 121-22.

82 *Id.*

83 *Id.* at 123-24.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Hicks*, 539 U.S. at 122.

88 *Id.* at 123-24.

89 Commonwealth v. Hicks, 267 Va. 573 (Va. 2004).

merit to Hicks' Fourteenth Amendment arguments, including those alleging a violation of his right to intimate associations.[90] The Richmond community expressed excitement over the decision and praised it as a great stride in cleaning up the housing projects.[91] Similarly, the Richmond City Manager saw the ruling as a good way to keep housing projects crime free for "good, solid, decent people . . . ."[92]

F. *What This Means for Virginia*

The *Hicks* decision will have a powerful effect in Virginia.[93] As noted by Richmond in its amicus brief, crime rose twenty percent after the trial court's decision was reversed.[94] Further, as pointed out by Virginia's Attorney General, there is every reason to believe that the crime rate in Whitcomb and other public housing areas will once again fall when enforcement resumes.[95] The immediate result of the Supreme Court's ruling in *Hicks* will be resumption of trespass-barment enforcement.[96]

In addition to the positive effects on the crime rate, the *Hicks* ruling will also reinstate the negative aspects of the policy. Because of the renewed enforcement, residents and visitors will again be subject to increased interaction with the Richmond police.[97] Presumably, this should be no more of an intrusion than that faced by residents of private, gated communities who interact with their own form of housing authority. However, residents who select either private or gated communities have more freedom of choice than those who live in public housing. Unlike residents of public housing communities, it is more likely that residents of private, gated communities have the ability to move out of such communities if the security interference upsets them. This factor is a double-edged sword because public housing residents have less freedom to move if they do not like increased enforcement,

---

[90] *Id.* at 585.

[91] Alan Cooper, *Trespass Policy Reaffirmed-The Virginia Supreme Court's Ruling is a victory for people in public housing,* RICHMOND TIMES DISPATCH, April, 24, 2004, at B8.

[92] *Id.*

[93] *See infra* Part III for the nationwide effects of *Virginia v. Hicks.*

[94] *See* Amicus Brief submitted by City of Richmond, *supra* note 24, at 14.

[95] *See* Kilgore, *supra* note 15, at A9.

[96] *See infra* Part II for a discussion of the enforcement details and legal ramifications of the *Virginia v. Hicks* decision as it relates to Fourth Amendment protection against unreasonable search and seizure.

[97] *See* Cooper, *Trespass Policy Reaffirmed, supra* note 91.

but so long as they remain they arguably need increased police protection.

III. New York City's Public Housing Has A Drug Problem

A. *Public Housing in New York City*

The five boroughs of New York City are home to the largest public housing authority in North America.[98] The New York City Housing Authority ("NYCHA") oversees 345 developments that house approximately 174,000 families and 419,000 authorized residents.[99] For a variety of reasons, drug-related crimes are rampant in these developments.[100]

B. *The Battle to Save The Projects*

Involvement of entire communities and the use of every conceivable tool in New York City's arsenal will be necessary to combat the ever-present criminal element in its housing projects.[101] The New York City Office of Special Narcotics,[102] in collaboration with the New York Police Department's ("NYPD") South Bronx Initiative, investigated and eventually removed a large segment of the drug trade from the Castle Hill Public Housing Development ("Castle Hill") in the Bronx and the Queensbridge Public Housing Development ("Queensbridge") in Queens.[103] Preliminary investigations of the

---

[98] *Fact Sheet*, New York City Housing Authority, *at* http://www.nyc.gov/html/nycha/html/factsheet.html (last visited Nov. 9, 2003). Of those living in New York City housing projects only 37.8 percent are working families. *Id.* Minors account for 42 percent of the residents, 20.6 percent of the families are on public assistance and 41.6 percent of the families receive support from governmental pensions and benefits. *Id.* The average family income is $15,685. *Id.* The U.S. Department of Housing and Urban Development ("HUD") subsidizes much of the rent for many qualifying residents in public housing. *Id.*

[99] *Id.*

[100] *See infra* Part II.B.

[101] For a discussion of several law enforcement tactics in fighting the "Drug War," see Patrick J. Harnett and William Andrews, *How New York Is Winning the Drug War*, 9 CITY JOURNAL 3 (Summer 1999), *available at* http://city-journal.org/html/9_3a2.html. Mr. Harnett is the former head of the New York Police Department's Narcotics Division. *Id.*

[102] The Office of Special Narcotics is a citywide prosecution unit with jurisdiction over felony narcotics cases. (Background information on file with author).

[103] *2001 CITYWIDE PUBLIC HOUSING INITIATIVES*, OFF. OF THE SPECIAL NARCOTICS PROSECUTOR FOR THE CITY OF NEW YORK, 2001 ANN. REP. 15 (2001) [hereinafter OSPN,

activity in these housing developments revealed that "groups of loosely-connected drug dealers controlled many of the buildings, using lobbies, stairwells and courtyards to conduct narcotics sales."[104]

Castle Hill and Queensbridge are not the only housing projects in the city with a history of drug-related criminal activity.[105] The Marcus Garvey Village in Brooklyn also has a documented history of crime.[106] In August 2003, a year-long FBI and NYPD investigation culminated in the arrest of sixteen members of two "warring drug retailing crews."[107]

Lefrak City, another Queens housing project, has been the target of recent drug-related arrests.[108] A lengthy NYPD investigation revealed that a group of criminals were conducting narcotics sales in public spaces and apartments while earning approximately $2.5 million a year.[109]

Kingsborough, a housing project in Brooklyn, was recently the target of a long-term firearms trafficking investigation.[110] Dubbed "Operation Young Guns," the investigation of Kingsborough was an attempt to provide the residents with a safe place to live and play.[111] Three crews worked the complex, selling both drugs and guns in public areas such as the basketball court.[112]

As evidenced by this small sampling of recent police activity,

---

2001 Annual Report]. The lengthy investigations in the Bronx and Queens resulted in 95 arrests and numerous convictions on various drug and gun charges. *Id.* In the Bronx, at least 42 of the 50 defendants pled guilty. *Id.*

104 *Id.*

105 *See* OSPN, *2001 Annual Report*, *supra* note 103.

106 Kate Connell-Smith et al., *16 Nabbed at Drug Lair – FBI Aids Finest in B'klyn Bust*, N.Y. POST, Aug. 14, 2003, at 22.

107 *Id.* "'They turned a residential housing complex into a virtual OK Corral of violence,' said FBI Assistant Director Pasquale D'Amuro." *Id.* According to the New York Post, although "none of the defendants were charged with violent crimes, court papers showed that, since 2000, there have been over 40 shootings - including six murders - near the drug-plagued Marcus Garvey houses." *Id.*

108 Erick Lenkowitz, *Lefrak Drug Gang Toppled – Cops Nab 20 in Raid on $2.5M Ring*, N.Y. POST, July 18, 2003, at 26.

109 *Id.* At least two of those arrested, a "street boss" and a "gang boss," did not live in Lefrak City. *Id.*

110 Brian Kates, *How They Got the Guns Out of Kingsborough – Undercover Sting: 63 Weapons, 36 Arrests*, N.Y. DAILY NEWS, June 8, 2003, at 28.

111 *Id.*

112 *Id.* "They were dealing drugs out of apartments, in the hallways, on the basketball courts, anywhere. The seniors were afraid to come out of their apartments. The youngsters would want to be like them. It was a serious situation." *Id.* (quoting Carolyn McLean, President of the Kingsborough Residents Association).

investigations into the criminal activity occurring in public housing projects can be difficult, lengthy, and consume manpower from various agencies.[113] Further, traditional police tactics are difficult to employ in public housing.[114] For instance, to combat street-level drug dealers who operate outside of the projects, police officers play on the high rate of demand and the relative anonymity that a marketplace atmosphere can create.[115] These street-level dealers are accustomed to a diverse customer base and are more likely to deal with strangers.[116] By comparison, dealers who operate in housing projects are more familiar with their customers.[117] Generally, these drug transactions are smaller in quantity and focus on repeat addicts and local users.[118] Consequently, in order to target housing project operations, lengthy undercover investigations are conducted where undercover officers make repeated buys from dealers and build a case over the course of weeks or months.[119]

The NYPD also employs vertical patrols to prevent crimes in public housing.[120] During vertical patrols, officers tour a building from top to bottom and briefly stop and question individuals they meet to determine the presence of trespassers or drug sellers.[121] Vertical patrols deter potential buyers and are good for spot-elimination of troubled areas, but they have recently become the topic of controversy.[122]

---

113 *See* Kates, *supra* note 110, at 28.

114 *Id.*

115 *See* People v. Gonzalez, 751 N.Y.S.2d 830, 831 (2002). One traditional law enforcement tool is the "buy and bust," where an undercover officer approaches a street dealer, purchases a small quantity of narcotics with pre-recorded "buy money", and then departs. *Id.* Once the sale has been completed, the undercover officer signals the team that a "positive buy" has occurred and the team moves in and arrests the suspect. *Id.* The pre-recorded "buy money" recovered from the suspect is used to bolster the credibility of the undercover officer who discreetly passes the suspect in custody and confirms the identification to the team. *Id.*

116 Background information on file with author.

117 *See* Harnett & Andrews, *supra* note 101.

118 *Id.*

119 *Id.*

120 N.Y. PENAL LAW § 140.10(e)-(f) (Gould 2003). *See infra* Part II.D for a discussion.

121 BARRY KAMINS, NEW YORK SEARCH & SEIZURE 122 (13th ed. 2003).

122 Editorial, *A Wrongful Death in Brooklyn*, N.Y. TIMES, Jan. 27, 2004, at A22. An unarmed teen was shot and killed by a police officer conducting a routine vertical patrol of a Brooklyn housing project. *Id.* Since the shooting, there was a call to examine the tactics employed by vertical patrol officers, including the routine practice of drawing their weapons. *Id.* This event attracted much media attention to the role of the police in housing projects. *Id.*

C. *Civil Combat*

Civil laws are also available to combat the drug problem in public housing.[123] The United States Department of Housing and Urban Development ("HUD") is responsible for drafting regulations that set limits for public housing authorities that receive federal funding.[124] It has also established a powerful one-strike eviction policy.[125] Under this policy, tenants can be evicted for "other good cause" which includes "criminal activity."[126] New York courts have applied this policy liberally and have upheld evictions where the resident listed on the lease participated in criminal activity, [127] where the actions of one resident resulted in eviction of all who occupied the same apartment, and where the actions of a guest caused the eviction of a resident.[128]

However, the power of one-strike civil evictions based on NYCHA procedure is not without limits.[129] New York courts have held that due process restricts the scope of HUD's one-strike eviction policy and

---

123 *See* Gibson v. Blackburne, 607 N.Y.S.2d 345, 345-47 (N.Y. App. Div. 1994). Eviction was properly pursued by Housing Authority based on testimony about two drug transactions in the public housing apartment which made the tenant "non-desir[able]" as defined in the Housing Authority's Termination of Tenancy Procedures. *Id.*

124 24 C.F.R. § 966.4(l)(2)(ii)(A)(2003).

125 *Id. See also* Adam P. Hellegers, Comment: *Reforming HUD's "One-Strike" Public Housing Evictions Through Tenant Participation*, 90 J. CRIM. L. & CRIMINOLOGY 323, 341 (1999).

126 24 C.F.R. § 966.4(l)(5)(B) (2003) includes as criminal activity:

> Drug crime on or off the premises. The lease must provide that drug-related criminal activity engaged in on or off the premises by any tenant, member of the tenant's household or guest, and any such activity engaged in on the premises by any other person under the tenant's control, is grounds for the PHA to terminate tenancy. In addition, the lease must provide that a PHA may evict a family when the PHA determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal use of a drug interferes with the health, safety, or right to peaceful enjoyment of the premises by other residents.

Id.

127 *See, e.g.*, Blanco v. Popolizio, 593 N.Y.S.2d 504, 506 (N.Y. App. Div. 1993). The court ruled that "[t]he Housing Authority's Termination of Tenancy Procedures permit the Authority to commence an action to terminate a tenancy for non-desirability based on the conduct of either the tenant or a 'person occupying the premises of the tenant.' Such conduct clearly includes the sale of drugs, either in the apartment itself or elsewhere on or in the vicinity of the Authority premises." *Id. See also* Walker v. Franco, 96 N.Y.2d 891, 891 (2001).

128 *See* Featherston v. Franco, 95 N.Y.2d 550, 555 (2000); Syracuse Hous. Auth. v. Boule, 265 A.D.2d 832, 833 (N.Y. App. Div. 1999).

129 *See* Hellegers, *supra* note 125.

excludes evictions based solely on familial relationships where the criminal activity is committed by a relative who is no longer a resident.[130] In *Brown v. Popolizio,* the court rejected eviction proceedings where the three tenants' children were arrested at the housing project for various drug infractions, but were no longer residents there.[131] The *Brown* court employed a due process fundamental fairness evaluation and ruled that the tenants could not be evicted merely because of their relationship with a wrongdoer.[132] The NYCHA argued that the state has a compelling interest in preventing the drug crisis in public housing.[133] The court rejected this argument and decided that the punishment was so grossly disproportionate that it upset notions of fairness, and as a policy matter, its result would escalate the homelessness problem.[134]

In the private housing sector, law enforcement has additional tools to combat drug dealers and prevent entrenchment in buildings and neighborhoods.[135] These tools include the trespass affidavit program[136]

---

[130] *See id. See also* Brown v. Popolizio, 166 A.D.2d 44, 57-58 (N.Y. App. Div. 1991); Tyson v. New York City Hous. Auth., 369 F. Supp. 513 (S.D.N.Y. 1974).

[131] *Brown*, 166 A.D.2d at 58. Rachel Brown was evicted after her son was arrested for possession of a controlled substance at the Frederick Douglass Houses in Manhattan. *Id.* at 48. Brown argued that her son had not lived with her for six months and had only come to visit. *Id.* The second petitioner was Cozyella Coe, who had been evicted after her son was twice arrested for possession of cocaine with intent to distribute, also at the Frederick Douglass Houses. *Id.* at 617-18. Coe contested the eviction on the grounds that while her son lived with her at the time of his arrest, she had since barred him from her home and he no longer lived there. *Id.* at 621. The third petitioner, Rose Dickerson was evicted from the Soundview Houses in the Bronx after her son was arrested for possession of cocaine with intent to distribute. *Id.* at 618. Dickerson argued that her son had not lived in Soundview for a year. *Id.*

[132] *Id.* at 622-23.

[133] *Id.* at 623.

[134] *Id.* at 622.

> Respondent urges us to recognize the drug crisis' effect on housing developments in this city and the need to rid the drug 'plague' by evicting tenants who use or sell drugs. *While the adverse affects of drug use cannot be ignored*, the growing number of homeless men and women is also a great concern. The punishment of terminating petitioners' tenancies under the circumstances presented was 'so disproportionate to the offense[s] as to be shocking to one's sense of fairness' .... Notably, the offenders are the emancipated sons of long-term tenants which tenants have not been accused of engaging in any wrongdoing.

Id. (citations omitted)(emphasis added).

[135] *See* Harnett & Andrews, *supra* note 101, at 7.

[136] KAMINS, *supra* note 121, at 123-24.

and the nuisance-abatement law.[137] Through the trespass affidavit program implemented by the NYPD, landlords or managing agents are permitted by their tenants to allow the police to question and arrest anyone who is found in the building without a legitimate reason.[138] The nuisance-abatement law permits New York City to shut down businesses that have had three or more incidents of narcotics sales on the premises within a one-year period.[139] Nuisance abatement, when coupled with buy-and-bust operations, is a powerful way to clean up a neighborhood and deter drug dealing.

Both of these laws exemplify the unusual willingness of the legislature to combat drug dealing by narrowing certain rights, subjecting residents of private buildings to police inquiry, and evicting business owners who are, at a minimum, complacent in the face of drug dealing.[140]

D. *Privatization*

In *Hicks,* the Supreme Court enabled privatization as a new weapon for prevention of crime in public housing projects.[141] The New York legislature, particularly the New York City Council, should take note of the power provided by privatization.

Privatization of New York City's public housing communities would be beneficial in the fight against crime by expanding the power of the city's criminal trespass law.[142] Privatization is easily

---

137 *Id.*

138 *Id.*

139 NEW YORK CITY, N.Y ADMIN. CODE § 7-703(g) (2003) defines a public nuisance as:

> Any building, erection or place, including one- or two-family dwellings, wherein, within the period of one year prior to the commencement of an action under this chapter, there have occurred three or more violations of any of the provisions of [Article 220, 221] . . ..

Id. See N.Y. PENAL LAW §§ 220-221(McKinney 2004)(dealing with controlled substances and marijuana offenses).

140 *See* Harnett & Andrews, *supra* note 101.

141 *See supra* Part I.

142 N.Y. PENAL LAW § 140.10(e) & (f)(McKinney 2003). This section provides that:

> A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property
>
> (e) where the building is used as a public housing project in violation of conspicuously posted rules or regulations governing entry and use thereof; or
>
> (f) where a building is used as a public housing project in violation of a personally communicated request to leave the premises from a housing

accomplished as seen in *Hicks*.[143] Following the *Hicks* model, New York City may abandon all rights to the sidewalks and streets adjacent to specific public housing areas and the NYCHA may claim these areas as abandoned property.[144]

Many of New York City's housing projects are prime candidates for privatization. Currently, all public housing projects in the city are covered by the criminal trespass statute.[145] The statute makes it a misdemeanor to enter or remain on land owned by a public housing authority where the property is clearly marked as private or the individual has been previously barred from the property.[146] Many of New York City's housing projects are already self-contained, multi-neighborhood regions.[147] Others, however, span blocks or are divided by public thoroughfares.[148] Those communities, which are freestanding or are divided by public areas, are prime candidates for privatization. Those which are already privatized could be expanded to include more of the neighboring areas.

Section 140.10 of the statute enables the police to stop and question anyone in a public housing complex when they comply with the court's "articulable reason" standard.[149] In *People v. Carter*, the court ruled that an articulable reason can be found in a totality-of-the-circumstances evaluation.[150] Once the police have such a reason, they may question suspects to find out if there is a legitimate purpose for their presence in the building.[151] This inquiry permits the officer to take additional steps to check the veracity of the information, so long as it is done in such a way that "it is clear that the citizen is not the subject of any police investigation and that the police manner is not intimidating,

---

police officer or other person in charge thereof[.]

Id.

143 *See generally Hicks*, 539 U.S. 113. *See also supra* Part I.

144 *See generally Hicks*, 539 U.S. 113.

145 *See* Hellegers, *supra* note 125.

146 *Id.*

147 *See* New York City Department of City Planning, Population Division, *Results from the 2000 Census, Socioeconomic Charateristics*, City of New York *at* http://www.ci.nyc.ny.us/html/dcp/pdf/census/socioopp.pdf (last visited Nov. 9, 2003).

148 *Id.*

149 N.Y. PENAL LAW § 140.10(e) & (f).

150 169 Misc. 2d 230, 232-33 (N.Y. Crim. Ct. 1996). A police officer patrolling a public housing project had an articulable reason to stop and question a suspect after the officer smelled marijuana and the suspect "acted nervous and uneasy as their eyes met." *Id.*

151 *Id.* at 233.

harassing or excessive in any fashion."[152] An officer cannot bootstrap refusal to comply with the inquiry into probable cause for arrest.[153] However, probable cause may be found by a lack of any credible evidence that the suspect has a legal right to be present.[154] Once an officer has probable cause, he can arrest the suspect for criminal trespass in the third degree and perform a valid search incident to arrest.[155]

The criminal trespass statute effectively precludes people from congregating in public housing projects without an invitation, and makes housing projects the functional equivalent of private housing complexes.[156] However, in spite of this tool, the drug problem still exists.[157] Privatization of areas adjacent to housing projects alone does not provide any additional strength to law enforcement.[158] If the legislature makes clear that the entire newly-privatized area is subject to criminal trespass, by posting the area as private, it would effectively widen the zone of protection afforded to members of a housing community.[159] This is an added protection not currently granted to most private housing communities.[160]

A recent Bronx County Supreme Court ruling illustrates the need for the legislature to clarify and strengthen criminal trespass statutes through increased privatization.[161] In *People v. Douglas*, the court overturned a conviction that arose out of a police inquiry as the suspect left a housing project.[162] The court held that because the suspect was outside of the building, the officer had no right to stop and inquire.[163]

---

152 *Id.* (internal citations omitted).

153 *See id.*

154 *Id.* at 233.

155 *Id.* at 232. *See also* People v. R. Gonzalez, 250 A.D.2d 545, 546 (N.Y. App. Div. 1998). In *R. Gonzalez*, the court upheld a search incident to arrest where an officer responding to a burglary call noticed the defendant in a locked portion of the building sweating and "avoiding eye contact." *Id.* The officer inquired further and the defendant lied about his presence. *Id.* The officer arrested the defendant and removed two watches from his pocket. *Id.*

156 *Carter*, 169 Misc. 2d at 233.

157 *See supra* Part II.B.

158 *See, e.g.*, People v. Raymond Douglas, *New York Law Journal Decision of Interest*, N.Y.L.J., Mar. 5, 2004, at vol. 43, page 18. [hereinafter Douglas].

159 *See* KAMINS, *supra* note 121, at 123-124.

160 *Id.*

161 Douglas, *supra* note 158.

162 *Id.*

163 *Id.*

The court suggested that had the officer been intimately familiar with the building's residents, or had additional suspicions, the ruling may have been a different one.[164] Although it was argued that the officer did have enough reason to stop the suspect if the area outside the building had been privatized, and therefore an extension of the area protected by the trespass statute, the case might have been decided differently and the defendant would have been convicted.[165]

Privatization of a greater area surrounding housing projects may have some unpopular results. Most notably, one result would be the increase of police interaction and questioning of residents.[166] Although this is inconvenient and unsettling to some, overtime officers will likely become familiar faces in the neighborhood and will easily be able to identify residents, as has occurred with vertical patrols.[167]

The legislature owes a duty to the residents under the supervision of the NYCHA to, at the very least, privatize streets and sidewalks between otherwise self-contained housing project buildings.[168] Currently, the residents of New York City's public housing communities are at the mercy of the criminal element.[169] The legislature, whose task it is to protect these residents, should implement a comprehensive plan that increases the power of criminal trespass statutes and the nuisance abatement laws while providing more funding for law enforcement.

IV. Methodology—Other Jurisdictions

Criminal procedure limits the power of trespass-barment statutes.[170] However, an important benefit of trespass-barment statutes in public housing facilities is the law enforcement officer's ability to search a suspect without violating the Fourth Amendment.[171] Under a search

---

164 *Id.*

165 *Id.*

166 *See, e.g.*, Kilgore, *supra* note 15.

167 *See, e.g.*, People v. Thompson, 260 A.D.2d 242 (N.Y. App. Div. 1999). The court ruled that an officer had an articulable reason to question the defendant because the officer had patrolled the building for years, knew many residents, and did not know the defendant. *Id.*

168 *See supra* Part I for a discussion of the decrease in crime at the Whitcomb Court housing project after the *Virginia v. Hicks* decision.

169 *See* Connell-Smith et al., *supra* note 106.

170 *See* U.S. CONST. amend. IV (prohibits unreasonable searches and seizures).

171 *Id.*

incident to arrest, a police officer may perform liberal searches of arrested trespassers, including their pockets and possibly the containers within their pockets, without a search warrant.[172] Under the *Terry* doctrine, an officer may conduct a warrantless search, without probable cause, of a person not under arrest if the officer has a reasonable suspicion that the suspect is dangerous.[173] Jurisdictions are split on what type of search, if any, a police officer may perform on a trespasser absent reasonable suspicion of a threat to safety.[174]

A. *Minority Approach*

New Jersey has taken a very limited approach to searches of trespassers. In *New Jersey v. Dangerfield,* the New Jersey Supreme Court announced its limited interpretation of law enforcement's power to perform a warrantless search incident to arrest.[175] New Jersey's Defiant Trespass statute only empowers law enforcement to briefly stop visitors in public housing premises and question them as to the purpose of their visit.[176]

In *Dangerfield,* the Long Branch New Jersey Police Department strictly enforced the Defiant Trespass statute.[177] The department maintained a list composed of the residents in the city's public housing complexes.[178] If a suspected intruder was stopped in these buildings, the police would try to determine if that person was a visitor or a listed tenant.[179] The Long Branch police arrested a man in a public housing

---

172 Chimel v. California, 395 U.S. 752 (1969).

173 Terry v. Ohio, 392 U.S. 1 (1968).

174 *See infra* Part IV(A)-(B).

175 171 N.J. 446 (2002).

176 N.J. STAT. ANN. § 2C:18-3(b) (LEXIS 2004) provides the following definition of a defiant trespasser:

> A person commits a petty disorderly persons offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:
> (1) Actual communication to the actor; or
> (2) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
> (3) Fencing or other enclosure manifestly designed to exclude intruders.

Id.

177 *Dangerfield,* 171 N.J. at 452.

178 *Id.*

179 *Id.*

complex for violating the Defiant Trespass statute.[180] He was searched and later charged with possession of cocaine after the search revealed two bags of the controlled substance.[181]

The New Jersey Supreme Court upheld the man's conviction for violating the trespass statute, but limited the police's authority to search such a violator.[182] It noted that the justification for a typical warrantless search incident to arrest is limited to either preventing the destruction of evidence or to protecting the arresting officer.[183] The court reasoned that these justifications do not exist when the arrest is done solely for violating of the trespass statute.[184] The court further explained that the presence of the suspect on the premises without authorization is the criminal act, and therefore, no evidence can be destroyed.[185] Moreover, without additional circumstances which lead to the belief that a suspect is dangerous, the second justification permitting a warrantless search for an officer's safety is also insufficient.[186]

The result of the *Dangerfield* holding is that the effect of the Defiant Trespass statute as a tool to combat drug, and other criminal activity in New Jersey public housing projects is limited.[187] The New Jersey Supreme Court's narrow application of the *Terry* doctrine, as applied to the Defiant Trespass statute, effectively forces the criminal element out of public housing complexes.[188] However, this narrow reading does not enable the police to use an illegal entry as a reason to search the offender and remove additional contraband from the streets.[189]

B. *Majority Approach*

For the vast majority of states, it is permissible to liberally search trespassers.[190] In *Connecticut v. Duncan,* the defendant was seen by

---

180 *Id.*

181 *Id.* at 451.

182 *Id.* at 460. The court ruled that without a custodial arrest, there is no valid search incident to arrest. *Id.* at 452.

183 *Id.* at 461. *See also* Chimel v. California, 395 U.S. 752 (1969).

184 *Dangerfield*, 171 N.J. at 463.

185 *Id.*

186 *Id.*

187 *Id.* at 460.

188 *Id.*

189 *See* Terry v. Ohio, 392 U.S. 1; *Chimel*, 395 U.S. at 752.

190 For example, both Connecticut and Washington are liberal in permitting the search of a suspect arrested or detained for criminal trespass. *See infra* notes 191-204.

police at a public housing complex, and as the officer approached the defendant, he put something in his mouth.[191] The officer grabbed the defendant, attempted to inquire about his presence, and told him to open his mouth.[192] The Appellate Court of Connecticut held that the officer's search of the defendant, which revealed narcotics, was a valid search incident to the arrest of the defendant for criminal trespass.[193] The defendant argued that the search exceeded the lawful scope of a trespass detention.[194] The court dismissed this argument for two reasons.[195] First, the officer had a reasonable suspicion to initially stop and question the defendant.[196] The officer knew that the public housing complex had a standing no-trespass policy that authorized him to interact with anyone present.[197] Second, because the search was subsequent to a lawful arrest for trespass, the fact that the officer also discovered contraband in the suspect's mouth was of no issue.[198]

The State of Washington has also reviewed its search incident to arrest policy when the arrest is predicated solely on a criminal trespass charge.[199] The Court of Appeals of Washington held in *Washington v. Thompson* that a search incident to arrest is permitted whenever a custodial arrest occurs, regardless of the specific circumstances, in order to promote officer safety and minimize the destruction of evidence.[200] In *Thompson*, an officer arrested the defendant for criminal trespass after having twice warned him that his presence at an apartment complex was illegal.[201] The defendant argued unsuccessfully that the officer could not search him because he had no probable cause to arrest him for the misdemeanor of trespassing without first questioning him.[202] Citing the long-standing principle that an officer may arrest someone for a

---

191 Connecticut v. Duncan, 67 Conn. App. 29, 32 (2001).

192 *Id.*

193 *Id.* at 35-36.

194 *Id.* at 34.

195 *Id.*

196 *Id.*

197 Duncan, 67 Conn. App. at 33.

198 *Id.* at 36.

199 Washington v. Thompson, 69 Wash. App. 436 (1993).

200 *Id.* at 441.

201 *Id.* at 439.

202 *Id.* It is important to note that this case is predicated on the review of defense counsel's efficiency. *Id.* The defendant pled *nolo contendere* in reliance on counsel's advice, and the court determined that a motion to suppress would have been unsuccessful regardless. *Id.*

misdemeanor committed in his presence, coupled with the fact that the officer knew that the defendant lacked permission to be on the premises, the court upheld the arrest and the subsequent search.[203] This case represents the view adopted by most states that liberal searches subsequent to trespass arrests are permitted.[204]

V. Conclusion

Public housing complexes are prime locations for criminal activity, particularly narcotics-related crimes.[205] The Virginia approach of privatization in housing is a large step toward reducing crime in these areas, but the governmental interest in reducing crime must be balanced against the invasion of privacy and other possible Constitutional infringements.[206]

Increased privatization extends the zone of protection afforded to the housing authority.[207] However, privatization also increases the inconvenience to residents and their visitors.[208] The theory of community policing efforts is that officers will become familiar enough with the residents that they will not need to regularly stop them, but rather only stop those thought to be visitors. However, this assumption is flawed because nothing in the policy forces officers to either learn who the residents are or to permit entrance to those they know or suspect are actual residents. Although police interactions with residents take place in the hallways and common areas of the public housing units and not in the apartments themselves, these exchanges arguably intrude on some residents' basic privacy rights. Such intrusions are at odds with the U.S. Supreme Court's frequent enunciation of the importance of protecting the privacy interest in the home.

Nonetheless, the government has a strong interest in combating crime in public housing. Increased patrols of housing projects can ensure that the drug trade is kept out of those neighborhoods. Despite limiting the scope of searches on trespassers, New Jersey has a system that allows the police to maintain lists of tenants, thereby attempting to increase the effectiveness of the officers who are patrolling public

---

203 *Id.*

204 *Id.*

205 *See supra* Part III.

206 *See supra* Parts II-III.

207 *See supra* Part IV.

208 *See supra* Part IV.

housing units.[209] Similarly, Virginia's system requires the police to communicate with a housing manager regarding tenants names and authorized visitors.[210] Regardless of the actual system employed, it behooves legislatures to build a policy where the police are encouraged to take extra time to investigate the status of visitors by contacting residents, consulting lists, and speaking with the housing authority. The police, in conjunction with housing authorities, could also create a voluntary visitor log outside the privatized public housing area where residents can report visitors they anticipate.

This solution is not the only way to combat the drug problem in public housing; there are several other possible solutions. A first step is to expand the area considered public housing property. For example, New York and other states should expand the size of housing communities to include much of the neighboring sidewalks and streets where possible. This expansion would immediately broaden the physical area accessible to law enforcement protection and scrutiny.

A second step is for legislatures to clarify that criminal trespass is a sufficient predicate crime to require, or at the very least permit, a valid search incident to arrest. Although New Jersey is one of a minority of states that has narrowed the warrantless search exceptions, this does not appear to be a trend other states will follow. Additionally, expanding civil forfeiture laws and nuisance abatement statutes can also help prevent criminal activity in public housing. Further, an increase in funding and police presence in public housing can prevent criminal activity within the public communities.

Housing projects are important parts of urban communities and provide an extremely necessary and vital service to those who are otherwise unable to afford safe, clean, and decent housing. In order to provide the proper level of housing, legislatures should create comprehensive plans to increase police presence and power to deter the criminal element while diligently ensuring minimal intrusions on the privacy of residents.

---

209 *See supra* Part IV.

210 *See supra* Part II.