In the

Supreme Court of the United States

BARRY VAN LARE, ETC., ET AL, Appellants	)	
v.	)	
ROSE HURLEY, ETC., ET AL;	)	No. 74-453
and	)	
ANNIE TAYLOR, ETC., ET AL,	)	
v.	)	
ABE LAVINE, ETC., ET AL	)	No. 74-5054

Washington, D. C.
March 26, 1975

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v.	No. 74-5054
ABE LAVINE, ETC., ET AL	

Washington, D. C.

Wednesday, March 26, 1975

The above-entitled matter came on for argument at 1:15 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY F. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. JUDITH A. GORDON, Assistant Attorney General of The State of New York, Two World Trade Center, New York, New York 10047 [For Appellants in 74-453 and Respondents in No. 74-5054]

[Continued]

APPEARANCES -- [Continued]

MARTIN A. SCHWARTZ, ESQ., The Legal Aid Society of Westchester County, 56 Grand Street, White Plains, New York 10601 [For Appellees in No. 74-453 and Petitioners in No. 74-5054]

C O N T E N T S

direct appeal from the three-judge district court in which the Appellants seek a reversal.

Nor will we consider except in passing the subsidiary issue breeched in Appellant's main brief at points 4, 5 and 6 and in Appellee's brief on the merits at 4, 5 and 6.

In New York, shelter is a separate component of assistance that every individual receives. The other component that the recipient receives is a per person flat grant for food, clothing and incidentals.

The amount paid for shelter, or the shelter allowance is variable and depends on two factors: the actual on the dwelling in which the recipients up to maximum established by number of rooms or number of recipients who, in fact, live there and two, it is based on the percentage of recipients in relation to the total number of individuals who live in a particular dwelling.

The result of the computation of shelter allowances, in light of these factors, results in the finding that in New York every recipient who receives 100 percent of his per capita standard of need for his individual shelter needs determined in light of his actual participation or his share of the dwelling in which he lives and in relation to the actual or maximum allowed rent on that dwelling under the system, no New York recipient can receive the entire cost of the dwelling unless he is, in fact, the exclusive occupant of

that dwelling since to do so would be to attribute or transfer the needs of the other individuals who live there to the recipient.

Equally, no New York recipient receives a fixed or averaged allowance based on the shelter needs of a hypothetical recipient such as are provided under flat grant systems.

To assure the Court that in stating that New York needs 100 percent of the / per capita standard of need of its recipients in terms of their shelter and to assure you that we are not masking the realities by omitting consideration of the substance of the standard of needs, we note that the maximums involved, the maximums under which the -- the maximums which provide the feeling under which the shelter allowances are computed, are provided by the 58 local services -- social services districts which comprise the state -- that is intended by the State Department of Social Services as expressed directly in its pertinent regulations, that the maximum be set at levels which provide shelter for recipients in conformity with local standards and that the maximums are updated from time to time as appears on the face of them in the Appendix at pages 523 to 603 and that the maximums themselves are subject to exceptions in favor of the recipient which are commonly made by local authorities to be sure that shelter is, in fact, provided to the

recipient.

The point is demonstrated most clearly by the uncontested statement in the record below that approximately 93 percent of New York recipients receive shelter allowances equal to their full cost.

Thus, the standard of shelter needs is actual cost for the vast majority of New York recipients.

QUESTION: Are we talking about the AFDC program only, or others?

MRS. GORDON: This is for both the AFDC program and the Home Relief program, those being the only two remaining programs that are subject to direct state supervision since the federal SSI takeover. And the 93 percent refers to both categories.

QUESTION: AFDC and Home Relief.

MRS. GORDON: AFDC and Home Relief.

QUESTION: And there is federal participation in Home Relief, is there?

MRS. GORDON: No, there is no federal participation in Home Relief.

QUESTION: Wholly state funds.

MRS. GORDON: That is wholly state and locally financed.

The question of whether New York must subsidize shelter costs of the nonrecipient who shares a dwelling

with the recipient of AFDC or Home Relief is presented in the specific context of Appellee's challenge to Section 352.30(b) of the Social Services title of the New York Code of Rules and Regulations and is limited to the portion of that regulation which prorates the actual or maximum allowed rent for a dwelling shared between recipient and nonrecipient when that recipient pays less than $15 a month.

This nonrecipient is called a non-contributing or nonpaying lodger under the terms of the regulation.

The result of the proration under this portion of the regulations is the determination of the per capita cost for each individual who lives in the dwelling and the payment of shelter allowances equal to the per capita shares or the need of the recipients while no public subsidy is provided in the form of a shelter allowance or by other means for the needs of the nonpaying, nonrecipient lodger.

Section 352.30(b) contains an additional provision for contributing lodgers who are defined again as nonrecipients who share dwellings with recipients but as individuals who pay $15 or more or $60 or more per month, depending on whether they are simply lodgers or boarding lodgers.

The contributing lodger's payment is income to the

recipient and results in a pro tanto reduction of the total assistance benefits paid to the recipient with the exception that the recipient is permitted to retain the first $15 or $60 paid as an income exemption or disregard.

Notwithstanding the permanent injunction contained in the judgment and order of the District Court, again, this contributing lodger portion of the regulation, the Appellees did not place this provision at issue below and concede it to be valid in their briefs before this Court at pages 94 to 95.

As stated, the lodgers in both categories, whether non-paying or contributing are nonrecipients.

In addition, under the terms of the regulation, these nonrecipients are individuals who do not owe the recipients with whom they live any duty of support and concomitantly, the recipients -- and thus the state, who is supporting the recipients, owes the lodger no duty of support.

However, the lodger, like all other individuals, bears the primary responsibility for his own support and this responsibility attaches to him regardless of whether he lives in a separate dwelling or whether he shares a dwelling with recipient.

It continues until such time as the lodger receives assistance, when that primary obligation is assumed by the state.

In this sense, the lodger is, in fact -- and is here under the terms of the regulation -- is having the same obligations of selfsupport as all individuals in society who are not on assistance.

It is this primary responsibility or legal obligation of the lodger that is recognized by the regulation and NOAA.

In light of the holding of the District Court -- of the three-judge District Court majority to the effect that the nonpaying lodger provision presumes diminished shelter need when that might not, in fact, be the case, and Appellees repeated assertions that the regulation necessarily results in reduced shelter allowances, it is appropriate to review briefly the two factual situations in which the nonpaying lodger provision operates which show, in effect, that both these contentions are incorrect.

First, when an individual is added to a dwelling, after recipient's shelter needs were originally budgeted, under these circumstances, the preexisting per capita cost of the recipient's share must be reevaluated to reflect the fact that the shelter needs of an additional individual are being met and that the actual or allowed rent is now allocable among the increased number of individuals.

Two results follow: a reduction in per capita shelter need and cost of the recipient and a consequent

reduction in the shelter allowance.

Now, this result occurs regardless of whether the individual who is added to the dwelling is a nonrecipient herein a lodger or whether he is , indeed, a recipient individual and it is illustrated by the example of -- by taking the example of the situation where we have, for example, a group of AFDC recipients living in a dwelling.

A point in time comes when a Home Relief recipient is added to that dwelling unit.

The result, under the New York program, is to reduce the per capita shelter costs of the AFDC recipient and to pay the proportionate share now held by the Home Relief recipient from the Home Relief program.

Now, under the specific terms of the regulation at issue, when the individual that is added to the dwelling is a nonrecipient and nonpaying, we recognize these facts in the regulations by not providing a subsidy for the non-recipient and by recognizing as well that since that recipient is nonpaying, perforce, a share of that shelter cost will remain unpaid.

The fact that the shelter cost, a share will remain unpaid, does not mean that the preexisting shares were not, in fact, reduced when the lodger moved into the dwelling, since the lodger is, in fact, meeting his own needs by his additional beneficial use of the premises, nor does it mean

that the lodger's -- the recipient's shares can be increased if the lodger doesn't pay, by transferring of the lodger's shelter needs to the recipient group.

The second situation in which the nonpaying lodger provision operates but does not reduce allowances is shown by the facts in support of Appellee Taylor's claim.

When AFDC recipients share a dwelling with Home Relief recipients and one or the other recipient groups loses its eligibility and thus may become a nonpaying lodger under the terms of the regulation, the per capita cost of that individual is, again, not compensated.

However, since the number of individuals in the dwelling remain the same, the valuation of the preexisting shares also remains the same and there is no reduction in the shelter allowance as payable to the remaining recipients.

Thus, when Appellee Taylor and her minor child received AFDC and Appellee's sister received Home Relief, the maximum allowed rent for the apartment was prorated two-thirds to AFDC and one-third to HR for Appellee's sister.

When Appellee's sister lost her home relief eligibility and became a nonpaying lodger, Appellee's minor child and her -- Appellee and her minor child continued to receive exactly the same shelter allowance, two-thirds from

the AFDC program and without any reduction obviously.

The nonpaying nonrecipient, Appellee's sister, the valuation of the share of the nonpaying nonrecipient, remained, again, the same. The only difference between the Home Relief and post-Home Relief situation is that that share, to wit, Virginia Taylor's share, was not being paid.

The fact that the share --

QUESTION: It meant that the Taylors -- what was it, mother and son -- had -- were stuck for the entire rent although the total group was getting the one-third less shelter relief than before. That's about it, isn't it?

MRS. GORDON: That is exactly the point I was coming to, your Honor.

The fact that the lodger's share remains unpaid does not, I believe -- and I think we can illustrate -- result in inevitable or drastic consequences for the remaining recipient.

Rather, it places the recipient and the lodger, herein Appellee Taylor and her sister, in the situation where they may choose among several among several alternatives.

First, the lodger may pay his share of shelter costs or possibly somewhat less and obtain the benefits of the contributing lodger's side of the regulation which we cited.

Second, if the lodger is truly needy -- as it was

claimed Virginia Taylor was -- she or he may apply for assistance which is made available in New York to everyone and at 100 percent of the standard of needs.

Now, in terms of applying for assistance, the individual obtains a grant or allowance measured to meet his own needs which, of course, includes the shelter cost and the per person flat grant.

QUESTION: Does the availability of that added kind of relief bear on the statutory question or the constitutional question or both?

MRS. GORDON: If I understand you correctly, Mr. Justice Rehnquist, you asked me whether or not the fact that any individuals had obtained assistance bears on the operation of this regulation.

QUESTION: Well, I didn't ask whether it bears on the operation of the regulation. I asked you if it bears on the statutory question that is involved in this case on a constitutional question or on both.

MRS. GORDON: I don't think it would bear on the statutory question because the statutory question is limited in this case to the AFDC program and the consistency of this regulation with the AFDC program.

I don't think it would be material to the determination of that consistency whether, under other programs, other individuals could get aid and we will come to a

discussion of the relationship of the AFDC statutes to that point.

Now, in terms of constitutionality, while I believe that a regulation which had a uniform, rational and fair operation would obviously be sustained under a due process or equal protection argument. It might be an argument under that -- under either clause that since there was no avail-- if, in fact, there were no availability of this supplemental type of assistance in New York that the operation might operate, the regulation might operate so harshly as to be so arbitrary and capricious as to deny due process.

However, that is, in fact, not the case since we do apply -- we do have the supplemental assistance program.

Now, returning to the alternatives available to the recipient who lives with the nonpaying lodger, as I was noting, the nonpaying lodger may obtain his own share of assistance and thus provide himself with his own means of support and generally increase the maximum allowed rent available to the combined unit.

Now, this course of action was, in fact, followed by the former lodgers in the Otey claim and by Virginia Taylor who, I should note in response to your question, Mr. Justice Stewart, is -- lost her original eligibility on Home Relief, apparently through her own fault. The record shows that -- the status of the record on this is not extensive but the

record does show in an affidavit of Marvin Rachlin from Nassau County that she failed to comply with continuing eligibility requirements. She thereafter, having lost her Home Relief assistance, reapplied, got Aid to the Disabled and has since been transferred to the SSI program.

The third alternative is that the lodger may leave the dwelling and thus remove the basis for the diminution of the recipient's allowances if, in fact, his addition to the dwelling caused the diminution.

Fourth, he may stay in the dwelling and hope to have the recipients meet his shelter needs from the balance of the assistance funds provided for themselves, namely, the per-person flat grant for food, clothing and incidentals.

Now, Mrs. D'Alessio, an applicant for intervention below, stated that this is the course of action that she would choose in order to hold her lodger in her home.

However, obviously, in view of the three other alternatives which we have just noted, this course of action is not the inevitable or even the intended result of the operation of the regulation and it is doubtful that it could be long pursued consistently with the goal of the AFDC program and the state's responsibilities under it, namely, the protection of the children or even as a practical matter if the lodger, in fact, paid nothing.

Now, we are compelled to note that Appellee's

position in this action does not alleviate the alleged harshness of this alternative, to wit, the lodger staying in the house and eating and living off the flat grants provided by the recipient.

As noted on the D'Alessio claim, the situation is brought about under the facts of these cases because it is claimed that the lodger is destitute.

However, on Appellee's view, which would eliminate pro-ration of shelter allowances, for any -- under all circumstances where the -- as Appellees would characterize it -- where the individual lodger refuses to apply his available resources to meet his own needs and thus cuts off the destitute lodger and the rich lodger as well.

Now, given that Appellee states that the refusal to apply his available resources to meet his own needs, or the refusal to obtain such resources from the public assistance program, the result of the combination of those two factors is that the lodger who remains in the home on Appellee's view still must obtain the balance of his support from the flat grant provided for the recipient individual.

Now, as we have noted, Section 352 functions essentially in two factual situations, both of which look at the lodger after the recipient's shelter needs were first budgeted and generally where the recipients were the first dependents in the dwelling.

We have also noted that the computation of the shelter allowance, under the New York program, depends in part on the percentage of recipients who live in the dwelling.

Thus we come to an additional regulation in the same title of the State Code of Rules and Regulations, Section 352.3(c) where, if the recipients move into a dwelling occupied by a lodger, they, in their turn again receive prorated shares of the shelter cost of that dwelling up to an appropriate maximum to meet their own needs.

Thus, in factually similar circumstances, we have factually similar regulations, both of which are designed to meet the individual needs of the recipients where the individual needs of the recipient, regardless of whether he lives with a lodger or a lodger lives with him.

Indeed, proration is itself illustrated between recipients and recipients on the Taylor claim as we noted, Mr. Justice Stewart, when we pointed out that when Virginia was on the Home Relief program and the Appellee and her child were on AFDC, there was, in effect, a proration as between those two programs.

Now, in subsidizing the shelter needs of the recipient and withholding a subsidy for the shelter needs of the nonpaying lodger, Section 353.30(b) is a direct expression of the Social Security Act provision providing

for Aid to Families with Dependent Children, related state statutes and with implementing legislation under the -- pardon me -- and with state statutes implementing the federal program as well as state statutes governing the Home Relief program.

We do not even reach, in this case, the traditional question presented on the statutory side of AFDC cases, namely, whether the challenged state regulation imposes an additional condition of eligibility inconsistent with the federal statutes.

Indeed, the condition of eligibility required here, qualified recipient status, is the exact same condition imposed by the AFDC program itself.

Now, the federal legislation setting forth the AFDC program is set forth in some detail in our main brief at point one.

In sum, that legislation defines the class of aided individuals for AFDC in a manner which excludes the nonpaying lodger. This is so principally because the lodger has not demonstrated his eligibility for assistance.

In short, he is not paid because he is not a recipient.

Appellees point out in addition, and interestingly, that the lodger could obtain assistance under the AFDC program, as he could obtain assistance under Home Relief and

this is, in fact, true. He can obtain assistance as an essential person; indeed, the fact Mrs. D,Alessio alleges would have made her lodger, H.M. conceivably an essential person under AFDC.

They failed to note, however, that the major criterion for an essential person is, of course, that criterion which is applicable to all AFDC individuals, namely, demonstration of need.

Now, the federal and state statutes and regulations recognize as well what is obviously commonsense and in fact, true, that people who receive AFDC -- and, indeed, people who receive Home Relief, may well choose to live with nonrecipients and then when that set of circumstances occurs, it is necessary, in order to follow the mandate of the legislation to separate the needs of the nonrecipients or the person who does not come within the aided classes under the federal program, from the needs of the recipients.

QUESTION: Mrs. Gordon, are you familiar with our rule 44(1)? It says that Court looks with disfavor on any oral argument that is read from a prepared text.

I thought perhaps I noticed you were reading.

MRS. GORDON: I apologize. First, your Honor, I am not familiar with the Court's rule.

Second, I apologize, to the extent that I am in part reading although I am not entirely reading.

QUESTION: And you have a lot of company in this Court.

MRS. GORDON: Yes, I know.

QUESTION: Especially from Government counsel.

MRS. GORDON: As I was noting, the federal legislation notes that which is obvious, namely that dwellings may be shared in common and that when that is, in fact, the case, it is necessary to separate one need from another in order to compensate only those needs of the recipient.

Now, this matter is easily accomplished in New York which, as we noted at the outset, treats shelter as a separate item of need; a matter, again, with HEW approval and with reference to this record established by a document called "Simplified Methods of Determining Needs" published in 1964 and, indeed, these statutes and the regulations recognize and the program material, recognize that shelter allowances may be computed on an individualized basis, such as the system which New York effectively has adopted.

Proration with the result of withholding the non-recipient's share, is again expressly recognized by HEW in that same 1964 document and has been recognized with express reference to this regulation by the approval of the HEW Region II commissioner extended to this regulation specifically in the course of this litigation.

Indeed, HEW's policy has continued then, to date, as

is shown in the most recent document we have available to us, namely, "Guidelines for Development of Consolidated AFDC Standards," wherein HEW provides some recommendations for states who wish to shift to a flat grant, noting that the effect of the flat grant system is to average away differences caused by proration between recipients and nonrecipients, thus stating, in effect, that for systems for states who do not adopt the flat grant system, that proration of rental policy is, of course, still in effect.

QUESTION: Long is 352.30?

MRS. GORDON: How long is it?

QUESTION: When was it enacted?

MRS. GORDON: It was enacted specifically, your Honor, I believe in 1970. We have several appendixes on that.

QUESTION: Umn hmn.

MRS. GORDON: '70 or '72 in terms -- in the express terms that it presently has.

In approximately 1965, I believe, provisions were added to the social services title Code which reflected the separation and proration of lodgers' needs.

Now, the means of proration and the element included in that system has varied from time to time and, certainly, of course, we are only concerned with the last one.

In Appellees' brief at pages 1A through 4A, they

cite some of the historical provisions and additional provisions appear in the Appendix under the appropriate heading.

QUESTION: Did New York ever have a rule of the kind that was held invalid in King against Smith?

MRS. GORDON: Absolutely not, Your Honor. New York never had a man-in-the-house rule. In fact, I was just coming to the portion of my argument where I was about to state that the regulation here involved is not a man-in-the-house rule.

This is apparent, first, by the terms of the regulations and the facts in support of the Otey, Taylor and Aloise claims which show that the lodger category is not confined to paramours but may include sons, sisters and male and female friends of various kinds.

Second and more importantly, unlike King and Lewis, it does not depend, that is, this regulation does not depend on a fictitious obligation of support running from the lodger to the caretaker-relative or to the children, to the extent either of their entire needs, as in King or to the extent of the lodger's available resources as in Lewis.

Rather, two obligations are considered by the regulation or perhaps one is a lack of obligation.

The lack of any legally-imposed obligation on the part of the caretaker to support the lodger and, indeed, the

obligation, as we previously noted, of the lodger to support himself -- at least primarily and until such time as he comes to the state for assistance.

In light of these facts, Appellees repeated use of the term "payment for the family's expense" is a complete misnomer. The expense involved is that of the lodger and his prorata share is that share whic is assigned to meet his own needs.

Now, turning briefly to the constitutional -- principal constitutional issues presented, we find that the nonpaying lodger provision does not depend on any irrebuttable presumption in violation of the 14th Amendment.

This claim must be viewed in light of the facts, as we have noted, that we are concerned here with a system of individualized shelter needs which confront the realities of the real world in terms of the recipient needs in that world, that the regulations involved express directly or at least clearly complement the federal AFDC legislation involved and, indeed, the federal HEW program material and which, if they do not mandate, they certainly allow the exclusion of the lodger's needs and, again, we are confronted with a situation where the federal regulations and statutes, if they do not mandate one particular system of determining shelter allowances, certainly allow this system and possibly a system based on average amounts as well.

Now, of the federal legislation here, and, indeed, the major state statutory provisions are challenged as unconstitutional.

In short, the underlying legislation which provides the basis on which this system operates is conceded by Appellees to be constitutional. It doesn't violate the due process clause at all.

We then come to their point where they say, but these regulations which neither directly implement or complement the system violate the due process clause.

Now, in terms of presumptions we must add one further fact and that is, this entire shelter allowance program and, indeed, regulation 352.30(b) operates in the context where a hearing is, in fact, provided.

That hearing is provided following -- at the recipient's request and following the investigation of the facts of every case in which a proposed reduction in the allowance is about to take place and it follows this Court's decision in Goldberg versus Kelly and, indeed, it is a prereduction hearing.

Now, we have already noted -- or perhaps I should point up the fact that under the statutory side of --

QUESTION: Mrs. Gordon, would you tell me in just a word why the state makes this reduction? Is it because it just doesn't want to support the lodger and the lodger,

inevitably, is living off the state when he isn't qualified to do so? Or are you assuming some contribution?

MRS. GORDON: No, your Honor, we are not assuming any kind of contribution. We are -- the principal reason for the regulation is the first two stated, namely, the conservation of the public assistance resources for those who are truly needy and the avoidance of diversion of those resources for the benefit of those who are not needy.

Now, interestingly --

QUESTION: Mrs. Gordon, do you say you are -- is the state entitled to withhold funds that are obviously being used to support someone who isn't entitled to it?

MRS. GORDON: That is absolutely correct, your Honor and particularly one must realize that the lodger here is a stranger to the system. The system does not investigate him to any extent or degree because he has not come before the Government and sought aid.

QUESTION: What does the state do if it discovers that some welfare or some AFDC mother is giving $15 a month to her mother who lives down the street? She just isn't spending it on the support of her own children or of herself but is giving $15 a month to her mother who lives in another establishment.

MRS. GORDON: There are both civil and

criminal penalties available -- civil penalties, shall we say, as well as criminal penalties available under the present system. But I would say first --

QUESTION: Can you recover the money --

MRS. GORDON: We can recover -- we can -- one must understand first of all that we are talking about two different types of grants and allowances. One is the flat rent.

Let us assume that she pays this money out of the flat rent. It is unquestionably a diversion of that flat rent although -- because it is provided for her own needs, not that of her mother -- but she is permitted to do that to some extent and degree because she has a discretionary choice of allocation.

What we watch out for most is whether the interests of the child remain protected. If, in fact, as Judge Oakes suggested in the Second Circuit -- in his Second Circuit dissent, she can afford, because she has made wise discretionary allocations of the money, to leave a dollar on a collection plate on Sunday from that flat grant, we do not do that.

Now, when the interest of the child becomes involved, we have various forms of counseling that we can give her, both psychological and budgetary, down to the point in time where we can -- if we feel the need --

QUESTION: Well, can't the state find -- isn't there some other way that the state can solve this problem of diversion other than doing what it -- just doing what it does?

Even if you left the grant, the flat grant the way it is, without reduction, the child doesn't have as much space as you thought it was going to have because the lodger has moved in and is sharing the space.

MRS. GORDON: Right.

QUESTION: But then if you reduce the grant, you further -- you even make it harder on the child.

MRS. GORDON: Yes. I -- two --

QUESTION: Now, how is that serving the welfare of the child?

MRS. GORDON: Two points should be made clear. Number one, in your $15 to the mother down the street example, the child was not getting the benefit of that money and that --

QUESTION: That is right.

MRS. GORDON: -- payment was harming the child. Now one could say, I shall -- in that example -- put that amount of money for the specific purpose, namely rent, on restricted payment so she won't have the opportunity to give it to her mother down the street -- if she gave part of the shelter allowance.

Well, obviously, that won't work in the lodger situation. We could do as Judge Oakes suggested. We could pay the money to the woman and sue the lodger -- or sue both of them at the end of the given month on the theory that he had obtained money or had received the benefit of a grant intended for another.

Now, the difficulty with that theory, your Honor, is that if we assume that -- or if it is true that we can recover the money from the lodger -- it is perfectly clear that we didn't have to pay it to him in the first place and if we entered it -- or to her in the first place -- we did not have to pay it for his benefit in the first place and if we entered into a system on the shelter side where we sought to recover the amounts of the lodger's shelter benefit from the lodger, we would be involved in a system where each lodger would be sued at the end of each monthly or bimonthly payment and as I say, again, confessing the validity of the point of not making the benefit available in the first instance.

QUESTION: Well, if the lodger was there and you cut the amount, right, and the lodger leaves, you get the amount back.

MRS. GORDON: Yes.

QUESTION: So the only purpose is to get the lodger out.

MRS. GORDON: No, your Honor, because --

QUESTION: Well, what other purpose is there?

MRS. GORDON: Because --

QUESTION: You said if the lodger goes, the money goes back.

MRS. GORDON: I --

QUESTION: You are giving $100 for shelter and the lodger comes in and you say, well, we are going to cut it to $80 and the recipient says, uh uh, I can't stand that. Get out, lodger.

Then you go back to the $100.

And the only thing that has been accomplished is the lodger has been thrown out in the cold, cold world.

MRS. GORDON: Well --

QUESTION: Am I right?

MRS. GORDON: Just like the rest of us, your Honor, to provide for his own shelter needs.

Now, your Honor, I am afraid that there are two inherent defects in that line of reasoning.

First, it assumes that there is something which Appellees like to characterize as a full shelter allowance or a full grant. There is no such thing in the New York system as a full shelter allowance.

There is only a shelter allowance to meet each individual need. Now, it may be --

QUESTION: Well, is that $100 in my case?

MRS. GORDON: That would be $100 in your case, your Honor, if, for example, there were four recipients and their pro rata shares of the allowed rent were $25 each.

All right? So that would be $100.

QUESTION: You'd say $100.

MRS. GORDON: Now, let's assume, for example, that at the time their needs were budgeted, there were three recipients and a lodger. Their original grant would be, let's say, on your example, $75. Right?

QUESTION: Mine was $100 and three recipients and nobody else.

MRS. GORDON: On my example, your Honor, there are now four recipients --

QUESTION: Will you first answer mine?

MRS. GORDON: I'm sorry, your Honor, I --

QUESTION: You have got three recipients. They have made a minimum requirement to you, for your three of you, is $100 a month.

Next month, lodger moves in.

They don't say, your requirement has dropped. They say, oh, lodger has moved in.

So without more, it is dropped to $80. And then lodger moves out and leaves the three recipients there. It goes back to $100.

QUESTION: Well, I take it one possible answer is that with the lodger in, the people are still living and they have proved by their behavior that they don't need as much as they did before.

MRS. GORDON: No, that is not the answer.

QUESTION: Well, what is the answer?

MRS. GORDON: I think perhaps if I can clarify my response to Justice Marshall. First of all, in New York, your Honor, there is no such thing as a minimum for three. There is only your proportion -- you are either a lodger or a nonrecipient individual -- your proportion of the allowed rent which we pointed out is largely the actual rent which is also a maximum, not a minimum and a ceiling on the amount of payment, not what any one individual or any one -- any group of individuals is entitled to.

The measure of anyone's need is his proportion of the dwelling. Now, if you have three recipients in a dwelling, your Honor, and the total dwelling costs $100 a month, each recipient, in effect, gets a third.

Now, Appellees say on that point that that is not true. Appellants are wrong because they only made one payment.

Now, it is true that in some circumstances we make one payment.

For example, an AFDC caretaker and her minor

children get one payment because she is the person of majority and they are all minors.

So therefore when we say, in your example, the third, they each get a third.

Now, that third also reflects their beneficial use of the dwelling, right? In thirds.

Now, we add somebody else, your Honor. Then we have fourths because we have four people using the dwelling but the costs didn't increase.

In short, the needs of the fourth individual were met in the same space, Mr. Justice White --

QUESTION: But the trouble is, in your houses, you don't add on rooms.

MRS. GORDON: That's right, your Honor, you don't add on rooms but you add on people.

QUESTION: Right, so the fact that it would hold four --

MRS. GORDON: Yes.

QUESTION: And you knew that --

MRS. GORDON: Yes.

QUESTION: -- when you put the three of them in .

MRS. GORDON: It might hold either three or four, your Honor.

QUESTION: Right.

MRS. GORDON: You can't put --

QUESTION: So you gave $100 and when all four moved in --

MRS. GORDON: Your Honor, we didn't give $100. We gave --

QUESTION: The reason you gave $100 was because you couldn't get it any cheaper, that's why you gave $100.

MRS. GORDON: That's right, your Honor. You could,perhaps --

QUESTION: That's why you gave $100.

MRS. GORDON: Perhaps so. You could not get that apartment for any cheaper and while three individuals were in it, each was allocable one-third of the cost.

Now, since -- as, in fact, one of the Appellees' witnesses below testified in evidentiary hearing, people are not mechanical toys, the same apartment that accommodates three may very well accommodate four and when that fourth person comes in, his need for shelter is being met and the question is then presented, should we allocate to him a share of costs?

If we do not allocate to him a share of costs, your Honor, we are operating under a totally different system than the one that New York operates under, namely a flat grant.

In addition, if we say, under the present system that the addition of an individual does not diminish shelter

needs then we are making one of at least several irrebuttable presumptions which are far more detrimental to the program and, indeed, to the individual recipients' welfare.

QUESTION: Do you also cut down the food allowance when he eats?

MRS. GORDON: Absolutely not, your Honor. We do not cut down the food allowance, because --

QUESTION: So if he lives next door and came in there and ate three meals a day, that is fine.

MRS. GORDON: No, that is not fine, your Honor, because that would be -- as an example that Justice White gave, probably a diversion of grants for the benefit of another for which various civil remedies could be applied to the woman for which various criminal remedies could be applied to the woman and which, indeed, ultimately -- perhaps the ultimate sanction --

QUESTION: You mean, it is a crime to give somebody a meal?

MRS. GORDON: No, it is not a crime to give somebody a meal, your Honor, but if you had a continuing pattern of behavior wherein a caretaker-relative were devoting substantial amounts of the resources provided for herself and her child to another, obviously, that is a diversion of the grant and there is a criminal penalty for that.

However, obviously, we do not enforce it in single

instances where there is no harm to the child.

That is exactly what I was trying to say and, indeed, perhaps the most severe sanction in the entire program is that if the woman neglects the child by diverting the resources on a persistent basis we ultimately have the power to remove the child but obviously this does not work in the lodger situation because we are taling about a big shelter allowance allocable among a certain number of individuals.

I have reserved some rebuttal time and I will close now.

Thank you, your Honors.

QUESTION: Mrs. Gordon, what if there were a situation where the mother and children occupied a couple of bedrooms and a lodger moved in and the social services people determined that was just one too many people in the house to be helpful.

Would they have the authority to ask the person who owned or rented the place to make the lodger move out?

MRS. GORDON: Yes, they would have authority to ask for her to do that. I do not think, particularly in view of the Appellees' associational and privacy claims they could compel her to do that.

As I say, the ultimate sanction for the woman who does not properly protect the interests of her children is,

of course, the removal of the children and determination of her status as a caretaker-relative, if she does what you say.

Now, one of the difficulties involved in what you say and, in fact, one of the benefits of the operation of the regulation is, in common sense, if you have a lodger who has money or if you have a lodger who applies for assistance, in other words, gets the means to support himself or is willing to apply those means, he then, in terms of his payment, can pay a share of a larger apartment to accommodate the combined group or he can -- if it is assistance he obtains by virtue of his getting on assistance, in effect, the right to a larger apartment to accommodate the combined group.

But if he chooses to refuse to pay anything, he refuses to get assistance to live, in effect, off the grant of the recipient and the children who are the only individuals before the Agency, then the choice -- their choice results in the situation you described and our alternative is ultimately, after exhausting our various lesser remedies, to remove the children or possibly prosecute the mother for neglect.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Schwartz.

The fact that we have fixed 45 minutes for each side imposes no obligation on you to use all that time. You may adjust your argument to whatever you think the needs are.

ORAL ARGUMENT OF MARTIN A. SCHWARTZ, ESQ.

MR. SCHWARTZ: Mr. Chief Justice and may it please the Court:

In 1968, this Court in King versus Smith, held that the Social Security Act prohibited the State of Alabama from denying needy and dependent children of AFDC assistance because the caretaker-relative associated with a person who had no legal obligation to support the children and who, in fact, provided no support.

This Court held that the Alabama substitute parent rule, in effect, defined the term "parent" in a manner that consisted with Section 606A of the Social Security Act and left Alabama's needy and dependent children without meaningful protection.

The New York lodger, the so-called "lodger" has the same relevant characteristics as Alabama's substitute parent. He is also a person who has no legal obligation to support the family. He is also a person who has, in fact, provided no support.

Both the Alabama rule and the New York rule operate without regard to the family's actual needs.

The only difference between the substitute parent rule in King versus Smith and the New York lodger rule is that, whereas Alabama completely denied AFDC children AFDC assistance, the New York rule works a reduction in the AFDC

grant because the caretaker-relative has chosen to allow another person to reside in the home.

We submit that this Court, in King versus Smith, did not imply -- and we submit did not intend that needy and dependent children can be denied part of their AFDC assistance based upon the fiction that their needs have diminished because the caretaker-relative associates with the person who has the same characteristics as the substitute parent in King versus Smith.

QUESTION: But on the other hand, if, in Mr. Justice Rehnquist's example, mother and children are occupying two bedrooms and mother's sister moves in with them and the children move in with the mother and the sister occupies the bedroom, I suppose the children aren't really enjoying the space they used to enjoy.

MR. SCHWARTZ: I think that if New York had a rule that was based upon an assessment of the space needed for the family and if --

QUESTION: Well, but the fact is that -- the fact is that the lodger is being -- his -- the space he occupies is being paid for by the state.

MR. SCHWARTZ: Well, I have to disagree with that characterization, your Honor when I say that --

QUESTION: Well, he isn't paying for it.

MR. SCHWARTZ: He is not paying --

QUESTION: Somebody is.

MR. SCHWARTZ: He is not paying for it but the state, when it initially computes the family shelter allowance, has computed the amount of shelter allowance that the state itself has determined is necessary to meet the needs of the AFDC family.

QUESTION: Well, that may be so but that space that is necessary is no longer being used by the children --

MR. SCHWARTZ: But --

QUESTION: Because the lodger is using it and whatever the state has computed as being needed by the child isn't being used any more.

MR. SCHWARTZ: Well, I think it is clear --

QUESTION: Well, isn't that so or not?

MR. SCHWARTZ: That is so by definition. Of course, it is not so -- we cannot assume that the lodger is using a pro rata share of the apartment. He may be -- as Judge Oakes pointed out in the Court of Appeals, he may be sleeping in the hallway, he may be sharing a bed in another room.

QUESTION: That's right.

QUESTION: Well, wherever he is, the three members of the family can't be.

MR. SCHWARTZ: Well, I could have no quarrel with that.

QUESTION: Well, I would hope not.

MR. SCHWARTZ: That the state, however, may not reduce the AFDC grant solely because the caretaker-relative has invited another person into the home is substantiated both by the regulation of the Department of Health, Education and Welfare, which was promulgated subsequent to this Court's decision in King and was designed to implement the decision in King and that regulation is now Section 233.90(A) of the Code of Federal Rules and Regulations, Title 45 and, secondly, by this Court's decision in Lewis versus Martin, which upheld the validity of this HEW regulation.

Now, this regulation in essence provides that the inclusion in the AFDC family or the presence in the home of any person other than a person who has a legal obligation to support the AFDC family is, in the words of the regulation, not an acceptable basis for a finding of ineligibility, which would be basically a codification of the holding in King.

The regulation goes on, or for assuming the availability of income by the state.

I submit that this regulation was designed to ensure that needy and dependent children are not denied and do not receive a reduced grant of assistance solely because the caretaker role relative has invited a person without a legal obligation of support into the home.

Indeed, this Court's decision in Lewis versus

Martin makes it clear that the state cannot reduce the grant even where the person residing in the home has some legal obligation of support, but where this legal obligation is something less than that of a natural parent and, secondly, even where the person residing in the home has available income.

So we submit that what New York is attempting to do here is to accomplish by the double assumption that A), the so-called "lodger" has available income and B), he is applying the assumed available income to meet the family's needs, even though Lewis versus Martin, in Section 233.90 would prohibit the state from even assuming that income which the lodger, in fact, has is available to meet the family's needs.

I think it is clear that the regulations, in fact, are based upon the assumption that the so-called "lodger" is paying his share of the rent.

First of all, the lodger regulations themselves are, on their face, state that the available income and resources of the so-called "lodger" shall be applied in accordance with -- and then comes the rest of the proration grant.

And in addition, the lodger regulations on their face deem the person residing in the home to be a lodger and the term "lodger," I submit, connotes a person who is

paying his part of the rent.

In addition, I think the operation of the regulations substantiate that they are based on the assumption that the lodger is paying his part of the rent. The family's rental obligation is, of course, fixed initially by its agreement with the landlord and the Defendants themselves compute the family's shelter allowance in a manner that is designed to reflect and meet the shelter needs of the AFDC family unit which, in most cases, would mean a shelter allowance sufficient to meet its actual rental obligation.

Now, these shelter needs and rental obligations do not automatically decrease, of course, by the fact that a caretaker-relative has invited another person to reside in the home.

They would only decrease if the person invited into the home, in fact, pays part of the rent. But I submit that it is this assumption of payment by the lodger which is the very assumption of payment which is prohibited by this Court's decision in Lewis versus Martin and by Section 233.90.

In response to Mr. Justice Stewart's question, New York in fact, as one of its predecessor regulations to the present lodger regulation had a regulation that clearly conflicted with Lewis versus Martin and it is set out in full in our brief at page 43.

I will not take the time of the Court to read that.

The reduction in the grant is not based upon any assessment by the state that the family shelter needs have decreased and I think this is brought out by the dialog between Mr. Justice Marshall and my adversary and it is clear that if the lodger moves out of the home the full shelter allowance would be restored.

In addition, if the family moved to a smaller apartment, no matter how small this new apartment was, no matter how low the rent was in the second apartment, the defendants would continue to provide a prorated share of the rent and I think this is made clear by the factual situation of one of the applicants for intervention, Loretta Clark.

Now, she lives with her five children so that is a family of six and their rental expense and obligation is $75 per month which is certainly, I think, a minimal amount for a family of six but because Mrs. Clark has invited another person to reside in the Clark household, the state continues to provide a reduced amount to meet their shelter needs.

QUESTION: Mr. Schwartz?

MR. SCHWARTZ: Yes.

QUESTION: Do you agree that this person is getting shelter paid for by the state? The lodger.

MR. SCHWARTZ: Well, that is a characterization.

I think --

QUESTION: Well, is it true or not?

MR. SCHWARTZ: Judge Oakes dissenting in the Court of Appeals made the point that the lodger is not the beneficiary of any funds from the state. He is the beneficiary of the generosity of the AFDC family but --

QUESTION: But who is paying the rent?

MR. SCHWARTZ: I submit that the AFDC --

QUESTION: The state. The state is paying the rent.

MR. SCHWARTZ: The state initially provides the funds for the rent. But that rental allowance --

QUESTION: Well, the state has paid for the rent and he is living there. So he is getting a bounty from the state.

MR. SCHWARTZ: I submit --

QUESTION: Well, without the state, would they be there?

MR. SCHWARTZ: Would the lodger be there? Is that the question?

QUESTION: Would the family be there, without the state money.

MR. SCHWARTZ: Well, I submit that the family would be someplace.

QUESTION: They wouldn't be in that premises?

MR. SCHWARTZ: I agree that wherever they are --

QUESTION: So it is the state that is paying the bill.

MR. SCHWARTZ: Indirectly, your Honor, the person residing in the home is getting --

QUESTION: Well, since I can't get an answer to it, assuming that the state is paying it and assuming that he is -- the lodger, he or she -- is getting the benefit of the state money without the state's permission, what can the state do about it?

MR. SCHWARTZ: Well, I submit --

QUESTION: With you, I'd have to say what, if anything, can the state do?

[Laughter.]

MR. SCHWARTZ: First, if the lodger were a relative -- which is one possibility, for example. It is reflected in the Taylor situation and it is also reflected in the Otey situation, the State of New York -- I believe it would be within its police powers as the State of California in Lewis versus Martin, to enact a statute which would provide for an obligation of support by that relative.

That is one possibility.

QUESTION: One possibility.

MR. SCHWARTZ: Now, I think the question is more difficult if the person is a nonrelative. Now, the

possibility arises that the state may be able to proceed against the lodger to collect part of the rent.

Of course, that --

QUESTION: How? I assume the lodger doesn't have any money.

MR. SCHWARTZ: I am only, of course, hypothesizing. The state could possibly -- I am not conceding --

QUESTION: The state might get its money back.

MR. SCHWARTZ: I am not conceding the validity of such a statute but I am saying --

QUESTION: Well, when you do that, aren't you conceding that the state has a right to get that money?

MR. SCHWARTZ: I am not making that concession. I am -- I am just --

QUESTION: I'm just wondering.

MR. SCHWARTZ: I am just looking at the state possibilities but I think that under the money payment principle, once the state provides a grant to the public assistance family, the money payment principle guarantees that family freedom of choice in expending their grant up to the point, I would say, that the children are being harmed.

I think it also has to be realized that the person in the home in King versus Smith and Lewis versus Martin were also getting those benefits and conforts that anyone who

may reside in the home of another would receive but this Court held that the purposes of the Social Security Act which are designed to protect the children and to prevent harm to the children would override any incidental free ride, which I suppose I would have to concede that this lodger is obtaining, but I submit it is the same free ride that the person in the home in King versus Smith and Lewis versus Martin was receiving.

QUESTION: Well, the state says that that applied only to men.

MR. SCHWARTZ: Well, the --

QUESTION: The King case applied only to men.

MR. SCHWARTZ: Well, the case of King versus Smith is -- relates not so much to the technical use of the term "parent" in section 606A, even though that was the precise holding of the Court, but to the question of whether the children were deprived of parental support and I think that was really the key issue and of course in Lewis versus Martin, the State of California was saying essentially the same thing that the State of New York is saying here.

They were saying that since this man is residing in the home, this man should take on the obligation of supporting the children. He is getting the benefits of --

QUESTION: Yes, but he should take on the

obligation of paying for his lodging, his own lodging, that is what it says.

MR. SCHWARTZ: Yes, but I am saying it is a very similar theory to the theory that the State of California --

QUESTION: It had nothing to do with the support of the children, as I understand the theory behind this law. It just says that his share of the shelter is attributable to him.

MR. SCHWARTZ: I recognize the differences. I am just saying that the State of California was saying something similar. It was saying you are here residing in the home. You are getting the benefit from being part of the family.

Therefore, because of those instances, you should take on an obligation to provide support for the family up to the amount of your available income.

In this case, New York is saying because the lodger is in the home, he is getting benefits in the home, the lodger should pay his share of the rent but I submit this assumption of payment is specifically prohibited by the Social Security Act Section 602A(7) and certainly by Section 233.90 of the HEW regulation.

On the constitutional issue, the lodger regulations also create a conclusive presumption in violation of the due process clause that whenever there is a lodger in the home, this person is able to and is in fact paying a prorata share

of the family's rental obligation.

The regulations work substantial takings of property in the forms of substantial reductions in the family's public assistance grant and therefore come within the purview of the due process clause.

This Court's recent decisions hold that it violates the due process clause for the state to work a taking of property on the basis of conclusively presumed facts when the conclusively-presumed facts are of the type that the state statutory scheme purports to be concerned with.

Here, the New York statutory scheme purports to meet 100 percent of the needs of all of its recipients. It purports to meet the full shelter obligation of all of its recipients. It purports to be concerned with the actual needs, the actual resources, the actual income of each of its recipients and, indeed, the lodger regulations themselves, on their face, purport to be concerned with the lodger's available income and resources which may, in fact, not even exist and with actual contributions by the lodger.

QUESTION: Assume the state calculated how much a family of four needed for food and it was $100 a month and they give them $100 a month and then the family moves in a so-called "lodger" or relative and he lives off the $100 along with the other four. Now, he is eating part of the

food. Now, is there anything the state can do about that?

MR. SCHWARTZ: Yes, I think they can.

QUESTION: What can they do?

MR. SCHWARTZ: All right, first of all, I think what they can do is reflected in this Court's decision in Wyman versus James. I mean, the whole purpose of the state welfare visit is to provide a safeguard against this type of abuse.

QUESTION: Well, the facts are perfectly clear and the recipient, or the AFDC recipient says, well, of course, the fifth person is living here and he is a relative of mine and I intend to keep him and we can all live on the $100 a month, it's just that we are not eating as well as we did.

MR. SCHWARTZ: Right, as I said, under Wyman versus James is a possibility of casework services that prevent this type of divestiture of the grant from continuing.

QUESTION: Well, I know, but the recipient just says, go about your own business. I'll go about mine.

MR. SCHWARTZ: Right. Right. Now, of course, this Court in Wyman versus James said that the recipient cannot make that assertion. At least, the recipient cannot say that the caseworker --

QUESTION: You mean that the state could say, well, either move the lodger out or we are going to cut you off entirely?

MR. SCHWARTZ: Well, the state can --

QUESTION: You suggest that in --

MR. SCHWARTZ: No, because that would conflict with our assertions --

QUESTION: I would think it would.

MR. SCHWARTZ: -- of the right to privacy and associations. However, the state could make restricted payments or provide voucher payments to the family.

In other words, if there was a problem as to whether the rental allowance was, in fact, being met to meet the rental needs, the state could make a direct payment to the landlord.

This is provided by federal regulations and state regulations.

QUESTION: Well, I know but -- in my example, whatever food comes into the house, five people now share instead of four. Now, what can the state do about it?

MR. SCHWARTZ: Well, this is --

QUESTION: And all the food --

MR. SCHWARTZ: -- an assumption. Of course, this is nothing in the record in the instant case and there is nothing in the instant case that indicates that these so-called "lodgers" are obtaining their food and clothing from the grant of the --

QUESTION: Oh, I understand that. I understand

that. But they are sharing the space.

MR. SCHWARTZ: They are sharing the space.

Despite the state's concern with meeting the actual needs of each of its recipients, the grant is reduced automatically solely because the caretaker-relative has allowed another person to reside in the home. I submit that the state can rationally make case-by-case determinations of whether this lodger has, in fact, made a contribution -- indeed, made case-by-case determinations whether the family has any excessive space and making these case-by-case determinations would not impose a great burden on the state in view of the fact that the state already makes its fair hearing procedure available in all cases of proposed reductions in the public assistance grant.

QUESTION: What if they decided that the family didn't have any excessive space, just without the lodger and that the lodger was one too many?

MR. SCHWARTZ: The example that they did have extra --?

QUESTION: No, that they did not.

MR. SCHWARTZ: That they were overcrowded.

QUESTION: Yes.

MR. SCHWARTZ: If they -- I would concede that if the state determined that the family was residing in overcrowded quarters that perhaps the state could take steps to

compel the lodger to leave. I say that because --

QUESTION: Well, it could if your example that the state could proceed in a case-by-case basis means anything. Presumably if the state found the facts in the individual case, they would have to be --

MR. SCHWARTZ: Yes, I agree. I think the interests of the children are paramount throughout the entire AFDC program and any rights that the caretaker-relative might have in relationship to an association with a lodger would have to give way to the welfare of the children.

QUESTION: Well, what could the state do, though? You say they could -- how could they move him out?

MR. SCHWARTZ: I would concede that in that instance any rights of privacy and association that the caretaker-relative has would give way --

QUESTION: Well, I know they would give way but what could the state, as a practical matter, do?

MR. SCHWARTZ: I think in that instance that the state could insist that the lodger leave the home.

QUESTION: Well, I know they insist, they go down and insist but if the person says, sorry, this is my business.

MR. SCHWARTZ: It may ultimately result in a direct proceeding having to be brought against the parent. I mean, this remedy is available.

QUESTION: Is that the ultimate? Is that just about all the state could do? You don't think they could cut the aid off, do you?

MR. SCHWARTZ: I don't think cutting the aid off would solve the problem. If the family is living in overly-crowded quarters in accordance with the examples given by Mr. Justice Rehnquist, it is not going to solve the problem to provide the family with the reduced public assistance allowance.

It seems to me that that is only going to cause further harm to the family. It is not a means of tackling the problem.

Our claim under the --

QUESTION: Well, then, you really go back to what Mr. Justice White suggested, that all they can do is -- the state can do is initiate a proceedings to take the children away from the mother.

MR. SCHWARTZ: Well, as I say, there are steps prior to that drastic step. The possibility of casework services is there. There are intermediate steps.

QUESTION: All to the end of persuading the lodger to get out.

MR. SCHWARTZ: In a case where the children are being hurt, and only then.

QUESTION: And if he doesn't get out, then the

state is left only with the procedure for taking the children from their mother.

MR. SCHWARTZ: I would say in a case where the parent is doing something that is causing harm to the children that a neglect proceeding may well have to be the ultimate remedy.

QUESTION: Do you suggest the state would be enabled to bring an eviction proceeding against the lodger?

MR. SCHWARTZ: Well, the state would have no standing under New York State law to bring an eviction proceedings, only the --

QUESTION: What if these mediation efforts that Mr. Justice White was asking you about failed? What is the ultimate?

MR. SCHWARTZ: Well, as I say, if they failed, the Department of Social Services may well have to bring in the neglect proceeding. It would be brought in New York family court and of course the New York family court has wide discretionary powers.

QUESTION: It would be brought against whom?

MR. SCHWARTZ: It would be brought against the parent, against the caretaker-relative.

QUESTION: And then the State of New York will have to do something about supplying a lawyer for the --?

MR. SCHWARTZ: Well, the Department of Social

Services in New York routinely, unfortunately, in a social sense, has to bring neglect proceedings in New York family court.

QUESTION: Well, do they have to supply an attorney for the lodger, also, to defend his rights?

MR. SCHWARTZ: Well, under state law, there is a statutory right of assigned counsel. I believe it is Section 18(B) of the judiciary law.

QUESTION: Is that lodger party to this?

MR. SCHWARTZ: No, the lodger would not be a party.

QUESTION: Well --

MR. SCHWARTZ: I'm sorry, if the question was whether the lodger had a right to an attorney --

QUESTION: Yes, I should think the lodger --

MR. SCHWARTZ: The lodger would not be a party --

QUESTION: On your definition, the lodger is some sort of a third-party beneficiary here and if his rights are being attacked by someone, he probably would claim the right to counsel, wouldn't he?

MR. SCHWARTZ: Well, I don't believe that the lodger would be a proper party in the neglect proceeding. I don't think he has any interest in the issues relating to the welfare of the child which are the proper subject of the determination between the state and the caretaker-relative as determined by the family court.

I do not believe that the lodger would be a party to that proceeding.

I misunderstood your prior question. The New York law is, under Section 18(b) of the judiciary law and as established by the New York Court of Appeals' decision in Matter of Ella B., there is a constitutional right to assigned counsel that the mother has in a neglect proceeding, not the lodger.

Finally, our equal protection claim boils down to the fact that what the lodger regulations do is to create two classes of equally needy families.

One class consists of families in which all the persons in the home are recipients of public assistance. The second class of families consists of families in which the caretaker-relative has invited a non-legally-responsible person to reside in the home and solely because the caretaker relative has invited a non-legally-responsible person to reside in the home and solely because the caretaker-relative has invited the so-called "lodger" into the home, the second class of families receives a reduced shelter allowance and receives a shelter allowance which is insufficient to meet the actual shelter needs and rental obligations of the family.

Now, we contend that the caretaker-relative's decision or choice to invite the lodger into the home is

constitutionally-protected by the related rights of privacy and association in the home.

These rights have been recognized by such decisions of this Court as Griswold versus Connecticut and Eisenstadt versus Baird, which create a zone of privacy in the home.

The lodger regulations penalize the family and the caretaker-relative for exercising this right by reducing the allowance solely because the caretaker-relative has invited another person to reside in the home.

We submit that the state does not have a compelling interest to justify the infringement of the right to privacy and association that could reasonably accomplish its interest by making case-by-case determinations of whether the lodger has, in fact, made a contribution, whether the family, in fact, has excess space.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schwartz. The case is submitted.

[Whereupon, at 2:32 o'clock p.m., the case was submitted.]