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Notes

OPEN HOUSING MEETS MY OLD KENTUCKY HOME: A STUDY OF OPEN HOUSING WITH SPECIAL ATTENTION TO IMPLICATIONS FOR KENTUCKY

I. INTRODUCTION

Since the Supreme Court's decision in *Brown v. Board of Education*¹ in 1954, the civil rights movement in the United States has precipitated a growing awareness on the part of the general public that we live in an era of immediacy. Minority groups, Negroes in particular,² have attempted to impress upon the governing power structures that "second-class citizenship" will no longer be tolerated. "Freedom now!" is the demand.

The reactions of various governmental units to this contemporary militancy have ranged from total suppression³ to full cooperation and implementation.⁴ The latter has taken shape in both statutory and case law attempting to afford "freedom now" in such areas as public accommodations,⁵ employment,⁶ education,⁷ and voter participation.⁸

Another area, thought by some to be the most important, has become the focal point of the new militancy. This is the area of housing.⁹ Housing is of crucial concern to modern man:

The planning of human shelter was a relatively simple matter in the days of the cave man. Not so today. The complexity of

¹ 347 U.S. 483 (1954).

² Negroes comprise the largest segment of our non-white population, see text at note 38 *infra*, and seem to be the most militant minority group.

³ An excellent example of this may be found in *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁴ The examples of this are numerous as the survey of laws in other jurisdictions will show. See Appendix I & II *infra*. The statutes cited in notes 5-8 *infra* are also examples of governmental cooperation and implementation. In Kentucky, see the Civil Rights Act of 1966, Ky. REV. STAT. ch. 344 (1966) [hereinafter cited as KRS].

⁵ 42 U.S.C. § 2000a (1964).

⁶ 42 U.S.C. §§ 2000e-2-2000e-15 (1964).

⁷ The foremost example of this is *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also, 42 U.S.C. §§ 2000c-2000c-9 (1964).

⁸ 42 U.S.C. § 1971 (1965).

⁹ See RAPKIN & GRIGSBY, *THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS IX* (1960).

our society and the tremendous advances in science, not only permit, but also require, man's shelter to be much more than protection against the elements. It must satisfy his economic, social and psychological needs as well.¹⁰

Many feel that the housing discrimination which exists frustrates the economic, social, and psychological needs of the American Negro. Open housing legislation is viewed as a means of eliminating housing discrimination and its accompanying ills. A dialogue concerning open housing laws exists on a nationwide basis, with one of the primary focal points of this dialogue being the State of Kentucky in general, and the City of Louisville in particular. A brief review of developments in Kentucky and Louisville will help set the stage for a detailed discussion of open housing in Kentucky.

In 1962, the Louisville Human Relations Commission was established to promote improvement of inter-racial relations and the elimination of discriminatory practices; its powers were limited to investigation, conciliation, and the submission of recommendations to the Mayor and the Board of Aldermen.¹¹ In 1963, an ordinance was passed prohibiting racial discrimination in places of public accommodation and providing for fines of up to one hundred dollars for each violation. Three or more convictions shall, if the Commission so finds, constitute a public nuisance. Upon such finding, the Commission refers the matter to the Director of Law who then applies for appropriate injunctive relief.¹² In 1965, an equal employment ordinance was passed, providing fines of up to one hundred dollars for each violation.¹³

Louisville entered the housing field in 1965, when the Board of Aldermen adopted a "Declaration of Principles of Freedom of Choice of Residence." It provided a system for hearing complaints of discrimination in violation of principles set by local professional organizations of builders, real estate dealers, and financiers. The ordinance states in part: "Every family shall have full freedom to establish its home in a neighborhood of its choice, restricted only by a family's financial resources and the

¹⁰ BEYER, HOUSING: A FACTUAL ANALYSIS vii (1958).

¹¹ Ordinance 33, Series 1962, March 28, 1962.

¹² Ordinance 66, Series 1963, May 15, 1963.

¹³ Ordinance 23, Series 1965, February 10, 1965.

availability of such property by a willing seller."¹⁴ It does not provide for either subpoena powers or punitive action of any kind; instead, reliance is placed upon negotiation and persuasion by a seven-member panel.¹⁵

The Louisville-Jefferson County Human Relations Commission and various civil rights groups began a campaign for an ordinance with some "teeth" in 1966. This effort culminated in a Commission-drawn ordinance being submitted to the Board of Aldermen in the early part of 1967. The proposed ordinance prohibited discrimination in the sale or rental of virtually all housing and contained fines from \$100 to \$500 and/or up to thirty days in jail for each violation.¹⁶ Opposition immediately arose over the penalty provisions, and subsequently a revised proposal was submitted which exempted the direct sale of a residence by an individual private owner without the services of a real estate broker or salesman. In addition, enforcement proceedings in Jefferson Circuit Court were substituted for the penalty provisions.¹⁷ After amending the proposal to include changes offered by Mayor Kenneth Schmied, the aldermen defeated the bill by a nine-three vote on April 11.¹⁸ This rebuff touched off marches and demonstrations by open housing backers.¹⁹

On April 14, at the City's request, Jefferson Circuit Judge Marvin J. Sternberg issued a restraining order allowing marches only during daylight hours, exclusive of the rush hours (7-9 A.M. and 4-6 P.M.). The order also limited the number of marchers

¹⁴ Louisville Courier-Journal, March 13, 1966, § E, at 1, col. 3.

¹⁵ *Id.*

¹⁶ Louisville Courier-Journal, February 2, 1967, § A, at 17, col. 1. The proposed ordinance covered the sale, rental, lease or financing of real property. It exempted the rental of housing accommodations in a two-family dwelling if the owner or some of his relatives lived in one of the two apartments and the rental of rooms in one's home. Religious institutions were also exempted from the prohibition against religious discrimination. The Commission could initiate complaints, issue cease and desist orders, and initiate civil action in the circuit court. If the property was sold during the Commission's investigation, the Commission could go to the city or county attorney for initiation of criminal action in police or Quarterly Court. Fines and imprisonment were also provided.

¹⁷ Louisville Courier-Journal, March 2, 1967, § A, at 17, col. 1.

¹⁸ Louisville Courier-Journal, April 12, 1967, § A, at 1, col. 5. In a prepared statement, the majority of the aldermen announced the rejection of the ordinance because of the demonstrations which they felt were planned by outside agitators for the purpose of fomenting widespread disorder. They further stipulated that no further action should be taken "until our community regains its composure and the outsiders have gone home."

¹⁹ *Id.*

to no more than one hundred and fifty and prohibited the demonstrators from interfering with traffic. In addition, the police were to receive written notice at least twelve hours in advance of the time and route of any march, the number of participants, and the names of the organizers.²⁰ Open defiance of the order resulted immediately, and several arrests were made.²¹ Court battles ensued,²² and the slogan of many open housing proponents became

²⁰ Louisville Courier-Journal, April 15, 1967, § A, at 1, col. 1.

²¹ At least fifteen arrests were made the same night that the order was made. Louisville Courier-Journal, April 15, 1967, § A, at 1, col. 1. This was followed by forty-six arrests the next evening. Louisville Courier-Journal, April 16, 1967, § A, at 1, col. 1.

²² Three important contests developed. The first began with a petition filed in federal district court seeking removal of the case involving violation of the order against night marches from Jefferson Circuit Court to the federal district court. The federal judge ruled in favor of the city and returned the case to the circuit court on the grounds that the defendants had failed to show that they were unable to receive fair treatment in the state court. Louisville Courier-Journal, April 20, 1967, § A, at 1, col. 1.

The seeds of the second court battle were sown while the first contest was in federal court. During this time, the Rev. A. D. Williams King and six other open housing leaders were held in contempt of court for violating the order against night marches and were sentenced to thirty-hour jail terms and thirty dollar fines. Jailing of the seven was first postponed to permit them to attend a top-level conference with city officials. They then appealed to the Kentucky Court of Appeals; in a one-sentence denial which contained no reasoning, this court refused to overturn the conviction. Finally, United States District Judge James F. Gordon issued an order restraining Judge Sternberg from carrying out the sentences pending a hearing. Defendants argued that Sternberg violated due process by finding them in contempt during a two-day period when motions were being heard by United States District Judge Henry Brooks. The state court, they argued, had no authority to rule on the case while it was in federal court. However, Judge Gordon refused to take jurisdiction in the complaint, pointing out that the technicality was not of sufficient seriousness to authorize him to interfere with the state court's judgments. With all their legal remedies exhausted, the seven paid their fines and served their sentences.

During this same time, the Rev. A. D. Williams King and eleven others filed suit in federal district court against city and county officials; they alleged that the laws and ordinances under which more than six hundred demonstrators had been arrested were unconstitutional in that they violated the defendants' rights of free speech, assembly, and petition. This complaint also alleged that the ordinance and statutes fail to establish any ascertainable standard of guilt and are susceptible of sweeping and improper application. (The laws involved were parading without a permit, disorderly conduct, loitering, causing a child to become delinquent, conspiracy, and criminal syndicalism.) On May 3, two United States District Judges and one United States Circuit Judge were named to hear the case. On May 10, open housing advocates and city and county officials agreed in court before United States District Judge James F. Gordon to several stop-gap measures until the three-judge federal panel could rule on the constitutionality of the laws. The agreements were as follows: 1) cases of all demonstrators scheduled for trial in police court would be continued until the federal panel made a ruling; 2) the circuit court restraining order was amended to allow marches until 8:30 P.M.; 3) one person would be designated grand marshal of demonstrations but need not participate; 4) demonstrators would be entitled to a parade permit from the city unless a federal court denied a permit; 5) public officials could issue citations, make arrests, admit to bail and/or prosecute all persons believed by them to be in violation of ordinances and statutes, with final

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"No Open Housing, No Derby." The pre-Kentucky Derby Pegasus Parade was cancelled because of the potential disruption,²³ but the race itself was run without interference, some one hundred and forty demonstrators choosing instead to march on downtown Fourth Street for about ninety minutes.²⁴

The pressure by proponents and opponents of open housing has continued with no foreseeable solution.²⁵ If an ordinance is finally passed, additional problems will probably arise. William P. Snyder, President of the Louisville Real Estate Board, has said that local realtors would seek a referendum on any open housing law passed in Louisville.²⁶

The first open housing measure in Kentucky was passed by Bardstown and Nelson County jointly.²⁷ A strong act, it is substantially the same as the first proposed Louisville ordinance in that it covers virtually all housing and contains penalty provisions.²⁸

On June 1, 1967, Covington, the state's third largest city, passed an open housing ordinance by a 3-2 vote of the city commission.²⁹ Although exempting sales by individual home owners,

(Footnote continued from preceding page)

disposition of cases involving the ordinances and statutes in question to be handled in the "normal course of events"; 6) if a dispute arose between the two sides, it would be submitted informally to Judge Gordon.

²³ Louisville Courier-Journal, May 2, 1967, § A, at 1, col. 5.

²⁴ Louisville Courier-Journal, May 7, 1967, § A, at 1, col. 1. However, 1,156 Army and Air National Guardsmen, three times the usual number, and over 100 Kentucky State Policemen were on duty at the Derby. The rest of the 2,500-man security force included city and county police and privately-hired watchmen.

²⁵ There have already been well over six hundred arrests, and the marches are continuing. Louisville Courier-Journal, April 25, 1967, § A, at 1, col. 5.

²⁶ Louisville Courier-Journal, Jan. 20, 1967, § A, at 21, col. 1.

²⁷ Bardstown, Nelson County, Ky., Joint Ordinance and Resolution of the City of Bardstown and the County of Nelson, Kentucky, for the Prevention of Discrimination and Creating a Bardstown-Nelson County Commission on Human Rights and to Prevent Discrimination in Places of Public Accommodation, Resort, or Amusement, Employment or Housing, June 14, 1966.

²⁸ More specifically, it provides for the coverage of virtually all improved and unimproved real estate, brokers, and financing, with the following exemptions: 1) the rental of housing accommodations in a building which contains housing accommodations for not more than two families living independently of each other if the owner or a member of his family resides in one of the housing accommodations; 2) the rental of a portion of a housing accommodation by the occupant of the housing accommodation or by the owner if he or a member of his family resides therein; 3) rental by a religious organization or a charitable or educational institution connected with a religious organization. The Commission can initiate complaints and issue cease and desist orders. If violation continues, the Commission shall either file a complaint for enforcement in the Nelson Circuit Court or certify the case and the entire record to the county attorney for prosecution. The law provides for fines up to \$500 and/or up to thirty days in jail.

²⁹ Louisville Courier-Journal, June 2, 1967, § A, at 1, col. 3.

the measure covers other housing transactions quite thoroughly and provides fines and jail sentences for offenders.³⁰ While they will probably not challenge the legality of the ordinance, local realtors are attempting to influence September's primary in which local offices will again be filled.³¹

In October, 1966, the Lexington Human Rights Commission recommended, to both the city and county governments, an open housing ordinance similar to the defeated Louisville ordinance. In each instance the proposal was killed in committee.³² On January 31, 1967, the Lexington-Fayette County Human Rights Commission was formed and is now working on new proposals for open housing legislation.³³

³⁰ More specifically, virtually all improved and unimproved real estate, financing, and broadly-defined "salesmen" are covered, with the following exemptions: 1) rental of a housing accommodation in a building which contains such accommodations for not more than two families living independently of each other, if the owner or a member of his family resides in one of the housing accommodations; 2) rental of a portion of a housing accommodation by the occupant of the housing accommodation, or by the owner if he or a member of his family resides therein; 3) a religious institution, or a charitable or educational organization operated by a religious institution, if such discrimination is calculated to promote the religious principles for which it is established or maintained; 4) the direct rental or sale of a housing accommodation by the private individual owner himself without assistance of any kind rendered by a salesman. The Commission can initiate complaints and issue cease and desist orders. If any order is disobeyed, the Commission shall either file a complaint for enforcement in the Kenton Circuit Court pursuant to the provisions of Section 704 of the Kentucky Civil Rights Act or certify the case and the entire record of its proceedings to the City or County Attorney for prosecution. Fines between \$100 and \$500 and/or imprisonment for thirty days are provided. In addition, a broker's city occupational license can be suspended for a period of not less than thirty days. Ordinance 0-43-67, June 1, 1967.

³¹ Louisville Courier-Journal, June 21, 1967, § B, at 1, col. 1. Kenton County, which includes the city of Covington, also enacted an open housing ordinance. See Appendix II, No. 17 *infra*.

³² Correspondence with the Lexington-Fayette County Human Rights Commission, May 23, 1967.

³³ Two measures have been drafted and are now in the revision process. One proposal is aimed at the individual property owner in that, although sales by him without assistance of a broker are exempted from coverage, he as owner is subject to the enforcement provisions of the ordinance. The other prohibits discrimination in commercial real estate transactions and limits enforcement proceedings to the broker in such cases.

Both measures exempt rentals on rooms in owner-occupied housing and in a duplex in which one unit is owner-occupied, and also certain property owned, leased, or rented by religious, charitable, and educational institutions and organizations. Likewise, neither provision allows for criminal prosecution; rather, the Lexington-Fayette County Human Rights Commission, which has enforcement powers, may go into circuit court and obtain an order of compliance. If this order is disobeyed, the violator is subject to contempt proceedings. Louisville Courier-Journal, June 28, 1967, § A, at 1, col. 5.

Other than a few peaceful demonstrations led by the Congress for Racial Equality, there has been little public reaction to the proposals. After a meeting

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The only other city to take any step in the housing field is Hopkinsville, where in 1963, a fifteen-member Human Relations Commission was established "to promote and secure mutual understanding and respect among all economic, social, religious, ethnic and racial groups." The Commission is empowered to act as conciliator in racial disputes, to make investigations of complaints, and to submit recommendations for legislation to the Mayor and city council.³⁴

In April, 1967, Hopkinsville Mayor Alfred Naff, on the recommendation of a citizen's advisory committee, appointed a three-member committee to study the need for enactment of an open housing law. On June 22, the local branch of the NAACP and the Progressive Citizens Committee asked the Human Relations Commission to use its influence with real estate dealers, home builders, landlords, lending institutions, and other groups to obtain an open housing policy. However, no city legislative action was requested.³⁵

Thus, Kentucky has witnessed agitation, turmoil, and constructive work by responsible citizens, all stemming from the open housing issue. Obviously, open housing is a crucial issue on the state and local, as well as the national level. The purpose of this article is to explore and consider the origins, extent, and result of discrimination in the sale and rental of housing with emphasis on the applicability of the nationwide picture to the special problems of Kentucky. In conjunction with this, the article will point out various remedies which other governments—federal, state, and local—have utilized. The constitutionality of these remedies in Kentucky will be discussed, and conclusions will be drawn, suggesting action necessary in the Commonwealth.

II. THE HOUSING PROBLEM

Open Housing legislation, by the plain meaning of the term, indicates a concern for minority groups. Other government action,

(Footnote continued from preceding page)

involving Fayette County Judge Joe Johnson, Lexington Mayor Fred Fugazzi, city commissioners, and representatives of the city-county commission, Judge Johnson predicted passage of some open housing measure by both the city and the county. *Louisville Courier-Journal*, June 30, 1967, § A, at 1, col. 2.

³⁴ Ordinance 24-63, July 16, 1963.

³⁵ *Louisville Courier-Journal*, June 23, 1967, § B, at 1, col. 4.

such as urban renewal or low income housing tends to focus on the *economically* deprived, *i.e.*, the purpose of those programs is primarily to improve the living conditions of the poor, whether that poor be white or Negro. The concern is with geographical areas, not ethnic consideration; it is only incidental to these projects if the group happens to be mostly white or mostly black.

In open housing (fair housing, forced housing, or whatever it may be called), the primary legislative goal is the elimination of racial considerations in the housing market. Such legislation commands, in effect, that sellers or renters in the housing market may not refuse to sell or rent to a willing buyer or renter for the sole reason that he is of a particular racial or ethnic origin.

Since only thirteen per cent of the population of the United States is non-white,³⁶ open housing legislation is designed to protect a relatively small portion of the total population. There are housing problems for Puerto Ricans in New York, Nisei in San Francisco, Chinese in both cities, Mexican-Americans in Houston, and Indians in the Southwest, the Dakotas, North Carolina, California, Montana, Wisconsin, and Minnesota.³⁷ However, while thirteen per cent of the country's population in 1960 was non-white, about ninety-two per cent of this group was Negro.³⁸ Therefore any discussion of minority housing problems will primarily refer to those problems vis-a-vis the Negro.

But to reflect on the Negro as a group is still to paint with too broad a brush, because, while open housing concerns Negroes, it would not affect all Negroes. Racial considerations do not deprive all Negroes of better housing. Some Negroes, for example, simply do not favor integration, although it is impossible to say how many or why. There may be an ethnic desire on the part of some Negroes to keep the races separate;³⁹ there may be fear of the consequences of integration;⁴⁰ or there may be a kind of optimism on the part of certain Negroes that

³⁶ U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1966).

³⁷ GLAZER & McENTIRE, STUDIES IN HOUSING AND MINORITY GROUPS (1960); McENTIRE, RESIDENCE AND RACE 12, 46-60 (1960).

³⁸ U.S. DEP'T OF COMMERCE, *supra* note 36, at 24.

³⁹ MEYERSON, TERRETT, & WHEATON, HOUSING, PEOPLE, AND CITIES 75 (1962).

⁴⁰ Lincoln, *The Black Muslims*, in MINORITY PROBLEMS 220 (1965); *see also* McENTIRE, *supra* note 37, at 75.

the next generation will be a little better off; and he will think about making efforts toward that end, but he does not really believe in his own capacity to live as a free equal, unsegregated, undiscriminated—against American who can be proud to be both a Negro and an American. Moreover, although he wishfully believes that the next generation will be better off, he does not devote his attention to preparing an economic base and a historical or cultural image which are the necessary foundations for the freedom of that next generation.⁴¹

This optimistic lassitude also tends to remove these Negroes from the group which would be directly affected by an open housing law.

Another, and possibly even more effective removal of Negroes from the effects of open housing legislation is that caused by economic deprivation. Many Negroes could not move out of their resent housing into more costly quarters if they did so desire. While non-white incomes have increased dramatically in recent years, there are other factors which must be considered. For example, the number of non-white families whose income did *not* appreciably increase has continued to grow, so that there are proportionally more poor families each year. This situation will probably remain true no matter how much larger the Negro middle class becomes. Moreover, the rapid rise of the Negro middle class with increased wealth and income potential has been matched by an even steeper upward trend in non-Negro wealth.⁴² In addition, the comparatively low income level of minority groups, together with relatively unstable employment factors tends to limit their ability to meet the usual credit requirements. In short, non-whites have not improved their position with respect to whites during the period from 1950 to the present. The median earnings of non-white males in 1960 represented only sixty-two per cent of the median white income, and had, in fact, decreased one per cent between 1950 and 1960. Median incomes for Negro females in the same period did increase, but still rep-

⁴¹ Butler, *The Negro Self-Image*, in *MINORITY PROBLEMS* 354, 357 (1965).

⁴² PETTIGREW, *PROFILE OF THE AMERICAN NEGRO* 188-92 (1964); Moynihan, *Employment, Income and the Ordeal of the Negro Family*, in *DAEDALUS* 745, 755 (Fall 1965).

resented only seventy-two per cent of the median earnings of all females.⁴³

Other factors which tend to delimit the group being considered are the educational and employment levels of Negroes. The 1960 census shows only slightly more than half as many Negroes as whites with one year of college education; and over fifty per cent of all urban non-white workers in 1960 were employed as household or other service employees in low paying jobs.⁴⁴ Furthermore, in the past thirty-five years the rate of Negro unemployment has increased to the point that it is now regularly more than twice as great as the rate among whites. In 1957 the ratio of non-white to white unemployment was 2.05. By 1964 the ratio had risen to 2.13.⁴⁵

But who *would* be affected by open housing legislation? As discussed, open housing would affect only a narrowly defined group. The increase in earning power of the Negro population has created a dramatic increase in the size of the Negro middle class. It is these Negroes who are affected by open housing legislation. In particular, then, this discussion refers to members of a minority group, such as Negroes, who have the financial ability to participate in the housing market, but are precluded from doing so solely because they are Negro. One example of such a person is the Negro physician. Any professional man who has spent years educating himself and becoming a respected member of his profession will usually have money and some status. If he wants to build a new home for a growing family, he must have a site. If he lives in Louisville, Kentucky, or in any number of cities, the chances are that his choice will be limited. Such a physician has been reported as having had his choice restricted to the heavily Negro "West End" of Louisville.⁴⁶

One reaction to such an example is to treat it as an isolated, insignificant event. To this there are two responses. The first is that access to housing now is the key to solving other civil rights problems. This physician does not represent all discriminatees in

⁴³ HOUSING & HOME FINANCE AGENCY, *OUR NON-WHITE POPULATION AND ITS HOUSING: THE CHANGES BETWEEN 1950 AND 1960* (1963).

⁴⁴ *Id.*

⁴⁵ Moynihan, *supra* note 42, at 750.

⁴⁶ Louisville Courier-Journal, Sept. 11, 1966, § D, at 1, col. 1.

the housing market. By far, the preponderance of those affected by discrimination are those Negroes seeking to *rent* better housing.⁴⁷ Moreover, it is within the rental market that the owner-renter or agent-renter is most concerned about the economic repercussions of integration.⁴⁸ In either event, sale *or* rental,

Access of the Negro to decent housing is becoming the vortex around which his other rights revolve. Without housing in areas of his choice, the right of his child to an unsegregated school is meaningless; his right to a job will be impaired; his right to move and to secure shelter in a decent neighborhood will be an empty shell.⁴⁹

Significant progress has already been noted in the areas of public accommodations, employment, education, and voting. But there has been little in the housing area.⁵⁰ In sum, it seems fair to say

that lack of housing opportunities lies at the heart of the Negro's other social problems. The discriminatory practices which confine him to the slums of the central city work at the same time to bind him to poor schools and to a generally unhealthy environment.⁵¹

Perhaps an absence of discrimination in housing would not solve all Negro problems and end the need for a civil rights movement. But more than one researcher in the field has concluded that an attack on discrimination itself is as timely in the housing context as is the attack made by urban renewal projects and other housing reform programs. It has been stated that of the three major limitations on Negro participation in the housing market (choice, poverty, and discrimination) discrimination is by far the strongest,⁵² and that

Even though differences in the economic and social qualities of groups play a dynamic role in affecting their housing, a reduction of prejudice and discrimination will by itself be sufficient to improve greatly the housing of non-white groups.⁵³

⁴⁷ See text at note 65 *infra* for an indication of the size of this group.

⁴⁸ See, e.g., a striking illustration of the renter-owner problem in 112 CONG. REC. 21693-94 (daily ed. Sept. 14, 1966).

⁴⁹ Abrams, *The Housing Problem*, in DAEDALUS 64, 72 (Winter 1966).

⁵⁰ McENTIRE, *supra* note 37, at 347; RAPKIN & GRIGSBY, *supra* note 9, at 1.

⁵¹ LORD, EQUAL OPPORTUNITY IN HOUSING 9 (1966).

⁵² Taueber, *Residential Segregation*, in SCIENTIFIC AMERICAN, Aug., 1965.

⁵³ GLAZER & McENTIRE, *supra* note 37, at 9.

Another researcher put it this way:

Certainly the provision of good housing (by slum clearance, urban renewal, building of low income housing, etc.) will not solve all social and personal problems . . . but that attack cannot succeed—indeed it cannot commence—without the obliteration of the discriminatory obstacles which condemn the Negro to certain areas, to substandard housing, and to poverty in general.⁵⁴

The second response to the argument that the Negro professional is an isolated example is a direct refutation: it is not isolated—in fact, the Negro middle class is burgeoning; Negro buying power is increasing; the Negro is becoming a stronger economic force; Negroes could exercise a significant impression on the demand function of the housing market if discrimination were eliminated.

Poverty and low income will probably always be a factor in the Negro housing situation. However, open housing legislation is concerned with those Negroes who *do* have the money. For these people, urban renewal or a mere shifting from an old ghetto into a nice new one is no answer. For them, slum clearance is meaningless unless they can choose their new housing freely. If open housing includes the choice of neighborhood,⁵⁵ the problem for low income or rising-income Negroes is extreme since “racial discrimination limits the housing market *even for upper-income* families of minority origin.”⁵⁶ (Emphasis added.) In addition, the housing market as an economic entity “by and large . . . tends to reinforce all manner of pressures for the involuntary segregation of persons with similar characteristics. These can be lumped under the one word ‘discrimination.’”⁵⁷

It was stated above that access of the Negro to decent housing is the “vortex around which his other rights revolve.” Implicit in this is something more than just the right to buy or rent a dwelling. Implicit is the right to select any environment which he desires and can afford. As a Negro housewife in Boston said:

I don't think that too many people start out by saying ‘I want to move into a white neighborhood.’ They want to move to a

⁵⁴ LORD, *supra* note 51, at 9-10.

⁵⁵ See text at notes 74-75 *infra*.

⁵⁶ MEYERSON, TERRETT, & WHEATON, *supra* note 39, at 66.

⁵⁷ *Id.*

neighborhood that has modern housing, good schools, that has close shopping centers, that has a plot of grass around it; where people don't go through the street and drop paper; they want something clean.⁵⁸

So the inquiry must identify these people, indicate how many there are, and whether their demands can be met. A 1963 study by the United States Housing and Home Finance Agency⁵⁹ found a "spectacular rise" in the incomes of Negroes in urban areas and an increase in demand for middle-income suburban housing. If Negroes in this category (\$7,000-\$10,000) had purchased houses in the \$15,000 bracket in the same ratio as whites did, there would have been demand potential in the amount of some 45,000 housing units in the seventeen areas studied. Why was there no such realization to the economy? Because, "while the study cites a number of related factors inhibiting home ownership among non-whites, it points particularly to racial restrictions, as an important deterrent to the availability of new housing for this group."⁶⁰

In the regions nearest Kentucky, including Cincinnati, Atlanta, Cleveland, Chicago, and St. Louis, the increase in the income of non-white families is remarkable. In Cincinnati, for example, the number of non-whites in the \$5,000-\$9,999 bracket between 1949 and 1959 increased from 115 to 3,849. In the \$6,000 plus bracket, the increase was from 145 to 2,372.⁶¹ In the country as a whole, the percentage of non-white families earning \$6,000 in 1961, 20 per cent, was over five times larger than in 1945.⁶²

This growing economic power is reflected in other figures.

The assets of Negro savings and loan associations, for instance, have multiplied over thirty-two times since 1947, a rate roughly three times that of all savings and loan associations combined. Similarly commercial banks owned and operated by Negroes increased their assets from five million dollars in 1940 to about fifty-three million dollars by 1960, a growth rate over five times larger than that of all commercial banks. And

⁵⁸ MASS. DEP'T OF COMMERCE AND DEVELOPMENT, *THE MIDDLE INCOME NEGRO FACES URBAN RENEWAL* 98 (1964).

⁵⁹ HOUSING AND HOME FINANCE AGENCY, *POTENTIAL HOUSING DEMAND OF NON-WHITE POPULATION IN SELECTED METROPOLITAN AREAS* (1963).

⁶⁰ *Id.*

⁶¹ U.S. BUREAU OF THE CENSUS, *CENSUS OF POPULATION 1950*; U.S. BUREAU OF THE CENSUS, *CENSUS OF POPULATION 1960*.

⁶² PETTIGREW, *supra* note 42, at 181-83.

the fifty-one Negro controlled life insurance companies have doubled their assets since 1951 to a present total of at least 320 million dollars.⁶³

It would seem to follow that more Negro money would be injected into the housing market, and so it has been. The 1950's marked a doubling of the percentage of non-whites residing in census defined "standard housing." And many Negroes became able to afford their housing without taking in boarders and extended family members.⁶⁴ Furthermore, as a result of rising incomes, home ownership participation has increased rapidly among non-whites.

But despite this increase in the purchase of homes by non-white families, only one third of the total number owned their own homes in 1950, as compared with fifty-seven per cent of white families; by 1960 these percentages had changed to two-fifths and two-thirds.⁶⁵ These figures show increased Negro ability to participate in the housing market, but that their gains do not match gains by whites either relatively or absolutely. Furthermore the average value of owned homes is much less for non-whites than for whites.⁶⁶

By and large then, the available statistics tend to show a growing number of middle class Negro families. Clearly this category is still heavily outweighed by low income families (though improvement in this ratio is also shown). Not only are more housing units being demanded by this middle class, but there is also an increasingly effective demand for mortgage financing from this group. Many Negroes have demonstrated financial strength adequate to meet the highest mortgage credit standards, and Veteran's Administration and Federal Housing Administration studies demonstrate that they are sound risks. For example, an analysis of mortgage foreclosures in six metropolitan areas indicated that a lower ratio of foreclosures was necessary with non-white homeowners in the income bracket above \$5,000 than was necessary with whites in the same bracket.⁶⁷ The indication seems to be

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MEYERSON, TERRETT, & WHEATON, *supra* note 39, at 75.

⁶⁶ *Id.*

⁶⁷ U.S. HOUSING AND HOME FINANCE AGENCY, MORTGAGE FORECLOSURES IN SIX METROPOLITAN AREAS 67 (1963).

that the Negroes in the new rising middle class invest and manage their money at least as well as whites and in this particular table—better.

Despite these favorable indications, mortgage bankers in the past have not been influenced in their lending policies and tend to treat all Negroes, high and low income, alike. In part this is because low income Negroes have a worse foreclosure record than whites in low income brackets.⁶⁸ But even though the records indicate that more individual attention should be given individual Negro families, the traditional banker's approach remains. The fact that race in upper income brackets appears to have little or no bearing on foreclosures or delinquencies seems to have been ignored. A special report of a committee of the Mortgage Bankers Association pointed out that these institutions tended to classify Negroes as a "group risk" rather than as individuals.⁶⁹ This seems to be discrimination based on something other than reality. It is, in fact, economic discrimination.

This position is more anomalous, even as a realistic business approach, when juxtaposed with the experience of lenders who do not consider race. The Bowery Savings Bank, one of the largest mortgage lenders in the country and the largest mutual savings bank in the world, has

followed successfully the policy of making loans on mortgages without regard to race, color, creed, or national origin of either the owners or the tenants of the property. Its experience with those mortgages has been just as good as its experience with any other type of loan that it has made. It has millions of dollars of mortgages on properties which are open to occupancy by any person who is qualified economically to pay the rent or pay the price for the housing; and . . . its experience with respect to those loans has been just as favorable as its experience with respect to other loans that it has made.⁷⁰

Such institutions are, fortunately, not the only effective outlet for the increased non-white demand for housing mortgages. Another is a growing Negro-owned and operated mortgage financing

⁶⁸ *Id.*

⁶⁹ Mortgage Bankers Ass'n of America, Committee on Financing Minority Housing, Report to the Board of Directors 11 (1955).

⁷⁰ U.S. Comm'n on Human Rights, New York Hearings, Feb. 2-3, 1959, 31 (1960).

industry which has recognized the Negro demand for such services. In 1921, the National Negro Insurance Association was organized by thirteen companies. In 1962, the Association (now the National Insurance Association) reported assets of over \$343 million with mortgage real estate loans of almost \$94.5 million. Similarly, Negro savings and loan associations have captured a share, small but meaningful, of this strongly competitive industry; from 1940 to 1963, their total assets increased from \$5 billion to \$108 billion. In almost every case the Negro-owned operation came into being because existing institutions were not meeting non-white demand for mortgage funds. By 1963, there were thirty-three such institutions, six in California.⁷¹

The foregoing shows an encouraging picture. However the total housing picture is rather bleak:

The housing available to Negroes is inferior in quality compared to the housing of whites; both the housing and neighborhoods in which he lives show signs of greater deterioration; there are fewer amenities; mortgages are more difficult to obtain; there is little or no private investment in new buildings for Negroes; tax arrears are higher in their neighborhoods and public interest in maintenance is lower; real estate values are lower in relation to net income; over-crowding is more intense; schools, hospitals, and recreation are inferior; and the Negro usually gets less housing per dollar he pays.⁷²

A vital valve is not functioning properly in the life of the modern Negro who is a member of the rising middle class. The valve is held shut by his lack of access to housing. He is richer than ever before, participates more in American life, and is able more fully to realize his capabilities—yet his progress is still years behind the rate at which whites are progressing and he still lives in comparative poverty. He is becoming concentrated in urban ghettos and slums, and the benefits of his wealth remain nearly impossible to manifest in the housing market.

In 1960, forty-four per cent of all units occupied by non-whites were substandard, compared to thirteen per cent for whites. One hundred and fifty-five thousand non-white families had to share single dwelling units with other families. This represents

⁷¹ Pitts, *Mortgage Financing and Race*, in RACE & PROPERTY 109 (1964).

⁷² ABRAMS, THE CITY IS THE FRONTIER 59 (1965).

4.8 per cent of all non-white families. Only 2.1 per cent of white families are forced to live under these conditions.⁷³

Considering the inferior quality of non-white dwellings contrasted with those of whites at every income level—an inferiority not compensated by additional space—it would seem natural that less would be paid for this space. But statistics compiled by the Census Bureau show that non-white renters, with few exceptions, pay nearly as much as whites. These prices are paid for fewer rooms per person, fewer rooms per unit, and for substandard units.⁷⁴ For example, the average non-white renter in St. Louis pays about eighty-three per cent of what the white pays,⁷⁵ but the value of that property, due to its location and relative dilapidation, is much less.⁷⁶ Thus, not only are non-white dwellings more likely to be substandard and overcrowded,⁷⁷ but a higher relative proportion of income is paid by non-whites for these tenements since Negroes get so much less for their rent money.

These characteristics of the housing problems of non-whites are economic effects which are caused, in part at least, by discrimination in jobs, housing, and other areas. But perhaps the most significant and widespread economic effect of housing discrimination is the phenomenon known as "urban decay."⁷⁸ The population of the United States has been classified by the Bureau of the Budget as either inside or outside what it calls Standard Metropolitan Statistical Areas (SMSA). SMSA refers to a county or group of contiguous counties with at least one central city of 50,000 or more. Also, according to the 1960 census definition, "urban" areas are comprised of incorporated cities of 2,500 or more inhabitants and the densely populated urban fringes (suburbs).⁷⁹ A glance at these statistics helps in the understanding of the phenomenon of urban decay. Because our population is so highly mobile it is possible to classify it in terms of its "mobility status";⁸⁰ it is not necessary to point out that many Americans take advantage of their freedom of mobility.

⁷³LORD, *supra* note 51, at 3.

⁷⁴*Id.* at 142. These conclusions are based on U.S. census statistics.

⁷⁵*Id.*

⁷⁶McENTIRE, *supra* note 37, at 135.

⁷⁷*Id.* at 126.

⁷⁸Abrams, *supra* note 49, at 65.

⁷⁹U.S. DEP'T OF COMMERCE, *supra* note 36, at 2.

⁸⁰*Id.* at 3.

In 1900, nine-tenths of all Negroes lived in the South and more than three-fourths in rural areas. By 1950, Negroes had become predominately urban dwellers and only two-thirds lived in the South. Negro migration has been from South to North as well as from rural to urban; and both trends have recently accelerated greatly. From 1940 to 1950 more than three million Negroes moved to cities while rural Negro population declined by almost a million.⁸¹ This migration has been to the central city areas, not into the suburbs, since the pull of the northern and western cities has been job opportunities and relative racial equality.⁸² As the Negroes moved in, the whites moved out into the more expensive suburbs and offered their homes at bargain prices.⁸³ The trend to suburbia for racial and other reasons has continued until today the central cities have become areas of heavy Negro concentration with large, white suburbs surrounding the cities. There has been a significant trend along these lines to the present. From 1950 to 1960, the percentage of the white population which lived in central city areas declined from 31.1 to 30 per cent and increased in urban fringe areas or suburbs from 14.7 to 22.8 per cent. The same figures for Negroes show the reverse. Negro city population increased from 39.2 per cent of the total Negro population to 50.5 per cent, and decreased in the rural areas from 38.3 to 27.6 per cent. Only 6.1 per cent of Negroes lived in urban fringe areas in 1950 and that figure had increased negligibly by 1960 to 8.4.⁸⁴

It is not unnatural, of course, for cities to develop outward, nor is it unusual for minority groups to migrate into the central city. Early immigrants usually went to the cities in great throngs and found living space in the older areas abandoned by those moving to newer districts where the rent was always less. As the immigrants became assimilated and improved their economic position they moved away.⁸⁵ Negroes will undoubtedly, if given the opportunity, do the same. However there are some extra phenomena today which did not exist when most immigrants

⁸¹ U.S. CENSUS OF POPULATION: 1950, VOL. II, Characteristics of the Population, pt. 1, U.S. Summary, Table 34 (1951).

⁸² Gródzins, *The New Shame of the Cities*, in MINORITY PROBLEMS 158, 160 (1965).

⁸³ See Section III. *infra*.

⁸⁴ U.S. DEP'T OF COMMERCE, *supra* note 36, at Table 22.

⁸⁵ McENTIRE, *supra* note 37, at 19.

were white. The first is that not only house-seekers, but commerce and industry are moving to suburban locations.⁸⁶ Obviously this trend encourages urban decay. The second is that although an outward growth of cities is natural, the concentricity of black central areas surrounded by white suburbs is not a natural phenomenon because discrimination exerts an unnatural pressure on the natural outward movement of Negroes.⁸⁷

The consequences are already apparent. Slums spread and since the surrounding areas have no free market for Negro housing, overcrowding results. The remaining city dwellers, both white and non-white, are generally low income groups, among whom racial pressures seem to be most strongly manifested.⁸⁸ Crime rates are higher, and health standards are lower; in short, the culture of poverty continues to spread. And the cost to the taxpayers is great.

The city revenues from Harlem (symbol of Negro ghettos over the country) from sales, city income, real property, and commercial occupancy taxes falls far short of paying for the extra police, fire, health, welfare, and building inspection costs to the city.⁸⁹

The federal government seems to be highly concerned with the urban decay problem. One study being considered by the government to rejuvenate the cities would cost fifty billion dollars.⁹⁰ Donald Hummel of the Department of Housing and Urban Development has expressed concern by warning realtors to "get involved" in revitalizing and governing American cities "before the federal government is forced to widen its areas of operation."⁹¹

The urban decay problem is pressing enough to have the attention of Congress. The Demonstration Cities and Metropolitan Development Act of 1966⁹² offers Congress' findings:

Improving the quality of urban life is the most critical domestic problem facing the United States. The persistence

⁸⁶ Folson, *Outward Expansion of Industry is Changing the Face of Suburbia*, N.Y. Times, Jan. 29, 1957, at 1, Col. 1. See also N.Y. Times, May 21, 1967, at 41, col. 1.

⁸⁷ ABRAMS, *FORBIDDEN NEIGHBORS* 28 (1955).

⁸⁸ Grodzins, *supra* note 82, at 163.

⁸⁹ Lexington (Ky.) Sunday Herald-Leader, Nov. 6, 1966, at 50, col. 1.

⁹⁰ Louisville Courier-Journal, Nov. 27, 1966, § A, at 1, col. 1.

⁹¹ *Id.*

⁹² Pub. L. No. 89-754, 80 Stat. 1255 (1966).

of widespread urban slums and blight, the concentration of persons of low income in older urban areas, and the unmet needs for additional housing and community facilities and services arising from rapid expansion of our urban population have resulted in a marked deterioration in the quality of the environment and the lives of large numbers of our people while the Nation as a whole prospers.⁹³

The purpose of this Act is to

revitalize large slum and blighted areas; to expand housing, job, and income opportunities; to reduce dependence on welfare payments, to improve educational facilities and programs; to combat disease and ill health; to reduce the incidence of crime and delinquency; to enhance recreational and cultural opportunities; to establish better access between home and job; and generally to improve living conditions for the people who live in such areas. . . .⁹⁴

So it would seem that urban decay is a problem that should concern every city with any problems in the areas listed above.

The momentum of this pattern now seems to be self-sustaining unless the Demonstration Cities program and others like it are large enough to be successful in reversing the trend. Left to themselves, these population patterns can have no effect other than to swell the ghettos and further exacerbate the color dichotomy between cities and suburbs. To reverse the trend completely, at least sixty per cent of the Negro city dwellers would, in most cities, have to be relocated into presently white dominated areas.⁹⁵ Merely to allow the natural migration of financially able Negro city dwellers would not reverse the trend but certainly would relieve it. As mentioned above⁹⁶ Negroes in one income bracket alone would have demanded 45,000 units of housing if they could escape the slums, but

while the study indicates a number of related factors inhibiting home ownership among non-whites, it points particularly to racial restrictions as an important deterrent to the availability of new housing in this group.⁹⁷

However, there appears to be no reversal of this trend, and each

⁹³ *Id.* See 11 U.S. CODE CONG. & AD. NEWS 4723 (Nov. 20, 1966).

⁹⁴ *Id.*

⁹⁵ Taueber, *supra* note 52.

⁹⁶ HOUSING AND HOME FINANCE AGENCY, *supra* note 59.

⁹⁷ *Id.*

year the ghettos continue to expand.⁹⁸ There are various reasons for this continued expansion; some Negroes would, in any event, choose to remain there with people they know and understand; but the line between voluntary and involuntary ghetto-like concentration is difficult to follow. "By and large, the market tends to reinforce all manner of pressures for the involuntary segregation of persons with similar characteristics. These can be lumped under the one word 'discrimination.'"⁹⁹

This, then, is where open housing laws enter the picture. There is great pressure from financially able Negroes to buy or rent houses outside the ghettos, in clean areas, near good schools, where they can enjoy their increased income. But whites, from their position of numerical and economic superiority, have kept them in the ghettos. The main reactionary force is discrimination.

It is not totally wrong to say that there are as many reasons for discrimination as there are persons who discriminate. But there are two main headings under which it is helpful to examine prejudice. One is psychological: the focus on individual prejudice. The other is economic, or the overall functions and effects of the prejudices of one race against another as they affect society. The core idea here is that if it were more widely known that prejudice is perhaps as injurious—in terms of dollars and cents—to discriminators as to discriminatees,¹⁰⁰ and to the entire social entity, more action would be taken to eliminate it. Economics has already been mentioned in regard to discrimination as a deterrent to a more active Negro demand for housing. This demand is to *spend money* on housing—not necessarily to integrate for integration's sake. This prospective demand is irrevocably lost to the economy.

Since World War II, the National Association of Home Builders has come to recognize that substantial markets for new homes are being ignored by the industry and that profit-

⁹⁸ Grier & Grier, *Equality & Beyond: Housing Segregation in the Great Society*, in *DAEDALUS* 77, 87 (Winter 1966).

⁹⁹ MEYERSON, TERRETT, & WHEATON, *HOUSING, PEOPLE, AND CITIES* 75 (1962).

¹⁰⁰ The terms "discriminator" and "discriminatee" may seem amusingly "legal," but they are used commonly in the civil rights literature.

able opportunities for additional business may be lost. Some of the country's largest mortgage lenders are recognizing that they are less competitive with other classes of savings and mortgage-lending institutions solely because of their discriminatory policies.¹⁰¹

This would appear to be an anomalous situation in a capitalistic society, but in the overall view it makes sense. It is rather universally accepted that there is an inverse relationship between property values and the presence of Negroes,¹⁰² *i.e.*, that Negro influx into a neighborhood automatically means: 1) values go down, 2) enough Negroes follow the leaders to turn the entire neighborhood into a Negro enclave, and 3) contamination, dilapidation, and filth naturally result.¹⁰³ A detailed discussion of these and other beliefs as they relate to discrimination by individuals follows in section IV; here, the focal point is the economic rationale, which quite apart from racial ill-will, tends to provide a fertile ground in which discrimination can flourish, with all its coeval inequities. It can flourish because anyone who accepts these postulates will discriminate against Negroes in order to protect his economic interests; that is, for economic reasons, and not because he is racially intolerant.

A detailed scientific study, by Nathan Glazer and Davis McEntire in conjunction with a widespread study by the Commission on Race and Housing, reached the conclusion that

Prejudice in its pure form—that is to say, as unreasoning and inflexible antipathy—rarely plays a decisive role in the determination of the housing of minority groups . . . [E] very action of discrimination—and there is discriminatory behavior by builders, renters, lenders, government, and other groups—is based on economic factors in the situation somewhat independent of prejudice. . . .¹⁰⁴

Another conclusion made by the same study group is “that a rise in the economic capacity [of a minority group] is an extremely

¹⁰¹ MEYERSON, TERRETT, & WHEATON, *supra* note 99, at 77.

¹⁰² See Section III. *infra*.

¹⁰³ Palmore & Howe, *Residential Integration and Property Values*, in SOCIAL PROBLEMS (Summer 1962); See also, LAURENTI, PROPERTY VALUES AND RACE (1960).

¹⁰⁴ GLAZER & MCENTIRE, STUDIES IN HOUSING AND MINORITY GROUPS 4 (1960).

powerful force in improving its housing, even though it may have little effect on the degree of segregation and on prejudice against it."¹⁰⁵

If these two conclusions are considered together, it can be postulated that economic factors are not only present but are an important key to problems of discrimination in housing; and that if anyone does discriminate to protect an investment, a demonstration that there is no natural relationship between race and property values may serve to reduce housing discrimination.¹⁰⁶

One area in which economic considerations can cause some housing discrimination is in the mortgage lending aspect.¹⁰⁷ In addition to property location and other considerations applicable to all borrowers, there are some additional considerations where minorities are concerned; the most important of these factors is whether the property securing a loan to a Negro is within "an established Negro neighborhood."¹⁰⁸ The reason given is not that there is prejudice or discrimination but that good business (economics) demands it. There are two reasons for lending to Negroes only for property in good quality Negro neighborhoods.

One is the desire to protect property values [and hence investments] in white neighborhoods against the believed destructive effect of non-white entry. The other is to preserve good relations with the white people of a neighborhood and avoid being blamed for placing a non-white family in their midst. Part of the good relations to be preserved is with other members of the financial and real estate business community who may be devoted to keeping non-white out of white neighborhoods.¹⁰⁹

Thus, public relations (economics) is also a motivation for lending policy which restricts Negro housing freedom.

Similar motivations are presented by some realtors, who claim they discriminate not for racial but for economic reasons. The claim has been that realtors are merely agents for a home owner who has a property right to choose the person to whom he sells.¹¹⁰

¹⁰⁵ *Id.* at 5.

¹⁰⁶ See Section II. *infra*.

¹⁰⁷ McENTIRE, RESIDENCE AND RACE 218-38 (1960).

¹⁰⁸ *Id.* at 224.

¹⁰⁹ *Id.*

¹¹⁰ Whether such a right exists is discussed in Section VI. *infra*.

The National Association of Real Estate Boards (NAREB) issued a policy statement on minority housing. Statement number one reads:

Being agents, realtors individually and collectively in performing their agency functions, have no right or responsibility to determine the racial, creedal, or ethnic composition of any area or neighborhood or any part thereof.¹¹¹

So despite the fact that NAREB is the most outspoken single opponent of "forced" housing,¹¹² this opposition is based on economics. The reasons revolve around an agency responsibility to a principal, and the theme that they are powerless; and that realtors like everyone else have to "make a buck," but if they sell to Negroes they will be professionally ostracized.

One youthful salesman was courteous and cooperative [when faced with a Negro home buyer] but said he would have to check with the reality [sic—an interesting misprint] association. He gave the Negro his card and invited him to return. When the Negro returned, the young salesman evidently had learned for he said, "I am in sympathy with the colored people, but selling to a Negro would be tantamount to putting myself out of business as well as ostracizing me from other brokers and residents in this area . . . I don't have the courage to sell to a Negro."¹¹³

The causes of discrimination are usually based on prejudice and the kinds of prejudice, as just discussed, may be primarily economic. Now it is necessary to look at some effects of discrimination. Urban decay, which is probably the most obvious effect, and the artificial oppression of the Negro housing demand, have already been discussed. Another inimical effect of housing discrimination is that it forms the base for other forms of discrimination. This effect is graphically pointed out in a study by Leo Kuper which compares South African apartheid policy with housing segregation in the United States.¹¹⁴ In both places,

¹¹¹ Policy statement adopted by the National Association of Real Estate Boards [hereinafter referred to as NAREB].

¹¹² "Forced Housing" is NAREB's term of art, chosen as a semantic riposte to the terms "open" and "fair" housing. For practical matters the terms are synonymous.

¹¹³ McENTIRE, *supra* note 107, at 239.

¹¹⁴ Kuper, *Sociological Aspects of Housing Discrimination*, in RACE AND PROPERTY 122 (1964).

Kuper finds, where a minority is physically isolated, isolation in other areas such as in schools, hospitals, libraries, and other facilities follows. The net effect is a system of total de facto segregation with the resultant superior-inferior racial feelings.

Not only does discrimination (prejudice) lead to segregation, but the equation is reversible, *i.e.*, segregation creates more discrimination (prejudice). Deutsch and Collins pointed out the latter half of the equation in a study of integrated housing which showed that contact between the races promoted interracial association and mutual respect.¹¹⁵ The inference drawn from this study, a follow-up project,¹¹⁶ and other empirical investigations,¹¹⁷ supports the thesis that proximity of groups which are mutually antagonistic tends to reduce prejudice and racial discrimination. Another effect of discrimination is that many of the human resources of minority groups are lost to a segregated society. It can hardly be gainsaid that the prime waster of such resources is hard core poverty.

The reasons for poverty are presumably the same for Negroes as for low income whites—poverty breeds poverty. But for minorities there are additional factors which tend to make poverty an even more inexorably oppressive force. For example, population growth seems to be concentrated among the poor; and since, proportionately, there are more poor non-whites than whites, non-white families size increases while white family size changes little. Between 1950 and 1960 the non-white population grew at a rate of 2.4 per cent per year while white population grew at the rate of 1.7 per cent. The significance of these figures is accentuated by statistics which indicate that, as of 1960, non-white mothers, aged thirty-five to thirty-nine, with family incomes over \$10,000 had 2.9 children; those with incomes less than \$2,000 had 5.3. Even more striking is that Negro families in higher income brackets have *fewer* children than their white counterparts.¹¹⁸ Another factor which tends to generate poverty among non-whites is that a Negro family is more likely to be broken up

¹¹⁵ DEUTSCH & COLLINS, *INTERRACIAL HOUSING* (1951).

¹¹⁶ WILNER, WALKLEY, & COOK, *HUMAN RELATIONS IN INTERRACIAL HOUSING* (1955).

¹¹⁷ See, *e.g.*, Swados, *When Black and White Live Together*, N.Y. Times, Nov. 13, 1966, (Magazine), at 47.

¹¹⁸ *Id.* at 758.

by the strain of unemployment and marginal income. In 1960, fully one quarter of the four-child families among non-whites were headed by women separated from their husbands. As poverty is the cause, so poverty is the result.¹¹⁹

Thus, this "culture of poverty"¹²⁰ is self-propagating, so that

despite the current civil rights efforts, there are little prospects that all the differences between whites and Negroes in terms of their regional and residential patterns, their backgrounds, and in the way employers, unions, and others in the labor market treat them will soon be erased. There are, therefore, little prospects that we will soon see substantial equality in the education, skills, and opportunities of the new groups of young people of the two races.¹²¹

The Negro has a far heavier burden to shoulder in order to escape the culture of poverty than does the white. The white is not subject to racial discrimination. This human loss is, of course, both sociological and economic; but there *are* economic implications to the extent that a society needs the full economic cooperation of all its members to attain optimum economic effectiveness. If any portion of the economy cannot contribute, the remaining portions must do the extra work, and pay the extra price.¹²²

The last consequence of segregation and housing discrimination to be mentioned is wholly economic. The economy suffers from the loss of non-white participation in the housing market. This is a price paid by society for its discriminatory practices. Another such cost is the loss of potential industrial development to a community without open housing legislation. When a company is interested in a location, it may be that either certain key personnel are non-white or that the industry follows non-discriminatory employment policies.¹²³ In either event, it would be likely that Negro white collar workers are employed or employable, since this is a growing group.

[W]hite collar work was not an important field for Negro employment for many decades, but recently this has changed.

¹¹⁹ *Id.* at 767.

¹²⁰ LEWIS, *LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY—SAN JUAN AND NEW YORK* (1966).

¹²¹ HIESTAND, *ECONOMIC GROWTH AND EMPLOYMENT OPPORTUNITIES FOR MINORITIES* 57 (1964).

¹²² See text at note 111 *supra*.

¹²³ As is required by federal and some state laws. See, e.g., KRS § 344.040 (1966).

Only 3 per cent of Negro workers were engaged in white collar occupations in 1910, 6 per cent in 1940 and 15 per cent in 1960. White collar jobs have been as important as manual and service work as growing areas of Negro employment.¹²⁴

Furthermore:

The expansion of the Negro middle class has been most marked by accretion of persons in professional, technical, clerical and sales occupations. This expansion by approximately 300,000 persons since 1940 has been influenced in part by government policy which prohibits those business firms holding contracts with the federal government from discriminating against workers on the basis of race, religion, creed, or national origin. In engineering, architecture, and the natural sciences . . . the increases among Negroes, though small in absolute numbers, have been rather dramatic. Between 1950 and 1960, there was a three-fold increase in Negro engineers. The number of Negro architects increased by 72 per cent . . . physicians increased by 14 per cent, dentists by 31 per cent, and lawyers by 43 per cent . . . [But] it is not only the increase in number of these professionals which deserves attention; the improved opportunities for advanced training and learning experiences are also of importance.¹²⁵

Since such people will be valuable employees, an industry would consider not only the normal site requirements but also the housing situation and the area's attitudes toward segregation.¹²⁶ Thus it is conceivable that an unfavorable attitude toward equal housing which would affect employment policies or employees of an industry might cost a community a plant and a tremendous increment to the area's economy.¹²⁷

The same possibility of lost income exists where an installation is to be located by the Federal Government or where federal funds are at stake. It is difficult, as in the case of industry, to say just how much weight is given to housing implications, but that they *are* considered seems certain. The recent furor over the location of the atom smashing plant provides an illustration. Kentucky was considered for this plant and several proposals were presented regarding various possible sites. After some delay,

¹²⁴ HESTAND, *supra* note 121, at 43.

¹²⁵ Edwards, *Community and Class Realities*, in DAEDALUS 14 (Winter 1966).

¹²⁶ A list of usual considerations appear in Stuckeman, *A Community-Industry Marriage. Will It Last?*, in AREA DEVELOPMENT 6 (Feb., 1967).

¹²⁷ *Id.*

a small Illinois town was selected. Weston, Illinois, had no open housing law prior to the selection, but passed one shortly thereafter.¹²⁸ While the selection of a site is "final," Congress has not yet appropriated the funds, and may not. Civil rights advocates are taking advantage of this situation to bring attention to the lack of open housing laws in the surrounding counties and in Illinois as a whole.¹²⁹ It will be an indication of just how much consideration is given the racial picture of a prospective facility location as the denouement progresses in Weston and in Congress. It can be said, though, that the federal government will be increasingly concerned with the racial balance of a community and with its attitudes toward civil rights. The Department of Health, Education and Welfare is now conducting "anti-bias" surveys in certain areas to determine whether public agencies are administering federally supported programs with an absence of racial consideration.¹³⁰ Furthermore, the Johnson Administration has stated that discrimination in either employment or housing will not be tolerated where the Demonstration Cities program is concerned.¹³¹ This policy position apparently has to be considered if Louisville's Demonstration Cities proposal is to be successful.

III. INDIVIDUAL DISCRIMINATION: MYTHS AND REALITY

Section II discussed the economic causes and effects of housing discrimination as they relate to society. Here, the inquiry will focus on those beliefs which underlie housing discrimination and have been called, after analysis, "myths."

These "myths" are as follows: (1) the belief that the entry of a Negro into a neighborhood will cause property values to decline; (2) the belief that social status is damaged by having a Negro neighbor; (3) the belief that the Negro is inherently

¹²⁸ N.Y. Times, March 5, 1967, § 1, at 58, col. 1.

¹²⁹ *Id.* See also 112 Cong. Rec. 21694 (daily ed. Sept. 14, 1966). In a letter to the Illinois Department of Business and Economic Development, Glenn T. Seaborg indicated clearly that the racial picture in Illinois was being "evaluated." On April 25, Seaborg was more specific. He is reported as having said that *unless* Illinois passes an open housing law, Congress may not even approve initial design funds for the smasher. Louisville Courier-Journal, April 28, 1967, § A, at 4, col. 1.

¹³⁰ Louisville Courier-Journal, Jan. 28, 1967, § B, at 1, col. 4.

¹³¹ Louisville Courier-Journal, March 19, 1967, § A, at 1, col. 1.

unkempt and will fail to maintain his property; (4) the belief that one Negro will be followed by a heavy influx of Negroes into the area; and (5) the belief that one's white neighbors will soon leave the neighborhood after Negro entry is made.

The American philosopher William James once wrote that "our judgments . . . change the course of future reality by the acts to which they lead."¹³² The statement is appropriate in the context of the present discussion and is especially meaningful when the word "myths" is inserted in place of "our judgments." For example, if one white family in an area where a Negro has moved feels that all its neighbors will soon move, its decision to move is made on this assumption. Each family does the same, until, in fact, the white residents have all moved. The original belief is made "true" by the action to which it has led; it has been confirmed by future reality. An opposite attitude, a belief that one's neighbors will not move with the coming of the Negro, and a concerted effort on the part of the people of the neighborhood to maintain its present character, can have an opposite result, and the "truth" of white withdrawal is dispelled.

The declining property value argument is often an excellent example of the judgment-influences-reality syndrome. If the view in a neighborhood is that Negro entry will depress property values, then an area where such entry is made may see the white homeowners, attempting to avert the mythically inevitable price depression, put their homes on the market *en masse*. The result is a glut of homes on the market, an excess of supply over demand, and, as was predicted and believed, a decline in the price which the property will bring. This panic selling has been characterized elsewhere as "the self-fulfilling prophecy."¹³³

The result of this cycle of belief-plus-result-equals-reinforcement-of-original-belief is that attitudes are crystallized in the mind of the individual, the character and effects of prejudice are indurated, and both are much more difficult to eradicate. With this in mind studies have been made to see if the beliefs did have a basis in fact or were, as many supposed them to be, "myths."

¹³² JAMES, PRAGMATISM AND FOUR ESSAYS FROM THE MEANINGS OF TRUTH 252 (1963).

¹³³ See LAURENTI, *supra* note 103, at 25.

Should they be in fact exposed as myths, the feeling was that much of the opposition to open housing, or at least the rationalization therefore, would vanish.

The analysis of the property value argument is, perhaps, the most important of these beliefs, because, the belief that property values do decline influences the other beliefs and reactions to them. It has been said that:

No other reason . . . is more frequently and strongly urged in support of racially separate residence patterns than that non-whites depress property values. This is a widespread belief and one of crucial importance because it governs, or at least rationalizes many practices of real estate brokers, builders and financial institutions—as well as the actions of homeowners.¹³⁴

Perhaps the most extensive and comprehensive of the studies made of the effect of race on property value was that conducted by Luigi Laurenti in San Francisco, Oakland, and Philadelphia. The study was sponsored by the Commission on Race and Housing, an independent private citizen's group. Laurenti employed the following methodology.¹³⁵ He selected "test" areas into which Negroes had moved, and, for comparison, he selected "control" areas which had remained all-white. The "control" areas resembled the "test" areas in all significant respects: "age, type, and market value of houses, topography, location, land use pattern, income and occupational class of the residents and the character of neighborhood development."¹³⁶ By doing this, it was possible to isolate the factor of race and evaluate what effect the entry of minorities had on the market price in the integrated area as compared with the similar all-white area. This was done by a comprehensive analysis of the real estate transactions in both areas over periods of up to fifteen years. "Approximately ten thousand sales prices were collected, representing about half of all transactions in the San Francisco-Oakland areas and total sales in the Philadelphia area."¹³⁷

From the results of Laurenti's analysis of thirty-four comparisons between "test" and "control" areas, he concluded that "no

¹³⁴ *Id.* at 5.

¹³⁵ *Id.* at 28-46.

¹³⁶ McENTIRE, *supra* note 107, at 161.

¹³⁷ *Id.* at 162.

single or uniform pattern of non-white influence on property prices could be detected,"¹³⁸ and that "the entry of non-whites into previously all white neighborhoods was much more often associated with price improvement or stability than with price weakening."¹³⁹

The following table gives the results of the study.¹⁴⁰

Test Areas by Per Cent of Popula- tion Non-White, 1955	Paired Comparisons of Price Movements			
	Total	No Significant Differences	Test Area Higher	Control Area Higher
30-75 Per Cent				
8 Areas	16	10	5	1
14-28 Per Cent				
6 Areas	9	3	4	2
6- 7 Per Cent				
3 Areas	5	—	4	1
3 Per Cent or Less				
3 Areas	4	1	2	1

The study recognized ten factors which, after Negro entry, could affect the market price of homes in the newly integrated neighborhood. These are:

- (1) The strength of whites desire to move out; (2) the strength of non-whites desire to move in; (3) willingness of whites to purchase property in racially mixed areas; (4) housing choices open to non-whites; (5) absolute and relative purchasing power of non-whites; (6) absolute and relative levels of house prices; (7) state of general business conditions; (8) long run trend of values in areas involved; (9) time.¹⁴¹

As an example of the interaction of these factors, Laurenti gives two extremes: the glutted market and the market where houses are in short supply.¹⁴² If there is a plentiful supply of houses to which whites can move, and they look upon the coming of the

¹³⁸ LAURENTI, *supra* note 103, at 47.

¹³⁹ *Id.*

¹⁴⁰ McENTIRE, *supra* note 107, at 163.

¹⁴¹ LAURENTI, *supra* note 103, at 47-8.

¹⁴² *Id.* at 48-9.

Negro as a catastrophe and simultaneously put their homes on the market, there is a glut of houses for which the Negro demand is not able to compensate. The price falls. On the other hand, if there is a short supply of houses available and the white residents of the area are not intimidated, the great demand of Negroes for houses, due to the tight market, will force prices upward. The typical situation suggests a "balance of forces" where Negro demand offsets the white exodus, keeping prices at a relatively stable level.¹⁴³

Laurenti points out that in his study "the sellers were white and most of the buyers were non-white," and that "the study findings signify . . . that in the time period and the areas covered, non-whites were generally able to enter each local market fast enough to avoid the creation of a relative price slump."¹⁴⁴ A similar study in the Chicago area found that "the white market in such areas diminishes almost to the vanishing point."¹⁴⁵ The researcher here concluded that "as long as Negro housing demand continues, property values will not decline because of a Negro influx" but that "should Negro demand abate, the price structure in such areas might weaken."¹⁴⁶

The important question in relation to the weakening of Negro demand, which will inevitably occur as more and more areas become open to Negro occupancy, is whether the virtually non-existent white demand will exhibit an inverse increment. Studies have shown that "resistance of white people to buying or renting in racially mixed neighborhoods is greatly reduced when the non-white group is not numerous and is not perceived as likely to become the numerically dominant element. . . ."¹⁴⁷ From a study on demand in racially mixed areas comes the following comment:

Our data appear to support the view that as the proportion of Negroes in a mixed area increases, the percentage of white families who will consider the area as a place of residence declines. For many white families, doubts and apprehensions regarding status, quality of schools, property values, personal

¹⁴³ *Id.* at 49.

¹⁴⁴ *Id.* at 57-8.

¹⁴⁵ AVINS, OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT: SYMPOSIUM 284 (1963).

¹⁴⁶ *Id.* at 285.

¹⁴⁷ LAURENTI, *supra* note 103, at 57.

safety, and social contact are all tied to the actual or anticipated number of Negroes in the neighborhood.¹⁴⁸

It has been suggested that

to the extent that racial exclusion lessens, the number of neighborhoods containing small numbers of non-whites will be multiplied. Opportunities to escape living near non-whites by choosing exclusive neighborhoods will become fewer, and as the process continues, race should gradually lose its importance as a consideration in the housing market.¹⁴⁹

This latter statement is especially important in a discussion of open housing laws. If they were in effect, the conditions under which the Laurenti study was conducted would, theoretically, not be present. The typical housing situation in the absence of such laws is one in which the confinement of Negroes to a limited area causes the pressure of demand to rise until a new neighborhood is "broken." The pressure is relieved as home hungry Negroes spill over into the new neighborhood. As the Negroes move in the whites, fearing the Negroes will soon dominate the area, exit and the transition of the neighborhood is soon forthcoming. Conceivably under open housing laws this will not occur since the Negro demand will be satiated throughout all sections of the community. Moreover, whites will not be so anxious to move with only a few Negroes in the neighborhood and the exclusive areas to which they could move would be fewer. Thus, the transition of neighborhoods should become much more infrequent.

Another prime consideration of the white which underlies his opposition to Negro entry is status—that intangible yardstick which measures a person's station in society. The status of an American, the esteem in which he is held by others and by himself, is a composite of a myriad of factors—education, wealth, and job position, to name a few. The neighborhood in which a person lives and the quality of his dwelling have much to do with determining his status. Indeed, with the burgeoning of the suburbs in the postwar period, one's house and neighborhood have taken on an even greater role in establishing his "place" in the social spectrum.¹⁵⁰

¹⁴⁸ RAPIKIN & GRIGSBY, *THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS* 55-6 (1960).

¹⁴⁹ LAURENTI, *supra* note 103, at 57.

¹⁵⁰ PACKARD, *THE STATUS SEEKERS* 77-9 (1961).

Unfortunately, racial considerations often enter into evaluations of status, particularly in the residential field. While an individual might work side by side with a Negro, the presence of the same Negro in his neighborhood is often seen as a calamity.¹⁵¹ In such a situation, the individual feels that he will be regarded by his friends and associates as having lost ground in the status race. Indeed, one study on white attitudes toward interracial housing revealed that status in the eyes of others was a paramount reason for opposing integrated neighborhoods, even though those responding did not feel this was justified.¹⁵² It is, then, the fear of the opinions of others which determines opposition based on status. It has been said in regard to the problem of housing and race that "the individual concerned is less free than in many other areas of life to make decisions according to whatever personal feelings he may have. His choices are shaped and limited by pressures that converge on him from family and friends and neighbors, other associates, and the whole community."¹⁵³

The belief in status loss after Negro entry seems to be the product of a stereotyped view of the Negro. The individual Negro is judged, not in his capacity as an eminent doctor or professor, but rather as a member of a traditionally lower class group. This "association between non-white race or color and low status is profound and widespread."¹⁵⁴ Actually, when based on criteria other than race, the Negro newcomer to white neighborhoods is frequently higher on the status totem pole than his new neighbors. An unpublished study, which was cited by Laurenti, took into consideration the "occupations, educational attainment, and family income of white and Negroes"¹⁵⁵ in the neighborhoods entered by non-whites. The researcher found "the income Negro group superior to whites in all these respects indicative of socio-economic status."¹⁵⁶ It has been suggested that whites fear that the entry of one Negro into an all-white area, even though his social and economic status is fully commensurate with that of his

¹⁵¹ ABRAMS, *FORBIDDEN NEIGHBORS* (1955).

¹⁵² ROSE, *Inconsistencies in Attitude Toward Negro Housing*, in *MINORITY HOUSING* 387 (1965).

¹⁵³ MCENTIRE, *supra* note 107, at 86.

¹⁵⁴ *Id.* at 87.

¹⁵⁵ LAURENTI, *PROPERTY VALUES AND RACE* 204 (1960).

¹⁵⁶ *Id.*

neighbors, will be a prelude to the eventual entry of lower class Negroes.

White residents of middle class neighborhoods are paying for certain values that residents of lower class areas do not possess. . . . The values of a middle class include such things as quiet, protection from violence, cleanliness, and good schools—none of which exist in the slums. . . . These values are generally seen as threatened by the entrance of any lower class group.¹⁵⁷

This fear of lower class entry, however unfounded it may be, is present whenever a Negro moves into a previously all white area. One writer has postulated that the decline of anti-Japanese prejudice has resulted from the fact that most Japanese-Americans today are middle class.¹⁵⁸ Because of stringent immigration laws, there is little likelihood that undesirable Japanese will follow in the wake of Nisei entry into a white neighborhood. The portrait of the Japanese has taken on the hue of the acceptable middle class. Negroes, on the other hand, despite their improving social posture, retain the lower class stereotype because of the constant migration to the cities. Therefore, white residents see the possibility of an imminent deluge of lower class, "undesirable" Negroes.

Actually this fear on the part of whites is irrational. The laws of the market would exclude lower class Negroes from more desirable neighborhoods in the same way they exclude lower class whites. Only those who are financially able and can meet mortgage requirements could move into middle class neighborhoods. Thus, the elimination of the factor of race in the housing market would stabilize status in the neighborhoods, with middle class whites and middle class Negroes sharing common areas.

The stereotype view of the Negro has also bred the myth that the property of Negroes is invariably unkempt. The Negro is pictured as living in squalor, in rundown and dilapidated housing, with garbage in the gutter and rats in the halls. Informed sources speculated that

it is quite probable that much of the white held belief about substandard maintenance by non whites stems from over-

¹⁵⁷ GLAZER & McENTIRE, *STUDIES IN HOUSING AND MINORITY GROUPS* 7 (1960).

¹⁵⁸ *Id.*

crowded slum areas, where non whites are predominately tenants and where most landlords spend little, if anything to maintain the appearance of property in which their only interest is the derivation of income.¹⁵⁹

In fact, studies have shown that Negroes, when given the chance of home ownership and of living in a decent neighborhood, maintain their homes as well as whites.

Statistics accumulated by the United States Housing Authority and the Federal Housing Authority show that Negroes and whites of comparable incomes have practically identical records of property maintenance and payment, regardless of whether they live in mixed or segregated neighborhoods. In fact, these statistics show that Negroes have a slightly better record in this respect than whites.¹⁶⁰

Laurenti also found that "non-whites were maintaining their property at least as well as white owners."¹⁶¹ Another researcher found that in his study area "a higher percentage of Negro homeowners had made and were making repairs than were white homeowners of comparable properties."¹⁶²

Several reasons have been proffered as to why Negro maintenance should equal and in many cases surpass that of whites. Of course there is the usual pride in ownership and the desire to keep one's home in good condition. But in addition to this, there is apparently a feeling of "race pride" on the part of many Negro homeowners and an attempt to live down the reputation gained from decades in the slums.¹⁶³ One Negro homeowner interviewed remarked that "good maintenance helps Negroes in general to find better housing."¹⁶⁴ In any event, the evidence would seem to demand the conclusion that the belief of Negro slovenliness as a racial characteristic is without foundation.

IV. THE HOUSING PROBLEM IN KENTUCKY

As has been delineated earlier, open housing relates peculiarly to the cities and is meant to affect the relatively small number of

¹⁵⁹ LAURENTI, *supra* note 155, at 236.

¹⁶⁰ LAURENTI, *supra* note 155, at 233. Laurenti takes the quote from NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL, EQUALITY OF OPPORTUNITY IN HOUSING, A HANDBOOK OF FACTS (1952).

¹⁶¹ LAURENTI, *supra* note 155, at 56.

¹⁶² *Id.* at 233.

¹⁶³ *Id.* at 235.

¹⁶⁴ *Id.*

minority group members who can afford to buy or rent better living quarters, but are prevented by discrimination from doing so. The Kentucky situation, then, must be examined in light of the character of the state's minority population, their living conditions, and their ability to escape these conditions should racially restrictive barriers be lowered. From this examination it should be possible to draw conclusions on the need for, and the possible effects of, open housing laws.

A. Characteristics of Kentucky's Minority Population

The 1960 Census of Population¹⁶⁵ showed that the Negro population of Kentucky was 215,949, or 7.1 per cent of the overall population.¹⁶⁶ Kentucky's Negro to white ratio is lower than that of most nearby states except Indiana.¹⁶⁷ The rate of Negro population growth within the Commonwealth has also been much smaller than that of the contiguous states.¹⁶⁸

As would be expected, the largest concentration of Negroes within the Commonwealth is within the two largest metropolitan areas, Louisville and Lexington. It is interesting, and perhaps surprising, that there are large sections of the state in which the presence of Negroes is negligible.¹⁶⁹ Eastern Kentucky is the best example. In this forty county area there are fewer than two Negroes for every one hundred people.¹⁷⁰ This relative absence of

¹⁶⁵ U.S. BUREAU OF THE CENSUS, CENSUS OF POPULATION, 1960.

¹⁶⁶ Other minorities: Indian 391; Japanese 774; Chinese 288; Filipino 236; other 435.

¹⁶⁷ For comparison: Alabama 30%; Indiana 5.8%; Illinois 10.3%; Mississippi 42%; Missouri 9%; Ohio 8.1%; Tennessee 16.5%; Virginia 20.6%.

¹⁶⁸ For comparison: Alabama 983,290 to 980,271; Indiana 121,916 to 269,275; Illinois 387,486 to 1,037,470; Mississippi 1,074,578 to 915,743; Missouri 244,386 to 390,853; Ohio 339,461 to 786,097; Tennessee 508,736 to 586,786; Virginia 661,449 to 816,258.

¹⁶⁹ See map, Appendix IV *infra*.

¹⁷⁰ Negro distribution in Kentucky by region:

Region	Population	Negro population	% of state pop.	% of Negro pop.
E. Ky. (40 cos.)	747,187	14,899	24.6	6.9
W. Ky. (32 cos.)	645,981	53,283	21.2	23.9
N. Ky. (7 cos.)	260,745	5,313	8.6	2.5
N. C. Ky. (23 cos.)	499,841	50,239	16.5	23.9
S. C. Ky. (17 cos.)	252,053	11,389	8.3	5.3
Jefferson Co.	610,947	78,350	20.1	36.5

For counties in each region, see map *infra*.

Negro density by region, *i.e.*, Negroes per 100 population.

(40 cos.) 1.9

(34 cos.) 1.0

E. Ky. (6 cos.) 3.9 (Bell, Harlan, Letcher, Mason, Perry, Pike)

(Continued on next page)

Negroes undoubtedly results from the fact that, historically, the topography of Eastern Kentucky created a situation in which the use of slaves was unprofitable. Indeed, the major concentration of Negroes within Eastern Kentucky is in the larger coal counties and in the river town of Maysville. The settling of Negroes within the coal counties was instituted when Negro labor was imported to build the railroads and work the rivers.

Northern Kentucky likewise has relatively few Negroes, perhaps for the reason that this area is, in essence, but a suburb of Cincinnati. Negroes settle in the larger urban center of Cincinnati, rather than in Covington and Newport, because their jobs are in Cincinnati.

There is a heavy concentration of Negroes in western counties of the state, particularly those along the Tennessee border.¹⁷¹ Christian County, for example, is 22.4 per cent Negro. But in the state as a whole there does not seem to be a great problem in terms of a large minority population. Seventy-two of the state's one hundred and twenty counties have a Negro population of under five per cent, and thirty-four counties have fewer than one hundred Negroes.¹⁷²

The mobility of the population is an important aspect of the problem for it tends to show which areas are growing and where the pressure for housing is created. The decade of the fifties showed a great movement in Kentucky's population, with eighty-eight counties showing losses in overall population and ninety-two decreasing in Negro inhabitants. The forty Appalachian counties

(Footnote continued from preceding page)

W. Ky.	(32 cos.)	8.3	
	(27 cos.)	5.9	
	(5 cos.)	13.1	(Christian, Henderson, Hopkins, Logan, McCracken)
N. Ky.	(7 cos.)	2.2	
	(5 cos.)	1.2	
	(2 cos.)	2.2	(Campbell, Kenton)
N. C. Ky.	(22 cos.)	7.8	
	(1 cos.)	15.2	(Fayette)
S. C. Ky.	(17 cos.)	4.3	
Jefferson Co.		12.8	

¹⁷¹ Western counties, 10% or more Negro: Christian 22.4%; Fulton 17.6%; Logan 11.1%; McCracken 10.9%; Simpson 13.9%; Todd 16.6%; Trigg 17.0%.

¹⁷² Bracken 63; Breathitt 49; Butler 72; Carlisle 84; Carter 11; Casey 45; Clinton 30; Elliott 0; Estill 41; Gallatin 100; Grant 59; Grayston 80; Jackson 0; Johnson 1; Lawrence 41; Lee 52; Leslie 0; Lewis 20; Livingston 78; Magoffin 1; Marshall 10; Martin 2; McCreary 0; McClean 60; Menifee 11; Morgan 7; Owsley 15; Pendleton 89; Powell 94; Robertson 18; Rockcastle 2; Rowan 25; Trimble 3; Wolfe 0.

suffered a disproportionate share of the loss because thirty-five decreased in population. This general movement from Eastern Kentucky resulting from the automation of the coal industry, was, in most cases, matched by an even greater exodus of Negroes. Pike County, for example, lost fifty-two per cent of its Negro population, while losing only fourteen per cent of its whites.

The greatest population increases were in those counties which contain or are near large cities. This reflects the nationwide population shift from rural and small-town environments to the urban areas. The Negro population increases, however, did not keep abreast with the overall population increases. In those eighteen counties which showed an increase of over ten per cent,¹⁷³ Negro population increased in only nine.¹⁷⁴ In fact, of the thirty-six counties in the state which have over one thousand Negroes, only sixteen showed increases in Negro population, and the increase in most of these was negligible.¹⁷⁵

The critical areas of the state, those with a relatively great number of Negroes and a propensity for that number to increase, would be in the following counties: Jefferson, Fayette, Daviess, McCracken, Christian, and perhaps Franklin. It is not surprising that these counties also contain six of the state's ten largest cities.¹⁷⁶ Of the state's largest cities, Louisville, Lexington, and Hopkinsville have shown the greatest increase in Negro population.¹⁷⁷ Because of this, a closer examination of the particular

¹⁷³ Boone 68.6%; Bullitt 38.6%; Campbell 13.9%; Christian 34.3%; Clark 11.5%; Daviess 23.3%; Fayette 30.9%; Franklin 13.5%; Greenup 17.5%; Hardin 34.7%; Jefferson 26.1%; Kenton 15.8%; Marshall 25%; McCracken 16.6%; Meade 10.1%; Nelson 13.6%; Oldham 21.5%; Taylor 13.1%.

¹⁷⁴ Christian, 9,871 to 12,192; Daviess, 2,923 to 3,107; Fayette, 17,394 to 20,037; Hardin, 2,846 to 4,597; Jefferson, 62,620 to 78,350; McCracken, 5,964 to 6,207; Meade, 333 to 842; Nelson, 1,587 to 1,745; Franklin, 1,204 to 1,258.

¹⁷⁵ E.g., Barren 391; Clark 111; Montgomery 5; Scott 12; Shelby 155; Simpson 102; Trigg 61.

¹⁷⁶ Christian—Hopkinsville; Daviess—Owensboro; Fayette—Lexington; Franklin—Frankfort; Jefferson—Louisville; McCracken—Paducah.

¹⁷⁷ Populations—total and Negro—Cities of over 10,000 people—1950 and 1960.

City	1950	1960	change	1950	1960	change
	(total)	(total)		(Negro)	(Negro)	
1. Louisville	369,129	390,639	21,510	57,657	70,075	12,418
2. Lexington	55,534	62,810	7,276	13,655	16,192	2,537
3. Covington	64,452	60,376	-4,076	3,574	3,483	-91
4. Owensboro	33,651	42,471	8,820	2,518	2,813	295
5. Paducah	32,828	34,479	1,651	5,360	5,586	226
6. Ashland	31,131	31,283	152	782	828	46
7. Newport	30,070	31,044	974	977	780	-197

(Continued on next page)

population characteristics in these three communities will be made.¹⁷⁸ This examination will include not only the Negro and white population within the city limits, but characteristics in the area beyond the city as well. This will give an indication of the phenomenon, "white flight," which was discussed earlier. The distribution of Negroes within the city and outside will give an indication of whether that phenomenon which has been called a "white noose" is developing around predominately Negro central cities.

The two metropolitan areas of Louisville and Lexington exhibit these characteristics more than the relatively smaller community of Hopkinsville. The Negro population of Louisville increased by almost twenty-two per cent during the fifties, and a similar increase seems to be occurring in the present decade. A special census taken in 1964 revealed that Louisville's Negro population had increased by almost 8,000 during the first years

(Footnote continued from preceding page)

8. Bowling Green	18,347	28,338	991	2,533	3,256	723
9. Hopkinsville	12,526	19,465	6,939	3,852	5,325	1,437
10. Frankfort	11,916	18,365	6,449	1,488	2,397	909
11. Henderson	16,832	16,892	60	2,499	2,567	118
12. Shively	2,401	15,155	12,754	0	2	2
13. Fort Thomas	10,870	14,896	4,026	17	36	19
14. Madisonville	11,132	13,110	1,978	1,182	1,752	-60
15. Middlesboro	14,482	12,607	-1,875	1,177	990	-187
16. Richmond	10,268	12,168	1,900	1,654	1,806	152
17. Mayfield	8,990	10,762	1,772	1,064	1,185	121
18. Valley Station*	—	10,553	—	—	1	—
19. Winchester	9,226	10,187	961	1,525	1,786	261
20. Glasgow	7,025	10,069	3,044	768	993	228

* The population of Valley Station was not available in the 1950 census figures. Apparently, at that time, it had fewer than one thousand inhabitants.

¹⁷⁸ Population statistics—Louisville and Jefferson County, Lexington and Fayette County, and Hopkinsville and Christian County: col. (1), shows populations of the areas in 1950 and 1960; col. (2), the Negro populations, 1950 and 1960; col. (3), the percentage of the total population which was Negro in 1950 and 1960; col. (4), the percentage of the total increase in population which was white and Negro; col. (5), the percentage by which the white population increased, and by which the Negro population increased. The third area in each area grouping, *i.e.*, Co. bal., represents that area of the county outside the city limits.

	(1) Population		(2) Negro pop		(3) % Negro		(4) % of total increase		(5) % incr.	
	1950	1960	1950	1960	1950	1960	white	Negro	white	Negro
Jeff. Co.	484,615	610,947	62,620	78,350	13.9	12.9	86.5	13.5	23.9	25.1
Louisville	369,129	390,839	57,565	70,075	15.6	17.9	42.3	57.7	2.9	21.5
Co. bal.	115,486	220,308	4,963	8,275	4.3	3.8	96.8	3.2	91.8	66.7
Fayette Co.	100,746	131,906	17,954	20,037	17.5	15.3	92.2	7.8	34.1	13.9
Lexington	55,534	82,810	13,655	16,192	24.6	25.8	64.9	35.1	11.2	18.6
Co. bal.	45,214	69,096	3,939	3,845	8.7	5.6	100.4	-0.4	58.1	-2.4
Christ'n Co.	42,359	56,904	9,871	12,192	23.3	21.4	84.0	16.0	37.6	23.5
Hopk'ville	12,526	19,565	3,852	5,325	30.8	27.4	78.8	21.2	65.3	38.2
Co. bal.	29,833	37,439	6,019	6,867	20.2	18.3	88.9	11.1	28.4	14.1

of this decade¹⁷⁹ as compared with an increase of only 12,500 from 1950 to 1960. Especially significant was the fact that almost fifty-eight per cent of Louisville's population increase during the fifties was in the Negro population. This raised the proportion of Negroes in Louisville from 15.6 per cent in 1950 to about eighteen per cent in 1960. This was a gain of almost 2.5 per cent in ten years. This rate of Negro increase appears to be accelerating at an even faster pace now since the proportion of Negroes in Louisville in 1964 was 20.1 per cent.¹⁸⁰

Ironically, during the first four years of this decade the overall population of Louisville declined, while the Negro population increased by about twelve per cent. This increase is probably the result of the urban renewal program in Louisville. When Negro neighborhoods were destroyed, the uprooted inhabitants moved into the West End of the city.¹⁸¹ But when white areas are destroyed, the inhabitants either moved to the suburbs themselves or started a process of replacement which drove other whites into suburban areas.

This movement of Negroes into the "West End" during the first four years of the decade is graphically portrayed in the census tract statistics.

In one census tract . . . there was a solitary Negro at the time of the regular 10 year census in 1960. By 1964, . . . there were 300 Negroes in this tract. At the same time, this tract's overall population declined almost 6 per cent, which means whites left the area. . . . Another tract increased from 8 Negroes in 1960 to 1,315 four years later. . . . Other West End areas showed big increases in the number of Negroes: one tract went from 972 to 2,278, another from 910 to 2,805, another from 2,326 to 4,453.¹⁸²

The amazing rise in the number of Negroes within the city limits has been more than matched by the increase in white population in suburban areas. Whites accounted for 96.8 per cent of the population growth in that area of Jefferson County beyond Louisville between 1950 and 1960. The suburban communities surrounding Louisville are notable for their lack of Negro in-

¹⁷⁹ Cincinnati Enquirer, April 23, 1967, § E, at 3, col. 3.

¹⁸⁰ *Id.*

¹⁸¹ Louisville Courier-Journal, Sept. 11, 1966, § D, at 1, col. 2.

¹⁸² *Id.* at col. 1 & 2.

habitants. Shively, for example, is a suburb of Louisville and its remarkable growth has made it the state's tenth largest city. Its 1960 population of 15,515 included a total of two Negroes. St. Matthews had thirteen Negroes in a population of 8,783; Valley Station had one in 10,553.

The census map for Jefferson County portrays this inequitable distribution.¹⁸³ It can be seen that most of the Negro population of the county lies within the central and western portion of Louisville, while the remaining Negroes are scattered throughout the outlying regions in the eastern part of the county. The southern areas of the county show a Negro distribution of fewer than one per cent.

The census map for Fayette County shows a similar pattern of distribution.¹⁸⁴ Negroes inhabit the central and northern sections of Lexington, while the remaining sections of the city and the suburban developments are almost entirely white. The remaining Negroes in the county are, again, scattered through the outlying underdeveloped areas.

Within the decade of the fifties, the Negro population of Lexington increased 18.6 per cent.¹⁸⁵ In the county beyond the city limits it declined by 2.4 per cent. The percentage increase in the number of Negroes within the city limits increased 1.2 per cent during the decade, so the problem of an influx of Negroes would not appear to be as great in Lexington as it is in Louisville. However, as in Louisville, there does appear to be a concentration of white suburbs surrounding the larger city, as the white population of the county outside of Lexington increased by about fifty-eight per cent during this period, and the percentage of Negroes in this area decreased from 8.5 to 5.6 per cent.

Hopkinsville is not as large as either Louisville or Lexington and thus does not have the suburban areas characteristic of those two cities.¹⁸⁶ Furthermore, it lies in an area which has traditionally had a large number of Negroes. As a result, with the great increase in the number of white inhabitants during the decade, perhaps increased with the expansion of Fort Campbell, the Negro density actually declined 3.4 per cent within the city even though

¹⁸³ See map, Appendix V *infra*.

¹⁸⁴ See map, Appendix VI *infra*.

¹⁸⁵ See note 178 *supra*.

¹⁸⁶ *Id.*

the Negro population increased thirty-eight per cent—an increase greater than that of either Louisville or Lexington.¹⁸⁷ Yet, this increase is important in absolute rather than in relative terms, because it reflects the greater pressure for housing exerted by Negroes, especially when they are confined by a limited market.

The population figures for Christian County outside of Hopkinsville do, to some extent, reflect a tendency of whites to inhabit exclusive suburban areas.¹⁸⁸ Whites accounted for ninety per cent of the population growth in this area while in 1950 they comprised only eighty per cent of the extra-city population. But any conclusion of white movement to the suburbs in Hopkinsville must be tempered by the fact that the population of Hopkinsville is only thirty-six per cent that of Christian County in its entirety.

B. Negro Housing Conditions

The census maps and, indeed, a casual trip through the Negro section of Kentucky's cities, reveal that Negroes invariably inhabit the oldest and poorest housing stock. This is due, in large measure, to the fact that Negroes have long occupied the lowest levels on the income scale and have been unable to rent or purchase better housing. However, factors other than lack of income contribute to this squalor. In a market which restricts the housing choices open to a certain group of people, there is a great demand but little available supply. The landlord who rents to Negroes under such circumstances is under no economic compulsion to keep the rented quarters in good repair. With the high demand, the landlord will always have a ready tenant and will always get his price.

The comparison of substandard housing occupied by whites with that occupied by Negroes in the metropolitan areas of Louisville and Lexington show some differences. The Census of Housing gives three classifications for assessing the quality of housing: sound, deteriorating, and dilapidated. The latter two make up what is called "substandard" housing. In 1960, fifty-two per cent of Lexington's Negro population lived in substandard housing, compared with only twelve per cent of the whites.¹⁸⁹ The

¹⁸⁷ *Id.*

¹⁸⁸ See note 178 *supra*.

¹⁸⁹ Condition of white and Negro occupied housing in metropolitan Lexington and Metropolitan Louisville.^o

figures are similar for Louisville, but not quite as severe. There, about forty per cent of the Negroes live in substandard housing, compared with about fourteen per cent of the whites.

In rental housing, where the majority of Negroes live,¹⁹⁰ the problem of substandard housing is much worse.¹⁹¹ For example, in Lexington, 54.5 per cent of the dwellings rented by Negroes are substandard, while only thirty per cent of those rented by whites are so classified. The discrepancy is much the same in Louisville, and in both cities, it compares with only twenty-two per cent substandard white-rented residences. It has been suggested that:

If open housing were put into effect in Louisville, rents in Negro areas would fall immediately. Why? Because if a Negro could rent a solid house or apartment for \$75 or even \$90 in the South or East end, then landlords in the West end would have to drop their rents to remain competitive. (Or they would have to fix up their properties.)¹⁹²

It has likewise been suggested that freeing Negroes to purchase houses in different sections of the cities would lead to a gradual

(Footnote continued from preceding page)

	Metro. Lexington		Metro. Louisville	
	white	Negro	white	Negro
Sound	87.7%	47.9%	86.4%	59.9%
Deteriorating	9.1%	24.1%	10.6%	26.6%
Dilapidated	3.2%	27.9%	3.0%	13.5%

¹⁹⁰ The statistics for Louisville are drawn from the census report's classification of the Louisville Standard Metropolitan Statistical Area (SMSA) and as such, include the two adjacent Indiana counties, Floyd and Clark.

¹⁹⁰ Owner-renter ratios in Lexington and Louisville metropolitan areas.

	1950		1960	
	white	Negro	white	Negro
Lexington				
Owner	51.4%	38.5%	59.1%	39.5%
Renter	48.6%	61.5%	40.5%	60.5%
Louisville				
Owner	55.2%	34.7%	59.5%	40.5%
Renter	44.8%	65.3%	40.5%	59.5%

¹⁹¹ Substandard housing in Louisville and Lexington metropolitan areas by status as owner or renter and race.

	Lexington		Louisville	
	White	Negro	White	Negro
Owner	4.0%		7.6%	
Renter	22.3%		22.4%	
Negro				
Owner		30.3%		29.5%
Renter		54.5%		47.0%

¹⁹² Louisville Courier-Journal, Sept. 11, 1966, § D, at 1, col. 6.

retirement of much of this substandard housing since landlords would not be willing to expend the money necessary to improve their property. It would be in a sense, a natural urban renewal.

C. Negro Purchasing Power

Of course, one of the primary reasons that Negroes inhabit the central areas of the cities is that here is found the oldest and cheapest housing stock. Most Negroes, because of their relatively lower income, cannot afford the luxury of newer housing. But the income picture of the Negro is changing in Kentucky. During the fifties, Negro income showed a remarkable increase.¹⁹³ In 1950, forty-seven per cent of the state's Negro families had incomes of under one thousand dollars a year; 1960, by comparison, found only thirty-one per cent in this group. Especially significant during that decade is the rise in the number of Negro families earning over four thousand dollars a year—from three per cent to twenty per cent. This rise is due partly to the fact that more and more Negroes are becoming urban dwellers rather than rural. This means, generally, that both their wages and costs will be higher. Furthermore, the general rise in the cost of living would mitigate the effectiveness, in terms of purchasing power, of much of this gain. Nevertheless, the rise in income can, in part, be attributed to rising job opportunities and increased educational attainment among Negroes. With the passage of the state law prohibiting discrimination in employment,¹⁹⁴ the income level should rise at an even more accelerated pace.

However, even assuming that Negro family income maintains

193 Negro Household Income in Kentucky—1950 and 1960		
Annual Income	% of Negro Households	
	1950	1960
Under \$1,000	46.4	30.7
\$1,000-1,999	28.7	22.1
\$2,000-2,999	16.6	15.3
\$3,000-3,999	5.2	12.0
\$4,000-4,999	1.7	8.8
\$5,000-5,999 .....	.6	4.6
\$6,000-6,999 .....	.3	2.4
\$7,000-7,999 .....	.2	1.6
\$8,000-8,999 .....	.05	.9
\$9,000-9,999 .....	.05	.6
Over \$10,000 .....	.1	.9

¹⁹⁴ KRS § 244.040 (1966).

the growth rate that it showed in the fifties,¹⁹⁵ by 1968, thirty-four per cent of the state's Negro families will be earning over four thousand dollars a year, and about ten per cent will be earning over six thousand dollars a year. But this rate of growth probably will not remain constant since the continued movement of Negroes into the cities will, of itself, accelerate the rise.

The fact of higher urban incomes for Negroes is reflected in the statistics in Louisville, Lexington, and Hopkinsville, which are all above the state average.¹⁹⁶ Indeed, the income level of Negroes in the state would be much lower if Louisville was not included in the statistics. In 1960, over forty per cent of Louisville's Negro families had incomes in excess of four thousand dollars annually, and almost fifteen per cent were over six thousand dollars. The number in these categories in Lexington and Hopkinsville is lower, but shows signs of continued improvement. In its analysis of the metropolitan housing market, the Lexington and Fayette County Planning Commission reported:

Although the non-white household income distribution will remain substantially below that for whites, the gap will narrow during the forecast period. Although well over half of all non-white households in 1960 had incomes under \$9,000, only 14 per cent of the net gain (in non-white population during the 1964 to 1970 period) will be in this low income group. The situation will be even more greatly improved during the decade of the seventies as the number of low income non-white households actually declines and the largest growth occurs in the over \$6,000 group. The result of these changes will be a significant upgrading of the income available to non-whites for housing expenditures.¹⁹⁷

¹⁹⁵ Negro income in Louisville, Lexington, and Hopkinsville.

	Louisville	Lexington	Hopkinsville
Under \$4,000	59.6%	77.2%	76.2%
\$4,000-6,000	25.9%	17.5%	17.6%
Over \$6,000	14.5%	5.3%	6.2%

¹⁹⁶ See note 193 *supra*.

¹⁹⁷ City-County Planning Commission of Lexington and Fayette County, Ky., *An Analysis of the Housing Market in Lexington and Fayette County, Ky.* 27 (1965).

Forecasts of Household Income by Race, Metropolitan Lexington

Income Group	White Households		Non-white Households	
	1964	1980	1964	1980
Under \$4,000	10,880	10,550	4,700	4,500
\$4,000-8,000	8,850	10,350	1,310	2,820
Over \$6,000	17,740	37,000	520	2,200

This discrepancy between income and the quality of houses purchased is shown by comparing the value of houses owned by whites and Negroes with the respective incomes.¹⁹⁸ In Lexington, for example, forty-four per cent of white-owned houses are valued at over fifteen thousand dollars, compared with only 2.6 per cent of Negro owned houses. In those valued at under ten thousand dollars, twenty per cent were white owned homes and almost seventy-nine per cent Negro owned homes. The figures can be roughly compared with the various income groupings. Such a comparison shows that although fifty-nine per cent of whites had incomes of over one thousand dollars a year, more than eighty per cent of white-owned houses were valued at over ten thousand dollars. For Negroes, the ratio was twenty-three per cent and twenty-one per cent. It seems apparent that, because of his income, the Negro is not able to purchase better housing in the same extent as whites.

V. OPEN HOUSING LEGISLATION IN OTHER JURISDICTIONS

It has been shown that there are movements in Kentucky to combat housing discrimination. This type of discrimination is not peculiar to Kentucky, and neither is the feeling which many citizens have that the discrimination must be eliminated. There has been action to eliminate housing discrimination on virtually every level of government. A survey of this action may suggest appropriate measures for the state and local governments in the Commonwealth.

When the 1966 Civil Rights Bill was first introduced in the United States House of Representatives, the drafters intended to outlaw discrimination in all housing. However, by August 9, when the Bill was finally passed in the House and sent to the Senate, it specifically exempted about sixty per cent of the nation's housing, covering only the sale or rental of single-family homes in new subdivisions and apartment buildings containing more than four units. In the Senate, the bill was opposed by a coalition

¹⁹⁸ Comparison of the value of homes owned by whites and Negroes in metropolitan Lexington.

Value	White owned	Negro owned
over \$15,000	44.4%	2.6%
\$10,000-15,000	35.8%	18.6%
under \$10,000	19.8%	78.8%

of Southern Democrats and Republicans led by Senator Dirksen of Illinois. The ensuing filibuster could not be broken,¹⁹⁹ and the bill was dropped from consideration on September 19.²⁰⁰

On February 15, 1967, President Johnson sent to Congress a civil rights package which included the following three-stage plan for elimination of discrimination in all housing: 1) discrimination would be prohibited immediately in the three or four per cent of all homes already covered by federal executive orders; 2) on January 1, 1968, the law would be extended to cover the thirty or forty per cent of all homes in real-estate developments and large apartment houses; 3) on January 1, 1969, all housing would come under the Act. Legislation would also make it a federal offense to interfere with anyone exercising his civil rights guaranteed by federal law, which rights would include purchasing a home free of discrimination.²⁰¹

However, with a much more conservative Congress this year than in 1966, there seems to be little possibility that a federal open housing law will be enacted. Therefore, for an analysis of existing law and the trends in this field, one must turn to the states and their local governments.

In 1957, New York City became the first governmental entity to legislate against racial discrimination in the housing market generally.²⁰² This was followed the next year by a similar ordinance in Pittsburgh, Pennsylvania.²⁰³ No state statute covered private housing until 1959, when Colorado,²⁰⁴ Connecticut,²⁰⁵ Massachusetts,²⁰⁶ and Oregon²⁰⁷ adopted such laws. As of June, 1967, some nineteen states²⁰⁸ and twenty-eight cities²⁰⁹ had adopted

¹⁹⁹ Two cloture votes were held. The vote on September 14 was 54 to 42 in favor of choking off debate, ten short of the needed two-thirds majority. Twelve moderate Republicans joined with forty-two Democrats voting for cloture, while twenty-one Democrats, mainly from the South, and twenty-one Republicans voted against the motion. On September 19, the motion again received a favorable but less than adequate response, the vote standing 52 to 41 for cloture.

²⁰⁰ Louisville Courier-Journal, Sept. 20, 1966, § A, at 1, col. 1.

²⁰¹ Louisville Courier-Journal, Feb. 16, 1967, § A, at 1, col. 6.

²⁰² New York City Fair Housing Practices Law (N.Y. City, Local Law No. 80), Dec. 30, 1957.

²⁰³ Pittsburgh, Pa., Ordinance 523, Dec. 15, 1958.

²⁰⁴ Colo. House Bill 259 (1959) [hereinafter cited as H.B.].

²⁰⁵ Conn. Pub. Act 113 (1959).

²⁰⁶ Mass. Act, ch. 239 (1959).

²⁰⁷ ORE. REV. STAT. §§ 659.031, 659.033, 696.300 (1959).

²⁰⁸ Alaska Acts, ch. 49 (1962); Colo. H.B. 259 (1959); Conn. Pub. Act 113 (1959); Ind. Senate Act 115 (1965); Me. Pub. Laws, ch. 344 (1965); Mass.

(Footnote 208 continued on next page and Footnote 209 on next page)

anti-discrimination laws affecting some part of the private housing market.

State and local open housing laws vary widely in their coverage of the private housing field and in methods of enforcement, thus defying any type of general classification. A brief look at various laws and ordinances will illustrate the divergent approaches to open housing.

Some laws, for example those in Maine²¹⁰ and New Hampshire,²¹¹ extend only to rental housing, while others, such as those in Oregon,²¹² Wisconsin,²¹³ and Chicago, Illinois,²¹⁴ cover only

(Footnote continued from preceding page)

Acts, ch. 239 (1959); MICH. CONST. art. 5, 329; MINN. STAT. §§ 363.01-09, 363.12-13 (1962); N.H. Acts, ch. 219 (1961); N.J. Pub. Laws, ch. 106 (1961); N.Y. Acts, ch. 414 (1961); Ohio Senate Bill 198 (1965) [hereinafter cited as S.B.]; ORE. REV. STAT. §§ 659.031, 659.033, 696.300 (1959); Pa. Act No. 19 (1961); R.I. Acts, ch. 27 (1965); Wis. Acts, ch. 439 (1965). California's present open housing provision is made up of four laws: 1) CAL. CIV. CODE §§ 51-52; 2) CAL. HEALTH AND SAFETY CODE §§ 35700-41 (Supp. 1965); 3) CAL. CIV. CODE § 53; 4) 1963 Rumford Fair Housing Act. The major provisions of these statutes are set out in Appendix I.

²⁰⁹ Albuquerque, N.M., Ordinance 2358, June 18, 1963; Ann Arbor, Mich., Ordinance 60-65, Dec. 20, 1965; Bardstown, Ky., Ordinance, June 14, 1966; Chicago, Ill., Ordinance, ch. 198.7-B, Sept. 11, 1963; Covington, Ky., Ordinance 0-43-67, June 1, 1967; Des Moines, Iowa, Ordinance 7079, June 4, 1964; East St. Louis, Ill., Ordinance 3913, Jan. 29, 1964; Erie, Pa., Ordinance 19, Sept. 1, 1963; Gary, Ind., Ordinance 4050, May 24, 1965; Grand Rapids, Mich., Ordinance 1628, Dec. 23, 1963; Iowa City, Iowa, Ordinance, August 18, 1964; Kalamazoo, Mich., Ordinance 750, June 6, 1966; Madison, Wis., Ordinance 1568, Dec. 13, 1963; New Haven, Conn., Ordinance, May 14, 1964; New York, N. Y., Local Law No. 80, April 1, 1958; Oberlin, Ohio, Ordinance 235, Nov. 20, 1961; Peoria, Ill., Ordinance, Dec. 30, 1963; Philadelphia, Pa., Code, ch. 9-1100, (1963); Pittsburgh, Pa., Ordinance 523, June 1, 1959; Schenectady, N.Y., Ordinance 14, 353, April 1, 1963; St. Louis, Mo., Ordinance 52, 323, Feb. 6, 1964; St. Paul, Minn., Legislative Code, ch. 74, Sept. 13, 1964; Wichita, Kan., Ordinance 27-903, Oct. 6, 1964. The major provisions of these ordinance are set out in Appendix II. Although research fails to disclose an ordinance, the National Committee Against Discrimination in Housing in its publication, *The Fair Housing Statutes and Ordinances As of June 1, 1965*, also lists the following cities as having open housing ordinances: Beloit, Wisconsin, effective April 1, 1964; Duluth, Minnesota, effective Oct. 19, 1963; Indianapolis, Indiana, enacted July, 1964; New London, Conn., effective August 1, 1963; Yellow Springs, Ohio, adopted August 19, 1963.

Laws prohibiting housing discrimination also exist in the District of Columbia, Kenton County, Ky., King County, Wash., Puerto Rico, and the Virgin Islands. In addition, other cities, such as Cincinnati, Ohio (Ordinance 112-1965, March 17, 1965); Los Angeles, Cal. (Ordinance 131.700, Jan. 25, 1966); Minneapolis, Minn. (Ordinance 89-33, Oct. 15, 1963); Providence, R.I. (Ordinance, ch. 1570, Sept. 24, 1963); Seattle, Wash. (Ordinance 92191, July 15, 1963); and the Metropolitan Government of Nashville and Davidson County, Tenn. (Ordinance approved Dec. 28, 1965), have adopted policy statements against all kinds of discrimination and in many instances have set up a commission to study the existing situation and to seek conciliation of racial differences.

²¹⁰ Me. Pub. Laws, ch. 344 (1965).

²¹¹ N.H. Acts, ch. 219 (1961).

²¹² ORE. REV. STAT. §§ 659.031, 659.033, 696.300 (1959).

²¹³ Wis. Acts, ch. 439 (1965).

²¹⁴ Ordinances ch. 198.7-B, Sept. 11, 1963.

persons engaged in the business of selling or renting real property. The Erie²¹⁵ and Philadelphia, Pennsylvania,²¹⁶ ordinances specifically exempt personal residences offered for sale, while New York City²¹⁷ and Pittsburgh, Pennsylvania,²¹⁸ exempt religious and denominational organizations or charitable and educational institutions connected with a religious organization. Still others, for example, Indiana,²¹⁹ Massachusetts,²²⁰ and Minnesota,²²¹ include any advertising of covered real estate, while states and cities such as New Jersey,²²² New York State,²²³ Ohio,²²⁴ Gary, Indiana,²²⁵ Albuquerque, New Mexico,²²⁶ and Madison, Wisconsin,²²⁷ include financing institutions within the coverage of their statutes and ordinances.

When New York in 1945 enacted the first state statute prohibiting discrimination in employment,²²⁸ it followed federal precedent²²⁹ in creating a State Commission Against Discrimination to enforce the new law. Other states copied the commission approach, and now the enforcement of most civil rights legislation, including housing laws, is handled in this way.²³⁰

Although the scope, power, or resources may vary, the methods of operation under most laws and ordinances are substantially similar. There are basically four procedural stages for handling a complaint:

- 1) an investigation to determine the facts;

²¹⁵ Ordinance 19, Sept. 1, 1963.

²¹⁶ Philadelphia, Pa. Code, ch. 9-1100 (1963).

²¹⁷ New York City Fair Housing Practices Law (N.Y. City, Local Law No. 80), Dec. 30, 1957.

²¹⁸ Pittsburgh, Pa., Ordinance 523, Dec. 15, 1958.

²¹⁹ Ind. Senate Act 115 (1965).

²²⁰ Mass. Acts, ch. 239 (1959).

²²¹ Minn. Stat. §§ 363.01-.09, 363.12-.13 (1962).

²²² N.J. Pub. Laws, ch. 106 (1961).

²²³ N.Y. Acts, Ch. 414 (1961).

²²⁴ Ohio S.B. 198 (1965).

²²⁵ Ordinance 4050, May 24, 1965.

²²⁶ Ordinance 2358, June 18, 1963.

²²⁷ Ordinance 1568, Dec. 13, 1963.

²²⁸ N.Y. Sess. Laws 1945, ch. 118, §§ 1-3, (frequently referred to as the Ives-Quinn Bill).

²²⁹ In 1941, after much agitation from organized labor, President Roosevelt, by executive order, established the Fair Employment Practices Commission, which was to enforce another order requiring all defense contracts to include a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin. The Commission was killed after five years by Congressional refusal to renew its appropriation.

²³⁰ Maine is the only state having no official enforcement agency.

- 2) an attempt to eliminate the discrimination by conference, conciliation, and persuasion;
- 3) if step (2) fails, formal procedures begin, usually in the form of a public hearing, ultimately culminating in the issuance of an order to cease the discriminatory practice;
- 4) if the order is not obeyed, enforcement is sought through the courts.

The deliberate enforcement of a law through persuasion is a new approach to law enforcement. Generally, the commissions operate with great circumspection, making minimal use of formal legal procedures, and relying chiefly on conference and conciliation to secure voluntary compliance with the laws. For example, a telephone interview with the Director of the Indiana Civil Rights Commission revealed that, of the forty-one complaints they received in 1966, only two reached the public hearing stage.²³¹

Few states with open housing laws provide assurance that the property in dispute will remain available to the purchaser until final disposition of the complaint. Unless the agency has this power in the form of a temporary restraining order prior to its final order, the property may be sold. Therefore, several states, led by Massachusetts, have attempted to provide adequate relief by empowering courts to act at an earlier state of the proceedings.²³² A survey of commission procedures conducted in

²³¹ Telephone interview with Mr. Harold Hatcher, Director, Indiana Civil Rights Commission, March, 1967.

²³² a) Massachusetts—After a complaint is filed and probable cause is found to exist, the Superior Court, on application of a commissioner of the Commission, may grant injunctive relief preventing the sale or other disposition of the property in question until final determination by the Commission. MASS. ANN. LAWS, ch. 151B, § 5 (Supp. 1963).

b) California—Under the Rumford Act, after a complaint is filed with the Commission and probable cause is found for its allegations, the Commission may bring an action to enjoin the owner from selling or otherwise disposing of property until it has ruled on the complaint. This temporary restraining order is limited to twenty days. CAL. HEALTH & SAFETY CODE § 35734. Though the Unruh Civil Rights Act provides only for damages, it has been interpreted to allow injunctive relief. *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 470, 20 Cal. Rep. 609, 613, 370 P.2d 313, 317 (1962).

c) Connecticut—After a complaint is filed and probable cause is found, any three commissioners may file a petition in equity in the circuit court seeking to restrain and enjoin the defendant from selling or renting to anyone other than the complainant or otherwise making unavailable to the complainant any housing accommodation with respect to which the complaint is made, pending final determination of proceedings on the case. No temporary relief will issue until the com-

(Continued on next page)

Massachusetts revealed, "The Massachusetts Commission is finding the injunctive relief process a 'valuable and necessary tool.' There are indications that this provision has encouraged some landlords—both large and small—to be more co-operative in conciliation efforts."²³³

A far-reaching appraisal of the effectiveness of open housing laws may not be available for many years since the oldest act on the books dates back only to 1957.²³⁴ However, a look at the activity of a few commissions may serve as a progress report on the elimination of discrimination in the housing field to date.

The Rumford Act was passed in September, 1963, and the California Fair Employment Practice Commission had received 440 complaints as of November 30, 1966. Of these, 101 were closed for insufficient evidence of discrimination, another 27 were dismissed for lack of jurisdiction, and in 59 the complaint was withdrawn. All but two of the cases where discrimination was found to exist were settled by conciliation. The Commission also reports that more than 75% of all complaints concerned apartment rentals, while homeowners were involved in a negligible 2% of the cases.²³⁵

The Chicago Commission on Human Relations reports a total of 323 complaints received since the passage of the Chicago

(Footnote continued from preceding page)

mission gives bond in an amount to be determined by the court. The respondent shall be entitled to all damages suffered by him in case the commission fails to prosecute to effect the action in which the relief was granted. CONN. REV. STAT. § 53-36a (Supp. 1965).

d) New York—Although the laws contain no provision for injunctive relief, the Attorney-General can request a temporary restraining order under N.Y. Executive Law § 63(9) pending disposition of complaints of housing discrimination.

e) Oregon—After a complaint is filed with the Commission of Labor, the alleged violator is immediately notified of its filing and is forbidden for ninety days after receipt of the notice from taking action which would make the property unavailable to the complainant. ORE. REV. STAT. § 659.010-.115 (Supp. 1963). Violation of this provision gives rise to a private cause of action by the complainant, in which actual and reasonable exemplary damages may be recovered. Since there is no requirement for a showing of probable cause before the temporary restraining order issues, an undue hardship is perhaps imposed upon innocent owners.

f) Pennsylvania—After a complaint is filed, the court, upon application of the Commission, may grant injunctive relief to restrain the sale, rental, or other disposition of the property until the case is settled. The injunction can be granted for a maximum of thirty days, with extension at the discretion of the court. Pa. Act 533, Jan. 24, 25, 1966.

²³³ TRENDS IN HOUSING, Sept. - Oct. 1963, at 5.

²³⁴ New York City Fair Housing Practice Law (N.Y. City Local Law No. 80), Dec. 30, 1957.

²³⁵ Correspondence from the California Fair Employment Practice Commission, April 12, 1967.

Fair Housing Ordinance in September, 1963. Of these, 79 were adjusted during investigation and 70 were conciliated. Of the remaining 174 cases, 154 were dismissed for lack of jurisdiction or no probable cause, 5 were closed after a public hearing, and 15 are pending. Of these 323 complaints, 206 alleged a refusal to *rent*, while only 38 concerned a refusal to *sell*.²³⁶

Forty-one complaints were received by the Indiana Civil Rights Commission in 1966. Of these, eighteen were adjusted by conciliation, fifteen were dismissed for insufficient evidence, and five were withdrawn by the complainant. Two hearings were held, and two complaints are still pending.²³⁷

The St. Louis Council on Human Relations reports that, during the three years in which their open housing ordinance has been in effect, approximately seventy-five complaints have been filed, of which fifty were conciliated on the staff level, seven were dismissed for insufficient evidence, and six were withdrawn at the request of the complainant. Hearings were held on twelve complaints unresolved at the staff level; of these six were resolved satisfactorily for the complainant by the Council and six were referred to the City Counselor's office for court prosecution.²³⁸

The Ann Arbor, Michigan, Commission receives approximately twenty-five complaints a year,²³⁹ and the commissions of Erie, Pennsylvania,²⁴⁰ Gary, Indiana,²⁴¹ and the Commonwealth of Massachusetts²⁴² report that their provisions had been effective in reducing overt discrimination in housing. At the other extreme, the King County, Washington, Sheriff's Department reports the filing of only one complaint in three years, and it was subsequently dismissed for insufficient evidence of any discriminatory practice. The reason put forth by the Sheriff's Office for

²³⁶ Correspondence from Mrs. Naomi B. Brodkey, Chicago Commission on Human Relations, April 18, 1967.

²³⁷ See note 231 *supra*.

²³⁸ Correspondence from Mr. W. J. Duford, Commissioner, St. Louis Council on Human Relations, March 16, 1967.

²³⁹ Correspondence from Mr. D. Cowley, Ann Arbor Human Relations Commission, March, 1967.

²⁴⁰ Correspondence from Mr. Leonard L. Karter, Executive Director, Erie Human Relations Commission, March 16, 1967.

²⁴¹ Correspondence from Mr. Charles H. King, Jr., Executive Director, Gary Human Relations Commission, March 15, 1967.

²⁴² Correspondence from Mr. Malcolm C. Webber, Chairman, Massachusetts Commission Against Discrimination, March 21, 1967.

the lack of activity is that there is no evidence of any discrimination in the county.²⁴³ With the exception of King County, the above-mentioned commissions have reported that the present laws were both necessary and in need of fortification by the elimination of exemption clauses. At the same time, all believe that, while the laws have improved the situation greatly, no statute will eliminate the problem entirely.²⁴⁴

Although the early laws in this field were rather limited in scope,²⁴⁵ the trend of the acts is toward more comprehensive coverage of the housing field, applying alike to owners, builders, brokers, and mortgage lenders.²⁴⁶ There is also a movement toward more effective administration and enforcement of the statutes. Eight of the nineteen states now permit the commission to initiate proceedings on its own motion without waiting for a complaint,²⁴⁷ while such cities as Pittsburgh, Pennsylvania,²⁴⁸ New York City,²⁴⁹ Albuquerque, New Mexico,²⁵⁰ and Gary, Indiana,²⁵¹ also allow such procedure. Two states authorize another authority, such as the attorney general, to file complaints with the commissions.²⁵²

Activity on the part of civil rights groups for action in this field has also increased. In comparison with 1963, when campaigns were waged in only twelve states,²⁵³ 1965 saw various groups in twenty-one states lobbying for initiation of laws to apply to the general housing market or for measures to strengthen existing statutes. Success of some degree was attained in ten of the twenty-one states.²⁵⁴

²⁴³ Correspondence from Mr. Jack D. Porter, Sheriff, King County, Washington, March 17, 1967. This law does not cover the city of Seattle.

²⁴⁴ See notes 231, 235-42 *supra*.

²⁴⁵ The early laws applied only to publicly subsidized housing.

²⁴⁶ See Appendixes I, II *infra*.

²⁴⁷ Alaska, Colorado, Connecticut, Massachusetts, Minnesota, New York, Pennsylvania, and Rhode Island.

²⁴⁸ Ordinance 523, June 1, 1959.

²⁴⁹ Local Law No. 80, April 1, 1958.

²⁵⁰ Ordinance 2358, June 18, 1963.

²⁵¹ Ordinance 4050, May 24, 1965.

²⁵² New Jersey and Oregon.

²⁵³ Nat'l Comm. Against Discrimination in Housing, *The Fair Housing Statutes and Ordinances as of June 1, 1965*, p. 1.

²⁵⁴ The ten states which passed such a law are Colorado, Connecticut, Indiana, Maine, Massachusetts, New Jersey, New York, Ohio, Rhode Island, and Wisconsin. The other eleven were Delaware, Illinois, Kansas, Maryland, Minnesota, Missouri, Nebraska, New Mexico, Utah, Washington, and Wyoming.

Several states²⁵⁵ and cities²⁵⁶ have also adopted what is commonly known as "blockbusting" or "panic peddling" laws, which prohibit real estate brokers from soliciting the sale of real property on the basis that impending change in the racial composition of the neighborhood will soon adversely affect property values. The usual punishment for such activity is either revocation or suspension of a broker's license. In addition, open housing laws have stimulated the formation of more than 250 local open housing groups throughout the nation, including "Welcome Neighbor" pledge-signing campaigns to assure acceptance, neighborhood stabilization efforts to maintain existing integrated patterns, and the operation of listing services for open housing.²⁵⁷

However, somewhat of a countertrend may be developing in different sections of the country, since open housing laws have recently been rejected through popular referenda in such diverse places as Detroit, Michigan, Tacoma and Seattle, Washington, Akron and Toledo, Ohio, and Berkeley, California.²⁵⁸

VI. CONSTITUTIONALITY OF AN OPEN HOUSING LAW IN KENTUCKY

A. Introduction

It should be clear that the fundamental purpose of an open housing law²⁵⁹ is to prohibit vendors and lessors of housing facilities and their agents from discriminating against prospective buyers or tenants because of race, color, or creed.²⁶⁰ This prohibition evolves from a policy decision that such discrimination is inimical to national ideals embodied in the Bill of Rights, the thirteenth, fourteenth, fifteenth amendments, and similar provisions in state constitutions, and that such discrimination bears

²⁵⁵ These states include California, Connecticut, Maryland, New York, Ohio and Pennsylvania.

²⁵⁶ The cities adopting such ordinances are Baltimore, Md.; Buffalo, N.Y.; Chicago, Ill.; Detroit, Mich.; East St. Louis, Ill.; Kansas City, Mo.; Park Forest, Ill.; Peoria, Ill.; San Francisco, Cal.; Shaker Heights, Ohio; South Euclid, Ohio; Toledo, Ohio; Warrensville Heights, Ohio; Washington, D.C.; and Wichita, Kansas.

²⁵⁷ Sloane, *Housing Discrimination—The Response of Law*, 42 N.C.L. Rev. 106, 127 (1963).

²⁵⁸ See Appendix III. See also N.Y. Times, Mar. 21, 1965, § 8 (Review), at 1, col. 1.

²⁵⁹ This term is used because of the three alternatives ("fair," "forced," and "open") it seems to be the most neutral term.

²⁶⁰ For an analysis of various laws on the subject already enacted, see text at notes 199-258 *supra*.

no rational relation to any reasonable interest of the property owner. Thus, it establishes that the color of a man's skin is irrelevant to a sale or rental of real estate. However, since an open housing law inhibits the hitherto free choice of sellers and landlords, many feel that it is inconsistent with the "basic economic norms embodied in our due process clauses, state and federal."²⁶¹ In addition it is contended that such a law creates "forced housing,"²⁶² thus depriving homeowners of a fundamental right—the "freedom of choice."²⁶³ The contentions of those opposing "open" or "forced" housing might be better understood if set out at some length.

The fourteenth amendment requires that a man's property shall not be taken from him without due process of law; is the effect only to protect physical property? Few would suggest that "property" is so limited. The National Association of Real Estate Boards in a statement of policy has asserted:

We hold steadfastly to the principle that the right to own, rent and dispose of real property, and the right to use it freely within the limits of necessary measures to protect the public health and safety, are traditional, constitutionally guaranteed to each citizen, and indispensable to the maintenance of a free society of free men.²⁶⁴

The Supreme Court has echoed similar sentiments in saying that: "property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."²⁶⁵ This constitutional right to dispose of property gives rise to the right to dispose of that property to whomever one wishes. It is contended that this right is such that "however arbitrary or capricious a private property owner's refusal to deal with a prospective tenant or purchaser may be, the state may not

²⁶¹ AVINS, OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT: SYMPOSIUM 8 (1963).

²⁶² This term is commonly used by those who oppose open housing legislation. It carries the connotation that open housing involves the forced sale or rental of property. A good example of this is an advertisement used by the Louisville Board of Realtors. *Louisville Courier-Journal*, Feb. 2, 1967, § A, at 9, col. 1-3.

²⁶³ This is a term realtors and other opponents of open housing legislation use quite frequently. See Avins, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13 (1960). See also text at notes 270-79 *infra*.

²⁶⁴ Statement of Policy, Adopted by NAREB, Nov. 14, 1963.

²⁶⁵ *Buchanan v. Warley*, 245 U.S. 60, 74 (1917).

interfere, for this is the very essence of private property."²⁶⁶ In *Great Atlantic and Pacific Tea Co. v. Cream of Wheat*,²⁶⁷ a case often cited as support for this proposition, the court "supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern."²⁶⁸ The *Cream of Wheat* court also quoted with approval the following from *Cooley on Torts*: "It is part of every man's civil rights that he be at liberty to refuse business relations with any person whomever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."²⁶⁹ Some opponents contend that an open housing law, by depriving property owners of the right to freely choose prospective buyers, amounts to an invalid attempt to transform a private enterprise into a public utility.

A public utility "must serve all . . . without discrimination," and these "onerous duties" may not be imposed on private businesses by "legislative fiat," for "that would be taking private property for public use without just compensation." Since anti-discrimination legislation in housing attempts to impose the obligation of public utilities on private businesses, it is unconstitutional.²⁷⁰

In addition to the fourteenth amendment property rights argument, opponents of "forced" housing base their resistance on "freedom of choice." The following line of argument is rather typical: "The right to individual and uncoerced freedom of choice and association, including the right of the individual to decline to associate with another, is an individual right, a human right, and a civil right, and such right to choose to associate or decline to associate extends to ethnic grounds."²⁷¹ Viewed in this light, "freedom of choice" could be no less than basic to a democratic society. But in a democratic society whose framework is a constitution and laws, if such a freedom exists, it must have its basis in some provision of the constitution. The United States Constitution has never been interpreted as provid-

²⁶⁶ AVINS, *supra* note 261, at 11.

²⁶⁷ 227 Fed. 46 (2d Cir. 1915).

²⁶⁸ *Id.* at 48.

²⁶⁹ COOLEY, *TORTS* 587 (3d ed. 1906).

²⁷⁰ AVINS, *supra* note 261, at 10. The author is quoting *Michigan Pub. Util. Comm'n v. Duke*, 286 U.S. 570, 577-78 (1925).

²⁷¹ Avins, *supra* note 263, at 25.

ing for an independent, unequivocal right called "freedom of choice."

In surveying literature circulated by proponents of this argument,²⁷² it becomes apparent that "freedom of choice" includes many different creatures. On one hand, it may be a freedom to choose prospective buyers or renters, and on the other it may be a sort of freedom of association.²⁷³ It becomes clear that where "freedom of choice" exists, it springs from a fundamental right. There is a right to vote,²⁷⁴ to attend church,²⁷⁵ to voice an opinion,²⁷⁶ or to sell property.²⁷⁷ All of these involve the so-called "freedom of choice," because all of these acts may be done or not at the individual's pleasure. However, all find their origin in an independent fundamental right. Is there also a freedom to choose the type of neighborhood one wishes to live in? Does any governmentally induced (or forced) change in the character of that neighborhood violate that freedom to choose? If such a freedom exists, it would seem to be a type of first amendment, "freedom of association" right. It would be enforced against state government by the guarantee of the fourteenth amendment, that no one shall be "deprived of . . . liberty . . . without due process of law."²⁷⁸

Kentuckians are also protected against similar incursions of their "freedom of choice" by Section Two of the Kentucky Constitution which provides: "Absolute and arbitrary power over the lives, liberty and property of free-men exists nowhere in a republic, not even in the largest majority."²⁷⁹ So, in the final analysis, opponents of "forced housing" are contending that a

²⁷² In truth, few proponents of this argument are actually putting their views into print. The Realtors' Commissions and Professor Avins furnish virtually the entire published opposition to open housing legislation. Avins' work cited *supra* sufficiently defines his position. For further examples of the realtors' views, see CONSER, HUMAN RIGHTS AND THE REALTOR (a pamphlet reproducing editorials from REALTOR'S HEADLINES, Sept., Oct. & Nov. 1963).

²⁷³ This freedom is well-defined in Douglas, *The Rights of Association*, 63 COLUM. L. REV. 1361 (1963); Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74.

²⁷⁴ U.S. CONST. amend. XV, § 1.

²⁷⁵ U.S. CONST. amend. I.

²⁷⁶ *Id.*

²⁷⁷ U.S. CONST. amend. XIV, § 1.

²⁷⁸ *Id.*

²⁷⁹ KY. CONST. § 2. This section has been interpreted as being roughly identical to the fourteenth amendment. *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964).

state's prohibition of discrimination in the sale or rental of housing is unconstitutional because it deprives individuals of liberty and property without due process of law.

B. General Constitutionality of an Open Housing Law

1. *The Nature of Due Process.*—As already established, property rights and "freedom of choice" are not absolutely guaranteed against state incursions. The guarantee goes only to deprivations without due process of law. Thus the first question for consideration is: What is due process of law?

In a classic case on substantive due process, *Palko v. Connecticut*,²⁸⁰ Mr. Justice Cardozo asserted that due process is composed of those things which are "of the very essence of a scheme of ordered liberty."²⁸¹ It involves "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²⁸² On another occasion the Court pronounced that "in each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in progressive society."²⁸³ In spite of the force of the Court's rhetoric, one is left with gnawing doubts about the real character of due process. It does not become clear from the foregoing what actions a state can take without violating due process of law. However, the Court has not always been so inscrutable. In *Nebbia v. New York*,²⁸⁴ due process was held to demand "only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."²⁸⁵ It must logically follow from this principle that

²⁸⁰ 302 U.S. 319 (1937).

²⁸¹ *Id.* at 325.

²⁸² *Id.*

²⁸³ *Rochin v. California*, 342 U.S. 165, 172 (1950). Although both this case and *Palko* involved criminal prosecutions, it would seem that the general definition of due process would remain unchanged regardless of the type of case involved; the only difference should lie in application.

²⁸⁴ 291 U.S. 502 (1934).

²⁸⁵ *Id.* at 525.

the object sought to be obtained cannot be something outside the state's authority.²⁸⁶

For a Kentucky law or ordinance, legitimacy under the federal constitution would be only half the battle. However, the Court of Appeals has asserted that Kentucky's constitutional prohibition of "arbitrary power"²⁸⁷ embodies the same basic guarantees as the fourteenth amendment.²⁸⁸ Thus, Kentucky's protection against "arbitrary power" and the federal requirement of due process are virtually synonymous in meaning. The Kentucky Court has chosen to allow legislators the same leeway which the Supreme Court would grant, determining only whether the "law is reasonably within the scope of a legitimate public purpose."²⁸⁹

2. *The Police Power.*—The test for due process indicates that for each law two questions must be answered. 1) Is the legislature pursuing a "legitimate public purpose"? 2) If so, is the law reasonably within the scope of that purpose?

A prerequisite to answering either question is an exploration of the public purpose involved in an open housing law. The Court of Appeals has stated:

To a degree and in a sense, practically every law enacted by the legislative departments in our form of government emanates from authority conferred by and springing from the exercise of the Police Power. Its fundamental purpose is the bettering of the conditions of living, and involves a multiplicity of objects looking to that end—chiefly the improvement of morals, health, education, co-operation, and all things else tending to make government ball bearing and smooth running.²⁹⁰

Thus, the police power must be the basis for sustaining an open housing law. This concept, like due process, has always

²⁸⁶ In spite of the way the test is set forth in one sentence, reason tells us it must be a two-part test. If the "object sought to be obtained" was something utterly outside the state's power, the law would be voided regardless of its relation to the "object." Thus we look not only to the validity of the legislature's means, but to its end as well.

²⁸⁷ KY. CONST. § 2.

²⁸⁸ *Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964).

²⁸⁹ *Id.* at 883.

²⁹⁰ *City of Louisville v. Kuhn*, 284 Ky. 684, 686-87, 145 S.W.2d 851, 853 (1940).

proved difficult to define. Kentucky's Court has made such attempts as: police power "is the right on the part of the Legislature . . . to regulate, deal with, curtail, or even prohibit certain engagements, conduct, or acts tending to suppress or injuriously affect movements, measures or schemes in furtherance of a permissible and authorized public policy."²⁹¹ Some doubt remains in spite of this effort. Perhaps it is best to say merely that "everything contrary to public policy or inimical to the public interest is the subject of the exercise of the public power."²⁹² The traditional bases of the police power are the areas of public safety, health, morals, and general welfare.²⁹³

Obviously the police power is a broad, comprehensive concept, but does its scope encompass an open housing law? The public interest involved in an open housing law is very broad, perhaps to the extent of encompassing all of the four traditional bases of the police power. A recent New Jersey case which enumerates the evils of housing discrimination supports this theory.

Discrimination against Negroes in the sale and rental of housing accommodations results in inadequate housing for them and in segregation in housing. They are thus compelled in large numbers to live in circumscribed areas under substandard, unhealthy, unsanitary, and crowded living conditions. These conditions in turn produce disease, increased mortality, unstable family life, moral laxity, crime, delinquency, risk of fire, loss of tax revenue and intergroup tensions. . . . Standards of sanitation have to be sacrificed because strict enforcement of building and health codes will simply make a great many people homeless. . . . All of these things imperil the tranquility of a community. In addition, substandard and segregated housing seriously complicates the problem of public school integration.²⁹⁴

Perhaps it would be simplest to support an open housing law on the basis of the "general or public welfare."²⁹⁵ The Court

²⁹¹ *Workman's Comp. Bd. of Ky. v. Abbot*, 212 Ky. 123, 129, 278 S.W. 533, 536 (1925).

²⁹² *Gross v. Commonwealth*, 256 Ky. 19, 23, 75 S.W.2d 558, 560 (1934).

²⁹³ These four areas are usually spoken of as the subjects of the police power. See, e.g., *Goodpaster v. Kenton & Campbell Benevolent Burial Ass'n*, 279 Ky. 92, 129 S.W.2d 1033 (1939); *Ware v. Ammon*, 212 Ky. 152, 278 S.W. 593 (1925).

²⁹⁴ *Jones v. Haridor Realty Corp.*, 37 N.J. 384, 181 A.2d 481, 485 (1962).

²⁹⁵ This is a very broad area. It involves no stretching of "public welfare" to include within its bounds a prohibition of racial discrimination in housing.

of Appeals has given Kentucky lawmakers wide latitude in enacting laws for the "public welfare." Its position in this regard has been made quite clear by cases such as *Moore v. Ward*,²⁹⁶ where the Court asserted that:

It is peculiarly within the province of the legislature to assimilate, consider, and weigh all the factors which inhere in the concept of public welfare. When the courts repeatedly assert that they have no authority to challenge the wisdom of a statute, it is a recognition that the legislature may within extremely broad limits determine "its own standard of public welfare."²⁹⁷

The Court of Appeals, like the United States Supreme Court, has gotten out of the "super legislature"²⁹⁸ business. Both Courts went through an era in which they invalidated economic regulation quite readily.²⁹⁹ But as the laissez-faire economics which motivated the earlier decisions became somewhat passe, both Courts discovered that "the fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."³⁰⁰

Even though the statement that the Court of Appeals would view an open housing law as bearing a reasonable relation to a proper legislative purpose is speculative, a contrary decision would be rather difficult to square with cases like *Jasper v. Commonwealth*,³⁰¹ wherein the Court held that the police power is as "broad and comprehensive as the demands of society make necessary It must keep pace with changing concepts of public welfare."³⁰² Likewise federal constitutionality should be assured by cases such as *Day-Brite Lighting Inc. v. Missouri*,³⁰³ and *Railway Express Agency v. New York*³⁰⁴ wherein the Supreme

²⁹⁶ 377 S.W.2d 881 (Ky. 1964).

²⁹⁷ *Id.* at 884. The Court of Appeals was quoting *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

²⁹⁸ The term "super-legislature" was used by Mr. Justice Douglas in the *Day-Brite* case, *id.*, when he said: "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare."

²⁹⁹ For an account of this period in the Supreme Court's history, see WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942). For Kentucky examples, see *Black v. O'Hara*, 175 Ky. 623, 194 S.W. 811 (1917); *Tilford v. Belknap*, 126 Ky. 244, 103 S.W. 289 (1907).

³⁰⁰ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

³⁰¹ 375 S.W.2d 709 (Ky. 1964).

³⁰² *Id.* at 711.

³⁰³ 342 U.S. 421 (1952).

³⁰⁴ 336 U.S. 108 (1949).

Court constantly reiterates that it does "not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate."³⁰⁵ The conclusion must be that the federal due process standards are virtually identical with Kentucky's in the area of economic regulations, and an open housing law does no violence to either.³⁰⁶

3. *Due Process Constitutionality in Other Jurisdictions.*— Perhaps to further bolster the proposition that open housing laws could meet constitutional challenge in Kentucky, it would be helpful to survey the constitutional status of open housing laws in other states. As pointed out in the survey contained in this article,³⁰⁷ seventeen states and twenty-five municipalities have already passed laws regulating some aspect of the problem. A brief look at some of the state court decisions passing on the constitutionality of these statutes would seem helpful to the present discussion.

A leading case is *Colorado Anti-Discrimination Commission v. Case*.³⁰⁸ Sustaining the general validity of an open housing statute, the Colorado court said:

We hold that as an unenumerated inalienable right a man has the right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination against him on account of his race, creed or color. The act of the legislature here in question is fully justified by . . . the Ninth Amendment of the United States.³⁰⁹

³⁰⁵ *Id.* at 109. For additional support on the proposition that an open housing law could withstand constitutional challenge in the nation's highest Court, see *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 588 (1960).

³⁰⁶ Most of the constitutional arguments used by opponents of open housing legislation are made with the private homeowner in mind. This is as it should be because, when an open housing law is applied to a private homeowner selling his own home, the greatest constitutional difficulties are raised. However all open housing laws cover a greater range of transactions than the sale between two private individuals. Most of the laws presently in operation cover real estate brokers, landlords, and lending institutions as well (if indeed they even cover the private sale). See Appendix I & II *infra*. Thus far the constitutional issues have been discussed with the private homeowner in mind on the theory that if open housing could survive constitutional challenge as regards that private sale, no difficulties would arise in application to realtors, banks, or landlords. For some cases upholding antidiscrimination legislation as applied to businesses, see *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Chicago Real Estate Bd. v. City of Chicago*, 224 N.E.2d 793 (Ill. 1967); *Commonwealth v. Beasy*, 386 S.W.2d 444 (Ky. 1965).

³⁰⁷ See Appendix I & II *infra*.

³⁰⁸ 380 P.2d 34 (Colo. 1962).

³⁰⁹ *Id.* at 41.

New Jersey also sustained its open housing law against due process attack in *Jones v. Haridor Realty Corp.*³¹⁰ The court upheld the law by using a test identical with that employed by the Kentucky Court of Appeals: exercise of the state's police power "is valid so long as the regulation or limitation on the use of property bears a reasonable relation to public health, safety, morals, or general welfare."³¹¹ This view was again upheld in a 1965 case.³¹²

The most recent case of this series involves the Chicago open housing ordinance.³¹³ The Chicago Real Estate Board sought a declaratory judgment on the validity of Chicago's ordinance and an injunction to enjoin its enforcement. The Illinois Supreme Court unanimously upheld the ordinance in an extremely thorough opinion which covered every constitutional aspect of open housing legislation, and discussed at some length the other state court decisions in this area.³¹⁴ It concluded that "the concept of due process of law has never insulated a business from regulations deemed essential under the police power."³¹⁵

Although New York,³¹⁶ Massachusetts,³¹⁷ Ohio,³¹⁸ California,³¹⁹ and Washington³²⁰ have also had occasion to pass on the constitutionality of open housing laws, none of these statutes were invalidated on due process grounds.

4. *Property Rights.*—In spite of voluminous authority to the contrary, opponents of open housing press their property

³¹⁰ 37 N.J. 384, 181 A.2d 481 (1962).

³¹¹ *Id.*, 181 A.2d at 484-85.

³¹² *David v. Vesta Co.*, 45 N.J. 301, 212 A.2d 345 (1965).

³¹³ See Appendix II, No. 5 *infra*.

³¹⁴ *Chicago Real Estate Bd. v. City of Chicago*, 224 N.E.2d 793 (Ill. 1967).

³¹⁵ *Id.* at 801.

³¹⁶ *New York State Comm'n Against Discrimination v. Pellham Hall Apartments*, 170 N.Y.S.2d 750 (1958).

³¹⁷ *Massachusetts Comm'n Against Discrimination v. Colangelo*, 182 N.E.2d 595 (Mass. 1962).

³¹⁸ *Porter v. City of Oberlin*, 30 Ohio App. 2d 158, 209 N.E.2d 629 (1964). An earlier case, *Porter v. City of Oberlin*, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1963), generally upheld the ordinance, but voided the enforcement procedure. The reason was that a dismissal by the enforcing commission did not prevent later judicial action. For a criticism of these somewhat dubious grounds, see Pearl & Turner, *Fair Housing Laws: Halfway Mark*, 54 GEO. L.J. 156 (1965-66).

³¹⁹ *Burks v. Poppy Constr. Co.*, 57 Cal. Rep. 2d 463, 370 P.2d 313 (1962).

³²⁰ *O'Meara v. Washington State Bd. Against Discrimination*, 365 P.2d 1, (Wash. 1961). This case also voided the statute on grounds other than due process. For a discussion of this case, see text at notes 340-59 *infra*.

rights argument.³²¹ The basic fallacy in this argument is the contention that an open housing law amounts to a taking and thus must be compensated for due process to be satisfied.³²² An open housing law, limiting the grounds for choosing buyers or renters, only *regulates* one's use of his property.³²³ Obviously this type of antidiscrimination law does not completely deprive a seller of all "freedom of choice." It prohibits only what the law considers unreasonable grounds for choosing—race, color, or creed. No law requires sale or rental to a person not likely to pay or keep the premises in good repair. Certainly even the most ardent opponent of open housing can distinguish between this type of regulation and a law which eliminated all "freedom of choice" in selling property or perhaps even eliminated the right to sell. The latter actions might well involve the taking of a property right, but no one could seriously contend that every restriction placed on property constitutes a taking. Of course, federal and state requirements of due process prevent "the legislative power of this state from arbitrarily passing a law taking property away from one person and giving it to another person without value received or without any contractual basis."³²⁴ But it is clear that a law or ordinance could "require that property rights be subordinated even though they are otherwise within the protection of the Constitution."³²⁵ This entire line of

³²¹ AVINS, *OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT: SYMPOSIUM 8* (1963); AVINS, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13 (1960); AVINS, *Trade Regulations*, 12 RUTGERS L. REV. 149 (1957).

³²² They are partially correct. If property is in fact taken, due process requires that compensation be paid. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

³²³ The difference between a taking and a regulation is often a very fine line. In cases where it is difficult to determine which is involved, a balancing test is employed. The public benefit gained by the regulation is balanced against the private loss. See *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

If the balancing test is applied to an open housing law, it should become apparent that no compensation is required. Consider the evils enumerated by the court in *Jones v. Haridor Realty Corp.*, 37 N.J. 384, 181 A.2d 481, 485 (1962) (see text at note 294 *supra*). If some of these evils were eliminated by an open housing law, the public benefit would be immeasurable. On the other side of the scales, the private loss must be weighed. This loss can be described variously as "freedom of choice" or a basic property right, but it seems ultimately to boil down to little more than the opportunity to practice racial prejudice. Such a loss carries very little weight.

³²⁴ *Illinois Cent. R.R. v. Commonwealth*, 305 Ky. 632, 635, 204 S.W.2d 973, 975 (1947).

³²⁵ *Bond Bros. v. Louisville & Jefferson County Metropolitan Sewer Dist.*, 307 Ky. 689, 696, 211 S.W.2d 867, 871 (1948).

argument was well summarized by the Kentucky Court of Appeals:

Almost inevitably the exercise of police power involves the destruction or limitation of property rights without a hearing. It is not a violation of that constitutional mandate if the police power is properly exercised. . . . To say that property is taken without due process, or without compensation, or in abridgement of the equal protection clause of the Federal Constitution, is simply another way of presenting the argument that the Act is arbitrary under section 2 of the Kentucky Constitution.³²⁶

The strongest due process argument against an open housing law may be the one found in a Supreme Court case³²⁷ which originated in Kentucky. It began when Louisville passed an ordinance to:

[P]revent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively.³²⁸

The effect of these "reasonable provisions" was to require colored persons living on blocks where the majority of homes were occupied by colored people to sell their homes only to colored people; white people in blocks where the majority was white were likewise restricted.³²⁹ The Court of Appeals had no problem sustaining the statute against due process and equal protection attacks.³³⁰ In the course of its opinion the Court made the following observation (which incidentally furnishes the strongest language in favor of the constitutionality of an open housing law which research of Kentucky cases has produced):

The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher

³²⁶ Moore v. Ward, 377 S.W.2d 881, 885 (Ky. 1964).

³²⁷ Buchanan v. Warley, 245 U.S. 60 (1917).

³²⁸ This ordinance may be found in Harris v. City of Louisville, Buchanan v. Warley, 165 Ky. 559, 560, 177 S.W. 472, 473 (1915).

³²⁹ *Id.*

³³⁰ Harris v. City of Louisville, Buchanan v. Warley, 165 Ky. 559, 177 S.W. 472 (1915).

standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the state in respect thereof, so that today all private property is held subject to the unchallenged right and power of the state to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare.³³¹

*Buchanan v. Warley*³³² was appealed to the United States Supreme Court, and the Kentucky decision was reversed. The Court granted that the state's power to pass laws under the police power was extremely broad and that this power may be used to control property. However, it felt Louisville went too far in this case and held that the ordinance violated the fourteenth amendment.³³³

At first blush this case would seem to be anything but a hindrance to open housing. However, the Supreme Court's statement of the case's issue, if read with an eye toward the basic effect of an open housing law, could create some difficulty. The Court said the issue was: "May the occupancy, and, necessarily the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"³³⁴ What does open housing legislation do except inhibit the sale of property "because of the color of the proposed occupant of the premises."³³⁵ It is unfortunate that the case was decided on due process when equal protection so strongly recommends itself. However, when *Buchanan* was decided, the *Plessy v. Ferguson*³³⁶ doctrine of "separate but equal" was holding sway and prevented a contrary result. Nevertheless, the *Buchanan* Court pointed out that the Civil Rights Acts of 1866³³⁷ and 1870³³⁸ passed pursuant to the thirteenth and fourteenth amendments, "expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white

³³¹ *Id.* at 569, 177 S.W. at 476.

³³² 245 U.S. 60 (1917).

³³³ *Id.*

³³⁴ *Id.* at 75.

³³⁵ *Id.*

³³⁶ 163 U.S. 537 (1896).

³³⁷ 42 U.S.C. § 1982 (1866).

³³⁸ 42 U.S.C. § 1981 (1870).

citizens.”³³⁹ This statement would indicate that the Court had equal protection in mind even though it spoke of due process. Regardless of the factors which might have motivated the Court, it is in truth a rather extravagant claim that language in *Buchanan* invalidating a segregation ordinance could ever be used to invalidate a law having for its purpose the outlawing of a type of discrimination.

B. Other Constitutional Problems

At this point the conclusion is that an open housing law violates neither the due process clause of the fourteenth amendment nor Section Two of Kentucky's Constitution. When speaking of open housing legislation in general terms, the only constitutional problem presented is due process; however, variations in application of the law or the identity of the governmental entity passing the law can raise various other difficulties. The remainder of this section will be devoted to a discussion of constitutional problems, in Kentucky, of variations on the general open housing theme.

1. *Equal Protection.*—In 1957 the state of Washington passed an anti-discrimination statute,³⁴⁰ part of which provided that publicly-assisted housing could be obtained without discrimination.³⁴¹ Publicly-assisted housing was defined as that purchased, repaired, or maintained by a loan whose repayment was insured by the federal or state government.³⁴² The Supreme Court of Washington³⁴³ held that this statute violated the equal protection clause of the fourteenth amendment and Article I, Section 12, of the Washington Constitution which provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” In so deciding, the court did not feel there was any “reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages,

³³⁹ *Buchanan v. Warley*, 245 U.S. 60, 78 (1917).

³⁴⁰ 49 WASH. REV. CODE § 60.030 (1957).

³⁴¹ *Id.*

³⁴² *Id.* at § 60.040.

³⁴³ *O'Meara v. Washington State Bd. Against Discrimination*, 365 P.2d 1 (Wash. 1961).

or those who are purchasing upon contract."³⁴⁴ The court felt that the law had the effect of giving those with conventional mortgages "special privileges and immunities,"³⁴⁵ that the classification was "arbitrary and capricious,"³⁴⁶ and that it bore "no reasonable relation to the evil . . . sought to be eliminated."³⁴⁷ The opinion of the court had the support of only three judges, with two others concurring in the outcome, but urging that the decision should turn on what amounted to due process grounds.³⁴⁸

This case has received something less than universal acclaim.³⁴⁹ It is a weak precedent, not necessarily because of the split court, but because of its generally discredited view of equal protection. Since 1940 the United States Supreme Court has voided only one economic regulation on equal protection grounds.³⁵⁰ The Court has often reiterated the doctrine that, like due process, equal protection allows a great deal of discretion to rest with the legislature.³⁵¹ Basically, only "invidious discrimination"³⁵² is proscribed. Statutory discrimination will be upheld "if any state of facts reasonably may be conceived to justify it."³⁵³

The identical question also confronted the New Jersey,³⁵⁴ California,³⁵⁵ and New York courts,³⁵⁶ but none followed the Washington decision.³⁵⁷ New Jersey did not find the limitation

³⁴⁴ *Id.* at 5.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ See Van Alstyne, *The O'Meara Case and Constitutional Requirements of State Anti-Discrimination Laws*, 8 *How. L.J.* 158 (1962); 75 *HARV. L. REV.* 1647 (1962).

³⁵⁰ LOCKHART, KAMISAR, & CHOPER, *CASES ON CONSTITUTIONAL LAW* 611 (1964). The case spoken of in the text was *Morey v. Doud*, 354 U.S. 457 (1957).

³⁵¹ See, e.g., *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949).

³⁵² *Morey v. Doud*, 354 U.S. 457, 463 (1957).

³⁵³ *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

³⁵⁴ *Jones v. Haridor Realty Corp.*, 37 N.J. 384, 181 A.2d 481 (1962).

³⁵⁵ *Burks v. Poppy Constr. Co.*, 57 Cal. Rep. 2d 463, 370 P.2d 313 (1962).

³⁵⁶ *New York State Comm'n Against Discrimination v. Pellham Hall Apartments*, 170 N.Y.S.2d 750 (1958).

³⁵⁷ The *Chicago Real Estate Bd.* case, 224 N.E.2d 793 (Ill. 1967), involved an equal protection issue. The realtors argued that home owners and brokers are both in a position to practice housing discrimination, but only brokers are restricted. The Illinois court discusses a wide range of cases on this issue, *id.* at 802-07, and concludes that equal protection is not violated. The court (at 805) felt it

evident that the city council was not obliged to deal with the evil of housing discrimination in its entirety by prohibiting such conduct by all persons alike. Quite the contrary. Pursuant to a realistic appraisal that

(Continued on next page)

to publicly assisted housing to be an unreasonable differentiation. "Absence of mathematical nicety or exact equality does not offend where there is some reasonable ground for the separate treatment. The wide scope of state police power will support such treatment so long as it cannot be said to be arbitrary."³⁵⁸ A New York court, faced with a similar classification, echoed these sentiments and emphasized the established principle that a legislature is not required to eradicate an evil in one broad sweep, but rather may make it a "step by step proposition."³⁵⁹

In addition to the fourteenth amendment of the federal constitution, Kentuckians can also claim equal protection under Section Fifty-nine of their state constitution. This section generally prohibits special laws "where a general law can be made applicable."³⁶⁰ The Court of Appeals has held that "in order for a law to be general in its constitutional sense it must meet the following requirements: (1) It must apply equally to all in a class, and (2) there must be distinctive and natural reasons for supporting the classification."³⁶¹ These requirements prohibit the Legislature from taking what the Court calls a "natural class of persons"³⁶² and dividing it, arbitrarily trying to call each new section a class susceptible to different treatment. The rule is "well established that the classification must be based upon some reasonable substantial difference in kind, situation or circumstance which bears a proper relation to the purpose of the statute."³⁶³ This would seem to dictate a result different than that reached by the Washington court. Separation of publicly assisted housing from privately assisted housing is in no sense arbitrary.

(Footnote continued from preceding page)

in this emotionally charged area of housing and race relations progress can be made by cautious advance, the city should direct its attention to the aspect of the problem deemed most acute. This step, moreover, will not be deemed arbitrary merely because others, also guilty of the evil of housing discrimination, were not included within the classification selected. The *sine qua non*, however, is that under the steps taken, the differences between those included and those excluded from the law are reasonably related to its purpose. (Citations omitted.)

³⁵⁸ Jones v. Haridor Realty Corp., 37 N.J. 384, 181 A.2d 481, 484 (1962).

³⁵⁹ New York State Comm'n Against Discrimination v. Pellham Hall Apartments, 170 N.Y.S.2d 750, 759 (1958). The Supreme Court supported this line of argument in Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

³⁶⁰ KY. CONST. § 59(29). This section also contains twenty-eight specific prohibitions of "special laws," but none of these are applicable here.

³⁶¹ Schoo v. Rose, 270 S.W.2d 940, 941 (Ky. 1954).

³⁶² *Id.*

³⁶³ *Id.*

Surely the state, while hopefully dedicated to eliminating all discrimination, has an even greater interest in making sure that those who purchase housing with government money do not discriminate in the sale or rental of that housing. When viewed in this light, an open housing law applying only to publicly assisted housing should withstand constitutional challenge in Kentucky.

2. *The Authority of Local Government.*—The state's police power is thought to be a power which is inherent in a sovereignty.³⁶⁴ The states, as sovereign entities, thus retain whatever police power is not expressly denied them by the federal constitution.³⁶⁵ Political entities within a state, the cities and counties, are not sovereign and possess no such reserved power.³⁶⁶ Cities and counties are mere "creatures of the legislature."³⁶⁷

The people of every state have the inherent right to pass laws for the public safety, health, morals, and general welfare. The police power rests in the legislature of the state, and no subdivision of the state may exercise that power except through a grant made by the people of the state through its legislative branch.³⁶⁸

Therefore, a city or county in Kentucky could not enact an ordinance prohibiting discrimination in the sale or rental of housing without some delegation of authority from the Legislature or state constitution.

Kentucky's cities are divided into classes by Section 156 of the state constitution.

The cities and towns of this Commonwealth, for the purposes of their organization and government, shall be divided into six classes. The organization and powers of each class shall be defined and provided for by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. To the first class shall belong cities with a population of one hundred thousand or more; to the second class, cities with a population of twenty thousand or more, and less than one hundred

³⁶⁴ For a general discussion of this, see 16 AM. JUR. 2d *Constitutional Law* § 260 (1964).

³⁶⁵ *Id.* at § 259.

³⁶⁶ McQUILLIN, MUNICIPAL CORPORATIONS § 24.35 (3d ed. 1949); 39 Ky. L.J. 447 (1950-51).

³⁶⁷ *Boyd v. Chambers*, 78 Ky. 140, 143 (1879).

³⁶⁸ *Fowler v. Obier*, 224 Ky. 742, 751-52, 7 S.W.2d 219, 223 (1928).

thousand; to the third class, cities with a population of eight thousand or more, and less than twenty thousand; to the fourth class, cities and towns with a population of three thousand or more, and less than eight thousand; to the fifth class, cities and towns with a population of one thousand or more, and less than three thousand; to the sixth class, towns with a population of less than one thousand.³⁶⁹

The only city in the state qualifying as a first class city is Louisville. The general powers possessed by the residents of a first class city enable them to "govern themselves by any ordinances and resolutions for *municipal purposes* not in conflict with the Constitution or laws of this state or of the United States."³⁷⁰ (Emphasis added.) The general powers of Louisville are also granted in KRS 83.011:

The legislative body of any city of the first class is hereby authorized and empowered to exercise all the rights, powers, franchises, and privileges not in conflict with any statute now or hereafter enacted which such legislative body shall deem requisite for the welfare of the inhabitants of such city . . . to the same extent and with the same force and effect as if the General Assembly had . . . granted and delegated to the legislative body of such city all the authority that it is within the power of the General Assembly to grant.³⁷¹

The effect of these statutes has been to grant to first class cities a police power "as broad as the police power of the state."³⁷² However, the question is which of these two statutes grants this broad power. The Court of Appeals in *Commonwealth v. Beasy*,³⁷³ held that "Louisville had adequate police power under the general charter for cities of the first class, particularly KRS 83.010, to enact a penal anti-discrimination ordinance."³⁷⁴ This is a rather surprising result in view of the sweeping delegation contained in KRS 83.011. Apparently the Court of Appeals feels that the delegation of power to enact ordinances for "municipal purposes" is sufficient to delegate the entire police power of the state. It is difficult to understand the Court's reasoning in by-

³⁶⁹ Ky. CONST. § 156.

³⁷⁰ KRS § 83.010 (1942).

³⁷¹ KRS § 83.011 (1954).

³⁷² *Commonwealth v. Beasy*, 386 S.W.2d 444, 447 (Ky. 1965).

³⁷³ 386 S.W.2d 444 (Ky. 1965). For a detailed analysis of this case, see 53 Ky. L.J. 812 (1965).

³⁷⁴ 386 S.W.2d at 447.

passing KRS 83.011, which granted to first class cities "all the authority that it is within the power of the General Assembly to grant,"³⁷⁵ and emphasizing the relatively limited delegation in KRS 83.010.

Kentucky cities of the second class³⁷⁶ are granted "power to govern themselves in all fiscal, prudential and *municipal concerns* by ordinances and resolutions not in conflict with the Constitution or statutes of this state or of the United States."³⁷⁷ (Emphasis added.) The question which immediately arises is whether "municipal concerns" are the same as "municipal purposes." There is no discernible reason for saying "concerns" are substantially different from "purposes" in the context of municipal regulations. Thus, if *Beasy* is to be accepted at face value, it would seem that second class cities also possess police power as broad as that of the state.

Three other classes of Kentucky cities, third, fifth, and sixth,³⁷⁸ are given general delegations which, at face value, seem broad enough to encompass open housing legislation. Third class cities are empowered "by ordinance, [to] make police regulations to secure and protect the general health, convenience, morals and safety of the public."³⁷⁸ Fifth and sixth class cities are empowered to "pass ordinances not in conflict with the Constitution or laws of this state or of the United States."³⁷⁹ They are also empowered to "enact and enforce within the city limits all local, police, sanitary and other regulations not in conflict with general laws."³⁸⁰

This group of statutes, taken in conjunction with the *Beasy* case, would allow a strong argument to be made in support of municipal open housing ordinances in second, third, fifth, and sixth class cities. There seems to be nothing particularly undesirable about the Commonwealth delegating its police power to municipalities. However, outside of the *Beasy* case, there is little authority for giving such a broad interpretation to the gen-

³⁷⁵ KRS § 83.011 (1954).

³⁷⁶ The second class cities in Kentucky are: Ashland, Bowling Green, Covington, Frankfort, Lexington, Newport, Owensboro, Paducah. KRS § 81.010 (1966).

³⁷⁷ KRS § 84.010 (1942).

³⁷⁸ KRS § 85.120(6) (1942).

³⁷⁹ KRS § 87.070 (1942); KRS § 88.080 (1942).

³⁸⁰ *Id.*

eral delegations.³⁸¹ In his treatise on municipal corporations,³⁸² McQuillin made the following comment:

While a municipality must observe and itself not violate constitutional or statutory guarantees of equality of civil rights irrespective of race or social condition, insofar as these guarantees bind municipal governments, a municipal corporation ordinarily is without power to legislate upon, or extend, equality of civil rights.³⁸³

Thus, while it is certain that first class cities would be empowered to prohibit discrimination in the sale or rental of housing, the general delegations of power to other classes of cities afford no such certainty. Even though *Beasy* emphasized the general delegation of KRS 83.010, the broad delegation of KRS 83.011 was ever present, and though seemingly ignored, its effect on the Court is uncertain. If "municipal purposes" justified such a broad delegation, why did the Legislature bother to enact KRS 83.011? Under the *Beasy* case the latter section appears to be merely redundant. Thus the powers of other classes of cities under their general delegations are at best uncertain.

The general delegations of power previously discussed do not furnish the only bases for open housing ordinances in the municipalities of Kentucky. There are numerous delegations of power contained in the statutes which deal with specific topics. These specific delegations may also be quite important in determining whether Kentucky cities below the first class are em-

³⁸¹ See Annot., 93 A.L.R.2d 1028 (1964). A good example of a city ordinance which was sustained in a state court is found in *Porter v. City of Oberlin*, 3 Ohio App. 2d 158, 209 N.E.2d 629 (1964), and *Porter v. City of Oberlin*, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1963). The Ohio court indicated that under OHIO CONST. art. XVIII, § 3, Oberlin has police power as broad as that of the state. The Constitutional provision gave Ohio cities home rule. It provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations, as are not in conflict with general laws." This is recognized by the Ohio Supreme Court as delegating an extremely broad police power to Ohio's cities. See, e.g., *City of Cincinnati v. Correll*, 141 Ohio St. 535, 49 N.E.2d 412 (1943).

It would seem that first class cities in Kentucky possess a similar police power to that of Ohio's cities. However, there is actually no home rule in Kentucky. See, Note, *Municipal Home Rule for Kentucky?*, 54 Ky. L. J. 757 (1966).

The Illinois court in the *Chicago Real Estate Bd.* case, 224 N.E.2d 793 (Ill. 1967), raised the inference that a delegation to "pass and enforce all necessary police ordinances," would be broad enough to support an open housing ordinance. *Id.* at 800.

³⁸² McQUILLIN, MUNICIPAL CORPORATIONS (3d ed. 1949).

³⁸³ *Id.* at § 24.430.

powered to prohibit discrimination in the sale or rental of housing.

KRS 84.190 empowers the general council of a second class city to "license, tax and regulate all trades, occupations and professions."³⁸⁴ Under this delegation it seems possible for a city of this class to prohibit discrimination by real estate brokers. Indeed the General Assembly has expressly recognized the power of second class cities to regulate brokers under the above statute, for in Chapter 324 of KRS,³⁸⁵ which deals exclusively with real estate brokers and salesmen, the following provision is made:

Nothing contained in this chapter shall affect the power of municipalities to tax, license, and regulate real estate brokers. The requirements hereof shall be in addition to the requirements of any existing or future ordinances of any municipality so taxing, licensing, or regulating real estate brokers.³⁸⁶

In the *Chicago Real Estate Board* case,³⁸⁷ a situation was presented wherein an open housing ordinance was passed on the basis of a statutory delegation to regulate brokers almost identical to that in Kentucky.³⁸⁸ In sustaining the ordinance against a claim that when the delegation was made "regulation" did not include civil rights legislation, the Illinois court said:

It would be unusual to construe the power to 'regulate' to mean only the kind of regulation contemplated by the legislature in 1871, as plaintiffs suggest. That exercise in conjecture would be contrary not only to the policy of this court to maintain the resiliency of the law, . . . but to the plain terms of the statute preserving without qualifications, future regulations of brokers by municipalities.³⁸⁹

The reasoning of the Illinois Supreme Court seems sound, and

³⁸⁴ KRS § 84.190(1) (1942).

³⁸⁵ KRS ch. 324 (1952).

³⁸⁶ KRS § 324.340 (1942).

³⁸⁷ 224 N.E.2d 793 (Ill. 1967).

³⁸⁸ The Illinois statutory scheme is virtually identical to Kentucky's with regard to regulation of realtors by second class cities. The only difference is that the Illinois statute specifically names realtors. Cities and Villages Act, ILL. REV. STAT. ch. 24 § 11-42-1 (1965). This difference should not be of enough significance to merit a different interpretation.

³⁸⁹ *Chicago Real Estate Bd. v. City of Chicago*, 224 N.E.2d 793, 799-800 (Ill. 1967).

no reason recommends itself why the Kentucky Court of Appeals should reach a contrary result.

Second class cities also have authority to regulate "tenement houses."³⁹⁰ This term has never been interpreted by the Kentucky Court, but an early Ohio case³⁹¹ approved the following definition:

A building, the different rooms or parts of which are let for residence purposes by the possessor to others, as distinct tenements, so that each tenant, as to the room or rooms occupied by him, would sustain to the common landlord the same relation that the tenant occupying a whole house would to his landlord.³⁹²

In other words, "tenement house" meant "apartment house." Although there is some contrary authority in the meaning of the term,³⁹³ a strong argument could be made that the second class cities are empowered to apply an open housing ordinance to apartment rentals.

For some unknown reason fourth class cities receive no general delegation of power comparable to the other classes of cities.³⁹⁴ However, they are specifically delegated the power to "regulate, within the city, . . . any business licensed or taxed by the state, and any trade, occupation or profession."³⁹⁵ The Court of Appeals has already held that this section does not delegate the power to regulate or tax apartment houses.³⁹⁶ However, there seems to be no good reason why real estate brokers could not be brought under its purview. This should be particularly true in view of the fact that real estate brokers and salesmen are licensed by the state.³⁹⁷

In Kentucky's county governments the fiscal court is the legislative body. The fiscal court is granted certain powers,³⁹⁸

³⁹⁰ KRS § 84.190(3) (1942).

³⁹¹ *Rose v. King*, 49 Ohio St. 213, 30 N.E. 267 (1892).

³⁹² *Id.*, 30 N.E. at 270.

³⁹³ *See, e.g., Kitching v. Brown*, 92 App. Div. 160, 87 N.Y. Supp. 75 (1904).

³⁹⁴ KRS § 86.010 (1942) specifically empowers a fourth class city to do certain acts such as sue and be sued, enter contracts, and hold and acquire land. There is no broad general delegation.

³⁹⁵ KRS § 86.120(1) (1942).

³⁹⁶ *Martin v. City of Greenville*, 312 Ky. 292, 227 S.W.2d 435 (1950).

³⁹⁷ KRS § 624.020 (1956).

³⁹⁸ KRS § 67.080 (1942).

none of which seem broad enough to permit the court to enact open housing legislation. However, there is a possible source for county action in the area of open housing. The Kentucky Interlocal Cooperation Act³⁹⁹ provides:

Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state, or of the United States to the extent that the laws of the United States permit such joint exercise or enjoyment.⁴⁰⁰

"Public agency" within the Act means political subdivisions of the state.⁴⁰¹

The question raised is whether the Act permits two governmental agencies to exercise a power jointly although only one of these agencies actually possesses the power. The Act has never been interpreted by the Court of Appeals, and a writer discussing this point was unable to reach a conclusion.⁴⁰² If the Act is interpreted to permit interlocal cooperation in an area even though only one of the governmental agencies was actually empowered to act in the area, it might be possible for a county, acting jointly with a city within that county, to pass an open housing ordinance. At this time the theory remains untested and therefore speculative, but the vague wording of the Act would clearly seem to permit such an interpretation.

The situation at this point is such that the only unequivocal answer which could be given on local authority in the area of open housing is that first class cities are empowered to act. In spite of this uncertainty, the city of Bardstown, together with Nelson County, has passed a comprehensive open housing ordinance covering private homeowners and providing for penal sanctions.⁴⁰³ This ordinance was passed pursuant to a purported delegation of authority in the Kentucky Civil Rights Act of

³⁹⁹ Ky. Acts, ch. 216 (1962).

⁴⁰⁰ KRS § 65.240(1) (1962).

⁴⁰¹ KRS § 65.230 (1962).

⁴⁰² Owsley, *The Kentucky Interlocal Cooperation Act*, 51 Ky. L. J. 22, 31-32 (1962).

⁴⁰³ Bardstown, Nelson County, Ky., Joint Ordinance and Resolution of the City of Bardstown and the County of Nelson, Kentucky, for the Prevention of Discrimination and Creating a Bardstown-Nelson County Commission on Human Rights and to Prevent Discrimination in Places of Public Accommodation, Resort or Amusement, Employment or Housing, June 14, 1966.

1966.⁴⁰⁴ Covington, Ky., and Kenton County, Ky., have also enacted laws, although their laws are much narrower in coverage than Bardstown's.⁴⁰⁵

In discussing specific delegations of power which might permit open housing legislation, the Civil Rights Act of 1966 is highly significant. The Act's title would seem to disavow any connection with open housing by calling it "an Act to prevent discrimination in employment and public accommodations within the Commonwealth of Kentucky."⁴⁰⁶ Consistently with this title, the various provisions in the Act speak of discrimination in employment and public accommodations.⁴⁰⁷ However, the clause of the Act delegating authority to local governments is as follows: "cities and counties are authorized to adopt and enforce ordinances, orders, and resolutions prohibiting discrimination on the basis of race, color, religion, or national origin, and to prescribe penalties for violations thereof . . ."⁴⁰⁸ This delegation, standing alone, is clearly broad enough to allow cities and counties to prohibit discrimination in the sale or rental of housing. But an interpretation problem is presented when the clause is read along with the rest of the Act, particularly the title.

It could be contended that the Act does delegate such authority in view of the fact that all other sections of the Act, when speaking of discrimination, carefully limit it to discrimination in public accommodations or employment while the delegation section contains no such limitation. However, a strong argument can be made that, in view of the Act's title, the Legislature obviously intended the whole Act to refer only to public accommodations and employment. The Court of Appeals has indicated the importance of the Legislature's intent in interpreting legislation. "The intent of the lawmakers is the soul of the statute and the search for this intent we have held to be the guiding star of the court. It must prevail over the literal sense and the precise letter of the language of the statute."⁴⁰⁹

⁴⁰⁴ KRS ch. 344 (1966).

⁴⁰⁵ See Appendix II *infra*.

⁴⁰⁶ Ky. Acts, ch. 2 (1966).

⁴⁰⁷ E.g., KRS § 344.100 (1966); KRS § 344.120 (1966).

⁴⁰⁸ KRS § 344.300 (1966).

⁴⁰⁹ *Fidelity & Columbia Trust Co. v. Meek*, 294 Ky. 122, 171 S.W.2d 41 (1943). The Court was quoting *Bridgeman v. City of Derby*, 104 Conn. 1, 132 Atl. 25, 27 (1926).

If the delegation be interpreted to be as broad as a literal reading would seem to make it, constitutional difficulties must be faced. Section Fifty-one of the Kentucky Constitution provides: "No law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title . . ." ⁴¹⁰ One's first impression upon reading this section is that the entire Act is unconstitutional because the prohibition of discrimination in public accommodations and employment are two separate subjects. However, the Court of Appeals has not interpreted Section Fifty-one so strictly, ⁴¹¹ having viewed it merely as a requirement that titles give "fair and reasonable notice of the nature and purpose of the Act." ⁴¹² This is "so that a member of the legislature or any other interested person reading the title may obtain a general notice or knowledge of the contents of the Act or what it proposes to do." ⁴¹³

Section Fifty-one does not completely foreclose the possibility of giving the delegation a broad interpretation. It is at least an arguable point that the subject expressed in the Act's title was the prohibition of discrimination in general, thus encompassing discrimination in housing. There is some authority to the effect that the constitution requires only that the Act contain nothing incongruous or irrelevant to the general subject in the title. ⁴¹⁴ However, if one considers the basic purposes of Section Fifty-one, it is difficult to accept this argument.

The 1966 Act offers a sounder way to empower local governments to prohibit housing discrimination. If it is conceded that local governments are delegated only the authority to prohibit discrimination in public accommodations and employment, there may be sufficient delegation to allow a limited open housing ordinance. The Act defines a place of public accommodation, resort, or amusement as including

⁴¹⁰ KY. CONST. § 51.

⁴¹¹ The Court has often upheld laws which, like the 1966 Civil Rights Act, seem to express two subjects in the title. *See, e.g.,* *Doller v. Reid*, 308 Ky. 348, 214 S.W.2d 584 (1948); *Carman v. Hickman County*, 185 Ky. 630, 215 S.W. 408 (1919).

⁴¹² *Board of Educ. of Kenton County v. Mescher*, 310 Ky. 453, 459, 220 S.W.2d 1016, 1019 (1949).

⁴¹³ *Engle v. Bonnie*, 305 Ky. 850, 852, 204 S.W.2d 963, 964 (1947).

⁴¹⁴ *See Fidelity & Columbia Trust Co. v. Meek*, 294 Ky. 122, 171 S.W.2d 41 (1943).

any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public or which is supported directly or indirectly by government funds⁴¹⁵

It should be possible to fit realtors, subdividers, and perhaps owners of large apartment complexes into this definition. After all, their function is nothing more than supplying "goods or services to the general public." They are no less of a "public accommodation" than are restaurants and retail stores. Large subdividers who build and sell hundreds of homes, none of which they have ever lived in, bear little resemblance to the private homeowner who puts his house on the market. One who sells or rents housing for a living, be it as an agent for another or as the owner, would seem susceptible of being termed a "public accommodation," as that phrase is defined in the Kentucky Civil Rights Act.⁴¹⁶

VII. CONCLUSION

A. The Need for an Open Housing Law

A solution to the problem of discrimination in housing rental and sale is a modern imperative. The groundwork laid for this conclusion has been statistically and economically oriented, but it shows that discrimination in the sale and rental of housing is a prime contributing factor to many problems of nationwide concern. Research indicates that the costs of housing discrimination to the state, in terms of industrial expansion, federal grants, urban decay, and a repressed Negro demand for housing, are more than an informed and progressive society should be willing to pay.

The human factors, however, are those which commend themselves to most proponents of open housing more readily than

⁴¹⁵ KRS § 344.130 (1966).

⁴¹⁶ There are very few cases which have interpreted the phrase. Rice v. Rinaldo, 95 N.E.2d 30 (Ohio Ct. of C.P. 1950), held that a dentist was not a public accommodation. However that case is not irreconcilable with the present contentions. There are few parallels between realtors and dentists. *But see* Burks v. Poppy Constr. Co., 57 Cal. Rep. 2d 463, 370 P.2d 313 (1962), where the California court held that a statute prohibiting discrimination "in all business establishments of every kind whatsoever," CAL. CIVIL CODE § 51 (West Supp. 1966), applied to a land developer who built and sold homes.

statistical and economic factors. In the final analysis, it is people we are talking about, and the effects on them are the most pressing reason to come to grips with housing discrimination and eliminate its more harmful results. The Supreme Court, in *Brown v. Board of Education*,⁴¹⁷ alluded to one basic effect of discrimination against Negro children: "To separate them from others solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁴¹⁸

As this is true for children in the schools, so is it true for all non-whites in forced segregation and in housing markets where discrimination creates segregation. The feelings of inferiority coupled with the abject frustration that faces the Negro may do as much to break his spirit as did the open slavery under which he formerly lived. A passage discussing the Negro housewife-mother seems applicable to all ghetto Negroes:

In large measures [the] conditions which existed under slavery still exist today [L]iving in restricted slums, under oppressive conditions, forced to menial work away from her home and her children, the Negro housewife must have striking ingenuity and fortitude to be able to keep a clean, well-kept home and to prevent her children from falling into evil ways.⁴¹⁹

Sometimes they succeed and sometimes not; but the best we can hope for is that only the frustration is passed on to the children and not the resulting propensity for evil. And so it is. The Negro American today is a smoldering person, highly aware of his oppression and angry about it, but at the same time fearful of the white power structure.⁴²⁰ His life is a study in anomaly and humiliation, replete with superstition on the part of both whites and blacks, degradation, and little or no opportunity to escape the discrimination which faces him every way he turns. It seems, then, little enough to ask that those Negroes who do overcome these handicaps be allowed to rent homes or apartments or to buy and build homes commensurate with their

⁴¹⁷ 347 U.S. 483 (1954).

⁴¹⁸ *Id.* at 494.

⁴¹⁹ DEUTSCH & COLLINS, *INTERRACIAL HOUSING* 139 (1951).

⁴²⁰ Cayton, *The Psychology of the Negro under Discrimination*, in *MINORITY PROBLEMS* 210 (1965).

financial ability in neighborhoods of their choosing. The white community would have something to gain from the assimilation which would result, and it should help and encourage these people to escape the slums, the ghetto way of life, and discrimination in general.

Not only should this be desirable from the standpoint of optimizing human resources and restoring basic dignity to valued individuals, but it should be even more desirable from the standpoint of encouraging contact between the races, reducing tension, and getting on with the work of securing "the blessings of liberty to ourselves and our posterity."⁴²¹

Finally, it would appear to be time for those who in fact believe in the precepts on which the federal and state constitutions are based to stand and be counted. Perhaps the undying opposition to civil rights, of which housing is a part, is the opposition of a minority. For example, how many whites would be willing to bomb a church, dynamite a truck, or shoot a man in the back from ambush to preserve all-white schools or all-white neighborhoods? Only a very few would be willing to go to such extremes, and the great majority is revolted by such heinous crimes, cowardice, and mob rule.⁴²² Yet there are those who are willing to go to this extreme, and they may very well be the single most important factor in relegating the Negro to his present position. There are many instances where a white has attempted to speak for the Negro. But then the castigation from the white bigot is directed to the spokesman with characteristic vituperation and name-calling. So loud is the philippic that all is silenced—even the protection that might have been forthcoming from other whites who might have spoken, but do not for fear that their deviation from a norm set up by the bigot will bring the obloquy down on their own heads. One writer has stated that:

Deviation from these norms [of discrimination] . . . is difficult [for many whites] because deviation may incur group sanctions. Since deviation in overt behavior is most likely to incur group sanctions, it is possible for an individual to have a "prejudiced" action orientation without having sentiments . . . appropriate to this orientation. Thus, under certain con-

⁴²¹ U.S. CONST. preamble.

⁴²² See ABRAMS, FORBIDDEN NEIGHBORS chs. X, XI (1955).

ditions, it is possible for a group to be considerably more prejudiced in action than in sentiment.⁴²³

Thus, realtors who broadcast myths about Negroes and declining property values, blockbusters with their misrepresentations and opportunistic acquisitiveness, and midnight dynamiters all serve to keep white property owners "in line," whether designedly or not; the result being that the pressure propagates the myths of the segregated society. These pressures on whites, coupled with the other economic and racial myths with which we are all bombarded, seem to lead to a situation where "a militant prejudiced minority [is able to determine] . . . the social practices of an unprejudiced majority."⁴²⁴

An open housing law would relieve this pressure on some white homeowners when the realtor is the discriminator; it would also take the pressure off the realtor when the homeowner is the discriminator.⁴²⁵ In effect, a law would remove the advantage the vociferous minority now has by removing the group pressure it can bring to bear. Since the law would cover everyone, realtors and homeowners could not exercise their discriminatory practices by citing fear of economic or social ostracism.⁴²⁶ The realtor who sells to a qualified Negro buyer may still encounter some ostracism, for "violating his agency status," but other realtors who attempted to apply the pressure would soon begin to wonder whether the first agent was not perhaps right after all when he makes a number of successful sales to financially able Negroes who, in all probability, will be accepted by their new neighbors.

These effects of an open housing law would tend, then, to restore a semblance of equality and dignity to some Negroes. The tendency would be to give them, their children, and all Negroes the basic realization that they can escape the ghetto if and when they are financially able. They do not presently have reason for such hopes. The resulting motivation for self-improvement could significantly ease the grinding frustration of ghetto life and all its attendant social ills, not the least of which is rioting.

⁴²³ DEUTSCH & COLLINS, *supra* note 418, at 413.

⁴²⁴ *Id.*

⁴²⁵ Louisville Courier-Journal, Oct. 30, 1966, § E, at 1, col. 4.

⁴²⁶ See text at note 113 *supra*.

Admittedly, these reasons why an open housing law is desirable are not so practical as the economic reasons. But they are the ones which commend themselves to those who find it anomalous that, in a country based on equality, there is none for a significant portion of the population. And while the number of people affected in Kentucky may not be large, a carefully drawn statute which allows even one deserving person to be treated equally in the housing market while alleviating some of the frustration of others, not yet able to take advantage of the law, should and would be well considered. Also, such legislation is as much for the future as the present. Kentucky is a growing state and will continue to grow with the nation. Civil rights for all Americans is clearly a part of that growth, and there is no satisfactory reason why such a stumbling block to modernity as housing discrimination should be allowed to hinder its progress in any way.

In any event, some arguments against open housing laws are more in the nature of arguments that such laws are not protective enough of homeowners and realtors who are not discriminators; these arguments do not seem to be arguments why *no* such legislation should ever be passed. There seems to be no insuperable reason why the legitimate objections to open housing cannot be fairly met and a statute designed which would safeguard the rights of sellers and renters as well as minority buyers. Senator Dirksen was the prime opponent of the open housing section of the 1966 Federal Civil Rights Act. Some of his remarks and those of other opponents occupy seventeen pages of the *Congressional Record*.⁴²⁷ This should be required reading for all those interested in the open housing colloquy; it is the most responsible argument against open housing which the writers have seen, and any legislation should take account of the points raised there.

That discussion, of course, regarded a federal bill, but some of the basic contentions apply equally to similar legislation on the local level. Its main thrust is not that no such legislation should be passed, but that the bill which is finally voted upon should be thoroughly debated. Its basic proposition is that one

⁴²⁷ 112 CONG. REC. 21690-708 (daily ed. Sept. 14, 1966).

citizen's rights cannot be guaranteed by denying another citizen his rights. But this argument does not mean that no rights can be guaranteed; it only requires that the measure be carefully drawn.

The purposes of the 1966 Kentucky Civil Rights Act are:

To safeguard all individuals within the state from discrimination because of race, color, religion and national origin . . . , thereby to protect their interest in personal dignity and freedom from humiliation . . . , to make available to the state their full productive capacities . . . to secure the state against domestic strife and unrest which would menace its democratic institutions, to preserve the public safety, health, and general welfare, and to further the interests, rights and privileges of individuals within the state.⁴²⁸

As these high motives are properly applicable to employment and public accommodations in Kentucky, so are they applicable to housing.

B. The Need for a Statewide Law

For much of Kentucky, the question of the need for open housing laws is largely academic. Negro demand for housing is based on income increment and growth in population, and whether such demand is present depends on the quality and number of jobs available to Negroes. Aside from the larger urban communities, this complex of factors is not present in Kentucky. The static or declining population of most of Kentucky's counties testifies to this fact. Substantial population growth, with its attendant homebuilding, has occurred in comparatively few cities, and the number of these communities which have shown appreciable advances in Negro population is even smaller.

Moreover, the amazing rise in the income level of Negro households statewide has been primarily the result of increasing income among Negro households in these large urban centers. Illustrative of this fact is that, while twenty per cent of the state's Negro families in 1960 had annual incomes of above four thousand dollars, fully forty per cent of the Negro families in Jefferson County were above the four thousand dollar level. Excluding

⁴²⁸ KRS § 344.020(1) (b) (1966).

Jefferson County, only about thirteen per cent of the state's Negro households had incomes of over four thousand a year, and the statewide level is even lower if Fayette County is eliminated from consideration.

Thus, the most critical areas of the state are the two metropolitan areas of Louisville and Lexington. The rapid growth in both Negro population and Negro income and the potential for such growth in the future, as Negroes are attracted by the better employment such areas offer, suggest that in these two areas open housing laws are imperative.

This is not to say, however, that there is no need for a statewide law. It does suggest that the demand on a statewide basis for the passage of such legislation will be much less vocal than it would be in the metropolitan areas. Unlike such areas of civil rights as access to public accommodations and opportunity for equal employment, only a relatively few Negroes, outside Louisville and Lexington, stand to gain much practical benefit from such a law. The principal effect of a state law would be in its relationship to the metropolitan areas. Even if Louisville and Lexington were to pass effective open housing ordinances, their applicability would not extend beyond the city limits. Other cities that have passed open housing ordinances have found that the effect of the law is to drive whites into the suburban areas, while the city itself continues to increase in its proportion of minority inhabitants. St. Louis, a city with an open housing ordinance, is a good example. It has been said, in a discussion of the St. Louis situation, that,

in the county, with no fair housing law, Negroes have had some success in getting housing . . . but most of them are being turned away. Rental housing in the county for Negroes is "virtually unattainable." "Unless we get a metropolitan law, preferably a state law, . . . we will be driving people out of the city and into the county."⁴²⁰

Louisville and Lexington probably will experience the same type of situation as St. Louis should city ordinances be passed. If a law applied to entire metropolitan areas, the effect of Negro entry on any one area would be less severe in terms of the at-

⁴²⁰ Louisville Courier-Journal, February 29, 1967, § C, at 1, col. 1.

titudes of the white residents and their desire to move. Those Negroes who chose to move out of all-Negro areas would presumably be dispersed throughout the entire area. Instead of neighborhoods being inundated by "home-hungry" Negroes and the concomitant rapid withdrawal of whites, each neighborhood would conceivably, and perhaps ideally, have a small proportion of Negro families.

A statewide law would, then, have its main effect in extending the protection of the law in those areas where open housing laws are most needed—the areas surrounding the state's larger cities. Of course, there will be some effect in any areas in which Negroes reside.

It could be contended that the problems which militate against relying on city laws would be solved by enacting a county ordinance. To a certain extent this is true. However, even in this eventuality, the whites who move in order to avoid Negro neighbors need only move across the county line. Thus, the oft-repeated fear that neighborhoods will be inundated by Negroes becomes a real possibility. But under a statewide law, there would be no premium in moving out when the first Negro moves in. Few neighborhoods in the state would retain their all-white character, but there should be no panic selling. Without the panic, there would be no Negro inundation or possible property value fluctuation.

An additional reason to enact a state wide law should be apparent to all who desire action in this area. The laws are necessary, but if it is left solely to the cities and counties, some of the state's Negroes might never have their right to purchase housing in a free market ensured. The situation in Louisville has shown that increased pressure for a law often leads to increased controversy and opposition.

Be that as it may, the suggestion is not that local laws are unnecessary or futile. It has always been a characteristic of American political philosophy that fear and distrust of government bears a direct relationship to the distance that government is removed from the individual. This seems to be a healthy philosophy and not at all unwarranted. The individual is much more likely to have his views aired in city hall than in the halls of Congress. In recommending an open housing law, this philosophy must be

considered, and if we are to take cognizance of political realities, the philosophy must also be reflected in our recommendations.

Before proceeding further, let it be acknowledged that eventually the federal courts or Congress will act in this field. Few would deny that the best way to handle discrimination in housing would be through comprehensive and well-enforced state or local laws, whose combined jurisdictions cover the entire country. However, this appears unlikely since open housing has mustered little support in many states. Though great strides have been made toward first class citizenship for all Americans, there remains a great deal of discrimination yet to be overcome. In any event, whether federal intervention occurs now or later, action on a state and local level is not to be deemed unnecessary. In the Federal Civil Rights Act of 1964,⁴³⁰ the following provision is made:

In the case of an alleged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority . . . , provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.⁴³¹

The Kentucky Civil Rights Act of 1966 provided that one of its purposes was "to provide for execution within the State of the policies embodied in the Federal Civil Rights Act of 1964"⁴³² Thus we have a situation where discrimination in public accommodations and employment is prohibited by both state and federal governments, but through the above-quoted section, the federal government is willing to allow the state to handle the problem. Only on default of this responsibility does the Federal Civil Rights Act operate.

⁴³⁰ 42 U.S.C. §§ 2000a to 2000h-6 (1964).

⁴³¹ 42 U.S.C. § 2000a-3(c) (1964).

⁴³² KRS § 344.020(1) (a) (1966).

The Kentucky Act carries this "local action" philosophy one step further. It provides that cities and counties are empowered to "adopt and enforce ordinances, orders and resolutions prohibiting discrimination on the basis of race, color, religion, or national origin, and to prescribe penalties for violations thereof" ⁴³³ The Kentucky Act contains no provision to require a stay in state proceedings if the local government passes an ordinance, but it would seem that in most cases where the right was enforceable on a local level, action would be brought on that level.

In this series of laws, we are able "to have our cake and eat it too" with regard to the political philosophy mentioned earlier. That is, the most local law can be invoked first, and the controversy can be settled by local officials. The basic rights of all Americans to fair opportunity in employment and service in public accommodations are established. However, those who fear federal intervention and wish to keep governmental power on a state or local level can rest assured. If state or local government does not abdicate its responsibilities to safeguard the rights of all citizens, it will be able to take care of these problems for itself.

This is a good method of solving the problem. It is strongly recommended that Kentucky, in enacting a statewide open housing law, follow essentially the same procedure used in the 1966 Civil Rights Act, with one exception. Along with the delegation empowering city and county governments to prohibit housing discrimination, the law should also contain a provision similar to the federal provision quoted above, requiring suspension of state proceedings where alleged discrimination occurred within the jurisdiction of a local open housing ordinance. This suspension should be maintained until the local authorities have had an opportunity to eliminate the discrimination. ⁴³⁴

C. Suggested Provisions for the Law

In determining the best type of open housing law for Kentucky, one may consider either political feasibility, the ideal solution, or a compromise between the two. Perhaps drawing a

⁴³³ KRS § 344.300 (1966).

⁴³⁴ See, e.g., MODEL ANTI-DISCRIMINATION ACT § 905 (1966).

statute which is politically feasible would be impossible judging from the pronouncements of the two 1967 gubernatorial candidates⁴³⁵ and the reaction in Louisville to various open housing proposals.⁴³⁶ It is not, however, the purpose of this article to play politics or to advocate a temporary or second-rate solution. Rather, as a need for such legislation exists, only a law which will satisfy this need should be acceptable.

Therefore, a comprehensive statute should be enacted, perhaps along the lines of the Bardstown-Nelson County ordinance,⁴³⁷ which would cover all real estate except an apartment in an owner-occupied, two-family house or rooms in a single-family dwelling. By making such exemptions, recognition is made of the sanctity of an individual's home while he is living therein, yet an adequate solution for the non-white's problem of housing discrimination is still provided. By including the rental or sale of single family dwellings, the statute would recognize that these are not, or soon will no longer be, the owner's home. Religious organizations or charitable and educational institutions connected with religious organization should be allowed to discriminate along religious, but no other, lines.⁴³⁸ Therefore, such property as private residences, vacant lots, apartment buildings, and commercial space should be covered by the statute. The act should extend to owners, real estate brokers, builders, lessors, financing institutions, and any advertising connected therewith.⁴³⁹ It should also contain a blockbusting provision that provides for the suspension or revocation of broker's licenses as a deterrent to this practice.⁴⁴⁰

⁴³⁵ Republican candidate, Louie Nunn, said he "is 'unalterably' opposed to open housing forced by ordinance, statute, judicial decree, executive order, 'or by any means whatever.'" Louisville Courier-Journal, Mar. 25, 1967, § A, at 1, col. 6. Democratic candidate, Henry Ward, does not believe "open housing legislation is a 'proper subject' for local legislation." He would advocate that the General Assembly pass a law prohibiting localities from passing laws which would "make a man sell his home against his will." Louisville Courier-Journal, April 20, 1967, § A, at 6, col. 5.

⁴³⁶ See Section I *supra*.

⁴³⁷ See Appendix II *infra*.

⁴³⁸ This is a rather common exemption. See MODEL ANTI-DISCRIMINATION ACT § 607 (1966). See also Appendixes I & II.

⁴³⁹ See MODEL ANTI-DISCRIMINATION ACT § 602 (1966).

⁴⁴⁰ See *Id.* at § 606. The Comment to this section says that "blockbusting" is carried on by operators who induce whites to sell their property to them at low prices by playing on the fear that the neighborhood is about to be opened to non-whites. The property is then resold at high profit to nonwhites who are prepared to pay exorbitant prices for decent housing." See also Appendixes I & II *supra* for states and localities with this type of law.

There are three possible methods by which the statute could operate: (1) through an administrative agency, (2) by means of a criminal statute which would be enforced through the courts, and (3) by the creation of a civil action which would be brought by the individual against whom the discrimination was made. The use of administrative agencies to enforce civil rights is apparently widespread and well-received. The use of the latter two means of operation as an exclusive remedy has been largely abandoned, for

experience has demonstrated . . . that neither of these forms is successful in appreciably decreasing the incidence of discrimination or in giving its victims an adequate legal remedy. Prosecuting attorneys are reluctant to bring actions under the criminal statutes, and, even when actions are brought, juries are often unwilling to indict or convict. Individuals are often hesitant to make use of civil action statutes because of the expense, effect, and threat of community opprobrium their use may entail; the difficulty of calculating damages and their inadequacy as a remedy for one whose primary interest is finding a better home or job indicate that broad reliance upon civil remedies would be misplaced.⁴⁴¹

Thus the administrative agency is the only reasonable alternative.

It is logical that the already existing Kentucky Human Rights Commission should be this agency.⁴⁴² The administration of the law could take place within the framework of procedure established by the Civil Rights Act of 1966.⁴⁴³ Whether the size of the Commission or its staff should be increased would ultimately depend on the number of complaints received by the Commission. As under the 1966 Act, individuals, the Attorney General, or a member of the Commission would have the right to file complaints.⁴⁴⁴ Also, the primary means of enforcing the statute, once the Commission finds that discrimination has been committed, would be by "conference, conciliation and persuasion" with the party committing the unlawful acts.⁴⁴⁵ The result of these efforts,

⁴⁴¹ *The Right to Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation*, 74 HARV. L. REV. 526 (1961).

⁴⁴² KRS §§ 344.150, -.190 (1966).

⁴⁴³ KRS ch. 344 (1966).

⁴⁴⁴ KRS § 344.200(1) (1966).

⁴⁴⁵ KRS § 344.200(4) (1966).

if successful, would be a conciliation agreement⁴⁴⁶ in which the discriminating party would agree to rectify his unlawful conduct.

Should conciliation efforts fail, a hearing before the Commission would be held.⁴⁴⁷ If the hearing resulted in a decision that there had been discrimination, the Commission would issue an order stating that the property owner should "cease and desist" from his unlawful discriminatory practice. It might also "require him to take such affirmative action as in the judgment of the Commission will carry out the purposes of [the Act]"⁴⁴⁸ Such a requirement would take the form of different actions, according to the property owner in the individual case. For example, if the discriminator was a homeowner, the Commission might order him to sell the property to the aggrieved party if the seller chooses to leave it on the market.⁴⁴⁹ Should he no longer have the home on the market, the Commission should not be able to force him to sell to the claimant. Such an order would be beyond the scope of the statute and would be manifestly unfair to the homeowner, who may have legitimate reasons for his change of mind. Likewise, *forcing* him to sell the property when he is not *willing* to do so would raise serious constitutional questions. The order should be limited to requiring him to sell to the party against whom he has unlawfully discriminated *if* he is going to sell it at all.⁴⁵⁰

On the other hand, the withdrawal of the home from the market may be a mere subterfuge by a confirmed discriminator to avoid sale to the particular complainant. After the complainant goes elsewhere to buy, the owner might again enter the market and sell the property to a white. It would be wise to incorporate appropriate measures into the law to prevent this type of evasion scheme. For example, if the Commission, after such a withdrawal and subsequent sale, felt that the party acted in this manner to avoid compliance, it could itself initiate hearings to determine if this was, in effect, a discriminatory practice. If it did so find, then appropriate sanctions, to be discussed later,

⁴⁴⁶ *Id.*

⁴⁴⁷ KRS § 344.210 (1966).

⁴⁴⁸ KRS § 344.230(2) (1966).

⁴⁴⁹ See MODEL ANTI-DISCRIMINATION ACT § 706 (1966).

⁴⁵⁰ 112 CONG. REC. 21696-99 (daily ed. Sept. 14, 1966).

could be applied. In the case of lessors, realtors, and financing institutions, an order of affirmative action commensurate with their respective functions could be made by the Commission on the finding that they were engaged in an unlawful discriminatory practice.

The enforcement provisions of legislation such as open housing, which, to a degree, attempts to legislate morals, are ordinarily the most controversial part. Such a law is considered by many to be an infringement on the traditional rights inherent in the ownership of property. Many who would agree with the underlying spirit of the law would balk at its attempted enforcement by the use of penal sanctions. It is widely felt that such sanctions should be quite limited. On the other hand, if the law provides no remedy after negotiation with the discriminator has failed, then it is for many a mere facade without vitality or substance. A law without enforcement provisions can affect the attitudes of both the would-be claimant and the would-be discriminator. The former could feel that any action that he would initiate under the law would be fruitless, and the latter, that he can act with impunity.

Such being the case, some form of sanction should be incorporated into the act and in a form which will give the act "teeth."⁴⁵¹ There are basically two methods used to provide "teeth" in open housing statutes. One is to provide for outright penalties in the event that the Commission finds the law has been violated. A discriminator, under this method, would be subject to a fine, a jail sentence, or both. A second method is that of having no fine or imprisonment for the discrimination itself, but to permit the Commission to obtain a court order for the enforcement of its decree in the particular case.⁴⁵² Should the discriminator violate this order and persist in his unlawful conduct, he would be subject to the sanctions of the court in contempt proceedings.

The latter method of enforcement would be sufficient to carry out the purposes of the act and to satisfy both the proponents and opponents of enforcement provisions. The property owner is not punished for the initial act of discrimination, but

⁴⁵¹ See the discussion of events in Louisville. Section I *supra*.

⁴⁵² See text at note 17 *supra*.

only in the event that he fails to cease such action. This procedure provides the element of forceful persuasion which encourages compliance and yet gives the discriminator a chance to cease his discrimination before any sanctions would be applied. This procedure, while being more equitable for the property owner, would not diminish the claimant's remedy in any way nor discourage him from initiating the action. It is also more politically expedient than the system of outright fines and imprisonment which could arouse public opposition to the passage of an open housing law.

The only conceivable instance in which fines need be imposed would be in the above described situation where the discriminating homeowner withdraws the property from the market and, after the claimant goes elsewhere, re-enters the market and sells the home to a non-minority group individual. Such a subsequent sale might not involve discrimination if there was no member of a minority group bidding for the purchase of the property at that later date, but the established procedures of ordering the party to cease and desist and to take affirmative action to remedy the situation could not come into play. A court order for enforcement could not be procured. The only remedy for this practice would be to permit the Commission, if it found that the action was an intentional evasion of compliance, to have the party fined for this evasion.

The rules promulgated by the Commission for the hearing of complaints should be equitable and ensure the rights of all parties to any action. They should make it clear that the burden of proof for establishing discrimination is on the party initiating or furthering the complaint.⁴⁶³ There should never be a presumption of discrimination against the party who is charged with the unlawful conduct. The equitable nature of the rules so promulgated should be subject, on appeal by either party, to review in the courts.

However, the law as suggested could, if the basic machinery for administration of the Civil Rights Act of 1966 is adopted for use, be attacked as being unfair to the party charged with discrimination. Under that Act, once a complaint has been received, the Commission itself bears the responsibility and expense

⁴⁶³ 112 CONG. REC., *supra* note 449, at 21698.

of investigation and enforcement. The complainant merely sits back and awaits the outcome of the proceedings. The person who is charged must, on the other hand, expend both his own time and resources to defend himself against the allegations. The person so charged is paying not only for his own defense, but also, in his role as a taxpayer, for the furtherance of the charges against him. Such procedure is fine so long as the complaints have merit since it encourages both complaints and compliance. But in the case of an unmeritorious claim, it could be argued that the person bringing the complaint goes away after calling into question the reputation of the respondent.⁴⁵⁴ However, the statute, if it is modeled on the 1966 Civil Rights Act, would have adequate safeguards to prevent this type of abuse. Under the provisions of the 1966 Act, the Commission or a member thereof, on the receipt of a complaint, makes a preliminary investigation to determine if there is probable cause to believe that a violation exists. Only if the answer is in the affirmative do the further procedures of conference and hearing come into force. If the complaint is found to be without merit, it is dismissed at this stage, and no further action is taken. The claimant, of course, if he desires to pursue his action, may take an appeal to a circuit court.⁴⁵⁵ Thus, the arguments that the statute is unfair to the alleged discriminator are overcome by the provisions of the statute which ensure that probable cause is present before any affirmative action is taken.

Another prerogative of the Commission must be mentioned here. In order to ensure that the subject of the controversy, the property in question, is not disposed of pending the outcome of the Commission's hearings on the complaint, it should have the right to obtain a temporary restraining order from a circuit court prohibiting the respondent "from doing or procuring any act tending to render ineffectual any order the Commission may enter with respect to the complaint."⁴⁵⁶ Should the property be disposed of during the time in which the decree of the court is in effect, the owner would be subject to the contempt sanctions of the court.

⁴⁵⁴ *Id.*

⁴⁵⁵ KRS § 344.240(1) (1966).

⁴⁵⁶ KRS § 344.200(6) (1966).

In conclusion, it is to be stressed again that the main method of enforcement under the statute would be by persuasion and not by penalty. Experience under the public accommodations and equal employment statutes as well as with open housing laws in other states shows that the great majority of the complaints which are filed are resolved during the early conciliation stage.⁴⁵⁷ The subsequent stages, including the possibility of court-ordered compliance, exist primarily as "last resorts" to be used only if conciliation and negotiation fail; so that they are primarily their inducements to early agreement.

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*Richard O. Stevenson*⁴⁶¹

⁴⁵⁷ See text at notes 230-31 *supra*.

⁴⁵⁸ Sections I & V; Appendices I, II, & III.

⁴⁵⁹ Section VI.

⁴⁶⁰ Section II.

⁴⁶¹ Sections III & IV.

APPENDIX I

STATE LAWS

*State**Major Provisions*

1. ALASKA—Covers sale or rental of all housing, forbids discrimination in financing of housing and sale of lease of unimproved real estate; also covers real estate brokers and builders. Provides for issuance of cease and desist orders, judicial review, and punishment of violations as misdemeanors (fines up to \$500, 30 days imprisonment). Enforced by the Alaska Commission for Human Rights. Effective April 4, 1962, amended 1963, 1965.

2. CALIFORNIA—Covers sales and rentals involving buildings with four or more units, and all existing publicly-aided housing; also covers all transactions of brokers, builders and mortgage lenders. Provision for injunctive relief, or damages up to \$500. Enforced by California Fair Employment Practice Commission. Effective Sept. 20, 1963.

3. COLORADO—Covers all publicly-offered sales or rentals (including vacant lots), exempting rental of rooms in single-family dwellings. Commercial space, brokers, builders and mortgage lenders are also covered. Makes refusal to show housing a violation. Under civil remedy clause, complainants may be entitled to damages. Commission empowered to initiate and to seek injunctive relief. Enforced by Colorado Civil Rights Commission. Effective May 1, 1959, amended 1965.

4. CONNECTICUT—Covers all sales and rentals (including vacant lots) except rental of an apartment in an owner-occupied two-family house and rental of rooms in private residences, brokers, builders and mortgage lenders are covered. Commission empowered to initiate and to seek injunctive relief. Fines up to \$100, 30 days imprisonment. Enforced by Connecticut Commission on Civil Rights. Effective Oct. 1, 1959, amended 1961, 1963, 1965.

5. INDIANA—Covers all sales or rentals (including vacant lots), commercial space, brokers, builders, mortgage lenders and advertising. However, no cease and desist orders may be issued against owner-occupants of buildings with three or less units. Enforced by Indiana Civil Rights Commission. Effective July, 1965.

6. MAINE—Covers all rental housing. No enforcement agency. Effective Sept., 1965.

7. MARYLAND—Applies to housing completed after June 1. Contents not available. Passed March, 1967.

8. MASSACHUSETTS—Covers all publicly-offered sales or rentals (including vacant lots), except rental of an apartment in an owner

occupied two-family house (rentals of rooms in private residences are covered by the state's public accommodations statutes by administrative ruling). Brokers, builders, mortgage lenders, advertising, and commercial space are also covered. Provides for revocation of license of brokers who refuse to obey an enforcement order. Commission empowered to initiate and to seek injunctive relief. Enforced by Massachusetts Commission Against Discrimination. Effective July 21, 1959, amended 1960, 1961, 1963.

9. MICHIGAN—Michigan's new State Constitution has been interpreted by the Attorney General to prohibit discrimination in all housing and in all mortgage lending transactions. Enforced by the Michigan Civil Rights Commission. Effective Jan. 1, 1964.

10. MINNESOTA—Covers sales or rentals (including vacant lots), with the following exceptions: 1) owner-occupied privately-financed, one-family houses (home with outstanding FHA or VA mortgages are covered); 2) rental of an apartment in an owner-occupied, two-family house; and 3) rental of rooms in private homes. Also covers brokers, builders, and mortgage lenders with respect to housing covered by the law, and all real estate advertising. Commission empowered to initiate complaints. Enforced by Minnesota Commission Against Discrimination. Effective Dec. 31, 1962.

11. NEW HAMPSHIRE—Covers rental, lease, or occupancy of a dwelling in a building containing more than three accommodations. Provides for issuance of cease and desist orders, and judicial review. Violation of order is misdemeanor with fines up to \$500 and/or six months imprisonment. Enforced by the State Commission on Human Rights. Effective August 29, 1961, amended July 7, 1965.

12. NEW JERSEY—Covers all housing and financing. Exemptions: Rental 1) of a single apartment or flat in a two-family dwelling, the other unit of which is occupied by owner as his residence or is the household of his family at the time of such rental; 2) of a room or rooms by owner or occupant of a one-family dwelling which is occupied by him as his residence or is the household of his family at the time of such rental; 3) a religious organization or a charitable or educational institution connected with a religious organization. Also covers all brokers and mortgage lenders with respect to housing covered by law, and all real estate advertising. State Attorney General can initiate complaints. Enforced by New Jersey Division on Civil Rights. Effective Sept. 13, 1961, amended April 7, 1966.

13. NEW YORK—Covers all sales and rentals except rental of an apartment in an owner-occupied two-family house and rental of rooms in private residences, commercial space, brokers, builders, mortgage

lenders, and advertising are covered. Attorney General may seek injunctive relief; Commission may initiate complaints. Enforced by New York State Commission for Human Rights. Effective Sept. 1, 1961, amended 1963, 1965.

14. OHIO—Prohibits discrimination in sale, transfer, assignment, rental, leasing or financing of commercial housing; (commercial housing defined as any housing held or offered for sale or rent, except the personal residence of the owner). The ban on discrimination in financing extends also to personal residences. Provision for issuance of cease and desist orders and judicial review. Effective July 30, 1965. Enforced by Ohio Civil Rights Commission.

15. OREGON—Covers persons engaged in the business of selling or renting real property, including vacant lots and commercial space. Advertising also covered. Attorney General can initiate complaints. Persons charged with discriminatory acts are notified upon filing of complaints, are forbidden to sell or rent the property at issue until disposition of the case has been made, and are liable to damages if they do so. Separate statute provides for revocation of license of brokers who violate the open housing law. Enforced by Civil Rights Division, Oregon State Bureau of Labor. Effective August 5, 1959.

16. PENNSYLVANIA—Covers all sales and rentals (including vacant lots) except owner-occupied one and two-family houses. Brokers, builders and mortgage lenders with respect to housing covered by the law and advertising are also covered. Commission empowered to initiate complaints. Allows injunctive relief to restrain the sale, rental, or other disposition of the property until case is settled. Enforced by Pennsylvania Human Relations Commission. Effective Sept. 1, 1961, amended Jan. 24, 25, 1966.

17. RHODE ISLAND—Covers all sales and rentals (including vacant lots) except rental of apartments in owner-occupied, two and three-family houses and rental of rooms in private residences. Brokers, builders, mortgage lenders, and advertising are also covered. Commission empowered to initiate complaints. Enforced by Rhode Island Commission Against Discrimination. Effective April 12, 1965.

18. WASHINGTON—Contents not available. Passed Spring, 1967.

19. WISCONSIN—Forbids discrimination in sale, lease, and financing of housing where the sale, rental, or lease of the housing constitutes a business. Exceptions are made for sale of owner-occupied housing, small rooming house operations, and certain small-lot units. Administered by the Industrial Commission through its Equal Opportunities Division. Effective Dec. 19, 1965.

APPENDIX II

CITY AND LOCAL LAWS

*Locality**Major Provisions*

1. ALBUQUERQUE, N. M.—Covers sale and rental of real property and lending practices. Exceptions: sub-renting or sub-leasing of any portion of an apartment or a house occupied by a single family; also religious organizations or charitable and educational institutions operated by religious organization. Fair Housing Advisory Board can initiate complaints, investigate, and recommend prosecution to City Attorney. Penalty of not more than \$300. Enacted June 18, 1963.

2. ANN ARBOR, MICH.—Covers sale, rental, or other transactions in real estate. Exceptions are made in regard to rental of rooms in a single dwelling unit. Violations punished as misdemeanors. Enforced by Ann Arbor Human Relations Commission. Effective Dec. 20, 1965.

3. BARDSTOWN, KY.—Covers both improved and unimproved real estate, brokers, and financing. Exemptions: rental of owner-occupied duplex, of a portion of a housing accommodation by the occupant of the accommodation or by the owner if he or a member of his family resides therein, or by a religious organization or a charitable or educational institution connected with a religious organization. Commission can initiate complaints and issue cease and desist orders. If violation continues, Commission shall either file a complaint for enforcement in Circuit Court or certify the case and the entire record to the county attorney for prosecution. Fines up to \$500 and/or up to thirty days in jail are provided. Enforced by Bardstown-Nelson County Commission on Human Rights. Effective June 14, 1966.

4. BELOIT, WIS.—Contents not available. Enforced by Beloit Human Relations Commission. Effective April 1, 1964.

5. CHICAGO, ILL.—Declares that discrimination in housing is against city policy. Forbids real estate brokers to discriminate. Commission may recommend to Mayor the suspension or revocation of broker's license if discrimination proved at a hearing. Also covers blockbusting. Enforced by Chicago Commission on Human Relations. Effective Sept. 24, 1963.

6. COVINGTON, KY.—All improved and unimproved real estate, financing, and broadly-defined "salesmen" are covered. Exemptions: rental of owner-occupied duplex, of a portion of a housing accommodation by the occupant of the accommodation, or by the owner if he or a member of his family resides therein, or by a religious institution, or a charitable or educational organization operated by a

religious institution, if such discrimination is calculated to promote the religious principles for which it is established or maintained. Also the direct rental or sale of housing accommodation by the private individual owner himself without assistance of any kind rendered by a salesman. Commission can initiate complaints and issue cease and desist orders. If any order is disobeyed, the Commission shall either file a complaint for enforcement in the Circuit Court or certify the case and the entire record of its proceedings to the city or county attorney for prosecution. Fines between \$100 and \$500 and/or imprisonment for thirty days are provided. Also, a broker's city occupational license can be suspended for a period of not less than thirty days. Enforced by Covington-Kenton Human Rights Commission. Effective June 1, 1967.

7. DES MOINES, IOWA—Covers the showing, sale, or rental of all housing and financing. Exceptions: Rental of two-family dwelling or of fewer than four rooms in a one-family dwelling occupied by owner, or of any apartment in a multiple dwelling containing six or fewer apartments. Also exempts religious organizations. No punishment except making all previous files regarding the violator open for public inspection. Enforced by Des Moines Commission on Human Rights and Job Discrimination. Effective June 4, 1964.

8. DISTRICT OF COLUMBIA—Covers transfer, lease, operation or financing of most types of housing units and vacant lots. Real estate brokers must post notice of anti-discrimination regulations in places where rentals are made. Exceptions: rental or lease of unit by church, or national fraternal organization, or a dwelling which owner is not required to be licensed to rent or lease provided that the owner resides there during the term of requested rental or lease. All persons forbidden to engage in blockbusting. Commissioners' Council on Human Relations investigates and attempts conciliation, but actual enforcement is the responsibility of the Corporation Counsel. Fine of not more than \$300 and/or up to ten days in jail. Effective Jan. 20, 1964.

9. DULUTH, MINN.—Contents not available. Enforced by the Duluth Fair Employment and Housing Practices Commission. Effective Oct. 19, 1963.

10. EAST ST. LOUIS, ILL.—Forbids discrimination in the sale of any residential housing by real estate brokers. Also covers blockbusting. Penalty of not over \$200 for each offense. Enforced by the East St. Louis Commission on Human Relations. Effective Jan. 29, 1964.

11. ERIE, PA.—Covers sale or rental and financing of all com-

mercial housing. Exceptions: personal residence offered for sale which contains no more than two families and is used by owner as residence. Also religious, fraternal and private organizations. Fine of not over \$100 and not over thirty days in jail if fine not paid within ten days. Enforced by Erie Human Relations Commission. Effective Sept. 1, 1963.

12. GARY, INDIANA—All lots, housing, and financing covered. Exceptions: multiple family dwelling, or portion thereof, designed to accommodate not more than three families, with separate units for each family, where owner occupies one or more of such units. Also any room or rooms in single apartment, any room or rooms within a single family private dwelling. Commissions can initiate and issue cease and desist order. If not obeyed, can seek a decree of court for enforcement of order. No penalty provided. Enforced by the Gary Fair Employment Practices Commission. Effective June 4, 1965.

13. GRAND RAPIDS, MICH.—Applies to units in housing accommodations of more than three units, and to lending institutions. Prosecution is on certification of the record to the city attorney by the Commission. Fine of not more than \$100 and/or up to ninety days in jail. Enforced by Grand Rapids Human Relations Commission. Effective Dec. 23, 1963.

14. INDIANAPOLIS, IND.—Contents not available. Enforced by the Indianapolis Human Rights Commission. Enacted July, 1964.

15. IOWA CITY, IOWA—Applies to financing, and all housing. Exceptions: rental or lease of accommodation in a building containing accommodations for not more than two families living independently of each other if owner or members of his family reside in one of such units, and rental or lease to less than seven persons within a single housing accommodation by occupant or owner of such accommodation if he or his family reside therein. Iowa City Human Relations Commission investigates and seeks conciliation. Enforcement by the City Council in District Court. Approved August 18, 1964.

16. KALAMAZOO, MICH.—Prohibits discrimination in sales, rentals, and other transactions involving real estate. Applies to owners, lessees, brokers, salesmen, lenders, financial institutions, advertisers, and their agents. Exceptions: rental of rooms to three or fewer persons in a single dwelling unit where the remainder of the house is occupied by the owner or lessee and members of his family. Kalamazoo Community Relations Board has no enforcement authority. Approved June 6, 1966.

17. KENTON COUNTY, KY.—This county includes within its bor-

ders the City of Covington. The law applies to all parts of the county outside the Covington City limits. It is identical to the Covington ordinance except in two respects. It provides a penalty of only a fifty dollar fine or thirty days imprisonment, and contains no provision for the suspension of a realtor's license. Approved July 7, 1967.

18. KING COUNTY, WASH.—Covers all lots, housing, and financing. Exceptions: renting, sub-renting, leasing or sub-leasing of single family or duplex units wherein owners or persons entitled to possession normally maintain or intend to maintain their residence, home, or abode. Also the renting or leasing either on a temporary or casual basis and not the principle reason for acquisition of rental unit. Violation is misdemeanor. Enforced by the King County Sheriff's Office. (covers the county's unincorporated areas—excluding Seattle.) Effective March 3, 1964.

19. MADISON, WIS.—Covers all housing, including mobile homes and trailers, also financing. Exceptions: rent or lease to roomer of any housing by landlord who occupies such housing as the household of his family and who rents a portion of such housing to not more than four roomers. Also the sale, rental, or lease of any housing consisting of one, two, three, or four dwelling units, all in one structure, where one of such units is occupied by the owner of such housing as household of his family. Fine of \$25 to \$500 for each offense. The Madison Equal Opportunities Commission investigates and seeks conciliation, but the City enforces. Enacted Dec. 12, 1963.

20. NEW HAVEN, CONN.—Coverage is co-extensive with Connecticut state law. Commission can initiate complaints, seek temporary injunctive relief while a case is pending, and issue orders. Enforced by New Haven Commissions on Equal Opportunities. Enacted May 14, 1964.

21. NEW LONDON, CONN.—Contents not available. Enforced by the New London Fair Housing Practices Board. Effective August 1, 1963.

22. NEW YORK CITY, N. Y.—Covers sale, rental or leasing of all property and financing. Exceptions: the rental of an apartment in an owner-occupied two-family house, the rental of a room or rooms with owner-occupied one-family house, and the rental of a room or rooms by a tenant occupying an apartment. Also excepted are religious institutions, or charitable or educational institutions connected with a religious organization. Commission can initiate complaints and can direct Corporation Counsel to bring equitable proceedings in the Superior Court, in the name of the City, for enforcement of the law.

Enforced by New York Commission on Human Rights. Effective April 1, 1958.

23. OBERLIN, OHIO.—Covers structures containing five or more dwelling units owned or otherwise subject to control of one owner and any parcel or parcels or lots available for such buildings. Also covers lending institutions. Commission refers a case to the City Council, which in turn refers it to the City Solicitor for action. Fine of not over \$100. Enforced by the Housing Renewal Commission. Enacted Nov. 20, 1961.

24. PEORIA, ILL.—Prohibits blockbusting. Also prohibits brokers from representing in ads or listings a limitation on the sale or rental of real property because of race, etc., of the buyer or renter. Also covers financing and pricing. Permits owner of property to sell "to whomsoever he pleases," and to list property with any restrictions he chooses to make. Fair Housing Board receives complaints, holds hearings, and makes recommendations to the City Manager concerning suspension or revocation of broker's license. Enacted Dec. 30, 1963.

25. PHILADELPHIA, PA.—Covers all vacant land and commercial housing and its financing. Exceptions: personal residence offered for sale, which includes no more than two families and is used by owner as residence. Also religious organizations and charitable and educational institutions connected with a religious organization. Fine of not more than \$300 and/or up to ninety days in jail.

26. PITTSBURGH, PA.—Covers brokers and salesmen. Also covers owner lessee, sub-lessee in a building comprising or containing five or more housing units (either a single room or rooms) or an apartment or dwelling owned or otherwise subject to control of one owner or any parcel or parcels of real property or lots available for the building of five or more housing units. Lending institutions covered. Religious organizations or charitable or educational institutions connected with religious organizations are exempt. The Commission can initiate, as can the person aggrieved or an organization which combats discrimination. Fine not over \$100 or in default of payment, nor over thirty days in jail. If non-compliance, Commission can go to court. Enforced by Pittsburgh Human Relations Commission. Effective June 1, 1959.

27. SCHENECTADY, N. Y.—Covers all real property used as home, residence, or sleeping place of one or more persons. Affects agents, brokers, and owners. Exception: owner-occupied housing for three families or less. Commission can issue cease and desist order, then can obtain court order to enforce rulings. Enforced by the Schenectady Human Relations Commission. Enacted April 1, 1963.

28. ST. LOUIS, MO.—Covers all land and housing, also financing and blockbusting. Exception: Rooms in single family residences. Commission certifies case to the City Counselor who may prosecute to enforce Commission's findings. Fine up to \$500 and/or up to one year in jail. Enforced by the St. Louis Council on Human Relations. Effective Feb. 6, 1964.

29. ST. PAUL, MINN.—Applies to improved or unimproved real property and financing. Exceptions: rental or lease of an owner-occupied duplex or rental of a room or rooms in an owner-occupied single family dwelling. Also excluded are religious organizations, or charitable and educational institutions connected with a religious organization. Enforced by the St. Paul Human and Civil Rights Commission, which receives and hears complaints, investigates, seeks conciliation, makes recommendations for remedial actions, and seeks enforcement by application to the City Counsel. Enacted August 13, 1964.

30. WICHITA, KANSAS—Covers any improved or unimproved real property, financing, and blockbusting. Applies to owners and brokers. Exception: rental of two-family dwelling or of fewer than four rooms in a one-family dwelling occupied by owner, or of any apartment in a multiple dwelling containing six or fewer apartments. Wichita Commission on Human Relations submits findings to City Commission for public recordation. No punishment provided. Enacted Oct. 6, 1964.

31. YELLOW SPRINGS, OHIO—Contents not available. Enforced by the Yellow Springs Human Relations Commission. Enacted August 19, 1963.

APPENDIX III

THE FOLLOWING STATUTES AND ORDINANCES HAVE BEEN REPEALED
OR ARE UNCERTAIN IN STATUS.

1. AKRON, OHIO—Enacted July, 1964. Struck down by referendum on November 3, 1964.

2. BERKELEY, CALIF.—Enacted Jan. 15, 1963. Struck down by referendum on April 2, 1963.

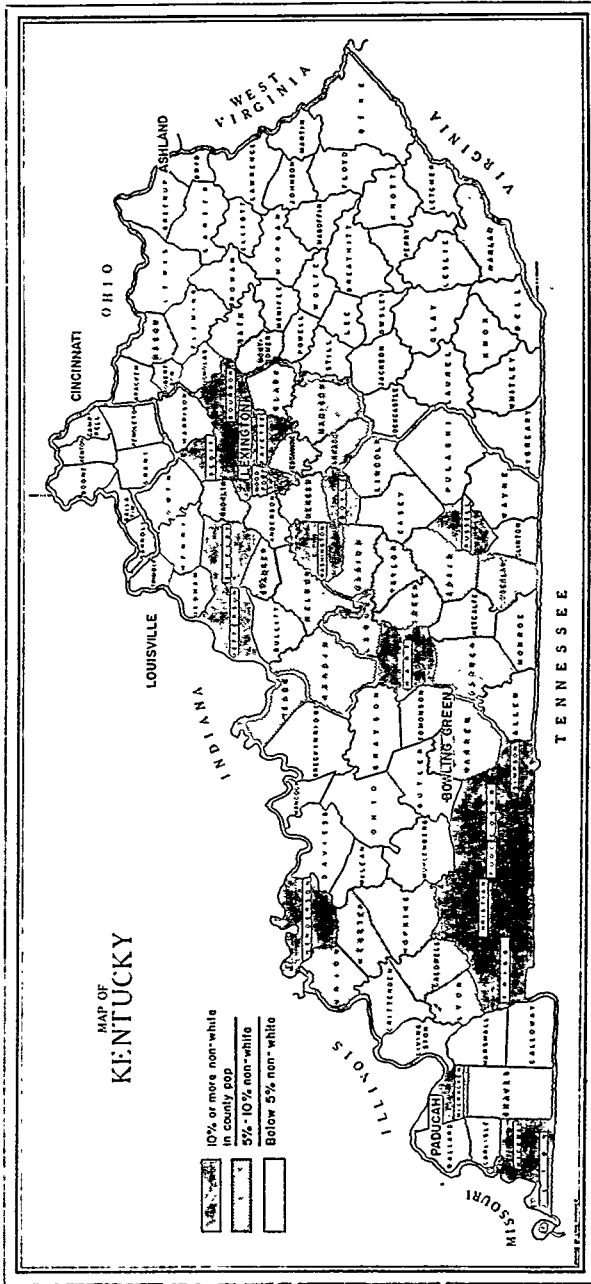
3. CALIFORNIA—Proposition 14, which became Article I, Section 26 of the California Constitution, was passed in a popular referendum in November, 1964, by a 2-1 majority. It provides that neither the state nor any subdivision thereof shall deny a person the right to decline to sell or lease his property to such persons as he chooses. The California Supreme Court, in *Mulkey v. Reitman*, 413 P.2d 825 (1966), found the enactment unconstitutional as a denial of equal protection of the laws under the fourteenth amendment to the United States Constitution. The State was found to be "at least a partner in the instant act of discrimination," in that by sanctioning the popular passage of proposition 14, the state encouraged discrimination rather than merely maintaining a status of neutrality. The United States Supreme Court affirmed the decision of the California Supreme Court, holding by a 5-4 vote that proposition 14 violated the federal Constitution by involving the state in racial discrimination. However, on April 13, 1967, following the desires of Governor Ronald Reagan, the California Senate voted 23-15 to repeal the Rumford Open Housing Act. The measure is now before the Assembly.

4. JACKSON, MICHIGAN—Enacted in 1966. Voided on April 11, 1967, by a vote of 5,826 - 2,886.

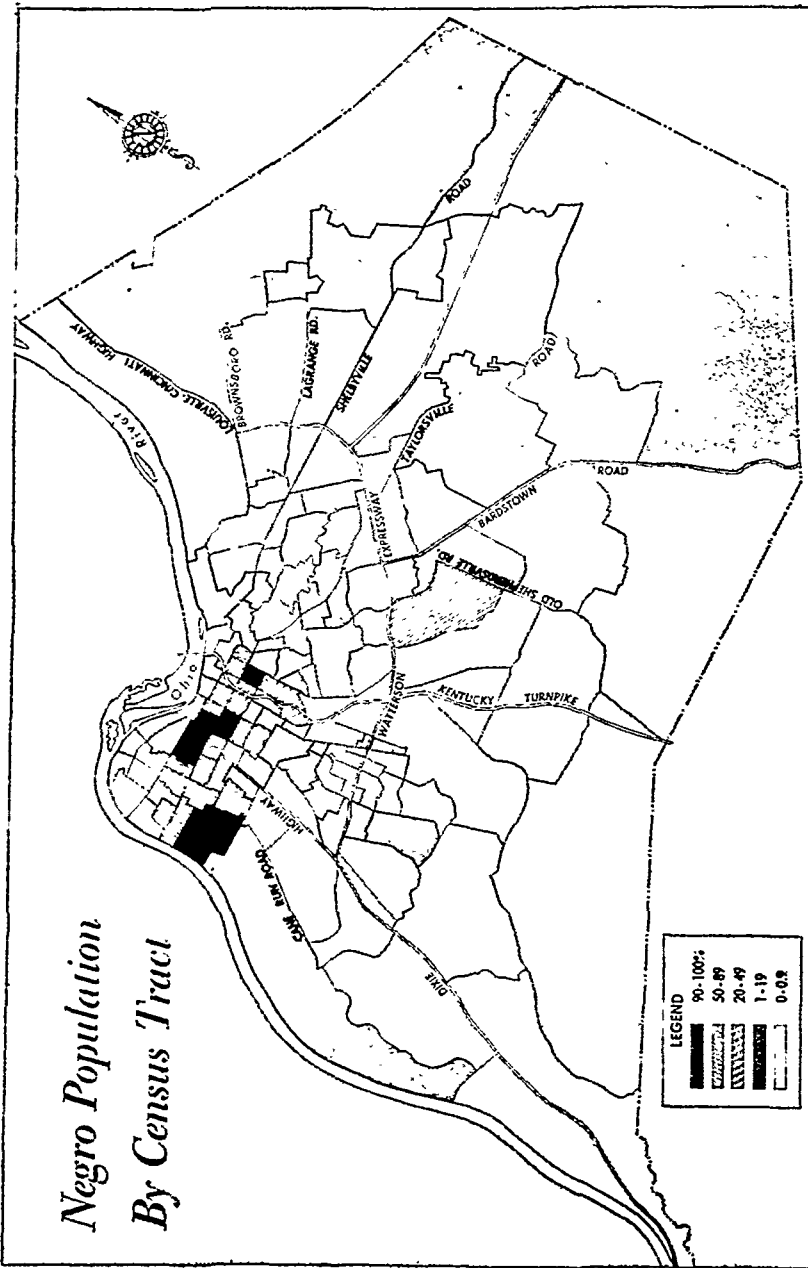
5. TACOMA, WASH.—Enacted Sept. 24, 1963. Struck down by referendum on Feb. 11, 1964.

6. TOLEDO, OHIO—Effective June 9, 1961. Ruled invalid by the Ohio Supreme Court on March 10, 1965, on the ground that the ordinance was so indefinite that enforcement of its provisions would be impossible. On the same date, the same court upheld the constitutionality of the Oberlin fair housing ordinance.

APPENDIX IV



APPENDIX V



This Map Courtesy of Courier Journal

APPENDIX VI

