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The Colorado Fair Housing Act of 1959[1] was innovative in that it was one of the first state statutes to generally forbid racial or religious discrimination in private housing. The controversial nature of the act was punctuated by legislative compromises and amendments prior to passage and by a narrow margin of victory in the legislature. By contrast, the 1965 amendments to the act were almost free of crippling compromise and enjoyed a surprisingly large margin of victory in the legislature.

The purpose of this paper is to examine the basic premises of the 1959 act, the administrative and judicial developments under that act, the background of the 1965 amendments, and a critique of the problems solved and the problems created by those amendments.

I. THE 1959 ACT

The heart of any statute dealing with fair housing is that race, color, religion, or ancestry should not be a factor in the transfer of housing accommodations. As stated in the Colorado act:

> (a) It shall be an unfair housing practice and unlawful and hereby prohibited:
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> (b) For any person having the right of ownership, or possession, or the right of transfer, rental, or lease of any housing: To refuse to transfer, rent, or lease, or otherwise to deny to or withhold from any person or persons such housing because of race, creed, color, sex, national origin, or ancestry; to discriminate against any person because of race, creed, color, sex, national origin, or ancestry in the terms, conditions, or privileges pertaining to any housing, or the transfer, rental, or lease thereof, or in the furnishing of facilities or services in connection therewith; or cause to be made any written or oral inquiry or record concerning the race, creed, color, sex, national origin, or ancestry of a person seeking to purchase, rent, or lease any housing.[2]

The idea that the state can regulate the racial or religious factor in the decision of one having control of housing was unquestioned so long as a connection between the state and the housing was established. Thus statutes dealing with discrimination in publicly-assisted housing do not create much controversy because of the aphorism that the hand that pays the piper calls the tune. When, however, the state regulates purely private residential property,

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[1] COLO. REV. STAT. §§ 69-7-1 to 7 (1963).

[2] COLO. REV. STAT. § 69-7-5 (1)(a), (b) (1963).

controversy is inevitable. Thus, a great public debate centered around the coverage provision of the Colorado Act:

> "Housing" shall mean any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied as the home or residence of one or more human beings; or any vacant land for sale or lease; but does not include premises maintained by the owner or lessee as the household of his family with or without domestic servants and not more than four boarders or lodgers.[3]

A. *Philosophical Basis for Covering Private Property*

In most legal systems the power of the state to control the nature of the transferor's "right" to transfer property would be unquestioned. The history of the United States, in contrast, demonstrates an extraordinary devotion to absolutist theories of private property. In the era of substantive due process limitations on governmental power — roughly 1885 to 1934 — this country came as close as possible to considering the right of private property as a natural right of man beyond the reach of government.[4]

Because much of the absolute view of private property remains in our society and is urged to deny the power of the state to deal with racial discrimination, some examination of the private property rights argument is necessary. The nature of the argument is best illustrated by the promulgation of a "Property Owners' Bill of Rights" by the National Association of Real Estate Boards (NAREB) which includes the following four "rights":

> The right to occupy and dispose of property, without governmental interference, in accordance with the dictates of his conscience.
>
> The right to maintain what, in his opinion, are congenial surroundings for tenants.
>
> The right to determine the acceptability and desirability of any prospective buyer or tenant of his property.
>
> The right to enjoy the freedom to accept, reject, negotiate, or not negotiate with others.

Labeling the above NAREB statements as "rights" can be justified only by some natural law view of private property. A natural law property theory starts with the assumption that "God gave to mankind in general, dominion over all the creatures of the earth . . ."[5] This assumption must (to avoid a communistic theory) be refined to determine how particular men acquire "ownership" of particular things:

> [W]e learn how things passed from being held in common to a state of property. It was not by the act of the mind alone that this change took place. For men in that case could never know,

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[3] COLO. REV. STAT. § 69-7-3 (1)(d) (1963).

[4] See, *e.g.*, Lynch v. United States, 292 U.S. 571 (1934); Terrace v. Thompson, 263 U.S. 197 (1923); Campbell v. Holt, 115 U.S. 620 (1885) (dissenting opinion).

[5] GROTIUS, WAR AND PEACE, Book II, Ch. 2, § 2 (1925).

> what others intended to appropriate to their own use, so as to exclude the claim of every other pretender to the same; and many too might desire to possess the same thing. Property therefore must have been established either by express agreement, as by division, or by tacit consent, as by occupancy.[6]

This notion that property rights are created by occupancy was augmented by John Locke's articulation of the labor theory of private property in his *Two Treatises of Government:*

> Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own Person. This no Body has any Right to but himself. The *Labour* of his Body, and the Work of his hands, we may say, are properly his. Whatsoever, then, he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his property.[7]

Mr. Justice Pitney used the labor theory of Locke to find a property right in the famous case of *International News Service v. Associated Press:*

> And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public.[8]

Alongside the occupancy and labor theories used to justify the concept of private property grew the theory that ownership of property consisted of many rights. One Roman law definition of property, *Dominium est jus utendi et abutendi re,* was understood to mean that the right of property carries with it the right to use or abuse a thing. Although writers have shown that *abutendi* means "to consume" and not "to abuse" and that the following clause of the Roman definition, *quatenus juris ratio patitur* (in so far as the reason of law permits), negates the right of misuse, the combination of Grotius, Locke, and the Roman law coalesced in Blackstone's famous definition of property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[9]

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[6] *Id.*

[7] LOCKE, TWO TREATISES OF GOVERNMENT, Book II, Ch. 5, § 27 (1890).

[8] 248 U.S. 215, 236 (1918).

[9] 2 BLACKSTONE, COMMENTARIES, *2.

Due to the strong influence of Locke on the Founders of the American Republic and also due to the extensive influence of *Blackstone's Commentaries* on the legal profession in the American Colonies, the American Constitution might be interpreted to embody the Locke theory of property and the Blackstone definition of property. Support for this view materialized when the Supreme Court utilized the Fourteenth Amendment to review the merits of state economic regulation and social legislation.[10]

The strong background of natural property rights of an absolute nature in this country has had several effects. Most important, the legal revolution which accompanied the industrial revolution was retarded in the United States. In England, by contrast, legal institutions responded more easily to the industrial revolution and shifted from a natural law view of property to a theory of social utility, traceable to Jeremy Bentham.

Bentham's view (epitomized in his statement, "Property and law are born together, and die together. Before laws were made there was no property; take away laws and property ceases."[11]) strips away the natural law mystery of property and replaces it with a theory that the state protects private property because security of ownership and security of title are more beneficial to social progress than absence of such security.[12]

Benthamite utilitarianism and the social utility theory of private property are, of course, adequate to justify a free enterprise economic system. However, the theory also supports governmental interference with private property to promote a greater social good. Therefore, whenever the state finds a sufficient public welfare interest which requires a restriction on private property, no mystical natural law principle or constitutional provision should prevent such an exercise of the police power.[13] The question in such situations is really whether society would benefit more from the protection of the private property interest involved than from securing the other social goal. The answer to the question of desirability, of course, depends on one's view of the role of government in the lives of citizens; the dispute is usually between those who favor positive government and those who believe in as little government as possible.[14]

The conclusion that the philosophical basis of private property is not a function of natural law principles but rather is an outgrowth

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[10] See Hamilton, *Property — According to Locke*, 41 Yale L. J. 864 (1932).

[11] BENTHAM, THEORY OF LEGISLATION 113 (1864).

[12] *Id.* at 115-119.

[13] See, *e.g.*, Nebbia v. New York, 291 U.S. 502 (1934).

[14] This dispute is beyond the scope of this paper. For a general discussion of the two views, see HAYEK, THE ROAD TO SERFDOM (1944); WOOTTON, FREEDOM UNDER PLANNING (1945).

of the social utility of protecting security is buttressed by twentieth century developments in industrial capitalism.[15] Also of interest is a study of the history of restrictions on private property in the common law countries, a history which demonstrates that private property was never in practice considered absolute and beyond the reach of the state.

The common law has developed over the centuries several areas where the owner's "right" to dispose of his property in any fashion he desires is curtailed by law. Some general examples would be bars on illegal or antisocial dispositions, the law dealing with restraints on alienation, and the Rule Against Perpetuities.[16] These restrictions on the power to dispose are rooted in social welfare considerations and thus support the social utility theory of property.

Along with legal restrictions on the power to dispose of property a lengthy history of restrictions on the use of property can be discerned. In the twelfth century the assize of nuisance can be regarded as the origin of law of nuisance which requires the owner of land to refrain from using his property in such a way as to injure his neighbor.[17] As early as 1388 a statute was passed restricting property owners from polluting the air:

> [F]or that so much dung and filth of the garbage and intrails [sic], as well of beasts killed, as of other corruptions, be cast and put in ditches, rivers, and other waters, and also within many other places, within, about, and nigh unto divers cities, boroughs, and towns of the realm, and the suburbs of them, that the air there is greatly corrupt and infect, and many maladies and other intolerable diseases do daily happen . . . to the great annoyance, damage and peril of the inhabitants. . . .[18]

In 1427 after a series of damaging floods Parliament imposed flood control regulations on property owners[19] and modern building codes can be traced back to the aftermath of the London fire of 1666:

> Forasmuch as the city of London . . . by reason of a most dreadful fire lately happening therein, was for the most part thereof burnt down and destroyed within the compass of a few days, and now lies buried in its own ruins: for the speedy restauration [sic] whereof, and for the better regulation, uniformity and gracefulness of such new buildings as shall be erected . . . and to the end that great and outragious [sic] fires . . . so far forth as human providence . . . can foresee, may be reasonably prevented or obviated for

[15] See, *e.g.*, Renner, THE INSTITUTIONS OF PRIVATE LAW (introduction by Kahn-Freund) (1949); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

[16] RESTATEMENT, PROPERTY §§ 370-438 (1936); Schnebly, *Restraints upon the Alienation of Legal Interest*, 44 YALE L.J. 961, 1186, 1380 (1935).

[17] McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

[18] 12 Rich. 2, c. 13 (1388).

[19] 6 Hen. 6, c. 5 (1427).

> the time to come, both by the matter and form of such building . . . [there follows several pages of building specifications].[20]

These ancient restrictions on the use of property offer support for the conclusion that the social utility theory of property is not a modern concept invented to justify modern restrictions. Modern limitations on the use of property such as zoning,[21] urban renewal,[22] restrictions on riparian owners,[23] to name but a few, have their roots in the historically constant theory that the social welfare authorizes the state to regulate the "rights" of property owners.

No philosophical or historical approach supports the idea of absolute property rights. The NAREB "Property Owners' Bill of Rights" has no factual basis and expresses merely a desire that the state should not interfere with the property owner's personal choice to discriminate against prospective transferees for racial, religious, or any other reasons. Consequently, the argument over the propriety of including private housing in fair housing legislation is reduced to a weighing of the social benefits and detriments flowing from such a decision.

B. *The Arguments for and Against Fair Housing*

Assuming that the foregoing analysis of property rights is correct the only possible conclusion is that the battle over regulation of racial discrimination in private housing does not involve an irreconcilable conflict between "property rights" and "human rights." The real battle should center about whether the problems caused or perpetuated by discriminatory housing practices are severe enough to justify a legal redefinition of property. To understand the real issues the arguments offered by both sides will be examined.

Although the arguments offered in favor of state fair housing legislation center about the notion that racial and religious discrimination is contrary to the American ideal, some of the specifics of that notion are of particular interest. Thus, without attempting to exhaust all the possible arguments, the four which will be discussed are: 1) discrimination in private housing exists and is an extensive problem; 2) discrimination harms the individual discriminated against; 3) discrimination in housing is uneconomic and a serious waste; 4) discrimination in private housing helps perpetuate segregated education.

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[20] 19 Car. 2, c. 3 (1666).

[21] See, *e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[22] See *e.g.*, Berman v. Parker, 348 U.S. 26 (1954).

[23] See e.g., United States v. Willow River Power Co., 324 U.S. 499 (1945).

That racial discrimination in housing exists no one will dispute. In the first half of the twentieth century as urbanization and the Negro migration to northern cities developed, institutions designed to assure segregated housing also developed. Two of the most important such institutions were the racial restrictive covenant[24] and the real estate industry practice of not "breaking" neighborhoods.[25] As a testament to the success of discriminatory housing practices and as an indication of how extensive the problem is, the 1960 census figures are revealing. The 1960 population of America's ten largest cities was 21,751,334; 27.4 per cent of this population (4,655,505) was Negro. In contrast, the standard metropolitan area population outside those cities was 18,271,039 of which only 5.4 per cent (809,134) was Negro. The lily-white suburb is an actuality. Furthermore, the population *growth* figures for the 1930-1960 period are even more indicative of the extent of the problem of the Negro ghetto and white suburb. The total population growth in the ten largest cities in the period 1930-1960 was 3,480,295; the Negro population increase in the same period was 3,222,347 (92 per cent). In contrast suburban growth was 4,174,537 with a Negro gain of 146,540 (3.5 per cent).[26] Evidently, then, the large central cities are becoming Negro ghettoes while the white population is fleeing to racially restricted suburbs. If this situation remains unchecked, the ultimate possibility of an all-Negro city surrounded by all-white suburbs would be disastrous.

The second argument for regulating private housing — that discrimination harms the individual — is, likewise, not often disputed. However, the Negro does dispute, with probable justification, the

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[24] Some of the early cases upholding racial restrictive covenants are Corrigan v. Buckley, 271 U.S. 323 (1926); Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915) Parmlee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Keltner v. Harris, 196 S.W. 1 (Mo. S. Ct.) (1917). In the *Parmalee* case the trial corut said (188 N.W. at 331):

> The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matters of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties, which the situation presents.

The Missouri Supreme Court said, in Keltner v. Harris, 196 S.W. at 2, "[I]f it was distasteful to plaintiff to have a colored man as his neighbor, he had a legal right to refuse to sell him or his agents the property in controversy."

[25] NAREB Code of Ethics (1950): "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will be clearly detrimental to property values in that neighborhood." The Code was amended in 1950 to remove the clause about race and nationality.

[26] Miller, *Government's Responsibility for Residential Segregation*, in RACE AND PROPERTY 58, 59 (Denton ed. 1964).

ability of a member of the white majority to feel the indignity, deprivation, and suffering felt by the victim of enforced racial discrimination. The answer so often given by the opponents of fair housing to the effect that the majority of Negroes prefer to live among their own kind[27] ignores the very important distinction between voluntary and involuntary segregation. As was pointed out by one author:

> The voluntary congregation of people who seek each other's society is an exercise of freedom . . . [b]ut segregation that is enforced upon a group is a deprivation of freedom — a deprivation especially erroneous when its basis is the unalterable fact of race or ancestry.[28]

The fact that housing discrimination today is enforced by custom and convention rather than law does not render it less compulsory. Thus, the hurt to the Negro psyche in and of itself should be a sufficient reason to support fair housing.[29]

The third argument — that discriminatory housing is socially and economically wasteful — is based on the evidence that segregated housing in the cities is generally lower quality housing. If the housing available to the Negro in the city is limited in area the market forces of supply and demand result in high rent for substandard housing which results in an absence of financial incentive for improvement of living conditions. The white rationalization for this waste is likely to be that the housing only reflects different culture and earning power. The ultimate expression of this type of rationalization is expressed in the following description of housing in South Africa:

> Discrimination is expressed in the concept of different standards of housing and of amenity for the different racial groups. There is African Housing (that is to say, Bantu or Negro Housing), Colored Housing, Indian Housing and European Housing. The quality of the housing is immediately conveyed by these terms. Public housing policy is defined on the basis of an image of appropriate standards for each of the racial groups. In the past, the failure to build houses for Africans in the cities forced large numbers into improvised shacks of corrugated iron and sacking, the so-called shanty towns. Some of these slums still persist, but they are now being replaced by small family homes. Under a policy of low-cost housing for Africans, many items conducive to comfort are eliminated. For example,

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[27] One study by Mr. Mays, Chairman of the Housing Committee of the Urban League in Los Angeles, estimated that over 90 per cent of Los Angeles Negroes prefer to live in the center of the Negro section of the community.

[28] MCENTIRE, RESIDENCE AND RACE 88 (1960).

[29] For additional material on the hurt to the Negro see generally, the novels of James Baldwin. For evidence that integrated housing does not harm the white psyche see, *e.g.*, WILLIAMS, STRANGERS NEXT DOOR (1964); SIMPSON AND YINGER, RACIAL AND CULTURAL MINORITIES (1958).

> houses may be built without any inner doors, and the allocation of floor space could hardly be more modest. There is a sharp contrast between the bare confined utility of homes for Africans and the more expansive and civilized standards the authorities consider appropriate for whites. The same contrast is to be found in the provision of neighborhood amenities. Rough, neglected roads and raw, unlighted sidewalks characterize the nonwhite residential areas.[30]

In the United States the nonwhite families have been able to improve their incomes much more rapidly than their housing[31] thus perpetuating the urban ills of crime, unemployment, and juvenile delinquency.

The relationship between discriminatory housing and segregated schools needs no documentation. The neighborhood public school is such a solid reality in our society that experiments in transporting children to non-neighborhood schools to correct racial imbalances have met with resounding resistance. The failure of the Supreme Court to entertain arguments that school districts have an affirmative duty to integrate schools (as opposed to the duty to desegregate)[32] has served to emphasize the close connection between ghetto housing and ghetto schools. In the cities, at least, the problem of satisfactory education for minority group children will be partially solved by removing barriers to interracial housing.

Turning now to the most frequently voiced arguments against coverage of private housing, the four selected for discussion here are: 1) discrimination will not be cured by statutory compulsion but only by education; 2) nonwhite families in a neighborhood will lower property values; 3) fair housing legislation is an undesirable restriction on the individual's freedom of personal choice; and 4) anti-discrimination commissions are usually composed of people unduly sympathetic to minority groups thus imposing a severe burden upon respondents.

The first argument — that prejudice can be eliminated only through education and not by statute — is based on the idea that the people are not ready for state regulation of private housing. The proponents of this argument point to the experience with prohibition earlier in this century and to the action of the citizens of California

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[30] Kuper, *Sociological Aspects of Housing Discrimination,* in RACE AND PROPERTY 122 (Denton ed. 1964). See also the novel, PATON, CRY THE BELOVED COUNTRY (1948).

[31] For example, in Denver the 1950 Census shows 8,035 nonwhite persons having incomes with 95 (1.2 per cent) having incomes of over $5,000; in 1960 19,646 nonwhites had incomes of which 2,912 (14.8 per cent) had incomes of over $5,000. See generally, HOUSING AND HOME FINANCE AGENCY, OUR NONWHITE POPULATION AND ITS HOUSING (1963).

[32] See Bell v. School City of Gary, Ind., 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); Downs v. Board of Education of Kansas City, Kans., 336 F.2d 988 (10th Cir. 1964), *cert. denied,* 85 Sup. Ct. 898 (1965).

adopting Proposition 14 in the 1964 election.[33] The difficulty with the argument is that it attempts to prove too much. One object of almost every piece of legislation is to affect morality,[34] and in a representative democracy the legislature should consider whether the legal duties imposed by a statute are so obnoxious to the felt morality of the governed that peoples' behavior will not be changed. Understandably, many people might be opposed to fair housing legislation, but as of this writing no state has reported a groundswell of resistance to its statute similar to resistance to statutes during the era of prohibition. As for the California vote, the only inference possible is that a majority of the voters for whatever reason or for no reason voted in favor of Proposition 14. How can one interpret such a vote as showing that fair housing runs counter to the positive morality of the people? The only possible way of determining whether a statute goes too far in attempting to change behavior is to observe the operation of the statute.

The argument that nonwhite residents lower property values has never been scientifically demonstrated. The few studies that have been made on the question tend to show otherwise — that race does not affect property values.[35] Also, the lending institutions seem to have encountered little difficulty in lending to nonwhites:

> The Bowery Savings Bank is one of the largest lenders on mortgage [sic] in the country. It is the largest mutual savings bank in the world. That bank 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 properties. Its experience with those mortgages has been just [as] good as its experience with any other type of loan that it has made. It

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[33] Proposition 14 was an initiated amendment to the California Constitution providing.

> The People of the State of California do enact the following constitutional amendment to be added as Section 26 of Article I of the Constitution of the State of California:
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> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
>
> "Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease, or rental of property owned by it.
>
> "Real property" consists of any interests in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other. . . .

[34] See generally, COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933); FULLER, THE MORALITY OF LAW (1964).

[35] See Case and Clark, *Property and Race* in RACE AND PROPERTY 114 (Denton ed. 1964); U. S. HOUSING AND HOME FINANCE AGENCY, EQUAL OPPORTUNITY IN HOUSINGS A SERIES OF CASE STUDIES (1964); LAURENTI, PROPERTY VALUES AND RACE: STUDIES IN SEVEN CITIES (1960).

> has millions of dollars of mortgages on properties owned by or occupied by minority groups, particularly nonwhites, and it has millions of dollars of loans on real estate 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, as I say, its experience with respect to those loans has been just as favorable as its experience with respect to other loans that it has made.[36]

In those areas where there are no established property values, such as a builder's subdivision, studies have indicated that the presence of a Negro purchaser does not make the sale or rental of immediately adjacent housing to a white purchaser any more difficult.[37]

The most difficult argument to deal with made by the opponents of fair housing is that the state is unduly restricting the free personal choice of the individual property owner.[38] If our society believes that an important aspect of freedom is the maximization of the personal choices of every citizen, then why should the state interfere with the very intimate personal choice of who buys or rents one's property? Should not the property owner be able to refuse to rent or sell for any reason or no reason at all? One answer is that in any society the personal choice of racial or religious discrimination may be outweighed by society's interest in overcoming the evils of discrimination. A more specific answer is that in the usual transfer of housing situation the transferor is not attempting to play the role of sociologist. The typical seller is interested in the economic abilities of the potential buyer, not the color of his skin. Others, such as neighbors and realtors, are more likely to have an interest in the race of the buyer or renter. The seller normally is interested only in selling and were it not for outside pressures he would probably sell to the first buyer with money in hand. Realistically speaking, fair housing does not diminish a seller's freedom in a meaningful way.

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[36] Testimony of Earl B. Schwulst before the United States Commission on Civil Rights, U.S. Comm. on Civil Rights, Hearings Held in New York February 2-3, 1959, at 31 (1960).

[37] HOUSING AND HOME FINANCE AGENCY, EQUAL OPPORTUNITY IN HOUSING: A SERIES OF CASE STUDIES, 9 (1964).

[38] Where the property owner is a corporation, the argument is less persuasive. See Mr. Justice Douglas' concurring opinion in Bell v. Maryland, 378 U.S. 226, 252, 261 (1964):

> The problem in this case, and in the other sit-in cases before us, is presented as though it involved the situation of "a private operator conducting his own business on his own premises and exercising his own judgment" [citation omitted] as to whom he will admit to the premises. . . . So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases — the stockholders — are unidentified members of the public at large, who probably never saw these petitioners [Negro sit-in demonstrators], who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance [of the convictions]? . . .Who in this situation, is the corporation? Whose racial prejudices are reflected in "its" decision to refuse service to Negroes? The racial prejudices of the manager? Of the stockholders? Of the Board of Directors?

Indeed, a fair housing statute may enhance his freedom in providing a greater potential market for his housing and in providing a legal scapegoat for the neighbors. Another consideration is that interracial housing may, instead of creating societal friction, achieve positive good in reducing racial disharmony,[39] thus enhancing and enriching the lives of those in the community. Finally, one must also consider that fair housing legislation may help to maximize the freedom of the minority-group individual who is seeking to fulfill the promise of equal opportunity.[40]

The argument that fair housing statutes are administered by commissions slanted in favor of minority groups thus favoring complainants and discrediting respondents may be answered in several ways. First, the policy underlying the creation of many administrative agencies has been a conscious desire on the part of the legislature to have a statute administered by a body sympathetic with the aims of the statute. For example, the reason workmen's compensation statutes are administered by agencies is because the courts proved unsympathetic to the claims of injured workmen.[41] To argue that the preconceived bias of a "do-good" agency renders the agency incompetent is, thus, to ignore that historically all agencies have a "program" which may, will, and should require them to resolve doubts in favor of the program,[42] and that judges and juries also have preconceived biases.[43] Second, fair housing decisions, like those of other administrative

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[39] GORDON, ASSIMILATION IN AMERICAN LIFE (1964); WILLIAMS, STRANGERS NEXT DOOR (1964); GRIER AND GRIER, PRIVATELY DEVELOPED INTERRACIAL HOUSING (1960); STETLER, RACIAL INTEGRATION IN PRIVATE RESIDENTIAL NEIGHBORHOODS IN CONNECTICUT (1957); WILNER, WALKLEY AND COOK, HUMAN RELATIONS IN INTERRACIAL HOUSING (1955); DEUTSCH AND COLLINS, INTERRACIAL HOUSING: A PSYCHOLOGICAL EVALUATION OF A SOCIAL EXPERIMENT (1951); FESTINGER, SCHACTER AND BACK, SOCIAL PRESSURES IN INFORMAL GROUPS (1950).

[40] But *c.f.*, Robbins, *A Critical Analysis of Anti-Discrimination Housing Laws*, in RACE AND PROPERTY 88, 95 (Denton ed. 1964) where the author cites as evidence that fair housing does not accomplish its intended purpose part of a New York Times article of Jan. 7, 1961:

> A Negro woman lives with her two children in a Staten Island [housing] project. She travels each day to her job in upper Manhattan [a two-hour ride each way].
>
> To save money and spend more time with her children — reasons the Authority would ordinarily accept — she asked to be transferred to a project near her job. She is turned down because she is a Negro and the available units are being held for whites to improve integration at the project.

This "evidence" appears to be a hypothetical situation constructed by the reporter. *id.*, p. 1, col. 2. For a contrary view, see HOUSING AND HOME FINANCE AGENCY, EQUAL OPPORTUNITY IN HOUSING: A SERIES OF CASE STUDIES (1964). For general views of the constitutional issues in racial quota situations, see Bittker, The Case of the Checker-Board Ordinance: An Experiment in Race Relations, 71 YALE L.J. 1387 (1962); Hellerstein, The Benign Quota, Equal Protection, and "The Rule in Shelley's Case," 17 RUTGERS L. REV. 531 (1963).

[41] See GELLHORN AND BYSE, ADMINISTRATIVE LAW 9, (4th Ed. 1960); c.f., Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1218 (1939).

[42] GELLHORN AND BYSE, *op. cit. supra* note 40, at 29.

[43] JAFFE, *op. cit. supra* note 40, at 1218.

agencies, are subject to the safeguards of judicial review.[44] Third, an examination of the disposition of complaints by the agencies tends to show that an "accusatorial" and not "inquisitorial" approach is taken. The reports of the Colorado Anti-Discrimination Commission disclose that, from 1962 to 1964, 73 complaints were filed under the Colorado Fair Housing Act; of the 73, 2 were dropped, 32 were dismissed, 25 were conciliated, and only 14 reached the hearing stage.[45] These statistics indicate that the Commission does a pretty good job of weeding out the unjustified and unsubstantiated complaints, refuting the indiscriminate attack upon the "do-gooder" agency.

Unfortunately, the arguments for and against fair housing legistion are usually made in the abstract. A typical statement supporting fair housing is that made by Milton Gordon:

> [T]he price of discrimination, in terms of welfare costs, law enforcement, educational services, and other social factors, is being recognized by the public as too high.
>
> In effect, these findings cry for the old concept of a free, open, private enterprise market in the field of housing. Thus, governmental action against private discrimination may, paradoxically, be justified in terms of free private enterprise! The individual buying a house is asking that his dollar be treated in the housing market as it is in the automobile market. . . .
>
> No reasonable person will contest the principle that a man's home is his castle. But, when this man, of his own free will, offers for a consideration to dispossess himself of that castle, he must necessarily grant to the potential purchaser the same privileges.[46]

Similarly, the argument against fair housing is typically abstract:

> Some proponents of legislation forcing property owners to deal with minority group members against their will recognize the thinness of their legal position. They also recognize that where legislation is being considered to correct what some consider a moral fault of society, there is considerable ground for the statement, "You cannot legislate morality." So they attempt to erect a legal foundation to support their position.
>
> They begin with a fallacy and then spend thousands of words erecting a magnificent edifice on that fallacy. The fallacy is the assumption that the right of the owner of residential property to resist governmental control of the property itself is the issue. They conveniently overlook the fact that, in this instance, government is not limiting the owner's right to control the property itself. It is limiting his right to deal or to decline to deal, with another individual concerning that property.[47]

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[44] *E.g.*, COLO. REV. STAT. § 69-7-7 (1963).

[45] COLORADO ANTI-DISCRIMINATION COMMISSION, NINTH ANNUAL REPORT 12 (1963) and TENTH ANNUAL REPORT 13 (1964).

[46] Gordon, *Property Rights and Civil Rights: The Role of Government*, in RACE AND PROPERTY 42, 51 (Denton ed. 1964).

[47] Robbins, *op. cit. supra* note 39, at 93.

The difficulty with such statements is that they tend to focus the controversy on the broad philosophical and legal questions rather than on the practical problems of effective legislation. Of greater significance is the question of what fair housing legislation can and cannot do or what it will and will not do. Therefore, following is a list of some general observations about the effective limits of a fair housing statute:

1. Fair housing does not guarantee interracial housing. The state cannot prevent a mass exodus of white residents when a Negro moves into the neighborhood.

2. On the other hand, one ultimate goal of fair housing is to insure that no neighborhood is immune from minority group residents thus removing incentive for a white resident to move upon the appearance of a Negro family; if there is no place to run to, biracial neighborhoods could become the rule rather than the exception.

3. Fair housing cannot cure the problem of the ghetto; a statute cannot provide housing for a particular family (except, of course, public housing), only economic ability and overcoming the fears of leaving the ghetto can accomplish that purpose.

4. A fair housing statute will have greater impact in the new housing market and apartment-house market than in the used single-family dwelling market, because of the greater difficulty in proving discrimination where the respondent is disposing of only one housing unit. Also, a neighborhood social structure is less evident in new subdivisions or apartment areas.

5. Fair housing can work well only with the cooperation of the real estate industry. The opportunities for evasion are too numerous to expect a statute to be effective without industry cooperation.

II. DEVELOPMENTS UNDER THE 1959 ACT

Although Connecticut is generally recognized as the first state to adopt a fair housing statute[48] the statute dealt only with discrimination in public housing. The Colorado Act of 1959 was the first state to cover discrimination in private housing.[49] However, the act did not cover all private housing. In the definition section "housing" was defined as

> . . . any building, structure, or part thereof which is used or occupied, or is intended, arranged or designed to be used or occupied as the home or residence of one or more human beings; or any vacant land for sale or lease; but does not include premises maintained by the owner or lessee as the household of his family with or without domestic servants and not more than four boarders or lodgers.[50]

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[48] CONN. GEN. STAT. TITLE 64, c. 417, Sec. 1407b (1949), now CONN. GEN. STAT. ANN. § 53-35 (Supp. 1964).

[49] New York City and Pittsburgh, Pa. had fair housing ordinances covering private housing as early as 1957. Soon after the Colorado Act became effective on May 1, 1959 three other states passed statutes (presumably the statutes were being considered in the legislatures contemporaneously with the Colorado Act). See: CONN. GEN. STAT. ANN. § 53-35 (Supp. 1964); MASS. GEN. LAWS ANN. ch. 151B, §§ 4.3B, 4.6, and 4.7 (Supp. 1964); ORE. REV. STAT. § 659.033 (1963).

[50] COLO. REV. STAT. § 69-7-3(1)(c) (1963).

This legislative exclusion of owner-occupied housing effectively limited application of the act to apartments, new housing, and the few cases of vacant used houses.

Administration of the act was placed with the Colorado Anti-Discrimination Commission,[51] the agency which had been created in 1957 to administer the state fair employment practices act.[52] Much of the Fair Housing Act was patterned after the Fair Employment Act.[53]

A. *The Legal Developments*

Between May 1, 1959, and June 30, 1960, fourteen fair housing complaints were filed with the Colorado Anti-Discrimination Commission.[54] One of these, filed on September 18, 1959, against the J. L. Case and Company, Realtors, was destined to become the test case for Colorado Supreme Court consideration of the validity of the Fair Housing Act.[55]

The essential facts involved in the case showed that the complainants, a Negro couple, answered an advertisement, for sale of a home in Colorado Springs, inserted by the owner who was a real estate broker. After visiting the property and giving the salesman a $500 deposit, the Negroes were informed by another employee of the broker that they would be unhappy in the neighborhood. The Negroes insisted on purchasing the house, whereupon they were told it had already been sold; actually, the house was conveyed to one of the broker's salesmen who subsequently resold the house to a white purchaser (at a lower price than agreed upon in the arrangement with complainants).

After a hearing in March, 1960, the Anti-Discrimination Commission found that an unfair housing practice had been committed and entered an order ordering the respondents to cease and desist from the unfair housing practices and to "afford to these complainants the opportunity of purchasing a comparable home as the home in question in the same general neighborhood or a comparable neighborhood . . . under the same terms and conditions as such a home would be offered to any other person." The Commission also ordered the respondents to report periodically on the manner of their compliance.[56]

Upon judicial review in the district court that portion of the act

[51] COLO. REV. STAT. § 69-7-2 (1963).

[52] See Colorado Anti-Discrimination Act of 1957, COLO. REV. STAT. § 80-21-2 to 7 (1963).

[53] Compare, *e.g.*, COLO. REV STAT. §§ 69-7-6, 69-7-7, 80-24-7, 80-24-8 (1963).

[54] SIXTH ANNUAL REPORT, COLORADO ANTI-DISCRIMINATION COMMISSION 10 (1960).

[55] Colorado Anti-Discrimination Comm'n v. Case, 151 Colo. 235, 380 P. 2d 34 (1962).

[56] 151 Colo. at 240-241, 380 P.2d at 38.

authorizing the Commission to enter the order[57] was held unconstitutional as being vague and indefinite and an unlawful delegation of legislative power.[58] The Commission appealed to the supreme court where the respondents argued, in addition to the delegation point, that the Fair Housing Act violated the Colorado Constitution by taking of private property for private use,[59] by infringing on the inalienable right to select the person with whom one contracts,[60] by deprivation of property without due process,[61] and by denying equal protection through unreasonably classifying in regard to owner-occupied housing.[62]

To all of the respondent's arguments founded on the concept of inalienable property rights, the court, through Justice Moore, responded in kind by finding corresponding and overbalancing human rights, equally inalienable and equally inherent:

> We have no hesitancy in stating there are fundamental and inherent rights with which all humans are endowed even though no specific mention is made of them in either the national or state constitutions.[63]

The court then discussed the Ninth Amendment to the Constitution and the Colorado Constitution, Article II, Section 28 and concluded the first part of the opinion,

> We hold that the Act here in question has a substantial relation to a legitimate object for the exercise of the police power, and that it is appropriate for the promotion of that object. We constantly speak of "equality of opportunity" as a foundation stone of the American way of life. We solemnly proclaim that "All men are created equal"; that "all men" have the inalienable right of acquiring, possessing and protecting property. 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 Article II, Section 28, of the Constitution of Colo-

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[57] COLO. REV. STAT. § 69-7-6 (12) (1963):
> If, upon all of the evidence at a hearing, the commission shall find that the respondent has engaged in or is engaging in an unfair housing practice . . . the commission shall . . . issue . . . an order requiring such respondent to cease and desist from such unfair housing practice and to take such affirmative action, including (but not limited to) the transfer, rental, or lease of housing, the making of reports as to the manner of compliance, and such other action as in the judgment of the commission will effectuate the purposes of this article.

[58] 151 Colo. at 241-242, 380 P.2d 38.

[59] COLO. CONST., art II, § 14.

[60] COLO. CONST., art II, § 3.

[61] COLO. CONST., art. II, § 25; U.S. CONST., amend. XIV.

[62] *Ibid.*

[63] 151 Colo. at 243-44, 380 P.2d at 39.

rado and the Ninth Amendment of the Constitution of the United States.[64]

The court answered the taking of private property argument by pointing out that the act comes into operation only after the owner of the property, of his own free will, places the property on the open market.

The second part of the court's opinion dealt with the problem of whether Section 6(12) of the act[65] is an unlawful delegation of legislative power. The court held that the portion of the section empowering the Commission to take "such other action as in the judgment of the Commission will effectuate the purposes of this article" is an unlawful delegation: "The legislature cannot delegate to any administrative agency 'carte blanche' authority to impose sanctions or penalties for violation of the substantive portion of a statute."[66] Because the order of the Commission went beyond the areas specifically mentioned in the statute (cease and desist order, order the transfer, rental or lease of housing) the case was remanded to the district court.

The court's opinion is quite puzzling, almost schizophrenic in that the first part represents an extremely liberal philosophy of "human rights" prevailing over "property rights," while the second part represents an exceedingly conservative, retrogressive view of the delegation doctrine.[67] However, the opinion was generally hailed by the supporters of fair housing because of the court's broad language sustaining the concept of the act. The part of the opinion dealing with the Commission's power to fashion remedies left in limbo the practical effect of Commission activity in fair housing cases, and soon led to the call for new legislation.

B. *The Administrative Developments*

The decision of the supreme court in *Colorado Anti-Discrimination Commission v. Case*[68] was finally handed down on April 8, 1963. Soon thereafter the Commission, feeling its enforcement powers to be severely curtailed, discouraged the filing of complaints in cases where the staff felt an effective order could not be entered. Table 1 illustrates the number of fair housing complaints filed each

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[64] 151 Colo. at 247, 380 P.2d at 41.

[65] See note 54, *supra.*

[66] 151 Colo. at 250, 380 P.2d at 43.

[67] See Gitelman, *One Year Review of Constitutional Law,* 40 DENVER L. CENT. J. 134, 145-149 (1963).

[68] 151 Colo. 235, 380 P.2d 34 (1962).

year and the comparison between the number of fair housing complaints and fair employment and public accommodations complaints:

TABLE 1

Year:	1959-1960	1960-1961	1961-1962	1962-1963	1963-1964
Fair Housing	14*	47	53	54	19
Public Accommodations	6	18	18	8	10
Fair Employment	27	62	49	38	64
TOTAL	47	127	120	100	93

*The Fair Housing Act became effective May 1, 1959.

The above comparisons demonstrate that the applause for the *Case* decision and its broad support for equal opportunity in housing was premature. The Commission was losing ground in enforcing the act and property owners and managers bent on maintaining discriminatory practices were discovering the ease with which the act could be avoided.

Both the members of the Anti-Discrimination Commission and the staff spearheaded a drive to seek legislative strengthening of the Fair Housing Act, using the *Case* decision as the catalyst to support repair of the act and new provisions which would give the Commission additional effective power. The same group of community organizations that fought for the original act were reactivated to do battle for new and better fair housing legislation,[69] and public pressure was exerted upon the Governor to include fair housing on his legislative call for the 1964 "short" session of the legislature.[70] The public pressure culminated in a sit-in demonstration by the Denver Chapter of the Congress of Racial Equality in the Governor's office.[71] The Governor refused to place fair housing on the legislative call but did, on June 19, 1964 appoint a sixteen member study committee to evaluate the Fair Housing Act and make recommendations on any necessary changes in time for submission to the 1965 General Assembly.

III. THE 1965 AMENDMENTS TO THE FAIR HOUSING ACT.

The first meeting of the Governor's Fair Housing Committee was held on August 14, 1964. At that initial meeting the Committee

[69] See Coopersmith, How the Colorado Fair Housing Law Was Enacted (mimeo published by Mountain States Regional Office, Anti-Defamation League of B'nai B'rith).

[70] The Denver Post, Jan. 8, 1964, p. 27, col. 7.

[71] *Id.*, Jan. 16, 1964, p. 1, col. 8.

decided that its function was not to deal with the fundamental questions of having or not having a fair housing statute but to devote its efforts toward improving the present act. Because the Committee's findings and recommendations bear a relationship to the amendments passed by the legislature in 1965, a brief survey of the Committee's activities and subsequent developments will be helpful in understanding the new provisions of the Fair Housing Act.[72]

A. *Background of the Amendents: The Governor's Committee*

Soon after the *Case* decision was handed down, the Anti-Discrimination Commission prepared a general statement covering the changes it desired in the Fair Housing Act. The Commission's proposals were considered and approved by several community organizations and, in August of 1964, presented to the Governor's Committee. The Commission sought the following changes in the act:

1. Add new enforcement section to comply with the *Case* decision, and to describe more fully the Commission's enforcement powers.

2. Expand coverage of the act to include in the definition of "housing" property during the time it is listed for sale, lease or rent with any licensed real estate broker or his agent.

3. Give the Commission power to seek a court injunction to restrain a respondent from transferring the property in dispute pending final determination by the Commission.

4. Make it an unfair housing practice to discharge or discipline an employee or agent for complying with the act.

5. Make violation of the act a misdemeanor subject, after conviction in court, to fine and/or imprisonment.

6. Expand coverage of the act to include commercial space.

7. Give the Commission power to require the posting of notices.

8. Change the Licensing Act (not the Fair Housing Act) to make possible suspension or revocation of a real estate broker's license for violating the provisions of the Fair Housing Act.

Although the Committee held itself open for all suggested amendments to the act, most of the time and effort of the Committee was centered about the Commission's proposals, several of which provided the occasion for extensive discussion and deliberation.

The first controversial Commission proposal dealt with extend-

[72] The Committee's hearings and deliberations were not transcribed and cannot be cited. However, the following discussion is based on the notes and recollections of the author, who was a member of the Committee.

ing coverage of the act to all private housing when listed with any licensed real estate broker or his agent. Proponents of such an amendment pointed out that most real estate transactions are handled by a licensed broker and that once an owner has listed a house it is on the public market. Opponents, mostly people in or connected with the real estate industry were concerned that the proposal places the onus for discriminatory practices upon the real estate agent rather than the owner and would disrupt the industry. Further, they argued, the proposal itself was discriminatory in that the act would not reach the discriminating owner, but only the real estate agent. Ultimately, the real estate interests on the Committee expressed their viewpoint that the 1959 act should not be expanded in coverage at all (improvement of housing opportunity to be accomplished through education) but if coverage were to be extended, all housing on the market should be subject to the act. In its final deliberations the Committee by one vote rejected a proposal to cover all publicly offered housing. However, the Committee did adopt a proposal initiated by the Commission to include commercial space in the act.[73]

The Commission's request for an amendment which would enable it to seek a court injunction to prevent transfer of property pending a final administrative decision occasioned more Committee discussion than any other topic. The Commission argued that its efforts were easily frustrated by respondents who rendered complaints moot by transferring the property in dispute. Because the extent of the Commission's power was to order transfer of the specific property in question, a sale by the owner soon after the filing of a complaint meant the Commission could not enter an effective order. In essence, what was sought by the Commission was some sort of procedure analagous to an injunction pendente lite. Opponents of giving injunctive power to the Commission emphasized the dangers of using such power for harassment and the problem of damage to a respondent (lost sales) in case of an ultimate victory at the administrative hearing or where the complainant would ultimately be unwilling or unable to take the property after favorable decision.

The Governor's Committee was first concerned with the question of whether the Commission really needed injunctive power and

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[73] The proposal adopted was to include the following in the definition of housing, COLO. REV. STAT. § 69-7-3(1)(d) (1963),

> any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, warehousing, handling, garaging or distribution of personal property; or any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof . . .

asked for a report on the disposition of 1962-1964 housing cases. The Commission provided the following reports:

> In reviewing 53 of the housing complaints filed during the fiscal years of 62-63 and 63-64 dealing with the denial of sale and rental of housing because of race, creed, color or national ancestry, we find the following:
>
> Number of cases dismissed (no probable cause) 24
>
> Number of cases closed by conference or conciliation 28
>
> Average length of time between date of filing complaint and date of closing of complaint by conference or conciliation (i.e., probable cause found) (one case closed in one day; one case closed after 185 days) . . 40 days
>
> Number of complainants who were offered the rental or sale of the housing in question 9
>
> Number of cases in which the apartment or house in question was sold during the investigation of a complaint. . . . 11
>
> Number of cases in which complainant moved into housing being sought 5
>
> It would seem quite obvious then that in only a very small percentage of the cases has the Commission been able to make the specific housing available to the complainant even after probable cause of discrimination has been found.[74]

The Committee accepted the need for some sort of injunction procedure provided that safeguards would be contained in the statute. Of particular concern were the dangers of tying up property for an overly long period and of no recompense to the owner for damages caused by the injunction. The Committee studied the Massachusetts injunction provision[75] and considered four alternative provisions before choosing the following:

> After the aforesaid determination by the Commission that probable cause exists, the Commission or a Commissioner designated by the Commission for that purpose may also file a petition in the District Court of the City and County of Denver, or of any county in which the alleged unfair housing practice occurred, or of any county in which a respondent resides, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing with respect to which the complaint is made, pending the final determination of proceedings under this article; provided, however, that no such injunctive relief, order or decree shall be granted except upon the giving of security by the person claiming to be aggrieved by the unfair housing practice, in such sum as the court deems proper, for the payment

[74] Memorandum from Colorado Anti-Discrimination Commission to Governor's Fair Housing Study Committee, Sept. 24, 1964 (mimeo).

[75] MASS. GEN. LAWS § 151B § 6 (1958).

> of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No injunctive relief, order or decree shall be granted except after hearing, notice of which shall be given to the respondent at least three days prior thereto by the Commission or Commissioner designated for that purpose by registered mail directed to the respondent's last and usual place of abode, together with a copy of such petition, and provided, further, that such injunctive relief shall expire by its terms within such time after entry not to exceed 60 days, as the court fixes, unless within the time so fixed, the order for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. An affidavit of notice of hearing shall forthwith be filed in the office of the clerk of the district court wherein said petition is filed. The procedure for seeking and granting said injunctive reilef, including temporary restraining orders and preliminary injunctions, shall be the procedure provided in the rules of civil procedure for courts of record in Colorado pertaining to injunctions, provided, however, that any provisions contained in such rules pertaining to the giving of security shall apply to the person claiming to be aggrieved by the unfair housing practice, and the district court shall have power to grant such temporary relief or restraining orders as it deems just and proper.[76]

In addition to insisting upon a well-safeguarded injunction procedure, some members of the Committee felt that the statute should, as an additional protection to respondents, spell out what constitutes probable cause for crediting the allegations of a complaint. The difficulty of defining "probable cause," a nebulous concept at best, and the danger of hamstringing the investigative staff of the Commission did not deter the Committee from drafting the following "definition":

> Probable cause shall exist if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that an unfair housing practice had been committed, provided, however, it shall be sufficient to discredit the allegations of a complaint if the investigating official shall find the complainant does not have sufficient financial resources to permit the leasing or purchasing of the housing in issue if the complainant has no bona fide intention of viewing, leasing or purchasing such housing should the same ultimately be made available to the complainant for such purposes under any of the provisions of this article.[77]

The Governor's Committee also adopted proposals dealing with posting of Commission notices, making refusal to show housing or transmit offers an unfair practice, and specifying the affirmative

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[76] Proposed amendment to COLO. REV. STAT. § 69-7-6(6) (1963).

[77] Proposed amendment to COLO. REV. STAT. § 69-7-6(3) (1963).

relief which the Commission could give.[78] The Committee refused to recommend amendments which would make violations of the act a misdemeanor, would subject a discriminating broker to revocation of his license, or would make discipline of an employee for obeying the act an unfair housing practice.

The Committee's recommendations were not well received by the supporters of fair housing who felt the important proposals were ignored. As reported by Charles Roos in his newspaper column:

> . . . The committee not only didn't rock the boat. It scarcely left the dock.
>
> It's true the committee does recommend some changes in the law—to extend coverage to commercial property (a noncontroversial issue) and, more important, to empower the Anti-Discrimination Commission to go into court to ask for injunctions. . . .
>
> But the committee chooses, in its recommendations, to bury three crucial proposals that would have put some steel in the 1959 law:
>
> Specifically, the committee (1) voted to leave the major loophole in the 1959 law: a provision that exempts owner-occupied houses from the act. The committee (2) declined to consider any criminal penalty, however slight, for violations of the act. At the suggestion of its chairman, the committee (3) avoided a vote on the possibility of action against the license of a real estate agent who violates the housing law.
>
> There were several reasons for all this:
>
> — Membership of the committee was weighted toward the estate industry, which plainly wants no strengthening of the 1959 law.
>
> — Of five legislators on the committee, four are Republicans who had held no positions of real leadership in the General

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[78] The posting proposal would amend COLO. REV. STAT. § 69-7-4(1)(d) to read that the Commission has power

> to adopt, publish, amend, and rescind regulations . . . including the adoption, publication, and amendment of regulations concerning the posting of notices setting forth provisions of the fair housing act of 1959, provided, however, that such posting of notices shall by regulation be uniformly applied to housing or types of housing as defined in this article.

Also, a new section was proposed, COLO. REV. STAT. § 69-7-7(13):

> Upon refusal by a person to comply with a regulation of the Commission, the Commission shall have authority to immediately seek an order in the district court enforcing such regulation of the Commission; such proceedings shall be brought in the district court in the county in which the respondent resides or transacts business.

The proposed amendment to the enforcement section, COLO. REV. STAT. § 69-7-6(12) would give the Commission power

> to take such affirmative action as is appropriate under all the facts and circumstances of the case as follows: the transfer, rental, or lease of the housing that is the subject matter of the complaint; the showing of the housing that is the subject matter of the compliant where the nature of the complaint is a refusal to show housing; the making of reports as to the manner of compliance with the order or orders of the Commission and such other action as in the judgment of the Commission will effectuate the purposes of this article. The Commission may order such affirmative action as provided for in this section in the conjunctive, disjunctive, or alternative.

> Assembly. The fifth, a Democrat, is a capable man, but one who had shown no special interest in fair housing.
>
> — The chairman, former Rep. Bert Gallegos, is a sincere advocate of fair housing practices, but he lacked muscle as a Democratic lawmaker and can't have gained much influence, if any, since switching Republican.
>
> — No strong supporter of the housing act was appointed. Several were still serving in the Legislature, including the chief sponsors of the 1959 bill, Sens. George Brown and Bob Allen of Denver.
>
> — Two Negro members of the committee missed the last policy session. Their votes might have changed one important recommendation, decided by a vote of 6 to 5.
>
> — The Colorado Anti-Discrimination Commission, which has the duty of enforcing the law, was represented in the committee by an employee, but no one with the official stature of a commissioner or the CADC director. . . .[79]

While the worth of the Committee's recommendations was being debated, a newly-elected legislator, Representative Gerald Kopel of Denver announced that he would introduce his own amendments to the Fair Housing Act which would be more in line with the amendments sought by the Anti-Distrimination Commission. When the 1965 General Assembly convened, Senator Donald Kelley (a member of the Governor's Committee) introduced the committee's amendments in the Senate[80] and Representative Kopel introduced his amendments in the House of Representatives.[81]

B. *Background of the 1965 Amendments: The General Assembly*

In January of 1965 most supporters of fair housing felt that strengthening amendments to the act would be easily passed in the House of Representatives but that the Senate would be reluctant to concur in such House action. The feeling was based primarily on the results of the 1964 election which created a heavy Democratic majority in the lower chamber but left a five-vote Republican majority in the upper chamber. The split legislature, as well as the results of the California referendum on Proposition 14, dimmed the prospect of any widespread changes in the act.

As introduced, Representative Kopel's bill contained provisions for expanding coverage to owner-occupied housing (but not commercial space), making violation of the act a misdemeanor, defining probable cause, providing injunctive power, and establishing as unfair practices the following: refusal to show, refusal to post Commission notices, and discharge of an employee for obeying the act. This bill received the support of the Commission and most civil rights groups

[79] The Denver Post, Dec. 3, 1964, p. 23, col. 1.
[80] Sen. Bill 4 (1965).
[81] H.B. 1021 (1965).

in all respects except the provision defining probable cause. The Commission felt that it could not in every case, before making a finding of probable cause, investigate and ascertain that the complainant's financial condition would enable him to complete the transaction complained of.

As predicted, Representative Kopel's bill passed the House easily and went to the Senate where it bogged down in the Judiciary Committee, chaired by Senator Kelley, the member of the Governor's Committee who had introduced the Committee's recommendations in the Senate. Finally, however, Senator George Brown offered some compromise amendments, the bill was surprisingly passed by the Senate with only a few nays, and was ironed out in a conference committee. Both houses then passed the revised bill and it was signed by the Governor on April 8th.

C. *The Nature of the 1965 Amendments*

The 1965 amendments to the Fair Housing Act represent a compromise which, on balance, is more favorable to the supporters of fair housing. The final bill omits the penalty provision, passed by the house, making violation of the act a misdemeanor. Also, the final bill contains no reference to posting of notices. The bill does contain a better, but still questionable, definition of probable cause. On the other hand, the final bill does have a very broad coverage provision, a procedure for obtaining injunctions, and a provision for the complainant to secure damages.

The new coverage provision is, in the author's opinion, the greatest victory achieved by the proponents of fair housing in Colorado. The definition section of the act now provides:

> "Housing" shall mean any building, structure, vacant land, or part thereof during the period it is advertised, listed, or publicly offered for sale, lease, rent, or transfer of ownership; except that "housing" shall not include any room or rooms offered for rent or lease in a single family dwelling maintained and occupied in part by the owner or lessee as his household.[82]

The legislature removed the original statutory language "intended, arranged or designed to be used or occupied as the home or residence of one or more human beings."[83] Thus the new definition includes commercial space as well as residential housing. The only housing beyond the reach of the statute is a room or rooms in a single family dwelling — the "Mrs. Murphy's Rooming House" exception.

The unfair housing practices section of the act now contains a provision making unfair the refusal to show housing or the refusal

[82] COLO. REV. STAT. § 69-7-3 (1)(d) (1963) as amended § 1, H.B. 1021 (1965).
[83] *Supra*, p. 14.

"to receive and transmit any bona fide offer to buy, sell, rent, or lease" and a new provision making it an unfair housing practice "[f]or any person to discharge, demote, or discriminate in matters of compensation against any employee or agent because of said employee's or agent's obedience to the provision of this article."[84]

A new section has been added to the statute to make effective the relief to a complainant when the gist of the complaint is a refusal to show housing:

> If the complaint alleging an unfair housing practice relates to the refusal to show the housing involved, the commission, after proper investigations as set forth in this section, may issue its order that the housing involved be shown to the complainant, and if the respondent refuses without good reason to comply therewith within three days, then the commission, or any commissioner, may file a petition pursuant to Section 69-7-7(13). The district court shall hear such matters at the earliest possible time, and the court may waive the requirement of security for a petition filed under this paragraph. If the district court finds that the denial to show is based upon an unfair housing practice, it shall order the respondent to immediately show said housing involved and also to make full disclosure concerning the sale, lease, or rental price and any other information being then given to the public.[85]

Section 69-7-7(13) referred to in the above provision is a new section stating that "[u]pon refusal by a person to comply with any order or regulation of the commission, the commission shall have authority to immediately seek an order in the district court enforcing the order or regulation of the commission; such proceedings shall be brought in the district court in the county in which the respondent resides or transacts business."[86]

The injunction procedure adopted by the legislature is almost exactly the same as the one proposed by the Governor's Committee[87] with the following *additional* safeguards:

> The district court shall hear matters on the request for an injunction at the earliest possible time. No restraining order or preliminary injunction shall be issued except upon the giving of security by the person claiming to be aggrieved in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. If at any time it shall appear to the court that security given under this section has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient. A surety upon a bond or undertaking under the section submits himself to the jurisdiction of the court and appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be

[84] COLO. REV. STAT. § 69-7-5 (1)(g) (1963) as amended § 5, H.B. 1021 (1965).
[85] COLO. REV. STAT. § 69-7-6 (1)(b) (1963) as amended § 6, H.B. 1021 (1965).
[86] COLO. REV. STAT. § 69-7-7 (13) (1963) as amended § 7, H.B. 1021 (1965).
[87] See text p. 19 *supra*.

> served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.[88]

The Legislature completely reworked the enforcement section so that it now reads:

> . . . the commission shall . . . issue . . . an order requiring such respondent to cease and desist from such unfair housing practice; to rehire, reinstate, provide back pay to any employee or agent discriminated against because of his obedience to this article; to make reports as to the manner of compliance with the order of the commission; and to take affirmative action, including the granting of financial assistance as provided in Section 69-7-5(1)(c), the showing, sale, transfer, rental, or lease of housing.[89]

The reference to financial assistance is to provide affirmative relief to a complainant who was discriminated against in applying for financial assistance to acquire housing.[90]

A new section was added to the act defining probable cause to exist

> . . . if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that the transaction would have proceeded to completion except that an unfair housing practice of refusal to sell, transfer, rent, or lease had been committed. As to all other unfair housing practices, probable cause shall exist if upon all the facts and circumstances a person of reasonable prudence and caution would be warranted in a belief that an unfair housing practice has been committed.[91]

Provision was made in the new amendments for a complainant to obtain relief in a separate action for damages occasioned by a respondent's unfair housing practice. The new section provides:

> (1)(a) Any complainant in a separate civil action shall be entitled to damages if the following facts are established by a preponderance of evidence:
>
> (b) That the complainant has proceeded pursuant to this article;
>
> (c) That a finding of probable cause has been made by the commission; and
>
> (d) That the respondent did in fact commit an unfair housing practice; and
>
> (e) That after the filing of a complaint, but prior to the issuance of a restraining order, the respondent has transferred, sold, or rented the subject property; and
>
> (f) That the respondent has failed to comply with the order or orders of the commission.
>
> (2) The complainant in such action shall be entitled to actual

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[88] COLO. REV. STAT. § 69-7-6 (6)(d) as amended § 6, H.B. 1021 (1965). This subsection (d) should be read in connection with subsections (b) and (c) to reflect the entire injunction procedure.

[89] COLO. REV. STAT. § 69-7-6 (12) (1963) as amended § 6, H.B. 1021 (1965).

[90] COLO. REV. STAT. § 69-7-5 (1) (c) (1963).

[91] COLO. REV. STAT. § 69-7-3 (1)(k) (1963) as amended § 2, H.B. 1021 (1965).

> damages, if any, costs incurred in the action, and interest upon such damages from the date of filing the complaint. The court may, under appropriate circumstances, require a respondent to sell, rent, lease, or transfer to complainant housing similar to the housing which was the subject matter of the complaint.[92]

Other amendments were made to the 1959 act, mostly technical amendments to clear up ambiguities in the original act and to tie in the new amendments with existing provisions.

IV. AN EVALUATION OF THE NEW COLORADO ACT

The 1965 amendments to the Fair Housing Act, as finally adopted, bear some resemblance to the proposals of the Governor's Committee in principle. Only the injunction procedure, however, was taken from the Committee's recommendations and even this proposal was modified by the Legislature. Although most will agree that the new act is broader than what the Governor's Committee envisioned, many aspects of the act present difficult problems of application and interpretation. These problem areas will be discussed here.

A. *Coverage*

Although the new act is very liberal in its coverage provision — all housing (except rooming houses) covered during the period it is advertised, listed, or publicly offered for sale — the definition could create some problems.

By defining housing in terms of when it is on the public market, the Commission could be faced with serious jurisdictional questions in cases where evasive devices are employed to keep housing on and off the market at the owner's will. For example, would the Commission have juridiction where an owner, seeking to sell his own house by way of a sign in the front yard, removes the sign as a Negro family approaches the house and refuses to talk to the would-be Negro purchaser because the house is no longer on the market? Or, can the words "advertised, listed, or publicly offered" be evaded by devices such as advertising only in private publications, *i.e.,* church bulletins, fraternal order publications, or by private offerings, *i.e.,* word-of-mouth or privately printed and circulated offerings?

Because, normally, the only way an unfair housing practice arises is when someone tries to secure housing he believes is available, perhaps the definition should have omitted the language discussed above. Certainly the Legislature could rely upon the Commission's ability to ignore any possible complaint that someone was refused housing that was not on the market! By writing such a limitation into

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[92] COLO. REV. STAT. § 69-7-8 (1963) as amended § 8, H.B. 1021 (1965).

the definition upon which the Commission's jurisdiction is based, the Legislature has created the danger that some people will seek to invent evasive devices.

B. *The Injunction Procedure*

Granting that the Commission has had problems of mootness caused by respondents who sold the property out from under the Commission, the injunction procedure provided in the new act will do little to solve the problem.

Before the injunction procedure can be invoked the Commission staff must investigate and make a finding of probable cause. Then, the Commission must review the staff findings and make its own finding of probable cause. The staff may require several days to investigate a complaint; the Commission meets monthly. Consequently, as long a period as a month could pass before the Commission is ready to seek an injunction — certainly long enough for a respondent to dispose of the property.

In addition to the time problem just mentioned, the safeguards written into the procedure — especially the security provisions — would discourage most complainants from participating in an injunction proceeding. Also, subsection (d), quoted *supra* p. 26, would discourage any surety from providing the necessary security. One can safely predict that the injunction procedure will rarely, if ever, be used. The only possible utility the procedure may have is its use by the Commission as a threatening tool to be used in settling complaints by conference, conciliation, or persuasion. How effective such a tool will be remains to be seen.

C. *Probable Cause*

The definition of probable cause in the new act has undoubtedly caused more problems than it solved. No one had ever complained that the Commission, under the original act, had difficulty in working with the term. The only real function of the use of the probable cause concept in the act is to enable the investigative staff of the Commission to ascertain those complaints with sufficient merit to warrant conciliation efforts or to go to the Commission for hearings. Now the act provides that the investigative staff must find that the transaction would have gone to completion but for the alleged unfair practice.

Several problems are created by this provision. First, in the usual case the complainant never gets to see enough of the house or apartment to know himself whether or not he would have completed the transaction. How, then, can an investigator for the Commission make this determination? Second, the respondent may be

able to rebut a finding of probable cause by showing the complainant looked at several houses or apartments in addition to the housing in question! This would hardly be consistent with the purpose of the act. Third, the definition seems to place upon the Commission a burden of showing the transaction would have gone to completion — a burden which would involve the Commission in investigating the financial resources of every complainant before any hearings are held.

Probable cause is incapable of definition. The legislature should not have even attempted a definition for the simple reason that the question of probable cause is, in housing complaints as in other areas of the law, merged into the merits of the case. If the investigator decides "no probable cause" the complaint is dismissed, and the complainant may seek judicial review. On the other hand, if the investigator to decide the merits of a case before an evidentiary ciliated) is heard by the Commission whose decision is subject to judicial review. In other words the probable cause determination is always safeguarded. In some cases the new definition will compel the investigator to decide the merits of a case before an evidentiary hearing! An apt analogy to this ridiculous situation would be a legislative definition saying "probable cause to issue a search warrant shall exist if the magistrate is convinced a crime has been committed."

Conceivably, the court could find the probable cause determination to be jurisdictional, and a condition precedent to a hearing. Such a legislative intent is inconceivable.

D. *Civil Relief for Complainant*

The new section providing a procedure for a damage suit by a complainant in district court[93] is unlikely to be effective. Limiting recovery to actual damages and no provision for attorney's fees makes it financially unfeasible for a complainant to utilize the procedure because actual damages would rarely make a suit worthwhile. Furthermore, all the conditions of the suit would rarely be met. For example, if the Commission did not get an injunction and the property were sold, the Commission would hardly go through the expense of a hearing and order with the only relief available a cease and desist order.[94] The section will probably never be invoked.

V. CONCLUSION

The new amendments, when coupled with the original act, make the Colorado Fair Housing Act the most comprehensive in

[93] Text, *supra* p. 26-27.
[94] *Ibid.*

the nation. Despite the problems mentioned above, the act, in general, is a complete scheme for correcting discriminatory housing practices.

The power has always rested with the states to provide for the health, safety and welfare of its citizens. At no time in the history of the United States was this police power actually and effectively subordinated to an overriding concept of private property (except, perhaps, for the short and spotty reign of substantive due process in economic regulation cases). The use of the police power to promote equal opportunity in housing is a relatively new step in the process of affirmative action in the civil rights area and, as experience with fair housing statutes progresses, new approaches may emerge.

Obviously an act like the Colorado Fair Housing Act cannot and will not by itself eliminate prejudice or discrimination. Law is a clumsy tool for changing attitudes. However, if law can change prejudicial practices, eventually the attitudes underlying the practices begin to change. This is the real hope of the Fair Housing Act. No mass movement of Negroes into white neighborhoods will result because of the act. No minority-group member in Colorado is guaranteeed, because of the act, that he will be able to buy a specific house. The major accomplishment of the fact was perhaps best expressed by James Reynolds, Director of the Anti-Discrimination Commission. Mr. Reynolds, a Negro, in talking to a group of Realtors recently said:

> But this law means something entirely different to me than it does to you. I say that I am a part of this country. I feel the people in Alabama and Mississippi are not separate from me.
>
> And I say to you — this law just passed is a great thing for me. It says, in effect, that the people of Colorado are telling me that I am a part of the community. It says that I am somebody in the social system in which I live.[95]

[95] The Denver Post, May 4, 1965, p. 52, col. 3.