NEW YORK LAW SCHOOL

NYLS Law Review

Volume 6 | Issue 1 Article 3

January 1960

Anti-Discrimination Legislation As An Infringement On Freedom Of Choice

Alfred Avins

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

Recommended Citation

Alfred Avins, *Anti-Discrimination Legislation As An Infringement On Freedom Of Choice*, 6 N.Y.L. SCH. L. REV. (1960).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS. For more information, please contact camille.broussard@nyls.edu, farrah.nagrampa@nyls.edu.

ANTI-DISCRIMINATION LEGISLATION AS AN INFRINGEMENT ON FREEDOM OF CHOICE

*ALFRED AVINS**

1. INTRODUCTION

THE widespread proliferation of laws in northern states forbidding discrimination based on race, creed, color, or national origin in employment,[1] and the growing number of states and municipalities which forbid such discrimination in publicly assisted and private housing,[2] make such laws a definite factor in the adjustment and control of relations between ethnic groups in American society. The significance of this type of legislation is further enhanced by the precedent it sets for similar restrictions in other fields of activity, and for analogous restrictions imposed by private groups.[3] It is clear that the cumulative impact of these laws can no longer be viewed as a mere alleviation of the plight of particular depressed minority

EDITOR'S NOTE: Although we are grateful for the author's contribution and publish this article in behalf of freedom of expression, we do not subscribe to his personal characterizations, nor to the author's references to Judge Shapiro or any other member of the judiciary. A full discussion of *In the Matter of Association for the Preservation of Freedom of Choice, Inc.,* wherein Mr. Avins served as attorney and Judge J. Irwin Shapiro as presiding justice, appears on page 69, infra.

* B.A. Hunter, 1954; LL.B. Columbia, 1956; LL.M. N.Y.U., 1957, member of the New York Bar; former Special Deputy Attorney General of New York State; former Instructor in Law, Rutgers University Law School; General Counsel, Association for the Preservation of Freedom of Choice, Inc. The author gratefully acknowledges the aid and encouragement given him by the following officers of the Association for the Preservation of Freedom of Choice, Inc., members of the New York Bar: Edwin M. Bourke, Member, Freedom of Choice Commission; Edward P. Scharfenberger, Deputy Director, Division of Employment; William J. Neilan, Solicitor; as well as Charles H. Witherwax, Assistant General Counsel; Sam S. Crutchfield, Administrative Assistant to the General Counsel; and also Arthur Maslansky, a third year student editor of the New York Law Forum. Any errors, however, remain those of the author.

1 Alaska Comp. Laws, § 43-5-1 (1953); Calif. Labor Code, § 1410 et seq (1959); Colo. Rev. Stat. Ann. § 80-24-1 et seq. (Supp. 1957); Conn. Gen. Stat. § 31-126 (1958); Ind. Ann. Stat. § 40-2301 et seq. (1952); Kan. Gen. Stat. Ann. § 44-1001 et seq. (Supp. 1957); Mass. Ann. Laws c. 151B § 1-10 (1957); Mich. Stat. Ann. § 17.458 (1)-(11) (Supp. 1957); Minn. Stat. Ann. § 363.01-.13 (1957); N.J. Stat. Ann. § 18:25-1 et seq. (Supp. 1957); N.M. Stat. Ann. § 59-4-1 et seq. (1953); N.Y. Executive Law, § 290 et seq. (1951); Ohio Rev. Code Ann. § 4112.01 et seq. (1959); Ore. Rev. Stat. § 659.010-.115 (Supp. 1957); Pa. Stat. Ann., Tit. 43, § 951 et seq. (Supp. 1957); R.I. Gen. Laws Ann. § 28-5-1 et seq. (1956); Wash. Rev. Code § 49.60.010 et seq. (1957); Wis. Stat. § 111.31 et seq. (1957).

2 Conn. Gen. Stat. § 53-35 (1958); Mass. Ann. Laws c. 151B, § 1, 4 (Supp. 1957); N.J. Stat. Ann. § 18:25-4 (Supp. 1958); N.Y. Executive Law, § 292 (1951); Ore. Rev. Stat. § 659.033 (Supp. 1957); Wash. Rev. Code § 49.60.040 (1957).

3 Landlords seeking to rent living quarters to Yale, Harvard, and Cornell students must sign nondiscrimination agreements before their properties will be listed by the university housing bureau. New York Times, October 25, 1959, p. 83, col. 3.

groups *in vacuo,* but must be considered in terms of the other members of a multi-cultural society who become, willy-nilly, integrated in significant aspects of their lives.

Implicit in anti-discrimination legislation, to a greater or lesser extent depending on the particular type and scope of the law, is the "conflict between 'reserved private rights such as freedom of association and non-association, and nondiscrimination.' "[4] The traditional rights of freedom of choice and association, long thought so inviolate as not to require formal embodiment in constitutional or statutory guarantees, have now been evaporated by the preemption of laws passed without adequate consideration of the fact that the "rights" they create must necessarily infringe on the freedoms of others, by subjecting them to the exercise of those rights by minority groups. Indeed, the Governor of New York, in stating he would recommend a state-wide law forbidding discrimination in private housing when the legislature meets in 1960 because "I believe every American citizen should be able to live where his heart desires and his means permit"[5] completely ignored the interests of individuals to choose their fellow residents and neighbors and thus live in the kind of a neighborhood that they desired.

The possible consideration of a state-wide anti-discrimination law in housing in New York during the next session of the legislature at the Governor's behest makes not only timely, but imperative, adequate reflection on the rights long basic to our concept of a free society which are being eliminated to make way for the creation of new "rights" against individuals. This article will deal with the proper identification of those rights, the premises on which they are based, and the persons to whom they may properly be said to run. In respect to each analysis, conflicts with anti-discrimination legislation will be noted, and some suggestions for proper accommodation between the two will be made.

2. ANTI-DISCRIMINATION LAWS AND PROPERTY RIGHTS

Endemic to the entire consideration of the conflict between freedom of choice and anti-discrimination legislation in the fields both of housing and employment is the clear-cut distinction between the

[4] Statement of American Civil Liberties Union as reported in N.Y. Times, June 3, 1959, p. 58, col. 6.

[5] See N.Y. Times, July 14, 1959, p. 1, col. 3.

rights of the property owner or employer and the residents, employees, or others who come in contact with the beneficiary of the anti-discrimination laws. A failure to recognize this distinction, and more particularly a failure to recognize the fact that tenants, residents, consumers, and employees do in fact have a vital stake in the use of such laws as a springboard to compel their integration with members of another ethnic group, can only result in completely ignoring the true nature of these statutes.

Over two years ago, almost at the inception of the enactment of any anti-discrimination legislation in non-public housing, this author pointed out how such legislation infringed upon traditional rights of property owners to dispose of property as they choose.[6] It was there shown how such legislation converts private housing into a public utility, and this author there pointed out that under theretofore existing constitutional concepts of property rights, such a statute should be held to be unconstitutional. The arguments there made and cases there cited will not be repeated here; suffice it to say that the proliferation of anti-discrimination laws has not undermined the rationale there expressed.

It is clear, however, that there is a certain futility in balancing Supreme Court cases, as on a scale, one against the other, in this field.[7] In terms of property concepts, a constitutional analysis of anti-discrimination legislation reduces itself to prediction of what the Supreme Court of the United States, or the generally more conservative highest state courts[8] will rule when and if such a case comes before them.[9] This can hardly rise much above the level of a study of the visceral reactions of particular judges.

No better illustration of the above can be found than by reference to the only New York case which has passed on the constitutionality of a law banning discrimination in publicly assisted housing, *New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc.*[10] In that case, the landlord's brief devoted nineteen pages to a selection of old Supreme Court cases striking down statutes

[6] Avins, *Trade Regulations,* 12 Rutgers Law Review 149 (1957) at 150 et seq. (Compulsory Housing Integration Law).

[7] Cf. Review, 46 Calif. L. Rev. 144 (1958).

[8] Carpenter, Our Constitutional Heritage; Economic Due Process and the State Courts, 45 A.B.A.J. 1027 (1959).

[9] See, e.g., Note, Prospects for Supreme Court Approval of Anti-Bias Housing Statutes, 45 Va. L. Rev. 428 (1959).

[10] 10 Misc. 2d 334, 170 N.Y.S.2d 750 (1958).

because of their infringement on property rights,[11] and in addition devoted two pages to an analysis of this author's prior article in the Rutgers Law Review.[12] Justice Eager, however, apparently ignored the law review article, as well as purported social science material cited to him by the State Commission Against Discrimination,[13] and used the following as his rationale:

"The private ownership of private property free of unreasonable restriction upon the control thereof, is truly a part of our way of life, but, on the other hand, we, as a people do hold firmly to the philosophy that all men are created equal. Indeed discrimination against any individual here on account of race, color, or religion is antagonistic to fundamental tenets of our form of government and of the God in whom we place our trust."[14]

It is clear that the only antidote to such a visceral reaction is a theological brief. Research of old cases is only a fruitless road to unnecessary eyestrain.

This is not to say that careful analysis of anti-discrimination legislation shows that it can be sustained by resort to traditional uses of the state's police power. Traditional exercise of police power has been confined to only three fields, public utility regulation, the use of property in such a manner as to be detrimental to one's neighbor's property or to the inhabitants already in the house, and emergency rent regulation.

Public utility regulation is sustained on the grounds that it enjoys a monopoly or near monopoly granted by the public.[15] The housing industry is about as far removed from a monopoly as it is possible to get. This ground is clearly lacking.

The second ground is likewise absent. Examples of this abound, and include the destruction of diseased trees[16] or cattle,[17] regulation of explosives,[18] fire and sanitation regulation,[19] and zoning.[20] The

11 Ibid., brief for respondents, pp. 3-21.
12 Id., at pp. 25-6.
13 Brief for petitioner, pp. 43-44.
14 10 Misc. 2d at 341, 170 N.Y.S.2d at 757.
15 Munn v. Illinois, 94 U.S. 113, 127-8, 131 (1876). See also People v. King, 110 N.Y. 418, 428, 18 N.E. 245, 249 (1888).
16 Miller v. Schoene, 276 U.S. 272 (1928).
17 Smith v. St. Louis & Sw. Ry. Co., 181 U.S. 248 (1901).
18 Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919).
19 Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-3 (1946); Thomas Cusack Co. v. Chicago, 242 U.S. 526, 529 (1916); Hadacheck v. Los Angeles, 239 U.S. 394, 408-9 (1915); Welch v. Swasey, 214 U.S. 91, 107-8 (1909). Cf. American Print Works v. Lawrence, 23 N.J.L. 9 (1850); Conwell v. Emrie, 2 Ind. 35 (1850).
20 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-8, 394 (1926).

necessity of preventing the spread of fire or disease to one's neighbor's property is obvious. Zoning is needed so that property will not be subjected to a use which lessens the ability of owners of neighboring property to use theirs. Anti-discrimination legislation does not fit this category either.

Emergency rent control regulation is the closest analogy to anti-discrimination legislation.[21] However, this exercise of the police power is invoked by, and may only last for, a genuine emergency, and the courts may continuously review the existence of the emergency as the constitutional fact on which the legislation may be sustained.[22] Anti-discrimination legislation is nowhere predicated on, nor drafted to last for, any purported emergency.

The fact, of course, that anti-discrimination legislation is not supported by traditional exercises of the police power may not be enough, standing alone, to overthrow it in the face of social science evidence adduced to support its reasonableness and desirability. In this connection, distinctions can be drawn on a practical, as distinguished from a theoretical level, between anti-discrimination laws in employment and the same laws in housing.

All persons must work to live, and unemployment is always a major social menace. Since the state cannot create jobs, and since Negroes must get work in private industry at some level or starve, it may be argued that some form of state activity along this line bears a close analogy to emergency rent control legislation when substantial unemployment occurs among Negroes. Whether this justifies a law, as distinguished from an educational commission, is very debatable, and surely some showing of emergency conditions should be made before state police power may be invoked. Present full employment conditions, however, make such legislation permissible only as a standby measure. And surely the above rationale cannot cover compulsory promotion of employees.[23] However, at the least potential state interest is possible.

[21] Justice Eager relied principally on cases sustaining these regulations in New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc., 10 Misc. 2d at 341, 170 N.Y.S. 2d at 758. For example, he cited Block v. Hirsh, 256 U.S. 135 (1921); Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Lincoln Bldg. Associates v. Barr, 1 N.Y.2d 413, 153 N.Y.S.2d 633 (1956); People ex rel. Durham Realty Corp. v. La Fetra, 230 N.Y. 429, 130 N.E. 601 (1921).

[22] Lincoln Bldg. Associates v. Barr, 1 N.Y.2d 413, 135 N.E.2d 801 (1956); Warren v. City of Philadelphia, 387 Pa. 362, 127 A.2d 703 (1956).

[23] Cf. Note, 42 Minnesota L. Rev. 1163 (1958).

Housing stands on a very different footing. States can, and many are throughout the country and even in the South, providing a greater and better supply of housing for Negroes, by building public housing projects for Negroes who can afford no better than low rent housing, and by encouraging private builders to build housing for Negroes in the middle income group through tax advantages, mortgage reinsurance, condemnation, and other assistance. Indeed, poor Negroes could not afford the going market price for housing in a privately-built dwelling anyway, while for those who can afford it, private industry can, and is, building new housing for them, spurred on by the basic profit motive.[24] To encourage such building further a state may lend its aid and thereby assist in actually putting up needed housing for Negroes instead of just adding useless laws to overcrowded statute books whose enforcement is resented when and if they can be enforced at all.

No better example of this fact, which the author pointed out two years ago,[25] can be found than by reference to the experience under the New York City Sharkey-Isaacs-Brown Bill.[26] When the law first went into effect, almost two years ago, the City Commission on Intergroup Relations, the administrative body charged with administration of this ordinance, received an annual appropriation of $358,050.[27] A year later, only 27 complaints were adjusted to the satisfaction of the complainant or the Commission,[28] for a total cost per dwelling unit obtained via the anti-discrimination law of over $13,000. With this money, the city could virtually have built each of the complainants his own apartment or house.[29]

Moreover, the natural tendency, in practical terms, is for an anti-discrimination law in employment to benefit those most in need

24 See N.Y. Times, Oct. 17, 1958, p. 16, col. 1, which related the opening of Lenox Terrace, a 1,716 unit luxury apartment house in Harlem with units renting for about $50 a room. This "$20,000,000 apartment development, with gold-braided doormen, oversized living rooms, private balconies, high rents and other luxury features" belies the assertion that anti-discrimination legislation is needed to open decent housing accommodations to Negroes who can afford to pay the market price.

25 Supra, n. 6 at p. 158.

26 New York Local Law 80 of 1957, New York City Administrative Code (1957), c. 41, Tit. X, Secs. X 41-1.0.

27 N.Y. Times, April 2, 1958, p. 35, col. 1.

28 N.Y. Times, April 5, 1959, p. R. 1, col. 8.

29 Lenox Terrace, the new Negro luxury apartment house, cost only about $11,600 per apartment, in contrast to the expenditure of $13,000 above noted through New York City's anti-discrimination ordinance. And, it must be emphasized, this was the total cost of erecting the apartment. See n. 24, supra.

of it, while the tendency is just the opposite in housing. For example, suppose an employer intent on discriminating, advertised a job as vice president of his corporation at a salary of $25,000 per year. This employer would be so flooded with applicants that he could select one before he ever saw a Negro, or, if he had a Negro applicant, could select someone else, and an intent to discriminate would be almost impossible to prove.[30] On the other hand, the dearth of applicants for, let us say, a messenger boy at $50 per week would be such that a refusal to employ a Negro and continued advertising would lend considerable credence to a claim of racial discrimination.

The same situation would follow where personal qualifications became significant. Thus, applicants for legal, executive, or other professional positions could seldom trace refusal to prohibited discrimination because of the vague standards for selection and the ever-present possibility that they could not meet such unknown criteria.[31] Indeed, as any lawyer knows, the question, for example, of whether a particular lawyer-applicant is better than other applicants for a particular job even absent any element of discrimination is so open to conflicting opinions that reference to any fixed standards is a virtual impossibility.

Hence, an anti-discrimination law in employment is unenforceable where the salary is high and there are more job-seekers than jobs, or where personal qualifications are needed, although no such exception is found in the statutes. It is only enforceable in low-level jobs which are more plentiful than job-seekers, where resistance to hiring minority-group members is weakest, and where most Negroes in economic need seek work.[32] Thus, this type of legislation may be argued to benefit the mass of Negroes.

Laws forbidding discrimination in housing have an entirely dif-

[30] Substantial evidence must support a finding of racial discrimination. A mere suspicion is insufficient. McKinley Park Homes, Inc. v. Commission on Civil Rights, 20 Conn. Supp. 167, 129 A.2d 235, 237-8 (Super. Ct. 1956). And the Commission Against Discrimination has the burden of proof of showing such discrimination. Cf. National Labor Relations Board v. Swinerton, 202 F.2d 511, 514 (9th Cir., 1953); Local 3 v. National Labor Relations Board, 210 F.2d 325, 328-9 (8th Cir., 1954), cert. den. 348 U.S. 822 (1954); National Labor Relations Board v. Hunter Engineering, 215 F.2d 916, 918 (8th Cir., 1954); National Labor Relations Board v. National Die Cast Co., 207 F.2d 344, 349 (7th Cir., 1953); National Labor Relations Board v. MacSmith Garment Co. 203 F.2d 868, 871 (5th Cir., 1953).

[31] Cf. Jeanpierre v. Arbury, 4 N.Y.2d 238, 173 N.Y.S.2d 597 (1958).

[32] This is not to say that there is not a number of Negroes employed in better positions. Their employment, however, can be traced to economic factors, and not the laws against discrimination.

ferent effect. In the lower rent category, in which most Negroes fall, there is a shortage of apartments and the anti-discrimination laws cannot operate because there are enough white applicants to fill all vacancies, while in luxury housing, the small number of Negroes who can afford such accommodations can also afford to have new living quarters built for them.[33]

An extreme hypothetical example will illustrate this point. Suppose a landlord builds two identical apartment houses, and, after completion, advertises one for $5 a month per room while the other is renting for $100 per room. He will almost certainly be flooded with applications for the first house and can pick tenants who are white, although he may have Negro applicants, without any evidence of discrimination. Because, however, renting in the high-priced house will be slow, if a Negro applies and is refused, and advertising for tenants continues, discrimination is easily demonstrated.

Since anti-discrimination laws in private housing operate in actuality only in higher rent apartments where there are more vacancies than applicants, only a relatively small percentage of Negroes who are in the upper income brackets and can afford to apply[34] are benefited by them.[35] It is these very people, moreover, who can afford to build new Negro housing. Hence, the small Negro minority which these laws benefit is precisely the group not in need of it to secure good housing. In short, this legislation is *pro bono* social-climbers and nothing more. The fallacy that these laws have something to do with good housing, carefully nurtured by their proponents is a mask behind which parades compulsory integration.[36] It is clear

[33] The complainant in New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc., supra, n. 10, had applied for an apartment renting for $158 per month. N.Y. Times, June 28, 1957, p. 23, col. 2. And in O'Meara v. Washington State Board Against Discrimination, (Superior Ct., King County, Washington, No. 535,996, July 31, 1959), the complainant offered $18,000 for the house later made the subject of an order to sell. See also N.Y. Times, May 2, 1959, p. 23, col. 2.

[34] See Report of the United States Commission on Civil Rights (1959), Part 4 (Housing), p. 375: "In New York City a few years ago it was found that only 13,000 Negro families, or less than 7 percent of the Negro population, had incomes high enough to purchase new homes in the suburbs even if such were available."

[35] This point is often overlooked. See, for example, Racial Discrimination in Housing, 107 U. of Pa. L. Rev. 515, 525 (1959):

"The double-edged purpose of these laws is to open up a new market for homes to members of minority groups who are able to afford them, and at the same time to wage a frontal attack against slum areas, which are caused in part by the inability of great numbers of persons to purchase or rent elsewhere."

[36] Indicative of this is the attitude of Robert Weaver, former Rent Administrator in New York, whose writing is often cited to show that anti-discrimination legislation is

from a careful analysis of the operation of these laws and the statements of their proponents that the cry of good housing for Negroes urged in justification of anti-discrimination legislation in housing is a fraudulent sham paraded before the public and the tragic deception of the many Negroes whose need for good housing is real and present and for whom such legislation raises but a mirage which vanishes as they approach it. Were a fraction of the energy, money, and thought now devoted to battling with unwilling landlords and hostile tenants turned to a solution of the Negro's housing problem in terms of real need, viz., good housing at a price he can afford,[37] the problem of

needed to assure good housing to Negroes. See, e.g., Note, Race Discrimination in Housing, 57 Yale L.J. 426 (1958), footnotes 4, 6, 23, 24, 25, 29, 67; Special Issue on Integration in Housing, 18 Law. Guild Rev., No. 1, at p. 5, p. 20, n. 1, p 21, n. 17, p. 22, n. 27, 29, 32 (1958); Note, Is There a Civil Right to Housing Accommodations? 33 Notre Dame Lawyer 463, 486, n. 108 (1958). Comment, Application of the Sherman Act to Housing Segregation, 63 Yale L.J. 1124, n. 1, p. 1126, n. 11, p. 1127, n. 26, p. 1129, n. 33, p. 1130, n. 39, p. 1138, n. 77, 79, p. 1141, n. 93, 97, 98, 99, p. 1142, n. 107, p. 1143, n. 111 (1954). Speaking before the NAACP's fiftieth annual convention, Weaver rejected the suggestion of cooperation with persons seeking improved Negro housing on an non-integrated basis. N.Y. Times, July 15, 1959, p. 13, col. 1. So too, the Urban League has opposed low-rent slum-clearance housing projects in Harlem unless white tenants can be persuaded to come. N.Y. Times, February 23, 1958, p. R. 1, col. 8, commented on, Note, Is There a Civil Right to Housing Accommodations? 33 Notre Dame Lawyer 463, 481, n. 83 (1958). See also infra, n. 86.

[37] See the U.S. Civil Rights Commission's Report, pp. 438-9, on public low-rent housing in Chicago:

"The startling racial fact involved was that, as of January 1, 1959, 85 percent of the tenants were Negro, about 13 percent white, and about 2 percent Puerto Rican. . . . Based on relative need for low rent housing in 1950, it was estimated that 60 percent of all units then planned should be allocated to low-income white families. Even making an allowance for the special factors creating special Negro needs for low-rent housing, Chicago's Negroes are receiving a disproportionate share of the low-rent housing available.

"Already a very high proportion of the projects are located within Negro areas. In spite of this, the Housing Authority is now planning to locate additional projects in predominately Negro neighborhoods. . . .

"The effect of this site selection policy is discrimination against low-income white families, who could not be expected to flock to projects in all-Negro neighborhoods.

. . . .

"[The Chicago Housing] Authority takes this position, reluctantly, because of the opposition and delays that might occur if sites were selected in white areas. . . . locating the projects in the Negro slums was 'expeditious right now to get the thing done.' There were 20,000 families with children in substandard conditions waiting for public housing [the Executive Director] said. 'Our prime consideration is better housing for these kids,' he said. The Authority had to get a project in 'where we can get it in the fastest,' rather than get into any long-drawn-out controversy about where sites shall be or shall not be.

"Not all Negroes appreciate this discrimination in their favor, at the price of accentuating the pattern of segregation. Rev. A. Lincoln James of the Greater Bethesda Baptist Church, a member of the Civil Rights Commission's Illinois State Advisory Committee, suggested to Mr. Rose that because of this policy of site selection 'the Council of Chicago is guilty of practicing to a certain degree segregated housing.'"

festering colored slums in our cities would be well on the way to solution.[38] As it is, our cities vainly struggle to keep an ever-widening portion of their dwellings from falling into slum conditions because of the reluctance of landlords in Negro or fringe areas to put money into their houses,[39] while devoting prime attention to miniscule integration[40] which hardly makes a dent in the Negro housing problem.[41]

[38] As proof of this, it is a real eye-opener to read the U.S. Civil Rights Commission's Report, on Negro housing in Atlanta. The following is taken from that report, pp. 421-2:

"But even the most critical Negro spokesman, the president of the Negro real estate board, agreed that . . . it was correct to say that 'the Negro population of Atlanta is housed in more modern, decent, safe, and sanitary housing in proportion to the population than are the Negroes in any city of the United States.'

. . . .

"But also in Atlanta a corridor has been opened for Negro expansion into the outlying areas and middle and upper-income Negro suburbs in the country. Mayor Hartsfield drove us through this growing area of beautiful homes, including some in the $50,000 to $100,000 class. Even more significantly, perhaps, a procedure has been devised by which the problems connected with Negro expansion can be handled through biracial negotiation.

"In 1952, the Mayor established the biracial West Side Mutual Development Committee. Its purpose was to plan an orderly development of the city's West Side, to bring about better public understanding of the problems of Negro expansion, to stabilize some of the white neighborhoods to promote a peaceable transition from white to Negro occupancy that would permit a Negro corridor to undeveloped suburban land.

"[p. 426:] there is probably more new land available for Negro housing and more construction of new houses for negroes in Atlanta than in any other major American city. Of the units added to the Negro housing supply in the last 2 years, half are in outlying residential areas an unusually high proportion. And of the 17,000 units added to the Negro housing supply since 1950, some 72 percent were added by construction and first occupied by Negroes. A nationally respected city planner testified that he knew 'of no other city in America of whatever size, large or small, North or South, East or West, in which a higher percentage . . . had been new construction.'

"The fact is, as the president of the Atlanta Real Estate Board stated with some pride, that the white suburban ring around Atlanta 'has been broken and large areas of land in the West Side have been opened for new Negro housing.' . . . the fact that the work of the West Side Committee has won for this development the support and approval of the organized white community, and that the expansion and improvement of Negro housing is increasingly viewed 'as a matter of pride and profit rather than as a threat,' stands as an important and perhaps a unique achievement."

[39] It might be noted that some of the worst slum landlords in Negro sections are wealthy Negroes who are the very people crying the loudest for anti-discrimination laws to cure the Negro slum problem. Thus, not long ago, Sugar Ray Robinson, the Negro boxer, was fined for nine building code violations on a tenement in Harlem which he owned. N.Y. Times, Nov. 21, 1957, p. 28, col. 8. And very recently, Roy Campanella, the Negro former baseball player, received a summons when he failed to answer charges of twenty-one violations on a tenement he owned in Harlem. N.Y. Times, Dec. 4, 1959, p. 26, col. 6.

[40] See U.S. Commission on Civil Rights Report, p. 403: "Chairman Abrams did not try to give a rosy picture of what had so far been accomplished. 'We're not making many gains in housing itself,' he stated candidly."

[41] During the first 14 months of the Sharkey-Isaacs-Brown Law, only 49 cases were settled satisfactorily to the New York City Commission on Intergroup Relations.

The enactment of ever more stringent anti-discrimination legislation in housing is unquestionably the great panacea, and most wide-scale delusion, of this century. Compared to this, Prohibition was the quintessence of farsighted statesmanship.

Notwithstanding the dubious effect which anti-discrimination laws have on the Negro housing problem, proponents of such legislation have hoisted the "property rights versus human rights" banner to their masthead to push such legislation.[42] And there is, indeed, good cause for so doing as a matter of public relations. The Negro housing problem does exist in fact,[43] and once one ignores the fact that anti-discrimination legislation will have no real effect on it, it is appealing in human terms to contrast the social effects of this problem with the dry legal insistence of the mythical landlord in clutching to the last ounce of his legal rights by whimsically, so we are told, refusing to rent an apartment to a deserving colored couple.[44] Indeed, Russian caricatures of American capitalists, relabeled "landlord," would approximate the representations drawn of property owners on the defensive.

This picture has, indeed, an undoubted surface attraction. A

Probably a significant fraction of this figure involved religious discrimination, which cases are easier to settle. In addition, the only relief in some cases was to put the applicant on a waiting list. The opening of a few dozen units of housing for a million Negroes hardly rises to the level of a drop in a bucket. N.Y. Times, July 19, 1959, p. E 7, col. 1. See also U.S. Commission on Civil Rights Report, p. 402, noting that C.O.I.R. closed 196 complaints in its first 14 months, of which only one in four was closed satisfactorily.

42 See, e.g., Scanlan, Racial Restrictions in Real Estate—Property Values Versus Human Values, 24 Notre Dame Lawyer 157 (1949).

43 See Note, Race Discrimination in Housing, 57 Yale L.J. 426 (1948).

44 The brief of the Commission in New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc., supra, n. 10, declares in this regard on p. 44: "Finally, it should not be forgotten that we are concerned with more than broad principles. We are dealing with the rights of a man and his family: Norris G. Shervington, a Negro, who needed an apartment . . . . The need for the legislation here in issue is illumined by his individual house-hunting frustrations. . . . The evil of housing discrimination is limited in New York by the Metcalf-Baker Laws. To the Shervingtons and many others there will be significant relief upon judicial affirmance of the action so taken by the Legislature."

In sharp contrast to these crocodile tears is the statement in a front page article reporting Justice Eager's decision in the Pelham Hall Case that the complainant was then living in the Morningside Gardens Housing Project, a relatively new and highly desirable modern middle-income project in Manhattan much closer to his place of work in midtown Manhattan than New Rochelle was, "according to S.C.A.D. representatives who believe he still wants to settle . . . at the Rochelle Arms." N.Y. Herald Tribune, Jan. 17, 1958, p. 1, col. 2, p. 9, col. 6. When the suit was settled, the complainant then informed the landlord that he wasn't even interested in the apartment any more. Cf. N.Y. Times editorial, Oct. 4, 1958, p. 20, col. 2.

landlord sells space, and as long as he gets the price he wants, and the property is not damaged, why, it may be asked, should he care who is occupying the space?[45] Indeed, where these are commercial premises, he almost uniformly does not. What, it may be asked, is added when residential premises are considered?

Proponents of anti-discrimination legislation, cognizant of the inherent infirmities of the property rights argument vis-a-vis a legitimate need for state regulation, have expended their energy in knocking down this straw man and in urging anti-discrimination legislation as a new category of the permissible exercise of state police power.[46] Even opponents of this legislation have fallen into the trap so carefully laid down for them[47] and attempt to refute these arguments on the basis of nineteenth century Supreme Court cases and laissez-faire economic doctrine now so riddled with exceptions that they form only a convenient dart-board on which integration-minded advocates can leisurely pick off the points made on the other side.[48] And who really cares that much whether property values go up, down, or sideways when Negroes move into a formerly all-white neighborhood?[49] If

[45] Cf. Racial Discrimination in Housing, 107 U. of Pa. L. Rev. 515 at 527 (1959):
"The laws, however, do not deprive the seller or lessor of the opportunity to transact his business. They merely require that he sell or rent at any price satisfactory to him, but without regard to the race, color, or creed of the offeree. The fact that a potential purchaser or lessee is of a particular minority group would seem to be a factor wholly irrelevant to legitimate commercial purposes, and obligatory disregard of it not an overly severe infringement on the liberty to contract."

[46] See Comment, Validity of Municipal Law Barring Discrimination in Private Housing, 58 Col. L. Rev. 728, 732-4 (1958); Note, Constitutional Aspects of Legislation Prohibiting Discrimination in Housing, 26 Ford. L. Rev. 675 (1957-8); Note, Is There a Civil Right to Housing Accommodations, 33 Notre Dame Lawyer, 463, 480-3 (1958); Note, Racial Discrimination in Housing, 107 U. of Pa. L. Rev. 515, 527-8 (1959); Note, New Jersey Housing Anti-Bias Law; Applicability to Non-State Aided Developments, 12 Rutgers L. Rev. 557 (1958).

[47] Note, Anti-Discrimination as it Affects Real Property Rights, 23 Albany L. Rev. 75 (1959) at p. 90:
"Is it reasonable that a basic, fundamental, inherent, and inalienable right such as this should be so abridged because the state desires to assist certain minority groups in gaining social and economic acceptance in society more quickly than they otherwise normally would? . . . But in this situation it appears that there is an attempt to make the end justify the means. When we must sacrifice one of our constitutional rights to gain the desired end, the price is too high to make the means even justifiable, much less reasonable."
But see O'Meara v. Washington St. Bd. Ag. Discrimination, supra, n. 33, where the court, although declaring that discrimination was sociologically bad, nevertheless held that the Washington State law against discrimination in housing was unconstitutional as too serious a violation of property rights.

[48] See the short shrift Justice Eager made of these arguments in the Rochelle Arms case, supra, n. 10, 10 Misc. 2d at 341-4, 170 N.Y.S.2d at 758-760.

[49] Cf. 12 Rutgers L. Rev. at p. 565, 566.

people who lost their whole life savings during the crash of 1929 and subsequent depression did not riot in the streets, how can it be contended that such disturbances as the Levittown, Pennsylvania incident are caused by the problematical and infinitesimal decline of real estate values because one Negro moves into a city of 15,000 people? Indeed, Chicago's Trumbull Park rioting was engaged in by tenants who did not own any property at all which could decline in value. Surely, it is fantastic to contend that tenants, traditionally at odds with landlords over matters financial, should engage in violence because of a sudden concern that the landlord's property might decline in value. It is clear that the issue here has more dimensions than property rights alone.

3. Substantive Aspects of Freedom of Choice

In discussing freedom of choice, in its substantive aspects, at the outset it may be laid down as a basic premise that "freedom of the individual in and under a democracy has implicit in it, as an absolute, the freedom of association."[50] 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 natural right, a human right, and a civil right, and such right to choose to associate or decline to associate extends to ethnic grounds. This uncoerced individual right to choose to associate or decline to associate based on ethnic grounds is basic to a free society, and its denial threatens not only the rights and proper privileges of the individual, but menaces the institutions and foundations of a free society, and tends to the creation of a totalitarian society devoid of the right of the individual to freely choose whom he shall associate with.[51] This right is not only compatible and consistent with the basic equality of all persons before the law in a democratic state, but as an expression of the right of the individual to freedom of choice in a free society, it is a facet of the dignity of the individual and thus an indispensable prerequisite to full equality in such society. As a Canadian court declared:

"I do know that in thousands of ways there exist restrictions which have always existed, and always will continue to exist, by

50 Re Noble & Wolfe, [1949] 4 D.L.R. 375, 391. "Compare the implicit recognition of this right in the army, with its strict discipline and relative lack of privacy or private freedom. CM 307107, Hart, 60 BR 247 (1946)."

51 Cf. Black, They Cannot Choose But Hear, 53 Col. L. Rev. 960 (1953).

which people are enabled to exercise a choice with respect to their friends and neighbours."[52]

When faced with the fact that anti-discrimination legislation collides head-on with freedom of choice, advocates of compulsory integration lose their glib self-assurance and begin to equivocate by trying to find excuses as to why such rights should not be considered. These excuses, examined seriatim are hardly convincing.

The first of them is the easiest way out of all. Justice Eager, in the *Rochelle Arms* Case, faced with the unquestioned fact that a majority of tenants in the house did not want a Negro co-tenant,[53] simply held that tenants were not interested in the matter at all.[54] This is pure fantasy.[55] The new tenant is there in the house; other tenants must see him in the elevator and listen to him when tenants' meetings are called to discuss common problems. Tenants' wives will see his wife. Other tenants will hear him entertain friends, argue with his wife, scold his children, and play television. And perhaps most significant of all, it is almost impossible to stop one's own children from playing with his children. In short, while he may not be physically in one's own apartment, his voice, habits, manners, ideas, mode of life, and whole cultural matrix come with him and do in fact affect his fellow residents.[56]

Of course, when an unwelcome neighbor moves in close proximity, other residents who cannot leave can and do try to isolate themselves from the intruder.[57] But in light of the use of common neighborhood facilities,[58] success is sometimes problematical. At any rate, his presence means that someone of the same ethnic group cannot occupy

[52] Re Noble & Wolf, supra, n. 50 at p. 389. See this author's previous remarks in 12 Rutgers L. Rev. at p. 157.

[53] See New Rochelle Standard Star, Nov. 26, 1957, p. 1, col. 1. The existence of this majority was confirmed by the General Counsel of the State Commission Against Discrimination in open court.

[54] New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc., 10 Misc. 2d 346, 171 N.Y.S.2d 558 (1958).

[55] See Lustgarten v. 36 C.P.S., Inc., 101 N.Y.S.2d 709 (1950). Cf. Wyatt v. Adair, 215 Ala. 363, 110 So. 801 (1927); Hannan v. Harper, 189 Wis. 588, 208 N.W. 255 (1926),

[56] See generally, Racial Integration in Public Housing Projects in Connecticut, (Conn. Comm. on Civil Rights, Hartford, 1955). See also the statement of Ira S. Robbins, Member of the New York City Housing Authority, urging tenants to tell landlords not to discriminate. "Mr. Robbins said that such 'landlord education' would probably open more private housing to members of minority groups than would a sudden and wholesale enforcement campaign." N.Y. Times, Feb. 19, 1959, p. 18, col. 1.

[57] See Private Interracial Neighborhoods in Connecticut (Conn. Comm. on Civil Rights, Hartford, 1957), pp. 22-7.

[58] This would include churches, schools, recreational facilities, and the like.

that space, and the resident is thus deprived of a family he would like to associate with.

Much the same considerations apply in the case of employees. Fellow workers are thrown into personal contact with the new employee, and where the nature of the position requires the rendition of personal services, such as professional or quasi-instructional duties, consumers are likewise personally affected. Thus, for example, the personal qualities of a teacher or camp counselor affect the students or campers quite directly. Likewise, personal confidence in a doctor, lawyer, or minister is necessary for him to be able to render satisfactory service. In sum, therefore, many anti-discrimination laws do in fact infringe on freedom of choice.[59]

The second line of attack is the allegation that the exercise of freedom of choice so as to discriminate based on ethnic grounds lacks a rational basis. To begin with, this contention is irrelevant. It is no more persuasive than would be the contention that freedom of religion should be abolished unless the worshiper could scientifically demonstrate that his mode of worship had a rational foundation, or that freedom of speech should be eliminated unless the speaker could first prove that his thoughts should be heard, or that the right to listen to the radio station which one wants should not be permitted unless the hearer can demonstrate that he has good taste, or the right to choose one's friends should be curtailed unless the person can show that his choice is rational as a matter of social science. The transferring of choice from the individual to government in the realm of personality is the essence of a totalitarian police state.

However, ethnic distinctions are not always irrational.[60] Ameri-

[59] There are a few anti-discrimination laws which affect property rights only. For example, the States of Washington and New Jersey forbid discrimination in the making of mortgage loans. RCW, 49.60, Sec. 15(5); N.J. Stat. Ann., Sec. 17:9A-69 (Supp. 1958), Sec. 17; 12A-78 (Supp. 1958). Other anti-discrimination laws may in particular instances not affect freedom of choice. The operation of such laws is not, of course, within the scope of this article.

[60] U.S. Commission on Civil Rights Report, p. 376;

"This does not mean that Negroes are barred only because of race prejudice. Many people in established residential areas no doubt fear and resist the arrival of low-income migrants because of what they regard as the low cultural and social standards of the newcomers. In the Back-of-the-Yards area of Chicago, for instance, the predominantly Central European Roman Catholic residents are said to view not only the intrusion of Negroes but of white Protestants or even Irish Catholics as a threat to the homogeneity of the community.

"It may be that the presence of a small number of such outsiders would be acceptable, but what is feared is inundation. The first newcomers might be upper-class members of their group, otherwise acceptable in terms of cultural and social standards, but

can society today is a multi-cultural society, composed of numerous racial, religious, cultural, and ethnic groups. Not only has the immigration of such groups contributed to American culture, but the continuation of such subcultural patterns and groups makes a continuing contribution both to the development of the individual members of the groups and to the society as a whole, and the very diversity of these groups is a substantial benefit to American society.[61] Hence, the maintenance of the above groups and their continuing development is a value which both the individual members thereof and a democratic society as a whole has an interest in preserving. Even the most biased defenders of anti-discrimination legislation are forced to admit this.[62]

Since ethnic differences are beneficial, their perpetuation is likewise a rational value. But subcultural groups cannot perpetuate those differences in the face of the general tendency to amalgamate and lose them unless these different heritages are institutionalized and instilled into both children and adults alike through numerous reinforcing techniques. And a most powerful technique for instilling feeling for subcultural values is to reverse the cause of the loss of such values, viz., by the association of group members with persons in other groups, and to reinforce that learning process through association with members of one's own group.

This process of horizontal learning and continued reinforcement through association with other members of the same subcultural group is particularly important in the case of children whose values are still in the formative stage.[63] Because of the tendency of children to

their arrival would be viewed as the opening of the dike to the lower class majority, walled-in the central city areas.

[61] As Justice Frankfurter observed in Hughes v. Superior Court, 339 U.S. 460, 464 (1950), "The differences in cultural traditions . . . [add] flavor and variety to our common citizenry." Compare this with Myrdal's theory of abandonment of subcultural patterns which runs like a dominant thread throughout his writing. Myrdal, The American Dilemma, 927 et seq. (1944).

[62] Justice J. Irwin Shapiro in Application of Association for the Preservation of Freedom of Choice, 188 N.Y.S.2d 885 (1959) at 888. To support his opinion that anti-discrimination legislation will not affect the maintenance of subcultural groups, he cites neither cases nor social science findings, but rather relies solely on name-calling and such authorities as the Liberty Bell. It would overly dignify that opinion to subject it to analysis; suffice it to say that the opinion's rationale is as cracked as the Liberty Bell on which it so strongly relies.

[63] See the testimony of Dr. Bettie Belk, expert witness for the NAACP, in Brown v. Board of Education, 98 F. Supp. 797 (D.C. Kans. 1951), rev. 349 U.S. 294 (1955). Her statements, contained in the record before the United States Supreme Court, p. 183, are as follows:

"Q. Well, assuming that segregation, as I have just stated, as practiced in this community in Topeka, in the city, outside of the school, and that is a fact, children

play with others in the immediate vicinity of their home regardless of their parents' associations,[64] to subject them to a horizontal learning process through their playmates requires that some degree of residential homogeneity be maintained; otherwise, they are likely not only to learn about other group mores, but to adopt them. So too, the widespread use of parochial schools instead of merely religious instruction after school hours is a clear indication that the value of this horizontal learning process is widely recognized.

Judicial sanction exists for the maintenance of both subcultural values and institutions designed to perpetuate them. Thus, to assimilate the massive wave of immigrants which came to these shores from 1880 to 1914, Nebraska and twenty-one other states passed laws restricting the teaching of foreign languages, since language instruction was one of the traditional mainstays of minority perpetuation in Europe.[65] The Attorney-General of Nebraska argued:

"The object of this legislation . . . was to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they have had an opportunity to learn the English language and observe American ideals."[66]

Without even reaching the question as to whether the perpetuation of subcultural patterns was socially desirable, the Supreme Court struck down the statutes as an undue infringement on liberty and in effect held that freedom to choose to perpetuate the values

coming from homes in this community, isn't it very natural that they would simply carry on that custom and usage in their relations with other negro students of the opposite race? [sic]

"A. Well, I think our recent studies have shown that children, adolescents particularly, take most of their social pattern from their peers rather than their parents; in fact, it's one of the real problems in our American society today that this is true.

"Q. Who are the children, what do you mean by that, that the negro children they would look upon as their peers and therefore would follow them; what do you mean?

"A. I mean that all adolescent children take most of their social patterns from people their own age; they tend to see each other as authorities. It's an age at which they break away completely from parental authority, in fact to the extent that it becomes a difficult problem in homelife, so it is not always the patterns of the parents that they are repeating; in fact, during this time they are forming their own values."

64 Private Interracial Neighborhoods in Connecticut, supra, n. 57 at pp. 27-8.

65 Cf. Matter of Catalonian Nationalist Club, 112 Misc. 297, 184 N.Y.S. 732 (1920), and its use in Application of Association for the Preservation of Freedom of Choice, 187 N.Y.S.2d 706, 708 (1959).

66 Meyer v. Nebraska, 262, U.S. 390, 394 (1923).

had constitutional protection regardless of the desirability of the choice.[67]

When the State of Oregon passed a law requiring all children to attend public school during some part of the day, its governor also used the melting pot argument to sustain the state's restriction of parochial schools. He declared:

"The voters of Oregon might have felt that the mingling together during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissentions and consequent weakening of the community against foreign dangers."[68]

A unanimous Supreme Court, including Justices Holmes and Brandeis, struck this down as an infringement on individual liberty, here again without feeling the necessity of going into the desirability of perpetuating a particular religious or cultural point of view.[69]

More recently, a lower federal court has applied the same thinking directly to the race relations area. In *Goshern v. Bar Association of the District of Columbia,*[70] the court declared:

"People of any race, religion, or political faith may assemble and associate for the advancement of their interests. No sound public policy would destroy the interesting diversity of life. If the aim and end of democracy should be to reduce all men to the same shape and shade and common opinion, then it could and should not survive. It would counter one of the fundamental principles of evolution."[71]

Another common argument adduced to avoid the effect of the violation of freedom of choice by anti-discrimination legislation is the contention that persons affected can change jobs or residences to

[67] Id., at p. 401-2.

[68] Pierce v. Society of Sisters, 268 U.S. 510, 525 (1925).

[69] Id., at p. 534. Justice Shapiro contended in his second Association for the Preservation of Freedom of Choice opinion, 188 N.Y.S.2d at 888, that this case dealt with an attempt by Oregon to impose religious conformity. This assertion is obviously erroneous. Roman Catholics in Oregon were still free to attend their own church and send their children to religious school after secular education was over for the day. As the argument by the governor shows, this law was designed to prevent educational segregation by religion, and the Supreme Court's upholding of the right of parents to segregate their children to instill in them their group subcultural values is, unless it be considered now overruled, a significant limitation on current anti-discrimination dogma.

Cf. Gardner, Liberty, the State, and the School, 20 Law and Cont. Prob. 184, 186, 189 (1955); Miller, Racial Discrimination in Private Schools, 41 Minn. L. Rev. 145 (1957) at 148-154.

[70] 152 F. Supp. 300 (D.C., 1957).

[71] Id., at p. 306.

non-integrated companies or developments. This argument was made by two student editors as follows:

"Some also disapprove of the act's tendency to force people to live together despite their desire not to. . . . A dissatisfied tenant can always move."[72]

The short answer to the above contention is that it may not be possible for the tenant or employee to move. Indeed, the above editors destroy the basis of their own argument on the very next page when they declare:

"The shortage of inexpensive non-government-aided dwellings where segregation could be continued reduces the possibility of wholesale vacating by established residents. Since FHA assistance is becoming the prevalent financing device of the private developers, mass vacating will become increasingly futile unless vacators move into luxury apartments. Therefore, developers are not likely to find their tenants departing in droves."[73]

Furthermore, as the above commentators themselves point out, if an anti-discrimination law is really effective, there will be no place to hide. Hence, the argument about moving is unreal.

Moreover, the argument that dissatisfied tenants or employees can move begs the very question at issue. Proponents of anti-discrimination laws would hardly be satisfied with the assertion that applicants who are discriminated against can look elsewhere; indeed, they would contend that the fact that they would have to look elsewhere is part and parcel of the very discrimination they seek to eliminate. By the same token, the fact that established tenants or employees would have to be constantly on the move to retain their freedom of association is a major facet of the violation here at issue.[74]

[72] Note, New Jersey Anti-Bias Law, supra, n. 46 at p. 562, cited in Levitt and Sons v. Division Against Discrimination, 153 A.2d 700, 707 (N.J. App. Div. 1959).

[73] Id., at p. 563.

[74] In discussing freedom of choice, it has been assumed heretofore for the sake of discussion that Negroes and other minority group members desire to integrate. In many cases, this is not true; they also desire homogeneous neighborhoods. See the following from the U.S. Civil Rights Commission's Report:

p. 365: "Thus, the pattern of racial concentration is in part voluntary. As the executive secretary of the National Association for the Advancement of Colored People testified, there are 'colored people in Harlem who wouldn't move out of Harlem if you gave them a gold-plated apartment.' Jewish enclaves remain on the lower East Side, and there is a German concentration in Yorkville, even though others of these groups have dispersed throughout New York City."

p. 381 (California Advisory Committee Report): "Perhaps one important reason [for the concentration of minority groups] is the existence of cultural ties which create a preference on their part for living with persons of their own racial or national origins."

Finally, proponents of anti-discrimination legislation have contended that while such laws may infringe on freedom of choice, such infringement is to be ignored because incidental to a valid exercise of the state's power to provide minority group members with the necessities of life.[75] This argument, too, contains two basic flaws.

First, exercises of state police power to infringe on vested rights cannot be extended ad infinitum on the plea that it will serve the public good; otherwise, the entire concept of eminent domain with compensation for the taking of the property would be non-existent. This is true because even when the state takes by eminent domain, it can only take for the public welfare.[76] Hence, police power has been rigidly confined to a relatively narrow compass of well-defined types of legislation, which have been discussed above. It has already been shown that anti-discrimination legislation does not fit into any traditional category of the exercise of the police power, and to extend it

p. 382 (Colorado Advisory Committee Report): "Minority group members must be educated against the gregarious tendency which permits the finger to be pointed, indicating that they like to live together and are unhappy elsewhere."

p. 382 (Massachusetts Advisory Committee Report): "A survey by the Boston Urban League found only two out of 400 nonwhite families willing to move into white areas."

p. 382 (Oregon Advisory Committee Report): ". . . an apparent reluctance on the part of many Negroes to break away from the Negro neighborhoods where their friends are and where they feel more secure."

p. 383 (Washington Advisory Committee Report): "Choice is a factor in the nonwhite's continuing to live in his present situation. Some are reluctant to live among persons of differing ethnic background."

p. 385 (Summary by the governor of Oregon): "Partly, this concentration [of minority groups] is due to the desire for fellowship among people of their own group."

For those Negroes who desire homogeneous neighborhoods, compulsory integration violates their rights also. See the protest of a group of 82 Negro residents who opposed having a white family move into their neighborhood. N.Y. Times, Sept. 5, 1959, p. 17, col. 7.

[75] Comment, Constitutional Aspects of Legislation Prohibiting Discrimination in Housing, 26 Ford. L. Rev. 675, 680 (1957-8):

"It is further argued that it is wrong to make people associate socially with others when they do not wish to do so. [Avins, Trade Regulations, 12 Rutgers L. Rev. 149, 157 (1957).] This, however, is clearly not the purpose of such legislation, just as social mixing is not the purpose of integrated schools. The purpose of the legislation is to provide adequate housing on an equal basis to all citizens, as the purpose of integrated schools is to provide equal educational facilities for all. Although greater contact between groups does necessarily result, no person is compelled to associate with any other on the social plane, to take him into his home, his club, or even his church."

[76] Berman v. Parker, 348 U.S. 26, 32 (1954); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251-2 (1905); Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896); Cole v. La Grange, 113 U.S. 1, 6 (1885); Bd. of Commissioners v. Lucas, 93 U.S. 108, 114 (1876); Mills v. St. Clair County, 8 How. 569, 584 (1850).

into new fields without any guide lines or limitations is to eliminate completely constitutional protection against government regulation.

Moreover, such extension, even if made, should be predicated on a finding in each particular case that the applicant is in fact in need of a dwelling place or job and cannot otherwise obtain this accommodation. No present or proposed anti-discrimination law makes this requirement, and there is no basis for presuming its existence in any particular case or in the majority of cases as has been pointed out above. Indeed, as cautious as we are in permitting the state to use its police power for the economic regulation of property rights,[77] we should be doubly careful when state regulation infringes rights in personality. In light of this fact, denial of freedom of choice can hardly be predicated on an asserted blanket necessity to provide Negroes and other minority groups with the necessities of life.

But this argument also cannot stand close scrutiny because it is not in fact the motivating reason for anti-discrimination laws, at least as they apply to housing.[78] True, when faced with the freedom of choice objection, proponents of compulsory housing integration laws take refuge in the assertion that such laws are needed to cure slums and prevent overcrowding. Behind this mask, however, the true motivation occasionally shows through.

Thus, for example, when the New York City ordinance banning discrimination in private housing was being considered by the New York City Council, an amendment was proposed exempting luxury cooperative apartment houses from the law on the grounds that anyone who could afford that rental could afford to rent or build some other place. The Executive Director of the Commission on Intergroup Relations, which administers the law, opposed the amendment in a statement before the City Council on the grounds "that luxury cooperative apartments were 'the hard core of residential anti-Semitism in New York City' "[79] and the amendment was defeated.[80] And more

[77] Supra, n. 22.

[78] As the U.S. Civil Rights Commission's Report, p. 365, succinctly pointed out: "In New York . . . there is an established city and State policy to promote integration."

[79] N.Y. Times, July 31, 1957, p. 1, col. 2. See also a similar statement by Charles Abrams, former Chairman of the New York State Commission Against Discrimination, reported in the New York Post, July 9, 1957, p. 5, col. 2. And see the recent statement of Edward Rutledge, Housing Director of the State Commission Against Discrimination, attacking exclusive Jewish suburban areas as "gilded ghettos." N.Y. Times, Oct. 15, 1959, p. 35, col. 1.

[80] N.Y. Times, December 6, 1957, p. 1, col. 4.

recently, when Governor Rockefeller declared that "every American citizen should be able to live where his heart desires and his means permit," he made no limitation as to need or alternate methods of satisfying it.[81]

Also symptomatic of current thinking of anti-discrimination advocates is the action of the New York City Housing Authority in actively promoting integration.[82] While the Authority denied using quota systems, it admitted using every other effort to foster integrated housing.[83] Indeed, when the 1,940 unit Grant Houses was built in Harlem, "every effort was made to persuade eligible white families to apply . . . but . . . only 142 (a scant 7.3 per cent) have white tenants."[84] And as had already been noted, the reluctance of white tenants to move to Harlem has caused numerous groups pushing anti-discrimination legislation to oppose more low-rent public housing there.[85]

In light of the above facts, the assertion that anti-discrimination legislation is being urged to obliviate slums falls flat on its face. Rather, the existence of slums is being used as an excuse and convenient leverage to promote such legislation.[86] Were housing for

[81] N.Y. Times, July 14, 1959, p. 1, col. 3.

[82] The U.S. Civil Rights Commission's Report declares along this line:

(p. 406). "The public housing projects operated by the New York City Housing Authority have been a major testing ground for the city's policy of integration.

(p. 407-8) "one of the first acts of the . . . Housing Authority after [its creation] . . . was to . . . [appoint] a consultant on race relations in order to help restore integrated occupancy. . . . In addition, the members of the New York Authority intend to promote integrated housing projects by the selection of sites in areas conducive to integration . . . . Moreover, to win public understanding and support of this program for true housing integration, the authority has started a community relations program under the direction of its new race relations consultant."

[83] N.Y. Times, July 5, 1959, p. 1, col. 4. And see the statement of Authority member Ira S. Robbins that "the Housing Authority was seeking to promote integration by situating new public housing in open-land areas or in racially mixed neighborhoods." N.Y. Times, Feb. 19, 1959, p. 18, col. 1.

[84] N.Y. Times, Feb. 23, 1958, p. R 1, col. 8.

[85] Supra, n. 36.

[86] And see the following from the U.S. Civil Rights Commission's Report, pp. 508-9:

"In 1954 the National Association of Home Builders announced a program to build 150,000 dwelling units annually for minority groups. Each local builders' association throughout the country was urged to adopt a community goal and 'start an aggressive campaign and effective production program to improve the housing conditions of minority groups in their own community.'

"Negro spokesmen generally opposed this program for 'minority housing.' 'We do not want jim-crow dwellings whether they are new or old,' the annual conference of the NAACP resolved, adding specifically: 'We condemn and oppose the policy advocated by the National Association of Home Builders for planned housing developments directed toward any specific minority group on the basis of race, color, national origin, or religion.' The National Urban League also announced that it was 'opposed

Negroes the prime consideration, it would be manifestly self-defeating for the City Housing Authority to attempt to get white families to move into Harlem housing project units which could otherwise be allocated to needy colored tenants.[87] Indeed, the 142 apartments in the Grant Houses alone given to white families constitutes at least three times the number of units of housing made available to colored tenants throughout the City of New York by the entire operation of the Sharkey-Isaacs-Brown Law during its first year of existence.[88] Thus, decent housing for 142 needy Negro tenants was sacrificed on the altar of integration.

The City Housing Authority's integration drive obviously does not stem from any desire to provide decent housing, for in terms of decent places to live, it can make no difference whether a Negro tenant lives in a project in Harlem or Queens or the Bronx. The efforts of anti-discrimination advocates in Harlem to block city projects unless integrated there, if anything, retard the elimination of colored slums.[89] The inclusion of luxury cooperatives in the Sharkey-Isaacs-Brown Law manifestly has no connection with either slum clearance or slum prevention; it is clear that anyone who could afford such rentals would be able to build his own dwelling. Moreover, no one has ever contended that tenants of the Jewish faith are doomed to poor housing; indeed, the "gilded ghettoes" of Long Island and West-

to, and unwilling to support or assist in the construction of segregated privately financed housing.' "

. . . .

"Most private construction of new housing for Negroes has taken place in the South, where many Negro leaders have gone along with the concept of 'minority housing.'

It might also be noted that the New York City Commission on Intergroup Relations, which administers the city's anti-discrimination law in housing, refuses to permit a builder to advertise new housing *for* Negroes, although builders "complained that Negroes were being deprived of an opportunity to find better housing because the racial identification was eliminated," in order to prevent "Negroes and other minority groups [from seeking] housing in segregated areas." N.Y. Times, Aug. 30, 1959, p. R. 1, col. 8.

87 See the statement that the New York City Housing Authority is "making a special effort to inform white families and solicit their applications" because of refusals to apply for integrated public housing. N.Y. Times, Nov. 19, 1959, p. 24, col. 5. And see Greenberg, *Race Relations and American Law* (1959), p. 292: "New Haven and other cities have to some extent followed an affirmative integration policy, based on a quota system, sometimes withholding vacant apartments from Negroes while waiting for white applicants."

88 Supra, note 41.

89 Supra, note 36.

chester, excoriated by several SCAD officials, contain homes in the $100,000 class.[90]

The short of the matter is that for all of its fancy trimmings and wrappings, a law banning discrimination in housing is, and is intended to be, a law compelling people to integrate who do not desire to do so.[91] To thus treat human beings as chess pieces, to be moved at the will or whim of others who would like to plan their lives for them, is as flagrant a violation of basic human rights and dignity as can be found in the worst totalitarian system ever devised.

Moreover, such integration for the sake of integration over the obvious objections of the people being integrated is patently violative of their constitutional rights.[92] To hold otherwise is to reduce fundamental human rights to the level of norms which can be changed at each passing fad or fancy in social engineering by self-appointed planners for the lives of others.

4. CONCLUSION

The United States Civil Rights Commission, in its recent report, found that "the need is not for a pattern of integrated housing. It is for equal opportunity to secure decent housing. . . . The Negro's need for . . . securing housing must be met just as the legitimate interests of white neighborhoods . . . must be protected."[93] Likewise, the Report also declared that "what is at issue is not the imposition of any residential pattern of racial integration. . . . There may be many Americans who prefer to live in neighborhoods with people of their

90 Supra, note 79. And see the statement of Charles Abrams, former SCAD chairman, critical of exclusive Jewish suburbs. N.Y. Times, April 29, 1958, p. 31, col. 8.

91 As the U.S. Civil Rights Commission's Report, p. 400, summed it up: "Thus New York is, as it has long been, a school . . . for integration."

92 Cf. Note, Constitutional Law—Civil Rights—Recent New York City Ordinance Bans Discrimination in Certain Private Housing Facilities, 56 Mich. L. Rev. 1223, 1225 (1958):

"A further possibility is that anti-discrimination legislation will expand into the area of purely social regulation, and prohibit private discrimination in such matters as membership in private clubs. This would seem to be an infringement of liberty under the due process clause, and would also seem to be beyond the present scope of the police power. . . . Anti-discrimination legislation aimed at purely social relationships, however, would probably violate the due process clause for two reasons. First, while anti-discrimination legislation which deals with economic relationships can be justified by the modern concept of the police power, legislation which deals with purely social relationships is not normally within the scope of the police power. Secondly, social anti-discrimination legislation would tend to infringe individual liberty rather than property rights, and the court has shown a tendency to give liberty greater protection from state regulation than property."

93 Report of the United States Commission on Civil Rights, p. 535.

own race, color, religion, or national origin. The right of voluntary association is also important."[94]

Freedom of association is a value which must be protected. Anti-discrimination legislation has a tendency to infringe on such freedom. In the employment area, the delicate balancing of the needs of disadvantaged minority group members against the desires of other employees to maintain homogeneity in their place of work requires a sensitivity to the means by which both goals can be accommodated and a desire to effectuate those means. And here, indeed, minority group member employees can be hired and assigned to work with consenting employees so that non-assenting employees will have their freedom of association protected. This sensitive task of accommodation of competing interests requires the recognition that both exist, and since such agencies as the State Commission Against Discrimination, and such laws as the present Law Against Discrimination in Employment, recognize only the desires and needs of applicants from minority groups as significant, they are lopsided in vantage point and through lack of balance infringe on reserved rights.

The vice in laws forbidding discrimination in housing runs much deeper. These laws are compulsory integration devices, and are designed to eliminate freedom of choice. As such, the issue is not merely to what extent freedom of association should be balanced against other values and objectives which the state may properly seek to promote, but rather whether this freedom itself should be eliminated in favor of social compulsion manipulated according to plans of self-appointed social engineers. Such a proposal carries its own inherent refutation.

The labels of "bigot," "bias," "reactionary," "prejudice," "ignorant," and so forth, so freely bantered about in the race relations area as semantic substitutes for thinking cannot obscure the simple fact that compulsory integration is a program by which some people presume to dictate to others in which type of environment they shall live. In so doing, they arrogate to themselves the right of choice of others which constitutes a fundamental human right inseparable from the dignity of each person as an individual. All the fancy phrases of "democratic living," "fair housing," "open occupancy," and "equality" cannot substitute for the denial of the right of freedom of association. Infringement of this right makes anti-discrimination legislation in housing violative of fundamental liberties.

[94] Id., at p. 332.