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# THE HOUSE I LIVE IN

## A Study of Housing for Minorities

Milton L. McGhee  
Ann Fagan Ginger†

*"The house I live in—that's America to me!"*

If the ballad singer is right, America is a dingy, overcrowded slum to millions of its citizens. To almost everyone it is a segregated society where your neighbor must be the same color you are. Judged by its housing, America is a country where the color of your skin matters more than the color of your money, for today one out of every six Americans is unable to live where he wishes to live because of racial or religious discrimination.<sup>1</sup> According to the United States Commission on Civil Rights:

Most of these Americans, regardless of their educational, economic, or professional accomplishments, have no alternative but to live in used dwellings originally occupied by white Americans who have a free choice of housing, new or old. Housing thus seems to be the one commodity in the American market that is not freely available on equal terms to everyone who can afford to pay. . . . The results can be seen in high rates of disease, fire, juvenile delinquency, crime and social demoralization among those forced to live in such conditions. A nation dedicated to respect for the human dignity of every individual should not permit such conditions to continue.<sup>2</sup>

This problem exists in every section of the country, and is acute in every urban center;<sup>3</sup> it is now moving into the suburbs.<sup>4</sup> With it inevitably goes its undemocratic concomitant—segregated public schools.<sup>5</sup>

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† See contributors' section, masthead, p. 306, for biographical data.

<sup>1</sup> McEntire, *Residence and Race* (1960).

<sup>2</sup> U.S. Comm'n on Civil Rights, *With Liberty and Justice For All* 180 (1959). This is a summary of the full Report of the U.S. Comm'n on Civil Rights issued Sept. 9, 1959.

The American minority groups which have traditionally had difficulty in securing housing on a nondiscriminatory basis include: Negroes, Jews, Puerto Ricans, Mexican-Americans, Chinese-Americans, Japanese-Americans. It has become customary to refer to these groups generally as "nonwhite." This is the term used by the U.S. Commission and other sources quoted herein, and will be repeated when necessary. Many find this term unacceptable since it implies that "white" is the norm and all who are not white are lacking something. Since the largest American minority group is the Negro group, it will occasionally be used to indicate all of the other groups mentioned above.

<sup>3</sup> For examples of housing discrimination against Negroes see, e.g., 1 Hearings Before the U.S. Comm'n on Civil Rights: *Housing, against Jews*, Id. at 362, 395-96; *against Puerto Ricans*, at 301; Id. at 386-87, 391 (all re New York City). Opposition to Chinese consul general moving to San Mateo, California, reported in *S.F. Chronicle*, Feb. 15, 1960, p. 1.

<sup>4</sup> See, e.g., speech by Eugene C. Lee to Int'l City Managers' Ass'n, *S.F. Chronicle*, Oct. 18, 1960.

<sup>5</sup> See, e.g., 1 Hearings, *supra* note 3, at 824 (Chicago); In the Matter of Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (N.Y. City Ct. 1958); Advisory Committee of Citizens, "Interracial Problems and Their Effect on Education in the Public Schools of Berkeley, California," Report to the Board of Education, Oct. 19, 1959, discussed *infra* at note 262.

This study of housing for American minority groups is intended as a guide to federal, state, city and private approaches to the problem. Existing legislation will be analyzed. The effects of executive action and inaction will be assessed. Recent court decisions will be discussed. Since private citizens are becoming increasingly active in this field—using a variety of means to achieve various ends—this study will set forth some of the classic examples of individual and community action in the face of inadequate housing for minority groups.

## I. FEDERAL ADMINISTRATION APPROACHES TO SEGREGATION IN HOUSING AND THEIR CONSTITUTIONALITY

### *Federal Aid to Housing*

For the past twenty-five years the federal government has played a major role in the housing industry. Today the Housing and Home Finance Agency (HHFA) encompasses five constituents: Public Housing Administration (PHA), Urban Renewal Administration (URA), Federal Housing Administration (FHA), Federal National Mortgage Association (FNMA) and Voluntary Home Mortgage Credit Program (VHMC). In addition, the Veterans' Administration (VA) affects the housing field through its insurance of housing loans to veterans.

PHA administers the public low-rent housing program by providing development loans and annual subsidies to local communities for developing and operating projects for low-income families. The program is locally owned and administered. Today there are more than 2,000 federally-aided projects, with 451,000 units<sup>6</sup> managed by 1,000 local authorities housing almost two million people in 42 states.<sup>7</sup>

URA authorizes advances to local communities for planning Title I projects,<sup>8</sup> giving loans and grants up to two-thirds of the cost of purchasing and clearing land for rehabilitation of blighted urban areas. The projects are carried out by local public agencies under powers granted by state and local enabling laws. Eight hundred and seventy-seven localities have adopted workable programs, and 645 Title I projects are being carried out in 386 localities. Already some \$1.3 billion has been provided for these projects by the federal government.<sup>9</sup>

FHA and VA administer the federal home mortgage loan insurance programs. Since 1935, FHA has written mortgage insurance on more than five million homes and on multifamily rental and cooperative

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<sup>6</sup> A unit consists of an apartment regardless of the number of rooms.

<sup>7</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 172-73; 2 Hearings, *supra* note 3, at 4, 62.

<sup>8</sup> Housing Act of 1949, 63 Stat. 416, 42 U.S.C. §§ 1441, 1450-62 (1958), as amended.

<sup>9</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 173-75; 2 Hearings, *supra* note 3, at 4.

housing units of 800,000 families. Property improvement loans have been approved for more than 22 million homeowners.<sup>10</sup>

FNMA provides supplementary assistance for FHA-insured and VA-guaranteed home mortgages, working directly with private lending institutions. FNMA also buys certain loans at the determination of Congress or the President to make financing available in new and unproved fields.<sup>11</sup>

The Voluntary Home Mortgage Credit Program, established in 1954, finds mortgage lenders for qualified minority group home buyers in any area unable to get mortgage credit from local sources. The HHFA administrator serves as chairman and HHFA provides a small staff and administrative assistance. In its first four and a half years, more than 8,000 loans totalling \$80 million were secured through this program, which has also arranged the financing of three project loans covering 546 open-occupancy rental units.<sup>12</sup>

The federal government causes new housing units to be built, purchased, or rented, and older units to be renovated. It also assists in the razing of large urban areas each time a new housing project (or highway) is built. Since the number of housing units built never equals the number of overcrowded slums formerly on the site, and since few of the new units are available to the former inhabitants, the housing crisis is heightened by every effort to alleviate it.<sup>13</sup>

Obviously, the policies of the federal government in housing have affected every aspect of this industry. Urban Renewal Administration must approve the razing of every area selected for Title I redevelopment, and must therefore set criteria for judging substandard housing. The federal government, through the Public Housing Administration, decides what constitutes adequate housing for low-income families. The federal government sets standards builders must meet in order to get VA or FHA mortgage insurance.

What has been the policy of the federal government toward equality in housing opportunity, regardless of race or color or national origin?

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<sup>10</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 171-72; 2 Hearings, *supra* note 3, at 3-4.

<sup>11</sup> 2 Hearings, *supra* note 3, at 4-5.

<sup>12</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 175-76.

<sup>13</sup> See, e.g., Abrams, "U.S. Housing: A New Program," at 1 Hearings, *supra* note 3, at 171-81; housing shortage in Chicago: *Id.* at 715, 716, 727, 868-69; S.F. Chronicle, May 9, 1960, p. 14. See inventory by N.Y. Real Estate Commissioner on 19,089 families to be relocated in N.Y.C. in 10-month period due to public improvements. N.Y. Times, July 12, 1960, p. 36, col. 1. Of all nonwhite residents of Providence, R.I., 48.2% have been displaced by slum clearance, highway and public school projects—1949-1960; 5.9% of white residents have also been displaced. Kellam, Council Highlights (R.I. State Council of Churches, 2 Stimson Ave., Providence, March 1960). For a compendium on the operational aspects of all federal housing programs, see Haar, *Federal Credit and Private Housing* (1960).

Toward racial segregation and racial restrictive covenants? Toward open occupancy?

*Constitutional, Executive and Legislative Policies*

The United States Constitution does not mention the right to buy, rent or occupy housing without discrimination on the basis of race, creed, color or national origin.<sup>14</sup> The Civil Rights Act of 1866 (enacted while the fourteenth amendment was also under consideration by Congress), led to section 1982 of title 42, which remains the only federal statute related to discrimination in housing:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Under this statute and the equal protection clause, the Supreme Court in *Buchanan v. Warley*<sup>15</sup> invalidated a city ordinance zoning residential areas along racial lines. And in the *Restrictive Covenant* cases<sup>16</sup> the Court outlawed the enforcement of racial restrictive covenants by state courts, but this has not covered the field.

The primary problem on the federal level today is the lack of a positive policy against racial discrimination in the expenditure of federal funds for construction of housing accommodations. In the Housing Act of 1949,<sup>17</sup> Congress declared the national goal to be "a decent home and a suitable living environment for every American family." But Congress has consistently refused to include in the federal housing program positive interdictions against discriminatory practices based on race, religion or national origin,<sup>18</sup> and standards for determining the existence of such practices. In the absence of such standards, administrators often defer to local pressures, defeating the plan for a uniform national housing program and frequently discriminating against the very people for whose benefit the program was instituted. Such inaction, of course, is not limited to the federal program; many states and localities have followed a similar course.

In 1957 Congress passed the first national civil rights measure enacted since 1875, setting up a fact-finding commission in the executive branch.<sup>19</sup> The Civil Rights Commission was directed *inter alia* to:

study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution; and

<sup>14</sup> The fourteenth amendment prohibits states from denying to any citizen the equal protection of the laws and the fifth amendment due process clause has been held to serve the same purpose. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>15</sup> 245 U.S. 60 (1917).

<sup>16</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>17</sup> 63 Stat. 416 (1949), 42 U.S.C. 1441 (1958).

<sup>18</sup> See, e.g., Housing Act of 1959, 73 Stat. 654-88.

<sup>19</sup> 71 Stat. 634-38 (1957).

appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution.<sup>20</sup>

Pursuant to this directive, the Commission has studied discriminatory practices in housing, holding extensive hearings in three cities in 1959 in preparation of its first report, and additional hearings in 1960.<sup>21</sup>

In its report the Commission documented present practices in the housing field, sharply pointing up the problem that has been brought about in large part by the inaction of the federal government and of many state and local governmental bodies. The reason for concern about federal action had been spelled out in great detail by the Commission on Race and Housing, a private research group, in its 1958 report:

The policies and actions of government agencies and public officials must be counted among the principal influences sustaining racial segregation in housing. As the United Nations Subcommittee on Prevention of Discrimination and Protection of Minorities has said, 'The most serious forms of discrimination are those embodied in laws and regulations . . . and those practiced by authorities and public officials.' . . .

The other indirect Federal support of segregation has been the moral sanction given to the racial discrimination practices of private business. As Myrdal has said, 'It is one thing when private tenants, property owners, and financial institutions maintain and extend patterns of racial segregation in housing. It is quite another matter when a Federal agency chooses to side with the segregationists.' Government, as an expression of the public will, is one of the sources of moral as well as legal authority. If the government sees nothing wrong in racial discrimination, how can private persons be censured for practicing it? In some fields, notably the armed forces, the government has actively moved to abolish segregation. In the housing field, the Federal government, in recent years, has withdrawn from any explicit endorsement of housing segregation. Federal agencies, however, aside from verbal pronouncements for equality, continue to tolerate the discriminatory practices of those who distribute Federal benefits.<sup>22</sup>

While President Eisenhower's policy, set forth before the Commission on Civil Rights made its first report, was to materially strengthen and augment the "administrative policies governing the operation of the several housing agencies . . . in order to assure equal opportunity for all of our citizens to acquire, within their means, good and well-located homes,"<sup>23</sup> the President did not act upon the Commission's specific recom-

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<sup>20</sup> *Id.* at § 104(a).

<sup>21</sup> 1959 hearings in New York City, Chicago and Atlanta; 1960 hearings in Los Angeles and San Francisco.

<sup>22</sup> *Where Shall We Live* 29-30, 32 (1958). Other studies prepared by the Commission include *McEntire, Residence and Race*; *Studies in Housing and Minority Groups* (Glazer ed.); *Grier, Privately Developed Interracial Housing*; *Laurenti, Property Values and Race* (1960); *Rapkin, The Demand for Housing in Racially Mixed Areas* (1960).

<sup>23</sup> Quoted in U.S. Comm'n on Civil Rights, *supra* note 2, at 170; and see President's Comm. on Civil Rights, *To Secure These Rights VIII-IX* (1947).

mendation that an Executive Order be issued "stating the constitutional objective of equal opportunity in housing, directing all Federal agencies to shape their policies and practices to make the maximum contribution to the achievement of this goal. . . ." <sup>24</sup>

Witnesses before the Commission have also suggested that the President call a National Conference on racial problems, similar to the National Conferences on Children and Youth and the proposed annual conference of labor leaders and management recently instituted by the President.

### *Public Housing Administration*

There is no federal legislation concerning the racial occupancy of public housing projects, but the housing statute does provide a preference "to families which are to be displaced by any low-rent housing project or by any public slum-clearance or redevelopment project" <sup>25</sup> and to families having the greatest need. <sup>26</sup> The housing statute does not provide assistance in the relocation of persons displaced by public housing projects under construction.

Under these vague provisions for occupant selection, there is unbridled discretion permitting selection of tenants on a racial basis. The choice of sites for new housing projects provides another method by which segregated patterns in public housing accommodations may be accomplished and maintained. Sites are frequently chosen which are located in areas exclusively or largely inhabited by certain racial or religious minority groups. PHA, in cooperation with local housing authorities, has approved construction of large numbers of high rise apartment houses in the middle of segregated slum areas. This choice of sites, together with the low maximum income qualifications for tenants, has resulted in 46 per cent Negro occupancy of the 2,000 PHA projects, only 428 of which are racially integrated.

In the selection of tenants, the 1951 Public Housing Manual provides:

- (1) Programs for the development of low-rent housing, in order to be eligible for Public Housing Administration assistance, must reflect equitable provisions for eligible families of all races determined on the approximate volume of their respective needs for such housing.
- (2) While the selection of tenants and the assigning of dwelling units are primarily matters for local determination, urgency of need and the preference prescribed in the Housing Act of 1949 are the basic statutory standards for the selection of tenants. <sup>27</sup>

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<sup>24</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 184.

<sup>25</sup> 63 Stat. 423 (1949), 42 U.S.C. § 1410(g) (1958).

<sup>26</sup> 63 Stat. 423 (1949), 42 U.S.C. § 1415(8)(c) (1958).

<sup>27</sup> § 102.1 (1951).

Each local housing authority has established its own procedures for filling vacancies. In the early period, most authorities in the North and South maintained two separate lists of applicants for housing and channeled Negro and other minority group applicants into one group of projects and white applicants into another. When this practice was challenged in the federal courts in the northern and western states, the courts uniformly forbade the practice and issued permanent injunctions against racial segregation of tenants by the housing authorities.<sup>28</sup> And in *Banks v. Housing Authority*<sup>29</sup> a quota system of tenants, based on the prevailing racial composition of the community, was invalidated. This "benign quota system," as it has been termed,<sup>30</sup> was held to be contrary to the equal protection guarantees of the fourteenth amendment.

These judicial pronouncements have not eliminated the practice of segregation by some northern and western public housing administrators. Just as the aftermath of the *School Segregation* cases<sup>31</sup> has provided the most graphic illustration of the pace at which even United States Supreme Court decisions are sometimes effectuated,<sup>32</sup> 1959 PHA figures show the present composition of projects in seven of the cities involved in litigation, as follows:<sup>33</sup>

<sup>28</sup> *Detroit Housing Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Davis v. St. Louis Housing Authority*, 1 Race Rel. L. Rep. 353 (Civil No. 8637 E.D. Mo., 1955); *Ward v. Columbus Metropolitan Housing Authority*, 1 Civ. Lib. Docket 28, 48, No. 630.3 (S.D. Ohio 1955); *Jones v. City of Hamtramck*, 13 Munic. L.C.D. 76 (E.D. Mich. 1954); *Woodbridge v. Housing Authority*, 18 Munic. L.J. 79 (D.C. Ill. 1953); *Askew v. Benton Harbor Housing Comm'n*, 2 Race Rel. L. Rep. 611 (Civil No. 2512, W.D. Mich. 1956).

<sup>29</sup> 120 Cal. App. 2d 1, 260 P.2d 668 (1953), cert. denied, 347 U.S. 974 (1954).

<sup>30</sup> Note, 107 U. Pa. L. Rev. 515 (1959). See discussion at note 240 *infra*.

<sup>31</sup> *Brown v. Board of Ed.*, 347 U.S. 483 (1954), reargued, 349 U.S. 294 (1955).

<sup>32</sup> Out of 2834 bi-racial school districts in the seventeen southern and border states, 768 have adopted a policy of desegregation, while 2,066 remain completely segregated. *Southern School News*, Oct. 1960, p. 1. A brief history of public school desegregation cases since 1955 may be found in 18 *Law. Guild Rev.* 93, 96-97 (1958), 19 *Law. Guild Rev.* 91, 95 (1959). See also McKay, "The Repression of Civil Rights as an Aftermath of the School Segregation Cases," 4 *How. L.J.* 9 (1958).

<sup>33</sup> PHA maintains a careful record of the racial occupancy of its projects, under the following categories:

- 0 Integrated, white and Negro (with or without other nonwhite)
- 1 Integrated, white and other nonwhite
- 2 Segregated within project, by building or site
- 4 No pattern (too few Negroes in a white project or too few whites in a Negro project to constitute a pattern)
- 5 All nonwhite
- 6 All white (with or without Latin-American)
- 7 All Latin-American

PHA statistics in the text refer to Detroit, Benton Harbor, Hamtramck, Mich.; St. Louis, Mo.; Columbus, Ohio; Evansville, Ind.; San Francisco, Cal. (See note 28 *supra*.) Statistics Branch, PHA, HHFA, Low-Rent Project Directory iii, 18, 63, 70, 87, 51. See generally Intergroup Relations Branch, PHA, HHFA, Trends Toward Open Occupancy in Low-Rent Housing Programs of the Public Housing Administration, published periodically. After the Washington State Board Against Discrimination found that the Pasco PHA project was using racial designations on housing application forms supplied by PHA, the project officials agreed to delete questions of race from all forms. *Washington State Board Newsletter*, III, No. 8, Aug. 1959.



10 all nonwhite projects containing 3,755 units  
 1 all white project containing 210 units  
 25 integrated projects containing 14,212 units<sup>34</sup>

Contrary to the favorable judicial relief uniformly granted in northern and western states, in the border and southern states courts have permitted discriminatory practices to continue despite challenges by tenants or prospective tenants seeking housing accommodations without regard to race or religion. The suits generally were disposed of on procedural grounds<sup>35</sup> or mooted by action of the local housing authority before trial on the merits.<sup>36</sup>

All but one of these cases were brought against city housing agencies; the United States was joined as a party defendant only in the unsuccessful Savannah suit.<sup>37</sup>

Today, almost two million Americans live in low-rent housing projects built by cities with federal aid. June 1, 1960, 46 per cent of the occupants of these projects were Negroes. But out of 2,000 projects, only 428 were racially integrated.<sup>38</sup> PHA now has 567 additional projects "in development."<sup>39</sup> These projects will house 60,189 family units. The plans for these projects, prepared by city housing agencies, have been approved by PHA, and they provide for:

<sup>34</sup> Plus one all Chinese-American project containing 234 units (San Francisco), and one project with 172 units segregated within the project.

<sup>35</sup> *Watts v. Housing Authority*, 2 Race Rel. L. Rep. 107 (Civ. No. 7690, N.D. Ala., 1956) (dismissed for misjoinder of parties plaintiff, homeowners and tenants to be removed from proposed project site). See also Title I cases discussed in text at note 57 *infra*. And see *Heyward v. PHA*, 135 F. Supp. 217 (S.D. Ga. 1955), 238 F.2d 689 (5th Cir. 1956), *aff'd sub nom. Cohen v. PHA*, 257 F.2d 73 (5th Cir. 1958), cert. denied, 358 U.S. 928 (1959). The case was dismissed for failure to prove Negro plaintiffs had applied for admission to white projects under PHA system of separate application lists for Negroes and whites. The suit had first arisen in the District of Columbia, but was dismissed since the local housing authority was not made a party. *Heyward v. PHA*, 214 F.2d 222 (D.C. Cir. 1954).

Of Birmingham's six projects, today three are for white occupants only and three solely for nonwhite. Of Savannah's nine projects, today five are solely for whites and four solely for nonwhites. Statistics Branch, PHA, *supra* note 33, at 2, 39.

<sup>36</sup> *Eley v. City of Louisville Municipal Housing Authority*, 2 Race Rel. L. Rep. 815 (Civ. No. 3240, W.D. Ky., 1957), *reaff'd*, 3 Race Rel. L. Rep. 1216 (1958). The district court in 1957 approved the PHA plan, effective within one year, under which all applicants would be permitted to request occupancy in any project and PHA would decide where to place each family, but not on the basis of race. Nor would PHA force anyone to live where he did not choose to live. Of the nine projects in Louisville today, 2 are integrated, 4 are for nonwhites only, 2 are for whites only and 1 has no racial pattern. Statistics Branch, PHA, *op. cit.* *supra* note 33, at 53.

<sup>37</sup> None of the cases was heard by the Supreme Court.

<sup>38</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 173. A comparison of desegregation in education and desegregation in PHA projects reveals that the percentage of desegregated southern and border public schools (locally governed) is almost twice as high as the percentage of desegregated public housing projects (federally assisted) scattered throughout the country.

<sup>39</sup> Intergroup Relations Fact Sheet, Summary of Information of Racial Importance in Development Programs Reviewed 7/1/57—6/30/59: one-page chart.

13,807 units exclusively for nonwhites  
 9,005 units exclusively for whites  
 37,377 units with non-discrimination by race

That is, 22,812 units, or 31 per cent of the total now in development, will be segregated units. These segregated units are being built in eight southern states;<sup>40</sup> in five border states (which have achieved integration in education to a considerable extent);<sup>41</sup> and segregated units are also in development in two northern states.<sup>42</sup> It seems extraordinary for a public agency to plan explicitly discriminatory housing in 1960 and to publish its intentions to do so.

In its first report, the United States Commission on Civil Rights set forth its findings concerning racial occupancy of PHA units, and recommended:

. . . that the Public Housing Administration take affirmative action to encourage the selection of sites on open land in good areas outside the present centers of racial concentration. PHA should put the local housing authorities on notice that their proposals will be evaluated in this light. PHA should further encourage the construction of smaller projects that fit better into residential neighborhoods, rather than large developments of tall "high rise" apartments that set a special group apart in a community of its own.<sup>43</sup>

However, the Commission's recommendation did not foreclose the promotion by the federal government of new, segregated, publicly financed low rent housing projects.<sup>44</sup> To avoid this result Commissioner Johnson carefully footnoted this suggestion:

I believe that equal opportunity to housing and freedom of choice in housing can be promoted in many ways, but I do not believe that this goal can be attained through so-called minority housing. Such housing merely makes available to Negroes better housing in new or existing ghettos and does not give them the full range of choice enjoyed by most other American citizens. In no real sense can this be called equality of opportunity or freedom of choice.<sup>45</sup>

The reports of the United States Commission on Civil Rights and the Commission on Race and Housing, as well as other testimony by housing authorities, indicate five needed reforms:

1. To increase the number of PHA units.<sup>46</sup>

<sup>40</sup> Ala., Fla., Ga., La., Miss., S.C., Tenn., Va.

<sup>41</sup> Ark., Ky., Md., Mo., Texas.

<sup>42</sup> 555 units in Illinois; 362 in Pennsylvania, which state prohibits discrimination in public housing projects and publicly assisted and urban renewal housing, by statute, see chart *infra* at p. 225.

<sup>43</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 185.

<sup>44</sup> *Id.* at 140.

<sup>45</sup> *Ibid.*

<sup>46</sup> It has not been uncommon for opponents of public housing to propose amendments to housing bills denying use of federal funds for racially discriminatory housing. See, e.g.,

2. To adopt and administer a clear nondiscriminatory policy in all PHA units.<sup>47</sup>
3. To follow a nondiscriminatory policy of site selection for all proposed PHA units by scattering many low rise apartments throughout the metropolitan areas, instead of a few high rise apartments which are sealed off from the rest of the community.
4. To encourage flexibility and creativity in public housing planning.<sup>48</sup>
5. To enact legislation providing financial and other relocation assistance to families displaced by PHA projects.

### *Urban Renewal Administration*

There is no mention of racial questions in federal legislation concerned with Title I urban renewal projects. Present legislation does require that a locality seeking Title I funds must submit a "workable program," prepared with citizen participation, including provision for the relocation of displaced families.<sup>49</sup> In addition, the HHFA Administrator must certify the program to be adequate for the overall development of the community, and must find that the program contains an adequate number of "decent, safe, and sanitary dwellings" to be available to displaced persons either "in the urban renewal area or in other areas not generally less desirable."<sup>50</sup>

President Eisenhower assured Congress that aid and assistance would be accorded on a nondiscriminatory basis:

[W]e shall take steps to insure that families of minority groups displaced by urban redevelopment operations have a fair opportunity to acquire adequate housing; we shall prevent the dislocation of such families through the misuse of slum clearance programs; and we shall encourage adequate

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Rep. Brown's comment, N.Y. Post, Apr. 28, 1960, p. 70. Acting U.S. Commissioner of Public Housing, Lawrence Davern, testified that many cities, particularly in the North, are reluctant to begin new public housing projects because they may be racially integrated. N.Y. Times, May 10, 1960, p. 1, col. 5.

<sup>47</sup> Completely integrated projects decreased from 20.0% in 1958 to 19.9% in 1960; the percentage of Negro families living in integrated public housing projects varied slightly: 35.2% in 1958; 34.3% in 1959; 35.4% in 1960. Intergroup Relations Branch, PHA, HHFA, Trends Toward Open Occupancy in Low-Rent Housing Programs of the Public Housing Administration, June 1, 1960. New York City, frequently the forerunner in social legislation and administration, quietly initiated a policy in February 1959 of encouraging white families to move into projects in predominantly Negro neighborhoods and vice versa, in order to further integration. Roshco, *The New Leader* 10 (1960), reported in N.Y. Times, July 4, 1960, p. 1, col. 4.

<sup>48</sup> For example, San Francisco Housing Commissioner Shemano suggested that the S.F. Housing Authority buy old homes, renovate them, and rent them to low-income families who could buy them from the Authority when their financial position improved. Shemano argued that this plan would eliminate institutionalization of public housing and location of projects in slum areas. S.F. Chronicle, Oct. 15, 1960, p. 1.

<sup>49</sup> 42 U.S.C. § 1451 (c) (1958). For a description of the effect of displacement on Puerto Rican small businessmen in New York, see 1 Hearings, supra note 3, at 388.

<sup>50</sup> 63 Stat. 417 (1949), 42 U.S.C. § 1455(c) (1958).

mortgage financing for the construction of new housing for such families on good, well-located sites.<sup>51</sup>

The HHFA Administrator testified before the Commission on Civil Rights that "he intends to take action to assure that the intentions of Congress are more fully achieved by breathing 'deeper meaning' into the requirements of the workable program. He emphasizes that urban renewal 'must result in adding to the living space available to the people being displaced.'"<sup>52</sup>

How has this policy been carried out by URA?

The Urban Renewal Administration studied 42,998 families relocated under its programs. Of this number, 30,372 were nonwhite, that is, 71 per cent. Of the nonwhite families, 2,066, or 6.8 per cent, were re-located back into substandard housing, and 5,050, or 16.6 per cent, were lost in the relocation program, with no records available to indicate the kind of housing they moved into.<sup>53</sup> In other words, almost one-quarter of the nonwhite families were moved from one slum to other inadequate housing.

From such statistics and testimony of housing experts, the United States Civil Rights Commission summarized the problem:

Finally, the clearance of slums occupied largely by Negroes and the construction of new housing beyond the means of most Negroes has given rise to the suggestion that slum clearance is being used for 'Negro clearance.' Because of the restricted housing available to Negroes, displacement may mean their further concentration in overcrowded all-Negro areas. Whether such accentuation of the pattern of residential segregation, or in some cases the establishment for the first time of such a clear-cut pattern, meets the congressional requirement of relocation in 'areas not generally less desirable' than those originally occupied by the displaced persons, is another pressing question.<sup>54</sup>

A few months after the Commission issued its report, the United States Housing Administrator notified purchasers of land in urban renewal programs that that they are required to abide by local laws forbidding racial discrimination in housing, and that a final determination by a state or local tribunal that a developer has used land in violation of such local law may result in the refusal of the federal government to allow him to participate further in the program.<sup>55</sup>

While this is a salutary action, it will not touch the majority of the

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<sup>51</sup> Quoted in U.S. Comm'n on Civil Rights, *supra* note 2, at 175.

<sup>52</sup> *Ibid.*

<sup>53</sup> 1 Hearings, *supra* note 3, at 310. For examples of slum-dwellers displaced by a Title I project seven years after being displaced by an earlier Title I project, see N.Y. Times, Aug. 24, 1959, p. 23, col. 1, re Chelsea area, New York; N.Y. Times, Nov. 11, 1959, p. 37, col. 8, re Rockaways, Brooklyn. And see note 13 *supra*.

<sup>54</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 174-75.

<sup>55</sup> 5 Race Rel. L. Rep. 562 (1960).

nation which is not, as yet, covered by such legislation.<sup>56</sup> Negro families displaced by Title I projects in Eufaula and Gadsden, Alabama, tried a different approach. They sought injunctive relief to prevent private developers who purchased land cleared with government funds from excluding Negroes from the new housing to be constructed there. The federal district courts denied relief<sup>57</sup> and dismissed the suits for lack of an existing justiciable controversy, finding a lack of proof that Negroes would be excluded from the proposed housing to be constructed. The courts assumed that the private builders, "after receiving the federal assistance in this public project, will, upon completion of this project (or any phase of it), recognize the law that is now so clear; this law being to the effect that there can be no governmentally enforced segregation solely because of race or color."<sup>58</sup>

In voting to affirm the Gadsden decision, Judge Rives of the Court of Appeals for the Fifth Circuit stated his view that "the plan has not been completed until the property passes out of the control of the redeveloper, and hence in disposing of property within either of the Areas the redeveloper may not discriminate between purchasers on the basis of race or color."<sup>59</sup>

The United States Commission on Civil Rights recommended that the "Urban Renewal Administration take positive steps to assure that in the preparation of overall community 'workable programs' for urban renewal, spokesmen for minority groups are in fact included among the citizens whose participation is required."<sup>60</sup> Commissioners Hesburgh and Johnson supplemented this proposal with the suggestion that the URA and HHFA examine all 'workable programs' to assure that no community is using federal urban renewal assistance to accomplish 'Negro clearance,' as charged by witnesses before the Commission, who said some Title I projects are creating new patterns of segregated neighborhoods or substantially accentuating existing patterns of segregation. The Commissioners stated that such examination would require the services of persons of special competence in the field of inter-group relations.<sup>61</sup>

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<sup>56</sup> See discussion beginning in text at note 104 *infra*.

<sup>57</sup> *Tate v. City of Eufaula*, 165 F. Supp. 303 (N.D. Ala. 1958); *Barnes v. City of Gadsden*, 175 F. Supp. 64 (N.D. Ala. 1958), *aff'd*, 268 F.2d 593 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959).

<sup>58</sup> *Tate v. City of Eufaula*, 165 F. Supp. 303 at 306.

<sup>59</sup> *Barnes v. City of Gadsden*, 268 F.2d 593, at 594, 598.

<sup>60</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 186. See, e.g., complaint of leaders of the NAACP of lack of Negro representation in public housing study in Oakland, Cal., S.F. Chronicle, Dec. 4, 1959. URA prepared an excellent report describing optimum participation in planning process by members of minority groups, relocation of nonwhite families in private and public housing and rental units, reuse housing planned for biracial or open occupancy, new private housing open to nonwhite families. Racial Minority Aspects of Urban Renewal, Dec. 1958, Technical Memo No. 19, URA, reprinted in 2 Hearings, *supra* note 3, 133-55.

<sup>61</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 187-88. For criticisms of Title I

The two Commissioners also suggested that the federal-aid highway program be amended to provide that "in any urban area where any substantial number of low-income persons are to be displaced by the construction of a Federally-aided highway, the locality must incorporate the highway program in its urban renewal program, and the relocation requirements and standards of the Urban Renewal Administration must be met in regard to all such displaced persons, or the localities must otherwise see that decent, safe, and sanitary housing is available to such persons."<sup>62</sup>

Since the Commission's report, a new approach to urban renewal has been inaugurated in the Riverside-Amsterdam area of New York City, providing for spot clearance of some slum buildings, renovation of others, as well as construction of new buildings. The great dislocation which has accompanied most Title I projects, and displacement particularly of minority group members who cannot find adequate housing, will be substantially reduced in this project. As a result, residents petitioned to have the project put into operation "expeditiously and without further delay." URA officials expect many communities to propose projects of this kind.<sup>63</sup>

#### *Federal Housing Authority and Veterans' Administration*

There is no federal legislation covering racial aspects of FHA home mortgage loan insurance or VA's loan guaranty program. The most succinct description of the present policies and practices of these two agencies is contained in the Report of the United States Commission on Civil Rights:

[N]onwhite home buyers and renters have not enjoyed the benefits of FHA mortgage insurance to the same extent as whites. According to testimony before this Commission, fewer than 2 per cent of the total number of new homes insured by FHA since 1946 have been available to minorities, and most of these homes have been in all-Negro developments in the South.

Although the lower participation of nonwhites has in part been due to their lower incomes, FHA itself bears some responsibility. Until the Supreme Court ruled in 1948 that official enforcement of racially restrictive covenants was unconstitutional, FHA actually encouraged the use of such covenants.

This is no longer the case, but FHA continues to insure mortgages on housing developments where the builder announces his intention to exclude Negroes, even where this is contrary to state or city laws against discrimi-

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projects in New York City in terms of racial policies and creation of community disintegration, see City-Wide Council for Better Housing, *New York City's Slum Clearance Committee: A Critical Study* (1958); Cook & Gleason, "The Shame of New York", *The Nation*, Oct. 31, 1959, pp. 284-99.

<sup>62</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 188.

<sup>63</sup> N.Y. Times, Dec. 25, 1959, p. 22, col. 1.

nation. FHA assistance has played an important part in the development of all-white suburbs around most large cities.<sup>64</sup>

There have been five suits brought against landowners or developers who had received assistance in some form, seeking, on the basis of the involvement of governmental aid, to compel them to sell or lease non-discriminatorily. The first case, *Dorsey v. Stuyvesant Town Corp.*,<sup>65</sup> involved only state and municipal assistance. The Metropolitan Life Insurance Company, under the New York State Redevelopment Law, constructed a large low-rent housing project. The corporation received assistance from both the state and the city in the form of tax exemptions, condemnation through the power of eminent domain, and sale to the corporation of public streets in exchange for property surrounding the project. In addition, the city retained certain managerial control over the operation of the project, fixing maximum rents and profits and prescribing limitations with respect to financing, disposing of the property and altering of structures.

The corporation refused to rent an apartment in the project to an applicant because of his color, whereupon the applicant brought an action for an injunction to restrain the corporation from refusing to lease an apartment. In refusing to grant the requested relief, the court held that, in the absence of positive legislation governing the lease of such projects, the corporation was free to refuse to lease accommodations to the applicants. It reasoned that the general state constitutional guarantee of civil rights did not, perforce, require the company to rent its units without regard to race or color.

It was argued that, because of the measure of governmental assistance, the corporation was not acting merely as a private entity, but was, in fact, an agent of the state; hence, its activities constituted state action. Dismissing this argument, the court stated:

The aid which the state has afforded to respondents and the control to which they are subject are not sufficient to transmute their conduct into state action . . . .<sup>66</sup>

Previously decided state action cases were distinguished on the ground that "they disclose the exertion of governmental power *directly* to aid in discrimination,"<sup>67</sup> while the governmental assistance in the instant case was of the character of indirect "helpful cooperation."<sup>68</sup>

An additional factor which the court relied upon was that the agree-

<sup>64</sup> At 171-72. Racial problems in obtaining mortgages are described in 1 Hearings, *supra* note 3, at 225.

<sup>65</sup> 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950).

<sup>66</sup> *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 536, 87 N.E.2d 541, 551 (1949).

<sup>67</sup> *Id.* at 533, 87 N.E.2d at 550.

<sup>68</sup> *Id.* at 535, 87 N.E.2d at 551.

ment between the state and the corporation contained no provision for the basis of selection of tenants. During negotiations the corporation had insisted that it could not afford to make an investment of approximately 90 million dollars were it required to accommodate tenants without regard to race or color. The court construed this understanding as being an agreement on the part of the state not to interfere with this aspect of the management of the project. The corporation, relying on the understanding, proceeded to build and invest and could not withdraw under the terms of the agreement. It was therefore thought that to now require it to do what it had insisted initially it could not afford to do—with state acquiescence—would, in a sense, be confiscating the corporation's investment.

The dissenting judges argued that even if the state had agreed as the corporation insisted, such an agreement was of no effect since it was contrary to constitutional requirements imposed on the state.<sup>69</sup>

Three of the cases, *Ming v. Horgan*,<sup>70</sup> *Johnson v. Levitt & Sons*, (Pa.),<sup>71</sup> and *O'Meara v. Washington State Bd. Against Discrimination*,<sup>72</sup> involved federal aid through FHA and VA, but no state aid. In the *Ming* case, a Negro brought a civil suit for damages and other declaratory relief against certain named tract builder-subdividers and real estate agents for refusing to sell him a tract home because of his race. Before building the homes, the builder-subdividers had obtained FHA and VA-insured mortgages. Both the developers and the real estate agents were required under state law to secure licenses in order to construct tract developments. Upon compliance with state law, the developers were then qualified to seek federal assistance. They could, and in this instance did, avail themselves of federal approval of plans, layouts, utility services, construction standards and mortgage guarantees of loans upon federal assurance that adequate standards had been met. To attract prospective purchasers, the developers or their agents could advertise VA and FHA financing. There were, to be sure, no direct grants of federal funds to the developers.

The evidence adduced at the trial established that the developers and their agents had followed a pattern of refusing to consider Negro applicants in the sale of the tract homes. The developers argued that the federal commitments and other services received did not transform the

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<sup>69</sup> Id. at 544-45, 87 N.E.2d at 556-57.

<sup>70</sup> Civil No. 97130, Super. Ct., Sacramento County, Cal., June 23, 1958. See also Comment, "Builder of FHA Housing Held Barred From Discriminating Against Purchasers on Basis of Race: Possible Sources of Federal Prohibition And Basis for Cause of Action," 59 Colum. L. Rev. 782 (1959).

<sup>71</sup> 131 F. Supp. 114 (E.D. Pa. 1955).

<sup>72</sup> Civil No. 535996, Super. Ct., King County, Wash., July 31, 1959.



character of the building from private to governmental; hence, they were free to discriminate in the sale of the homes. Moreover, they argued, Congress had not, in setting up the housing assistance programs, placed any restraints on those who availed themselves of the assistance with respect to the lease or sale of housing. They reasoned that, because Congress had repeatedly rejected suggestions to include interdictions in the housing assistance laws regarding sales or rental practices, it had implicitly left the freedom of contract undisturbed.<sup>73</sup>

Rejecting this argument, the court stated:

If it be objected that Congress refused to so ordain, it must be replied that Congress could not ordain otherwise—the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not, those who operate under the law and seek and gain the advantage it confers are as much bound thereby as the administrative agencies of government which have functions to perform in connection therewith. Congress must have intended the supplying of housing to all citizens, not just Caucasians—and on an equal, not a segregated basis.<sup>74</sup>

The court concluded that, because of the state regulation of the developers in addition to the federal assistance, they were governmental agents.

In *Johnson v. Levitt & Sons, Inc.*, certain Negro plaintiffs brought an action in federal district court against both the federal government and the developers of Levittown, Pennsylvania, seeking a declaratory judgment and injunctive relief, alleging that the defendant developers refused them accommodations because of race. The developers had received the same type of assistance as defendants in the *Ming* case, including FHA and VA commitments. Plaintiffs argued that: (1) the government had not acted to prohibit the discriminatory practices of the developers, and (2) the developers, because of the assistance, were in fact governmental agents.

The court dismissed the suit against the government, conceding that the government probably had power to regulate the sale or lease practices of developers, but holding that the government was in no way connected with the alleged discriminatory practices of the developers and that an action would not lie to compel the court to protect an individual's rights when no such duty had been placed on the agencies administering the housing assistance programs. Thus, the court followed the familiar argument that when Congress acts with respect to a matter,

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<sup>73</sup> In the 1949 Housing Act, a non-discriminatory amendment was offered but rejected on grounds it was unnecessary. See remarks of Senators Taft and Thye, 95 Cong. Rec. 4797 (1949). It was also argued that inclusion of such an amendment in the bill would cause its defeat. *Id.* at 4855. Cf. remarks of Senator Douglas, *id.* at 4851-60.

<sup>74</sup> *Supra* note 70.

but is silent as to certain of its details, such silence is to be construed as an intent not to regulate those aspects not specifically mentioned.

As to the developers, the court summarily held that the relationship with the government was not sufficient to impose upon them those sanctions imposed upon government in the sale or lease of its property.<sup>75</sup> While the court did not enumerate its reasons for this holding, apparently it viewed the federal assistance as the New York court in the *Stuyvesant Town Corporation* case viewed state and municipal assistance, as only "indirect . . . helpful cooperation."

In *O'Meara v. Washington State Bd. Against Discrimination*, which arose under the Washington statute discussed below, an individual home owner, after advertising the property for sale, refused to sell his home to a Negro. The home in question had been purchased through a private sale insured by the FHA. It was argued that, apart from the state statutory enactment, the public assistance the landowner had received in the financing of his home constituted a valid basis for imposing upon the owner the obligation to give equal treatment to prospective purchasers. Rejecting this argument, but as an alternative ground for decision, the court held that the mere existence of an FHA-insured mortgage on one's house is far "too tenuous a thread" to use in imposing drastic sanctions on a private home owner. At the same time, the court conceded that *Ming and Levitt* (N.J.)<sup>76</sup> may have been correctly decided:

A plausible argument can be made that one who obtains an FHA commitment prior to construction of a mass housing development and thereafter avails himself of all of the FHA administrative machinery including approval of plans and inspection during construction, thereby becomes so intimately identified with government as to become affected with a public interest. It can be argued that such people become, to coin a phrase, *persons of public accommodation*.<sup>77</sup>

In the fifth case, *Hackley v. Art Builders, Inc.*,<sup>78</sup> Negro plaintiffs, seeking to purchase a home in an "all white" development under construction, brought a class action in a federal district court against (1) the developers (private corporations), (2) the county and sanitary district, and (3) the commanding officer of the Army Chemical Center

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<sup>75</sup> See *Public Util. Comm'n v. Pollack*, 343 U.S. 451 (1952), where action was instituted against the PUC, a governmental agency regulating public utilities in the District of Columbia, by private persons who objected to the Commission's refusal to prohibit the use of radio programs on streetcars and busses. Although the Court upheld the action of the Commission, in so doing, it reviewed the Commission's action and found it to be reasonable. See also, Horowitz, "The Misleading Search for State Action Under the Fourteenth Amendment," 30 So. Cal. L. Rev. 208 (1957).

<sup>76</sup> *Levitt v. Division Against Discrimination in State Dep't of Education*, 31 N.J. 514, 158 A.2d 177 (1960).

<sup>77</sup> *Supra* note 70.

<sup>78</sup> 179 F. Supp. 851 (D. Md. 1960).

where plaintiff Hackley was employed in a civilian capacity, requesting injunctive and declaratory relief.

The basic contentions of the plaintiffs were these: (1) That the contracts of the county and sanitary district with the developers wherein these governmental bodies agreed to furnish sewerage, water, storm drains, streets and other required services to the development were sufficient governmental assistance to give a public nature to the developers' activities; (2) that an agreement between the Army, county and sanitary district, whereby the Army agreed to furnish water and sewage facilities to the county, which would in turn be made available to the development under the county's contract with the developers, constituted additional government assistance, and that under this dual arrangement with the developers, the services furnished to the latter were sufficient to make their activities governmental rather than private; and (3) that the concurrence of the local governmental bodies and the Army Chemical Center in the practice of racial discrimination against plaintiff Hackley, an employee of "a priority National Defense installation" and a member of the Reserved Armed Forces, unreasonably interfered with Congress' powers to raise and support armies and secure the national defense under article 1, section 8, of the Constitution.

There was no assistance given to the developers similar to that given in *Ming, Stuyvesant Town, O'Meara and Levitt* (Pa.). Both the county and sanitary district were required by statute to furnish sanitary services impartially to all applicants. It was conceded that the refusal to sell was based solely on race. The sole question was whether the sanitary services rendered under the above arrangements constituted government aid legally sufficient to treat the developers as a government agency. Answering in the negative, the court held that the agreement between the developers and the county and sanitary district was an "arms-length contract" under which payments by the developers were made for services rendered by the governmental bodies. This was considered as no different from myriad contracts the sanitary district had with other parties who had need for its services. This agreement gave the developers no additional benefit over other developers nor did it place upon them any special tasks relative to the general public.

The thread between all of the cases discussed is the common question: What quantum of assistance must be present in order to transform the activity from private to governmental action? While it is doubtless true that every modicum of assistance in whatever form or however remote should not be held sufficient to constitute governmental action, it is equally important that when government and private persons act in

concert, the government's contribution should not be made in such a way as to work deprivations of constitutionally protected rights.

Although *Stuyvesant Town*, *Levitt*, *O'Meara* and *Ming* are basically alike—when compared to *Hackley*—in that all involved some direct governmental assistance, there are distinguishing features within these cases. In *Stuyvesant Town* the court made control the determinative test—control over the activities of the project as required by state law. And having found that the state did not retain control over the matter of selection of tenants, it concluded that the developers were free to discriminate against the applicants. In *Ming* the court made the bifurcated regulation of developers by state licensing requirements and federal regulation of standards of construction determinative. It expressly stated that, standing alone, the state regulation of the developers was not enough, but taken together, the state and federal regulation provided a sufficient basis for transforming the activities of the developers from private to governmental in character. In *Johnson* federal assistance alone was present. There the court made determinative the absence of congressional regulation of the sale and lease practices of assisted developers and the lack of a close relationship between the developers and the government. In *O'Meara*, as an alternative ground for decision, the court made the nexus between the governmental assistance and the recipient, the size of the undertaking, and the conditions placed upon receipt of the assistance, decisive.

From these cases it can readily be seen that the question has yet to be answered by clearly defined legal norms. Following the 1883 decision in the *Civil Rights Cases*,<sup>79</sup> where wholly private discriminatory practices were held not interdicted by the due process clause of the fourteenth amendment, there have been many instances where private individuals, because of their relationship to government, or because their activities were aided or in some manner fostered by government, have been held to be acting for or as government and, therefore, subject to the interdictions against governmental action. In *American Communications Ass'n v. Douds*,<sup>80</sup> the Court observed:

But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.

The government's thumb has been found involved in a number of decisions which may well point the way to determining the quantum

<sup>79</sup> 109 U.S. 3 (1883).

<sup>80</sup> 339 U.S. 382, 401 (1950).

of private-governmental relationship necessary to transform the activities of aided housing developers from a private to a governmental character and thus extend constitutional proscriptions against government to their selling and leasing activities. A labor union which is the exclusive bargaining agent for collective bargaining,<sup>81</sup> a private association conducting an election on behalf of a state,<sup>82</sup> a private association leasing park facilities from the state,<sup>83</sup> a private cafeteria leasing space in a public building,<sup>84</sup> a state park leased to private operators,<sup>85</sup> a privately established library operated, controlled and financed by the state,<sup>86</sup> a private concessionaire operating in a city and federal airport,<sup>87</sup> a swimming pool leased to private operators,<sup>88</sup> and what was, in the case, held to be a "company town,"<sup>89</sup> were held to be engaged in activity of a governmental nature and therefore subject to the same constitutional proscriptions applicable against government.

There is a second class of decisions in which a private-governmental relationship was extant, holding the relationship to be insufficient to change the character of the private activity. It has been held that a labor union may exclude Negroes from membership even though it was certified by the federal government as the exclusive bargaining agent.<sup>90</sup> A hospital which received public funds for services rendered may exclude doctors from practicing therein because of race or color.<sup>91</sup> A boys' club operated by a private corporation partially in public buildings, with substantial financial assistance from the public, with policemen assigned to work with the clubs, may validly limit membership to a particular

<sup>81</sup> *Conley v. Gibson*, 355 U.S. 41 (1957); *Syres v. Oil Workers Int'l*, 350 U.S. 892 (1955); *Brotherhood v. Howard*, 343 U.S. 768 (1952); *Tunstall v. Brotherhood*, 323 U.S. 210 (1944); *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944).

<sup>82</sup> *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1947).

<sup>83</sup> *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), vacating and remanding 202 F.2d 275 (6th Cir. 1953).

<sup>84</sup> *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956).

<sup>85</sup> *Department of Constr. & Dev. v. Tate*, 231 F.2d 615 (5th Cir. 1956). But see *Willie v. Harris County*, 5 Race Rel. L. Rep. 146 (Civil No. 11926, S.D. Tex. 1960), where Negro plaintiffs brought a class action against the county alleging discriminatory practices in the use of the park facilities operated directly by the county. The action was held to be prematurely brought because only "one instance" of refusal of use had been shown to have occurred and the plaintiffs had not petitioned the county requesting remedial action. And see *Reid v. City of Norfolk*, 179 F. Supp. 768 (E.D. Va. 1960), where similar exhaustion-of-remedies reasoning was used.

<sup>86</sup> *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945).

<sup>87</sup> *Coke v. City of Atlanta*, 5 Race Rel. L. Rep. 138 (Civil No. 6733, N.D. Ga. 1960); *Lawrence v. Hancock*, 76 F. Supp. 104 (S.D. Va. 1948).

<sup>88</sup> *Culver v. City of Warren*, 52 Ohio L. Abs. 385, 83 N.E.2d 82 (1948).

<sup>89</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>90</sup> *Oliphant v. Brotherhood*, 156 F. Supp. 89 (N.D. Ohio, 1957), aff'd, 262 F.2d 359 (7th Cir. 1958), cert. denied, 359 U.S. 935 (1959). And see, *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946).

<sup>91</sup> *Eaton v. Bd. of Managers*, 164 F. Supp. 191 (D.N.C. 1958), aff'd, 261 F.2d 521 (4th Cir.), cert. denied, 359 U.S. 984 (1959).

race.<sup>92</sup> A public golf course leased to private persons may, it has been held, segregate on the basis of race.<sup>93</sup> A private school with 23 per cent of its revenue from public funds and a percentage of its students appointed by public officials has been held to be free to exclude students of certain racial or ethnic groups.<sup>94</sup> And the lease of a municipal auditorium to private persons does not, it has been held, impose upon the lessees a duty to accept all patrons without regard to race or color.<sup>95</sup>

Although the two groups of cases were decided differently, together they indicate what factors courts consider material in determining whether a particular activity has ceased to be merely private and has taken on a governmental character. The relevant factors seem to be:

- (1) Control: What control has the government over the private activity?
- (2) Benefit: What aid did the private person or group receive, and in what manner was it given, directly or indirectly?
- (3) Nature of the activity as it relates to governmental functions: To what extent does the private activity displace, duplicate or otherwise partake of what has heretofore been classified as a governmental function?

The most effective criticism of the FHA and VA's policies is contained in the material quoted from the United States Civil Rights Commission's Report. The Commission found that:

The present policy of the Federal Housing Administration and the Veterans' Administration is not to do further business with a builder who has been found in violation of a State or city law prohibiting discrimination.<sup>96</sup>

and recommended:

... that, in support of State and city laws the Federal Housing Administration and the Veterans' Administration should strengthen their present agreements with States and cities having laws against discrimination in housing by requiring that builders subject to these laws who desire the benefits of Federal mortgage insurance and loan guaranty programs agree

<sup>92</sup> Mitchell v. Boys Club, 157 F. Supp. 101 (D.D.C. 1957).

<sup>93</sup> Norris v. Baltimore, 78 F. Supp. 451 (D. Md. 1948). But see the more recent cases to the contrary, Holmes v. City of Atlanta, 124 F. Supp. 290 (N.D. Ga. 1954), aff'd, 223 F.2d 93 (5th Cir.), rev'd and remanded, 350 U.S. 879 (1955); Beale v. Holcombe, 103 F. Supp. 219 (S.D. Tex. 1950), aff'd, 193 F.2d 384 (5th Cir. 1951), cert. denied, 347 U.S. 974 (1954).

<sup>94</sup> Easterly v. Dempster, 112 F. Supp. 214 (D. Tenn. 1953).

<sup>95</sup> Harris v. St. Louis, 111 S.W.2d 995 (Mo. 1938). The validity of this decision is questionable today. In Jones v. Marva Theatres & City of Frederick, 180 F. Supp. 49 (D. Md. 1960), a case identical in all essentials to the Harris case, it was held that municipal ownership of a theatre, even though leased to a private person, did not change the nature of the facility from a public to a private one and thus the interdictions of the fourteenth amendment were applicable. The Harris decision was not cited or discussed by the court.

<sup>96</sup> U.S. Comm'n on Civil Rights, supra note 2, at 184.

in writing that they will abide by such laws. FHA and VA should establish their own factfinding machinery to determine whether such builders are violating State and city laws, and, if it is found that they are, immediate steps should be taken to withdraw Federal benefits from them, pending final action by the appropriate State agency or court.<sup>97</sup>

In August 1959, HHFA Administrator Norman P. Mason eliminated racial quotas from relocation housing. Shortly after the Commission's report was issued, VA reached agreement with the New York State Commission Against Discrimination to insure that VA-owned properties in New York would be marketed on a nondiscriminatory basis. In November 1959, FHA instructed all staff members in the country to immediately inform all brokers handling acquired properties that the sale and rental of government-owned foreclosed housing shall be handled "without distinction as to race, creed, or color."<sup>98</sup> In 1960, the FHA made available to FHA field offices a public information record of FHA-financed houses which had been repossessed and listed for resale or rental, in response to complaints by Negro brokers that they had been unable to secure this information.<sup>99</sup>

In addition to these reforms, witnesses before the Commission urged that FHA underwriters be instructed to give priority to applications for loan insurance on renovation of urban property in integrated areas. Community organizations "fighting blight" felt FHA discriminated against their work by delaying action on loan guarantee applications, while quickly approving applications for new homes in all-white suburbs.<sup>100</sup>

The Commission heard considerable testimony concerning the role of banks and other mortgage-lending institutions in supporting racial segregation.<sup>101</sup> While most lenders insist that they make no racial or color distinctions in the granting of loans, and can show substantial portfolios of loans to nonwhites, there is no doubt that nonwhite borrowers are restricted to certain racial districts. This serves to sustain segregation and disadvantages minority mortgagors in terms of mortgage credit, because properties in the areas where they are permitted to buy are generally inferior risks from a lender's standpoint.<sup>102</sup>

The Commission made no finding or recommendation on this point. However, it would be in line with HHFA's announced policy of eliminating racial discrimination for FHA (and VA) to notify mortgage-lending institutions that racial segregation is against federal policy.

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Trends In Housing*, November-December 1959, p. 1.

<sup>99</sup> Release by Washington State Bd. against Discrimination, Sept. 12, 1960.

<sup>100</sup> 1 Hearings, *supra* note 3, at 877-78.

<sup>101</sup> 1 Hearings, pt. 1, at 224-25, 481, 492-93.

<sup>102</sup> *Where Shall We Live*, *supra* note 22, p. 29.

Since FHA and VA insure loans issued by such institutions, the government's policy could have an immediate effect on the lending policies of the institutions.

## II. STATE AND CITY LEGISLATIVE APPROACHES TO FAIR HOUSING AND THEIR VALIDITY

### *State Fair Housing Laws*

Fourteen states and approximately thirty-three cities have enacted laws regulating in some form the sale, lease or rental of housing accommodations. During the 1959 general legislative season five states either strengthened existing law or wrote upon a clean slate. In addition, the problem has been investigated and studied in a limited way by the United States Civil Rights Commission.<sup>103</sup>

#### A. 1959 Laws

1. *Colorado.* Colorado was the first state to enact a comprehensive fair housing practices law. In rather sweeping terms, its coverage includes "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 and lodgers."<sup>104</sup> Presumably, this provision covers all housing, no matter how financed; that is, it covers private housing financed through conventional methods as well as housing financed with governmental assistance (state or federal).

The act prohibits owners of any housing accommodation from refusing to transfer, rent or lease to any person because of race, creed, color, sex, or national origin or ancestry. It also forbids any owner from discriminating on any of these grounds in the terms, conditions or privileges pertaining to any housing or in the furnishing of facilities or services in connection therewith. Owners are also prohibited from making any written or oral inquiry or record concerning the above factors.

In addition, there are general prohibitions: No person may include in any transfer, rental or lease of housing any restrictive covenant or honor or put into effect such covenant.<sup>105</sup> Nor may anyone print or publish notices or advertisements relating to the transfer, rental or

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<sup>103</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 139-89. Studies of cognate problems invariably reflect the problems in the housing field. See, Advisory Comm. of Citizens, *supra* note 5, at 7.

<sup>104</sup> Colorado Fair Housing Act of 1959.

<sup>105</sup> *Id.* § 5(1)(c).



lease of any housing which indicate a preference, limitation or discrimination on the basis of race or color, etc.

Banks and financial institutions are prohibited from making inquiries of race or color, etc., of persons seeking financial assistance. Nor may these institutions discriminate on such grounds in the terms, conditions or privileges relating to obtaining financial assistance.

The act provides a limited exception from these prohibitions to religious or denominational institutions or organizations which control housing accommodations. These organizations are free to select tenants or buyers or restrict use of their facilities to members or persons deemed to be in the best interest of the organization. Under this provision a religious group operating an old-age or rest home could restrict use of its facilities to members only—even if it did not include certain ethnic groups in its general membership. But it could not deny use of its facilities to an applicant solely on the basis of race or color.

Finally, the act exempts groups or persons leasing accommodations “only to members of one sex.” The YMCA and YWCA, it seems, are representative organizations falling within this exemption. But again, the exclusion must be based on sex only.

Enforcement of the act is entrusted to the Colorado Anti-Discrimination Commission, an agency created in 1955 to administer the state’s fair employment and public accommodations laws.

The procedure is typical of administrative boards generally. Any aggrieved person may file a complaint with the Commission within ninety days after the occurrence of the alleged unfair housing practice. The Commission must seek first to conciliate the matter, and failing in this, it may then require the defendant to appear before the full Commission and, upon the evidence adduced, adjudicate the controversy. It may issue a cease and desist order or take other affirmative actions including, but not limited to, the transfer, rental or lease of the property in question.

The Commission is also empowered to subpoena witnesses, take testimony of witnesses under oath, and compel the production of any books or papers relating to the subject matter of the complaint filed. Persons claiming to be aggrieved by an order of the Commission, including refusal to issue an order, may obtain judicial review of such administrative action.<sup>106</sup>

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<sup>106</sup> In the first order issued under the new fair housing law, *In re Rhone*, Negro plaintiffs sought unsuccessfully to purchase a house in an all white neighborhood. Before the refusal, plaintiff’s earnest money receipt was accepted and a contract signed, but thereafter the real estate agents sought to release themselves from the sale. After a hearing, the C.A.D.C. issued an order directing the defendants to give plaintiffs “the opportunity of purchasing a comparable home in the same general neighborhood or a comparable neighborhood in Colorado Springs, Colorado . . . and under the same terms and conditions

2. *Massachusetts.* Massachusetts was the second state to enact a comprehensive fair housing law.<sup>107</sup> Amending the 1957 Housing Act,<sup>108</sup> the 1959 act prohibits an owner, lessee, sub-lessee, assignee or managing agent from refusing to sell or lease to a prospective occupant because of race or creed. Like the Colorado act, it covers both public and private housing generally. Briefly, the law covers: (1) multiple dwellings and developments of ten or more one- or two-family units "located on land that is contiguous (exclusive of public streets)," or (2) housing which "was one of ten or more lots of a tract whose plans have been submitted to a planning board. . . ."

Written or oral inquiries or records concerning race, creed or color of a prospective occupant are also prohibited.

The act is administered by an administrative board created under the 1957 act. Its procedures are basically the same as those of the Colorado Commission. Also, the penalties in the 1957 act are applicable to the instant act.<sup>109</sup>

The act was patterned after the New York City Fair Housing Ordinance. The Massachusetts act does not, however, contain the New York provision exempting religious or charitable groups which maintain housing accommodations from the broad prohibition. However, it would seem that this omission is not material.<sup>110</sup>

During a 1960 session of the legislature, Massachusetts amended its 1959 act to prohibit any person engaged in the business of granting mortgage loans from discriminating against any person in the granting of such loans because of race, color, creed, religion or national origin.<sup>111</sup> In a December 1959 opinion the state attorney general had ruled that the state's Public Accommodation statute was applicable to real estate agents in accepting bookings and other services rendered by such persons because, as the opinion states, a real estate agency is a "place which is open to and accepts and solicits the patronage of the general public," even though the property in question was not of the type specifically mentioned in the state's Fair Housing law.<sup>112</sup>

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as such a home would be offered to any other person." The matter has been appealed and is presently pending. *Rhone v. J. L. Case & Co.*, 6 Civ. Lib. Docket 43 (1960).

<sup>107</sup> Acts and Resolves of Mass., ch. 239, Acts of 1959.

<sup>108</sup> Mass. Ann. Laws ch. 151B, § 1(12) (Supp. 1959).

<sup>109</sup> Violators may be imprisoned for not more than one year or fined not more than \$500, or both. Mass. Ann. Laws ch. 151B, § 8 (1957).

<sup>110</sup> Although the provision is captioned an exemption (and this is true of the Colorado act), it is nothing more than a preference. Religious groups may limit use of their facilities to those promoting their principles or members, but they may not solely on the basis of race, color or religion, exclude others.

<sup>111</sup> Mass. Ann. Laws ch. 151B, § 4 (Adv. Service 1960, p. 70).

<sup>112</sup> 5 Race Rel. L. Rep. 253, 254 (1959). This, then, is in fact not a discrimination—at least not of the type against which the act operates—and being merely a preference, not covered by the act, religious groups in Massachusetts may so lease or operate their accommodations with impunity.

3. *Connecticut*. Amending an early law,<sup>113</sup> Connecticut was the third state to enact a comprehensive fair housing law covering generally public and private housing.

The Connecticut Act has a two-fold objective: It prohibits discrimination because of race, creed or color in places of public accommodation, and in housing. In the terms of the act, the housing covered is "public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation offered for sale or rent which is one of five or more housing accommodations all of which are located on a single parcel of land or parcels of land that are contiguous without regard to highways or streets, and all of which any person owns or otherwise controls the sale or rental thereof."<sup>114</sup>

The act is administered by the Connecticut Commission on Civil Rights. This agency operates in much the same fashion as the Colorado and Massachusetts boards. Its primary duty is to seek to bring about adjustments of complaints arising between prospective occupants and landlords. However, in addition to this administrative remedy, violators of the act may be penalized.<sup>115</sup>

Four civil rights statutes were passed at the 1959 session of the Connecticut General Assembly. Three of the measures—fair employment, broadening powers of the Commission with respect to initiating complaints, and fair housing—were recommended by the Commission. After studying the housing problem in the state, the Commission recommended enactment of a statute similar to those in New York City, Pittsburgh, Pennsylvania, and Massachusetts, but the end product is perhaps an admixture of the three. Its coverage is more pervasive than its three models, and it, like the Massachusetts act, does not provide an exemption to religious or charitable organizations operating housing accommodations.

4. *Oregon*. Amending in part and repealing in part an earlier law,<sup>116</sup> Oregon enacted a new law regulating primarily the activities of persons engaged in the business of selling or leasing housing.<sup>117</sup> It prohibits such persons from engaging in certain discriminatory practices, based on the incidents listed in the above statutes: (1) accepting or retaining

<sup>113</sup> Conn. Gen. Stat. Ann. § 53-35 (Supp. 1959) amending § 1407b, Acts of 1949. And see, Conn. Gen. Stat. Ann. § 53-36 (Supp. 1959), broadening the powers of the Civil Rights Commission. For comments on the acts, see, Conn. State Comm'n on Civil Rights, Civil Rights Bulletin, June 1959, p. 4.

<sup>114</sup> Conn. Gen. Stat. Ann. § 53-35 (Supp. 1959).

<sup>115</sup> A violator may be penalized by a fine of not less than \$25 or more than \$100 and may be imprisoned for not more than 30 days, or both. In addition, a violator may be fined not more than \$1,000 or imprisoned for not more than one year or both under the general statutes. Conn. Gen. Stat. Ann. § 53-35 (Supp. 1959).

<sup>116</sup> Ore. Rev. Stat. § 659.032 (Supp. 1957).

<sup>117</sup> Id. § 659.010, Supp. 1959.

a listing of property with the understanding that a prospective purchaser may be discriminated against; (2) refusing to sell, lease or rent; (3) making a distinction in price, terms, or conditions of sale; (4) attempting to discourage a sale, rental or lease; and (5) expelling an occupant from housing accommodations.

In a general provision, the act forbids any kind of circulation, display or advertisement which indicates a preference or limitation based on race, color or creed, etc.

There is also another general provision which prohibits any person from assisting, inducing or inciting another person to engage in conduct violative of the act.

The act is administered by an administrative board in much the same manner as the above statutes. There are, however, as in the Connecticut act, criminal penalties in addition to administrative relief.<sup>118</sup>

As stated at the outset, owners as such are not covered by the prohibitions against discrimination in the sale or lease of property. They are, however, prohibited from advertising that they will sell on a discriminatory basis. They are also prohibited from working in concert with a real estate broker or agent in discriminatory housing practices. There are, then, restraints both direct and indirect against owners, as owners, in the sale or lease of their property. They are not entirely at liberty to disregard the prohibitions of the act.

The act has no provision setting forth the type of units covered or nature of the financing of the housing, as is common to all of the remaining acts. Presumably, it covers all housing whatever size, location or structure.

5. *California.* At its 1959 legislative session, the California General Assembly enacted three major civil rights bills: (1) a fair employment practices law,<sup>119</sup> (2) amendments to the public accommodations law,<sup>120</sup> and (3) a fair housing law, covering publicly assisted housing generally.<sup>121</sup>

The Housing Act prohibits discrimination, based on the incidents common to all of the fair housing laws, in the sale or lease of the following categories of housing:

- (1) Housing which at the time of unlawful discrimination is exempted in whole or in part from taxes levied by the state or any of its political subdivisions.<sup>122</sup>

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<sup>118</sup> Id. § 659.110.

<sup>119</sup> California Fair Employment Practices Act, Cal. Lab. Code §§ 1410-32 (Deering Supp. 1959).

<sup>120</sup> Unruh Civil Rights Act, Cal. Civ. Code § 51 (Deering 1960).

<sup>121</sup> Cal. Health & Safety Code § 35700-40 (Deering Supp. 1959).

<sup>122</sup> Id. § 35710(3)(a).

- (2) Any housing constructed on land sold below cost by the state pursuant to the Federal Housing Act of 1949.
- (3) Any housing constructed in whole or in part on property acquired by the state through the power of condemnation or otherwise for the purpose of constructing housing thereon.
- (4) Housing located in a multiple dwelling—which is defined in the act as “a dwelling . . . occupied . . . for permanent residence purposes or which is rented, leased [etc.] . . . to be occupied as a residence or home of three or more families living independently of each other,” and which is financed in whole or in part by federal, state or local funds.
- (5) Developments of five or more housing accommodations located on land that is contiguous, exclusive of public streets, which is financed in whole or in part by government funds.<sup>123</sup>

In a somewhat restrictive provision, inquiries concerning the race, creed or religion of prospective tenants are prohibited. Owners, with knowledge that their property is financed, either in whole or in part, through public assistance, are not permitted to make inquiries, written or oral, concerning the race or creed of a prospective occupant “for the purpose of violating” the act.<sup>124</sup>

Probably the ready legal answer would be that under the California provision, it is, as with all laws, merely a matter of proof—proof that the inquiry was made for the purpose of getting around the interdictions of the act. But in practical operation and effect, this restrictive clause greatly dilutes the positive interdictions against the actual sale, rental or lease of property. It becomes apparent by merely posing the question: What purpose could such an inquiry to a prospective occupant serve if the owner is, in the first instance, prohibited from dealing with him on the basis of his race, creed or color? The provision, it seems, is merely tautological since the statute, in terms, makes race, color, religion or creed irrelevant considerations in leasing or selling certain types of publicly assisted housing.

In a separate section, privately owned property is exempted from the coverage of the act.<sup>125</sup>

Unlike other fair housing laws, enforcement is entrusted to court action. An aggrieved person is given a right of action in an appropriate court for “restraint of such violation and for other equitable remedies including such affirmative relief as may be necessary to undo the effects

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<sup>123</sup> Id. § 35710 (3)(b), (3)(c), (3)(d), (3)(e).

<sup>124</sup> Id. § 35720(3).

<sup>125</sup> Id. § 35740.

of such violation."<sup>126</sup> In addition, an aggrieved person is given a right of action for damages "in a sum of not less than five hundred dollars" for loss caused by a violation.

The success of this act, then, depends upon the effectiveness of the judicial relief. It is, to be sure, more cumbersome and less expeditious than administrative relief. But under the general provision authorizing equitable relief, an aggrieved person may well be able to secure complete relief. In the first cases brought under the act, prompt relief was obtained when the trial courts issued preliminary injunctions restraining the unwilling tract developers from selling the lots selected by the willing Negro buyers, pending trial.<sup>127</sup>

In addition, according to a recent opinion rendered by the Attorney General of California, the 1959 amended Public Accommodations Act is applicable to real estate operators.<sup>128</sup> Should the Attorney General's opinion become law, there would be accomplished in a limited measure what the legislature declined to do, that is, regulate the sale or lease of private property. If a real estate broker or agent is prohibited from denying the "accommodations, advantages, facilities, privileges, or services" to an individual because of his race or color, he could not, consistently with the act, refuse to sell, lease or rent available accommodations whether they be private or publicly assisted.<sup>129</sup> It may be that the lawmakers "built better than they knew."

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<sup>126</sup> *Id.* § 35730.

<sup>127</sup> *Pearson v. Frumenti*, Civil No. R 7073, Super. Ct., 5(2) Civ. Lib. Docket 41, Contra Costa County, Cal., Nov. 20, 1959. Negro plaintiffs tried to purchase an FHA insured home in a development. It was alleged that the refusal to sell was because of the race of the plaintiffs. At the trial in April 1960, the defendants indicated a desire not to proceed with the case and entered into an agreement whereby another house was offered plus damages (\$400), contingent upon plaintiffs' securing financing for the new house.

<sup>128</sup> 34 Ops. Cal. Att'y Gen. 230 (1959). While this opinion, should it become law, may strengthen the fair housing act, it raises a host of questions. The public accommodations act gives an aggrieved person a right of action for damages in an amount not less than \$500, just as the fair housing act does. Would not, then, an aggrieved person have two causes of action based on the same delict, assuming the housing in question is also covered by the housing act? The interdictions in the housing act operate not only against the owner but against any one who endeavors to sell housing accommodations covered by the act contrary to its provisions.

True, the acts have different and distinct spheres of coverage: One operates against the seller or owner of publicly assisted property and the other, against operators of public places of accommodation. But there are areas where the two seem to overlap.

The basic objective of the acts is to protect certain groups against discrimination. It would appear, then, that a person could have but one cause of action growing out of discriminatory practices prohibited in both acts. Once a violator has been brought to book—even if the conduct complained of is violative of another act designed to achieve the same or identical end—the matter would thereafter be at an end. In short, the second action would be barred. There may of course be instances where an aggrieved may have two causes of actions against the same individual based on two distinct wrongs.

<sup>129</sup> The first reported case is *Burks v. Poppy Constr. Co.*, Civil No. 496058, Super. Ct., S.F. County, Cal. January 26, 1960, 5(2) Civ. Lib. Docket 41, where plaintiffs, Negroes, were denied solely because of their race the right to purchase a tract home advertised for sale. Action was instituted under the Fair Housing Act and the amended Unruh Civil

### *B. Prior Enactments*

The five laws enacted in 1959 by no means accurately reflect the general concern and efforts by states to remedy the problems of denial of housing facilities to certain groups. Thirteen states, including those discussed above, considered proposals designed to regulate the lease or sale of housing accommodations.<sup>130</sup> Many of these proposals were passed by one house of the legislature but either were defeated by the other or allowed to succumb by adjournment.

Nor is 1959 a record year. In 1957 five states<sup>131</sup> enacted laws regulating in some manner discrimination in housing. Four of these laws prohibit discrimination in publicly assisted housing, which covers federal assistance in addition to state or local aid. As noted above, this was a dominant feature in many of the 1959 laws. These laws are generally limited in coverage to developments of not less than a minimum number of houses on contiguously located land, or multiple dwellings of a minimum number of units. Several forbid discriminatory questions of prospective occupants.

The original Oregon law and the Washington law forbid discriminatory advertising.

The Washington act also contains a provision which the recent Colorado act incorporated. It prohibits discrimination by financial institutions in making inquiries of applicants for loans and in making loans for houses covered by the act.

Although rejecting a proposal to prohibit discriminatory housing practices generally, Minnesota enacted a law declaring it to be a civil right to buy, rent or enjoy housing accommodations, and created an interim commission to study the problem for a two-year period.<sup>132</sup> It is unclear

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Rights Act against the construction company, realty company and the agents handling the accommodations. See also *Gerrish v. Shattuck*, Super. Ct., San Diego County, Cal., January 1960, 5(2) Civ. Lib. Docket 41, where only damages are being sought against a builder, lending institution and real estate broker for allegedly conspiring to deny plaintiffs certain housing accommodations because of the national origin of one of the plaintiffs. Neither the fair housing act nor the public accommodations act is expressly invoked. A similar pending case is *Holmes v. Macco Constr. Co.*, Civil No. 247453, Super. Ct., San Diego County, Cal. In *Hudson v. Nixon*, Civil No. 28219, Super. Ct. Merced County, Cal., 5(4) Civ. Lib. Docket 96, January 5, 1960, Negro plaintiffs were granted \$1,000 damages in a suit filed under the new Fair Housing Law and the amended Public Accommodations Act when defendants refused to lease rental accommodations because of plaintiffs' race.

<sup>130</sup> In addition to the five laws discussed above, Kansas, Michigan, Minnesota, New Mexico, New York, Ohio, Pennsylvania and Washington considered fair housing legislative proposals. See, American Jewish Congress Memo No. 257, May 11, 1959.

<sup>131</sup> Massachusetts: supra note 108; Minnesota: Minn. Stat. Ann. 462.481 (Supp. 1959); New Jersey: N.J. Stat. Ann. § 18:25 (Supp. 1959); Oregon: supra note 116; and Washington: Wash. Rev. Code § 49.60.217 (1959). The states are collected in *Nondiscrimination Clauses in Regard to Public Housing, Private Housing and Urban Redevelopment Undertakings* (rev. ed. 1957). See also Sherr, "Present Status of Legislation Prohibiting Discrimination in Housing," 18 Law. Guild Rev. 23 (1958).

<sup>132</sup> Supra note 131.

whether this mere declaration of state public policy accords to aggrieved persons a right of action, either civil or equitable, upon a violation of this declared right. If equitable relief is proper, then one could accomplish through the courts what the legislature expressly declined to do, *i.e.*, regulate discriminatory practices in housing. On the other hand, if civil damages are proper, the question then arises as to the measure. Would an aggrieved party be entitled to compensatory damages or merely nominal damages to vindicate his rights? There appears to have been no reported litigation arising under this provision.<sup>133</sup>

Prior to 1957 there had been occasional enactment of fair housing laws in several states.<sup>134</sup> These laws operated in much the same manner as those discussed in detail above. Many states followed a serial pattern of enactment; that is, a public housing law was first enacted, and later, publicly assisted housing was included. The history of New York's fair housing legislation is illustrative. In 1939 New York enacted a public housing law, prohibiting discrimination in the state's low-rent public housing projects and private housing built under the state's Limited Dividend Law.<sup>135</sup> In 1946, legislation was enacted to regulate housing practices in emergency housing for veterans.<sup>136</sup> Later, in 1950, the law was again amended to cover publicly assisted housing.<sup>137</sup> And in 1955 the law was further amended to cover housing accommodations receiving publicly insured financing.<sup>138</sup> As can be seen from this chronology, each successive step extends the coverage of the law to other facets of the same problem.

Following a similar serial pattern, New Jersey amended its anti-discrimination law in 1960 to authorize the Commissioner of Education, who supervises the operations of the Division Against Discrimination, to file complaints on his own initiative and in the absence of complaints by aggrieved parties.<sup>139</sup>

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<sup>133</sup> In *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530, 87 N.E.2d 541, 548 (1949), the court held, *inter alia*, that the general state constitutional provision, "No person shall, because of his race, color, creed or religion be subjected to any discrimination in his civil rights by any other person", did not, perforce, provide a basis for striking down discriminatory practices of individuals. See also *Barrows v. Jackson*, 346 U.S. 249 (1953); and *Shelley v. Kraemer*, 334 U.S. 1 (1948), where damages were not allowed, though there were violations of constitutional rights. And see Note, 44 Ill. L. Rev. 363 (1949).

<sup>134</sup> See *supra* note 131, and 2 *Emerson & Haber, Political and Civil Rights in the United States 1258-60* (2d ed. 1958).

<sup>135</sup> N.Y. Pub. Housing Law.

<sup>136</sup> N.Y. Sess. Laws 1946, ch. 3, § 201 (expired 1953).

<sup>137</sup> N.Y. Civ. Rights Law §§ 18a-e (Supp. 1960).

<sup>138</sup> N.Y. State Fin. Law § 178.

<sup>139</sup> N.J. Laws 1960, ch. 59.



### C. Comparison

Graphically, the present status of state fair housing legislation is as follows:

A COMPARISON OF STATE FAIR HOUSING LEGISLATION

STATE	COVERAGE					ENFORCEMENT		
	Public Housing	Publicly Assisted and/or Urban Renewal	FHA- and VA-insured	Private Housing	Lending Institutions	Advertising	Administrative Agency	Judicial
California	X	X	X		X	X		X
Colorado	X	X	X	X	X	X	X	
Connecticut	X	X	X	X			X	
Indiana		X						X
Massachusetts	X	X	X	X	X	X	X	
Michigan	X							X
Minnesota	X	X						X
New Jersey	X	X	X		X		X	
New York	X	X	X				X	
Oregon	X	X	X	X		X	X	
Pennsylvania	X	X						X
Rhode Island	X						X	
Washington	X	X	X	X			X	
Wisconsin	X	X						X

Note: Illinois prohibits restrictive covenants in redevelopment housing.

### City Fair Housing Ordinances

Presently, approximately thirty-three cities have ordinances or resolutions affecting discrimination in housing.<sup>140</sup> Although the wisdom of municipal activity in this area has been questioned,<sup>141</sup> much of the present state legislation came after the localities had acted, and, in addition, states have at times looked to the municipalities for guidance in enacting state laws.

The New York City Ordinance, used as a model by Connecticut and Massachusetts, in its main essentials is the same as the state acts.<sup>142</sup> It is administered by the Commission on Intergroup Relations, an agency created under the 1955 housing ordinance.<sup>143</sup>

There are, however, two features found in the New York Ordinance which were not incorporated in state statutes. An intermediate review board was set up to review the action of COIR after conciliation had failed and before a matter could be taken into court. The addition of this step in the administrative procedure for relief was thought by many to make difficult a simple and expeditious procedure for relief. The ordinance also requires that all proceedings before COIR and the

<sup>140</sup> Discussed *infra* at p. 243. See also 3 Trends in Housing May-June 1959, p. 8, listing thirty-two of the municipalities with fair housing ordinances.

<sup>141</sup> Note, 107 U. Pa. L. Rev. 515, 533-40 (1959).

<sup>142</sup> 5 N.Y. City Code & Charter § W41-1.0 (Supp. 1960).

<sup>143</sup> *Id.* at § W41-1.0 (g).

newly created review board be "confidential." This requirement was opposed generally at the time of enactment because it was thought to be ambiguous. Opponents of the requirement argued that it might be construed to apply to a complainant seeking relief before COIR or the board and to newspapers merely reporting newsworthy occurrences. Little need for the requirement could be seen if it was directed to benefit COIR or the board since both were empowered to subpoena evidence and hold hearings. Nevertheless, there seem to have been no problems arising under these provisions.

The ordinance is not a penal statute. As originally introduced, it contained penal provisions but on final passage enforcement was left primarily to COIR. However, in at least one instance the probation department of the city magistracy imposed a sentence on a tenement agent where it was found in her probation report that the Fair Housing Law, in addition to other safety ordinances, had been violated.<sup>144</sup>

In a recent case before a state supreme court, the ordinance was held to be constitutionally valid. The court could find no merit in the argument that the enactment unreasonably infringed a real estate operator's right to freedom of selection of tenants or was otherwise beyond the ken of legislative police powers.<sup>145</sup>

Pittsburgh, Pennsylvania, is the only other city regulating private housing in some manner.<sup>146</sup> Its ordinance covers sales or rentals by persons who own or control five or more units and all parallel activities of real estate operators and lending institutions. Like the New York City ordinance, it is enforced by an administrative body.

A second type of city ordinance found in about nine cities deals generally with publicly assisted housing (FHA- or VA-insured or state assisted) and urban redevelopment (URA).<sup>147</sup> These measures are essentially like those found in several of the states. They forbid discrimination on the basis of race or color in housing accommodations of a stipulated number of units or tract homes located on contiguous land.

A third type of measure deals with public housing projects (PHA).<sup>148</sup>

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<sup>144</sup> N.Y. Times, October 12, 1959.

<sup>145</sup> *Martin v. N.Y.C. Comm'n on Intergroup Relations*, 143 N.Y.L.J. 13 (Sup. Ct. N.Y. County 1960).

<sup>146</sup> 4 Race Rel. L. Rep. 195 (1959). The ordinance was approved December 8, 1958, and supplements an earlier ordinance prohibiting discrimination in employment. See 1 Race Rel. L. Rep. 746 (1956).

<sup>147</sup> The cities are: Los Angeles, Sacramento and San Francisco, California; Hartford, Connecticut; Des Moines, Iowa; Superior Township, Michigan; Minneapolis and St. Paul, Minnesota; and Cincinnati and Cleveland, Ohio. Compiled in materials cited at notes 131 and 140 *supra*.

<sup>148</sup> The cities are: Phoenix, Arizona; Fresno, Richmond and San Francisco, California; Hartford, Connecticut; Wilmington, Delaware; Washington, D.C.; Chicago, Illinois; South Bend, Indiana; Baltimore, Maryland; Boston, Massachusetts; Pontiac and Superior Town-

At present, approximately twenty-seven cities have ordinances or regulations dealing solely with public housing. Many of the cities included in the public housing group have expanded their regulatory scheme to other housing.

As noted, many of the cities have preceded the states in enacting fair housing legislation. Much of what has been done by the states was based on the experience of municipalities. It has been suggested that the matter of fair housing is not a problem that can be adequately remedied at the city level; that the presence of city regulation, especially where there is state regulation, presents possible questions of duplication of regulation, or even conflict. More importantly, the argument runs, city regulation may well raise questions of the extent of a municipality's police power and, more specifically, its power to declare civil rights or to cut down existing rights.<sup>149</sup> Other have recommended greater municipal activity with respect to fair housing measures.<sup>150</sup>

The governmental power most directly felt by a citizen is that nearest him, a municipality. Also, the impact of social problems on government, especially those of a domestic and localized nature, is first felt by the governmental unit nearest it, again, a municipality. And in the housing field, the problem is first discerned in the population centers—the cities. It seems, therefore, that the governmental unit nearest the problem,

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ship, Michigan; Minneapolis and St. Paul, Minnesota; St. Louis, Missouri; Omaha, Nebraska; Newark, New Jersey; Cleveland and Toledo, Ohio; Chester, Delaware County, Erie and Philadelphia, Pennsylvania; Providence, Rhode Island; Pasco, Washington; and Superior, Wisconsin. See also, materials cited *supra* notes 131 and 140.

<sup>149</sup> See, Note, *supra* note 141, at 533-35. And see, Comment, "Validity of Municipal Law Barring Discrimination in Private Housing," 58 *Colum. L. Rev.* 728 (1958), concluding that the New York ordinance, discussed above, is constitutionally valid. Municipal home rule, to be sure, often times presents problems of legislative jurisdiction, but in each of the states under their respective method of empowering municipalities to act, there is an area where cities may act in respect of local housing problems. In California, for example, the authority of cities and counties to enact ordinances pertaining to housing is found in two state constitutional provisions. Art. XI § 11, provides:

Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. Authorizing the formation of cities and towns under freeholders' charters, art. XI, § 6, provides in part:

Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered . . . to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.

Jurisdictionally, then, it seems that non-chartered California cities may enact housing legislation, limited only to the extent that such regulation does not conflict with general law. And with chartered cities, the limitation seems to be that the regulation, i.e., housing legislation, must constitute a municipal affair and not subject to limitations or restrictions in individual charters. See, McCarty, *Local Regulation of Housing Conditions in California* (Bureau of Pub. Adm., Univ. of Cal., Berkeley, June 1958).

<sup>150</sup> See, Committee on Integration in Housing, "The Need for a Comprehensive Anti-Discrimination Law," 18 *Law. Guild Rev.* 26 (1958) and materials cited at note 168 *infra*.

experiencing the attendant consequences of an overcrowded area, of ghettos and slums, is probably best qualified to act in the circumstances. Moreover, the problems of a particular city may be such that a state-wide program would serve little use. A city's problems may well be peculiar to it, and through local regulation the remedy can be tailored to meet the need. The recent hearings of the United States Commission on Civil Rights in several cities on the housing problem laid bare this fact.<sup>151</sup>

### *Validity of State and City Fair Housing Laws*

The residuum of governmental power under which states may enact fair housing laws is the police power. Its limits are incapable of precise delineation. The approach followed in *Houston v. Moore*,<sup>152</sup> an early case, perhaps best illustrates the penumbral area of state power. The Court listed three general areas in which states are powerless to act: (1) where the power is lodged exclusively in the federal constitution; (2) where it is given to the United States and prohibited to the states; and (3) where, from the nature and subject matter of the power, it must necessarily be exercised by the federal government. In addition to these prohibitions or limitations and the limitations included in the respective state constitutions, there are two additional constitutional proscriptions on the exercise of the police power—the equal protection and due process clauses of the fourteenth amendment.

#### *A. Due Process*

Because of the reach and scope of police power, being neither susceptible of precise delineation nor definable by any talismanic formula, due process limitations on the power may be determined by examining the subject matter which occasions its exercise.<sup>153</sup> Broad generalizations, fundamental principles and notions of justice, fair play and liberty, deeply rooted in the traditions of the English-speaking world, can only be applied on an instance-by-instance, case-by-case approach.

It is generally stated that the due process proscriptions do not proscribe state regulation *per se*, but merely require that the means employed must not be arbitrary or oppressive; they must bear a reasonable relation to a governmental objective such as the public health, safety, morals or general welfare.<sup>154</sup> It is not enough merely to invoke such doctrinal

<sup>151</sup> See note 103 *supra*.

<sup>152</sup> 5 Wheat. 1 (1820).

<sup>153</sup> *Berman v. Parker*, 348 U.S. 26 (1954); *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80 (1946); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Block v. Hirsh*, 256 U.S. 135 (1922). And see *Hetherington*, "State Economic Regulation and Substantive Due Process of Law", 53 Nw. U.L. Rev. 13, 226 (1958); *Paulsen*, "The Persistence of Substantive Due Process in the States", 18 Ohio St. L.J. 384 (1957).

<sup>154</sup> See cases cited note 153 *supra*, and see, e.g., *Atchison, T. & S.F. Ry. v. Pub. Util.*

terms as "reasonably necessary," "general welfare" or "health, safety and morals" when testing a police measure. A doctrinaire or conceptualistic approach merely begs the question. What is necessary is a detailed enumeration of the facts or factors which imperil the tranquillity of the community and thus provide occasion for the exercise of this power. Typically, the New York Fair Housing Ordinance listed the relevant factors which prompted the municipality to act:

In the City of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, religion, national origin and ancestry, many persons have been compelled to live in circumscribed sections under substandard, unhealthful, unsanitary and crowded living conditions because of discrimination in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, intergroup tension, loss of tax revenue and other evils. As a result, the peace, health, safety and general welfare of the city and all its inhabitants are threatened. Such segregation in housing also necessarily results in other forms of segregation and discrimination which are against the policy of the state of New York. It results in racial segregation in public schools and other public facilities, which is condemned by the constitutions of our state and nation. In order to guard against these evils, it is necessary to assure to all inhabitants of the city equal opportunity to obtain living quarters, regardless of race, color, religion, national origin or ancestry.<sup>155</sup>

By articulating the reasons and factors which gave rise to the occasion for the exertion of power, its validity can be more readily tested. It is no longer open to question that upon review great weight is accorded the findings of a legislature, and that a court will not sit as a super legislature or substitute its judgment for that of a lawmaking body.<sup>156</sup> Legislative enactments are deemed presumptively constitutional, and only where it is shown that the legislative action is arbitrary or unreasonable will the courts invalidate it.<sup>157</sup> Therefore, in determining the validity of the several state and municipal fair housing laws, it is instructive to examine some of the decisions discussing the validity or invalidity of police measures in similar or related areas.

*Public Accommodations Measures.* Presently, twenty-one states, the District of Columbia, Puerto Rico and the Virgin Islands have statutes prohibiting owners and operators of places of public accommodation from discriminating on racial or religious grounds in the admission of guests, and prohibiting public advertisements designed to discourage

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Comm'n, 346 U.S. 346 (1953); *Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

<sup>155</sup> Preamble to New York City Ordinance, *supra* note 142.

<sup>156</sup> See cases cited in notes 153 and 154 *supra*.

<sup>157</sup> *Ibid.*, and see *Muller v. Oregon*, 208 U.S. 412 (1908).

patronage of certain groups because of race or religion.<sup>158</sup> The courts in eleven states where these laws have been contested have uniformly held them to be valid.<sup>159</sup> As early as 1898, the Supreme Court of Minnesota, in upholding the Minnesota law, summarily remarked:

The power of the legislature to enact . . . [a civil rights statute] as to all kinds of business, of a public or quasi-public character, conducted for the accommodation, refreshment, amusement or instruction of the public, which the state has the right to regulate under its police power, so that all classes of citizens may enjoy the benefit thereof without unjust discrimination, is no longer open to discussion.<sup>160</sup>

And in 1953, when the issue of the validity of the District of Columbia's public accommodations law was considered by the United States Supreme Court, it too treated the issue as no longer open:

And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states.<sup>161</sup>

*Fair Employment Practices Measures.* Many states have enacted laws prohibiting discrimination in employment.<sup>162</sup> Similarly, those laws which have been contested on the state level have been uniformly upheld.<sup>163</sup> And in *Railway Mail Ass'n v. Corsi*,<sup>164</sup> where the issue of the applicability of the New York FEPC Law to a labor union was before the Court, the measure was upheld as a valid exercise of the police power.<sup>165</sup>

These laws restrict personal liberties, but in balancing the relative interests—on the one hand, liberty of contract and right of choice of one's

<sup>158</sup> The statutes are compiled in 2 Emerson & Haber, *Political and Civil Rights in the United States* 1405-22 (2d ed. 1958), and see the amended California statute, *supra* note 120.

<sup>159</sup> *Jones v. Kehrlein*, 49 Cal. App. 646, 194 Pac. 55 (1920); *Darius v. Apostolos*, 68 Colo. 323, 190 Pac. 510 (1920); *Baylies v. Curry*, 128 Ill. 287, 21 N.E. 595 (1889); *Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N.E. 146 (1895); *Brown v. J.H. Bell Co.*, 146 Iowa 89, 123 N.W. 231 (1909); *Decuir v. Benson*, 27 La. Ann. 1 (1875), *rev'd* on other grounds, 95 U.S. 487 (1878); *Ferguson v. Giles*, 82 Mich. 358, 46 N.W. 638 (1890); *Rhone v. Loomis*, 74 Minn. 200 (1898); *People v. King*, 110 N.Y. 418 (1888).

<sup>160</sup> *Rhone v. Loomis*, *supra* note 159, at 203.

<sup>161</sup> *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953).

<sup>162</sup> 2 Emerson & Haber, *Political and Civil Rights in the United States* 1463-82 (2d ed. 1958). See generally Morgan, "An Analysis of State FEPC Legislation," 8 Lab. L.J. 469 (1957); Murray, "The Right to Equal Opportunity in Employment," 33 Calif. L. Rev. 388 (1945).

<sup>163</sup> *Castle Hill Beach Club v. Arbury*, 208 Misc. 622, 144 N.Y.S.2d 747 (1955), *aff'd*, 1 App. Div. 2d 950, 150 N.Y.S.2d 367, motion for reargument denied, 2 App. Div. 2d 664, 153 N.Y.S.2d 544 (1st Dep't 1956); *Holland v. Edwards*, 282 App. Div. 353, 122 N.Y.S.2d 721 (1st Dep't 1953), *aff'd mem.*, 307 N.Y. 38, 119 N.E.2d 581 (1954); *Ross v. Arbury*, 206 Misc. 74, 133 N.Y.S.2d 62, *aff'd*, 285 App. Div. 886, 139 N.Y.S.2d 245 (1st Dep't 1954); *Ivory v. Edwards*, 278 App. Div. 359, 105 N.Y.S.2d 580 (1st Dep't 1951), *aff'd mem.*, 304 N.Y. 949, 110 N.E.2d 887 (1953); *Tilley v. Local 35*, 18 Conn. Supp. 125 (1952); *Draper v. Clark*, 17 Conn. Supp. 93 (1950). In *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945) the constitutional validity of the state's FEPC laws was assumed by the Court.

<sup>164</sup> 326 U.S. 88 (1945).

<sup>165</sup> See Mr. Justice Frankfurter's concurring opinion *id.* at 97-99. Cf. materials cited note 162 *supra*.

patrons in a place of public accommodation and, on the other, the attendant evils of discrimination as to certain minority groups—the latter interest has been uniformly held to outweigh the former.

*Emergency Rent Control Measures.* The emergency rent cases present a strong parallel to the fair housing laws. In *Levy Leasing Co. v. Siegel*,<sup>166</sup> the validity of the New York Emergency Housing Law was questioned. The legislature had found that a shortage of dwelling space and the consequent overcrowding were leading to unsanitary conditions, disease, immorality, and widespread discontent. To remedy this evil, landlords were prohibited from evicting tenants. Over strong argument that the relation of landlord and tenant is a private one and not so affected by the public interest as to justify its subjection to regulation, the Court upheld the law.<sup>167</sup>

As stated earlier, almost all of the fair housing laws have a history of gradual, piecemeal enactment. As new problems developed, the states endeavored to remedy the evils with new measures. These enactments represent efforts on the part of the states to meet and solve admitted problems.<sup>168</sup> It may be that "sociology is not law";<sup>169</sup> nevertheless, law is an instrument by means of which sociological problems may be remedied or alleviated.

In the housing field, then, as in other areas, the validity of regulation depends upon whether, on balance, the interest of landlords or property owners in the lease or sale of their property is outweighed by the need to secure to all, without regard to race or religion, an opportunity to acquire a place to live.

### B. *Equal Protection*

Mr. Justice Holmes remarked that the equal protection clause is the "usual last refuge of constitutional arguments . . ." <sup>170</sup> Although this

<sup>166</sup> *Supra* note 153.

<sup>167</sup> The Court thereby reaffirmed its holdings in two earlier rent control cases, *Block v. Hirsh*, 256 U.S. 135 (1921), and *Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921).

<sup>168</sup> See, for example, *Abrams, Forbidden Neighbors* (1955); *Myrdal, An American Dilemma*, chs. 13-14 (1944); *Linder, "The Social Results of Segregation in Housing"*, 18 *Law. Guild Rev.* 2 (1958). For legal discussions, see, "Publicly-Owned Facilities, Housing, and Transportation: Federally Guaranteed Civil Rights," 54 *Nw U.L. Rev.* 377, 381-88 (1959); *Frey, "Freedom of Residence in Illinois"*, 41 *Chi. B. Rec.* 9 (1959); *Saks & Rabkin, "Racial and Religious Discrimination in Housing"*, 45 *Iowa L. Rev.* 488 (1960); *Comment, "Anti-Discrimination Legislation as It Affects Real Property Rights"*, 23 *Albany L. Rev.* 75 (1958); *Comment, "Validity of Municipal Law Barring Discrimination in Private Housing"*, *supra* note 149; *Comment, "The New Jersey Housing Anti-Bias Law: Applicability To Non-State-Aided Developments"*, 12 *Rutgers L. Rev.* 557 (1958); *Comment, "Discrimination in Housing"*, 57 *Yale L.J.* 426 (1948); *Note, supra* note 141; *Note*, 33 *Notre Dame L. Rev.* 463 (1958).

<sup>169</sup> *O'Meara v. Washington State Bd. Against Discrimination*, *supra* note 72, at 4, and see *Hughes v. Superior Court*, 339 U.S. 460, 463 (1950).

<sup>170</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

observation is widely accepted,<sup>171</sup> police measures must, nevertheless, comport with the requirements of this clause.

The due process and equal protection clauses harmonize and share much in common, but their respective interdictions are not coterminous. The former "tends to secure equality in law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or legislature may not withhold. . . . The guaranty [of the latter] was aimed at undue favor and individual or class privilege . . . and at hostile discrimination or the oppression of inequality . . ." <sup>172</sup>In short, as stated in *Williamson v. Lee Optical Co.*,<sup>173</sup> "the prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

The equal protection clause, then, does not disable state or local governmental units from dealing with a local, domestic problem; it merely requires that the impact of such regulation fall, in terms of operation and effect, upon all of the inhabitants of the state or locality equally except where there exists some reasonable basis for differentiation.<sup>174</sup> This is a requirement that police measures be just in the sense that they must, among other things, be equal in application and operation in so far as is practical under the circumstances.

The rules for testing the equal protection validity of police measures have been summarized as follows:

1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when . . . [there is no reasonable basis] and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.<sup>175</sup>

<sup>171</sup> See, Tussman & tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341 (1949).

<sup>172</sup> *Truax v. Corrigan*, 257 U.S. 312, 332-33 (1921). See also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>173</sup> 348 U.S. 483, 489 (1955).

<sup>174</sup> *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.*, supra note 173; *Railway Express Agency v. New York*, 336 U.S. 106 (1949); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Buck v. Bell*, supra note 170; *Truax v. Corrigan*, supra note 172; *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See also Tussman & tenBroek, "The Equal Protection of the Laws," supra note 171.

<sup>175</sup> *Morey v. Doud*, supra note 174, at 463.



Under the fair housing laws, there are three primary classifications and, consequently, three problems: (1) the classification of commercial property owners as opposed to individual home owners; (2) the classification of publicly assisted property owners as opposed to conventional owners; and (3) the classification of brokers, realtors and agents as a group. Under these laws, in the main, only those units are covered which constitute a large part of the housing market. Multiple dwellings of a minimum number of units, developments of a minimum number of tract houses situated on contiguous land, and those persons who engaged in the business of selling or leasing property for a livelihood, are the general classifications established for regulatory purposes. It may be pointed out here also that the type of housing covered under the typical fair housing law is the type a majority of the populace inhabit in large urban centers. In New York City, for example, multiple dwellings constitute approximately 70 per cent (approximately 1,700,000 apartments) of the city's housing market.<sup>176</sup> In addition, many new settlers—including persons of minority racial, religious and ethnic groups—seek living accommodations first in low rent housing or multiple dwelling units.

The classification of commercial landlords for regulatory purposes, in view of the admittedly great demand for housing accommodations and the present shortage of supply,<sup>177</sup> would appear to be reasonable. Commercial landlords, as opposed to private landlords, are by definition engaged in the business of furnishing housing accommodations as a profit-making activity, while the private owner is not. The two are not in competition. And to regulate the commercial owners does not accord to the private owners an advantage or privilege they would not, but for the regulation, have otherwise enjoyed. A classification, then, based on a business activity which affects a substantial portion of the general public, as did the milk producers in *Nebbia*, the opticians in *Lee Optical Co.*, the express money service in *Morey v. Doud* and the landlords in *Block v. Hirsh*, would appear to be a valid basis for regulation.

The classification of landlords receiving assistance presents two problems: (1) classification for regulatory purposes, and (2) the character of financial assistance as a basis for judicial relief.<sup>178</sup>

The classification of publicly assisted landlords as a special group must be tested by the same guides as any other classification. Except for the source and type of financing, publicly assisted landlords are no

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<sup>176</sup> See Note, 33 Notre Dame L. Rev. 463 at 478 n.77 (1958).

<sup>177</sup> See note 13 supra.

<sup>178</sup> See discussion in text beginning at note 66 supra.

different from private landowners using conventional finance methods. The inquiry, then, is whether the method of financing provides a sufficient basis for classification. The New York Supreme Court, adopting a rule fashioned in *Williamson v. Lee Optical Co.*,<sup>179</sup> in *S.C.A.D. v. Pelham Hall Apartments*<sup>180</sup> upheld a "publicly assisted" classification under the New York statute. The court held that a state may carve out a group of persons, with similar characteristics, whose numbers and activities are such as to create a greater need for immediate regulation than others, although similar, in the broader group. In short, it held that a state may take a "step-at-a-time" approach to reform.<sup>181</sup>

In *Levitt v. Division Against Discrimination in State Department of Education*,<sup>182</sup> the Supreme Court of New Jersey, upholding the New Jersey statute, detailed the various forms of assistance the developers received and held the classification to be reasonable. The FHA had committed itself to insure mortgages made by purchasers. It was necessary for FHA to approve the site and to set up requirements concerning drainage, street layouts, parks, curbs, sidewalks, utilities, including water and sewage disposal, driveways, entrance walks and the like. During the course of construction, FHA inspectors made periodic inspections. And, because of the size of the development, an FHA inspector was maintained at the site of the development full time during construction. The developers conceded that, were they not assured of this assistance, they would not have undertaken the project. The court held, following a different approach from that taken in *Pelham Hall Apartments*, that these factors justified singling out publicly assisted landlords for purposes of regulation.<sup>183</sup> The court noted that "the clear and positive policy" against discrimination embodied in the State's Constitution, article I, required a liberal interpretation of enactments designed to implement it, and it rejected the argument that the legislature could not carve out a segment of landowners or developers for regulatory purposes without covering all.

It was also argued that state regulation of federally assisted housing

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<sup>179</sup> *Supra* note 173.

<sup>180</sup> 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. Westchester County 1958).

<sup>181</sup> Although the court relied heavily on the approach adopted in the *Williamson* case, the general tenor of the opinion seems to be that the classification was viewed quantitatively rather than qualitatively. I.e., the court was influenced by the amount of the involvement and assistance under the New York statute rather than the fact and nature of the assistance. The proper test it seems is qualitative—the fact and nature of assistance. Where there is public assistance, whether federal, state or local, there should then be a proper basis for classification and regulation. See Comment, "Builder of FHA Housing Held Barred From Discriminating Against Purchasers on Basis of Race: Possible Sources of Federal Prohibition and Basis for Cause of Action," *supra* note 70.

<sup>182</sup> 31 N.J. 514, 158 A.2d 177, cert. denied, 363 U.S. 418 (1960).

<sup>183</sup> The court seems to have employed a qualitative test rather than a quantitative test.

invaded a field of regulation pre-empted by Congress and, therefore, prohibited under the supremacy clause of the federal constitution. Rejecting this argument, the court answered: "There is a considerable gap between Congress' refusing to adopt an express policy of non-discrimination in regard to FHA insured housing, to be applicable under all circumstances and in all sections of the country, and a congressional policy prohibiting states from enacting laws proscribing such discrimination."<sup>184</sup>

In *O'Meara v. Washington State Bd. Against Discrimination*,<sup>185</sup> the owner of a single-family residence advertised his home for sale. The home was approximately twenty-four years old and had been purchased by O'Meara in 1955. It was financed through a private loan insured by the FHA. Under the Washington fair housing law, all forms of publicly assisted housing are covered.

Pursuant to the advertisement, Robert L. Jones, a Negro, visited and inspected the home. Thereafter he, along with his attorney, left with O'Meara a signed earnest money receipt contemplating a sale for the requested price "all cash to seller on closing." The earnest money receipt was accompanied by a check for \$1,000, as a down payment.

Upon O'Meara's refusal to sell to Jones, even after an order by the Washington State Board Against Discrimination, the matter went to court, where it was argued that the classification set up in the fair housing law was unreasonable and therefore a denial of equal protection of the laws. Upholding this contention, the court stated:

There is no reason to suppose that persons with FHA mortgages on their homes are more likely to discriminate against minority groups than those who have conventional mortgages or no mortgages, or those who are purchasing upon contract. This act would prohibit Commander O'Meara from doing what his neighbors are at perfect liberty to do. It gives to those who have conventional mortgages, or no mortgages, and those who are buying upon contract, special privileges and immunities which are not accorded to him.<sup>186</sup>

The court therefore struck down the Washington statute.<sup>187</sup>

The flaw in the court's reasoning is that it assumed other similar but unregulated landowners have a right to discriminate. In the *Civil Rights Case*,<sup>188</sup> it was held that Congress could not interdict *individual action* under section 5 of the fourteenth amendment, and that under this provision, Congress could only enact corrective legislation designed to

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<sup>184</sup> 31 N.J. 514, 535, 158 A.2d 177, 188 (1960).

<sup>185</sup> Supra note 72.

<sup>186</sup> Id. at 8.

<sup>187</sup> The case is now on appeal to the Supreme Court of Washington.

<sup>188</sup> 109 U.S. 3 (1883).

relieve against action by states. Where there is individual discrimination, not furthered by a state in any form, Congress under section 5 is powerless to act. But Washington or any other state may interdict any discrimination it considers a threat or harmful to the peace and order of the community.<sup>189</sup> States have historically acted in myriad situations to protect or regulate the activities of individuals in their relationship with other individuals. There is then no basis for the distinction the court made in striking down the classification. As has been seen, when Congress entered the housing field, its objective was to stimulate home building and buying. And to do this, it, among other things, placed at the disposal of those availing themselves of the benefits of the housing program, a security guaranteeing payment that could not be duplicated by any private business or engagement. It thereby gave those availing themselves of the assistance an added advantage in the housing market which they would not—or indeed could not—otherwise enjoy. This factor it seems, without more, provides a constitutionally valid basis on which a state may bottom regulation under its police power.<sup>190</sup>

### C. *Criticisms and Proposals*

As can be readily gleaned from the illustrations, many of the state laws have basic common features. Eight of the laws are enforced by an administrative agency. This method of enforcement seems most suitable because of the nature of the problem. Immediate relief is important. Delay or a cumbersome procedure merely weakens enforcement and discourages those aggrieved from seeking relief.

It is interesting to note, with respect to the California act, which provides merely for court relief, that it was enacted at the same legislative session at which California's new FEPC law was enacted, which is administered by a board created in the act.<sup>191</sup> Many states which have both an FEPC law and a fair housing law have empowered the same board to administer both laws. This practice seems desirable because of the similarity of the two problems. Moreover, in general, those states acting through an administrative board have not experienced any frustration of their objectives under their fair housing laws because of administrative enforcement.<sup>192</sup>

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<sup>189</sup> In *In re Kimmler*, 136 U.S. 436, at 439 (1890), the Court stated: Protection of life, liberty and property rests, primarily, with the States, and the [Fourteenth] [A]mendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure.

<sup>190</sup> See Comment, "Builder of FHA Housing Held Barred From Discriminating Against Purchasers on Basis of Race: Possible Source of Federal Prohibition And Basis for Cause of Action," *supra* note 70.

<sup>191</sup> *Supra* note 119, § 1414.

<sup>192</sup> Under the Massachusetts Fair Housing Act, discussed in text accompanying note

The approach taken by the State of Oregon may well be instructive for other states. Much of the problem of discrimination against certain racial and religious minorities in the matter of securing housing accommodations is due to the activities of those who deal in real estate as a business or occupation. It would not require a complete repeal of the present common method of regulating the sale or rental of housing accommodations to add proscriptions directly against realtors and others engaged in the business. Realtors constitute a class and are regulated in other aspects of their business by the states. Hence, it would seem that they could be required to do or refrain from doing certain acts—namely, they could be prohibited from engaging in discriminatory practices in the sale or lease of property. This proscription, applying only to a distinct group, would greatly influence the practices of the housing market in a particular state or locality. It could also be effectively utilized in those states which are reluctant to regulate private housing directly.

From its investigation and study, the United States Commission on Civil Rights found:

[W]hatever the particular approach adopted, some official city and state program and agency concerned with promoting equal opportunity to decent housing is needed. Such programs and agencies can bring about better public understanding of the problems and better communication between citizens. Whether or not cities or states are prepared to adopt antidiscrimination laws, and even in areas where racial separation is the prevailing public policy, it is possible that through interracial negotiation practical agreements for progress in housing can be reached. Where public opinion makes possible the adoption of laws against discrimination in housing, this might contribute significantly to the work of the agency promoting equal opportunity in housing. Then the agency would have legal support in its efforts at mediation and conciliation.<sup>193</sup>

The Commission therefore recommended:

. . . that an appropriate biracial committee or commission on housing be established in every city and state with a substantial nonwhite population. Such agencies should be empowered to study racial problems in housing, receive and investigate complaints alleging discrimination, attempt to solve

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107 *supra*, the first two reported cases to arise under the 1959 amendments were dismissed through administrative settlement. The first complaint involved a Negro complainant who charged that a certain real estate operator refused to lease accommodations to a white friend, with whom the complainant contemplated sharing quarters. The second complaint was essentially the same as the first, and against the same realty firm. The cases were disposed of within ten days after the complaints were filed. Reported by MCAD Comm'r Carrington, 3 *Trends in Housing*, September-October 1959, No. 5, p. 1. In the housing field as with employment, immediate relief—if one is to get effective relief—is necessary, and this, it seems, can best be given by or through administrative machinery. But cf. *Burks v. Poppy Constr. Co.*, and *Gerrish v. Shattuck*, *supra* note 129, and *Pearson v. Frument*, *supra* note 127, where temporary court relief was granted under the California fair housing law.

<sup>193</sup> *Supra* note 2, at 182.

problems through mediation and conciliation, and consider whether these agencies should be strengthened by the enactment of legislation for equal opportunity in areas of housing deemed advisable.<sup>194</sup>

### III. FEDERAL, STATE AND CITY ADMINISTRATIVE APPROACHES TO DECENT, NONDISCRIMINATORY HOUSING AND THEIR TIMELINESS

#### *Federal and State Regulation of Home Financing Institutions*

The federal government is involved in many ways with housing which is customarily considered privately owned. Savings and loan associations, incorporated under federal statutes,<sup>195</sup> provide mortgage financing to individual and corporate builders and buyers. Banks which finance mortgages on housing constructed without other federal assistance or insurance are customarily members of the Federal Reserve System<sup>196</sup> and their deposits are protected by the Federal Deposit Insurance Corporation.<sup>197</sup> These services by the federal government cast the government in the role of participant in what would otherwise be nongovernmental transactions, and the proscription against denials of equal protection might logically be held to apply to home financing activities of federal savings and loan associations and banks which are members of FDIC and the Federal Reserve System. Such federal assistance programs, which accord to these institutions added business advantages they could not otherwise secure privately, provide a basis for legislative or administrative regulation of their home financing.

The Civil Rights Commission heard testimony on the current practice of many banks and savings and loan associations of refusing to finance a mortgage on the first minority owned housing in a previously exclusive area.<sup>198</sup> Administrative or legislative action, as proposed, could aid in the elimination of this restrictive practice. One step was taken in this direction early in 1960 when the Superintendent of Banks for New York State "respectfully suggested" to all lending institutions subject to his supervision that they refrain from any practices "which would give rise, directly or indirectly, to any justifiable inference that loan applications are being considered, and the disposition thereof is being made, upon [the basis of applicant's race, creed, color or national origin.]"<sup>199</sup>

Testimony before the Civil Rights Commission also reflected discriminatory practices by fire and casualty companies in setting higher pre-

<sup>194</sup> Id. at 182-83.

<sup>195</sup> 48 Stat. 132 (1934), 12 U.S.C. 1464 (1958); 48 Stat. 1256 (1935), 12 U.S.C. 1725, 1726 (1958). States also regulate banks and savings and loan associations: E.g., Cal. Fin. Code §§ 5000-71, 5500-6010 (Deering 1953).

<sup>196</sup> 38 Stat. 259 (1917), 12 U.S.C. 321-38 (1958), as amended.

<sup>197</sup> 48 Stat. 168 (1913), 12 U.S.C. 1813-31 (1958).

<sup>198</sup> 1 Hearings, *supra* note 3, at 740.

<sup>199</sup> Trends in Housing, Jan.-Feb. 1960, p. 5.

miums for insurance on property owned by minority group members in previously all-white areas, and in ghettos.<sup>200</sup> Under the decisions in the *Restrictive Covenant* cases,<sup>201</sup> state courts could not enforce such contracts, since the purpose of the inflated premiums is to discourage or deny equal housing opportunities to all prospective purchasers without regard to race, color, or national origin.

#### *State Regulation of Licensed Real Estate Operators*

The United States Commission of Civil Rights heard extensive testimony on the role of some real estate operators in causing panic selling by whites and buying by minority group members at inflated prices.<sup>202</sup> The classic pattern was described in a recent federal injunction proceeding in Illinois:

The whole community was thrown into an uproar . . . when it became known to the officials and citizens of Deerfield that some of the houses that plaintiffs proposed to build would be sold to Negroes and other non-Caucasians. The court finds, however, that the ensuing turmoil was not caused solely by the fact that the public had been informed of the proposed sale of houses to Negroes. The court finds that immediately after the revelation of that news, the residents of Deerfield were bombarded with telephone offers to purchase their homes at prices ranging from 50 to 75 per cent of their actual cost or fair market value. There is no credible evidence of the identity of the persons responsible for those calls. The only finding the court can and does make relative thereto is that it was a quickly organized campaign carried on by persons, highly skilled in the procedure, who practice it in various areas in and around Chicago where white and colored communities adjoin each other.<sup>203</sup>

A recent survey of the practices of realtors in San Francisco indicated that realtors insisted on the continuation of racial segregation in housing even when their clients had no objections to leasing or selling to members of minority groups.<sup>204</sup> Testimony before the Civil Rights Commission in Atlanta, Chicago and San Francisco emphasized the "gentleman's agreements" among real estate dealers not to "sell or rent to a nonwhite in any block, until the block has been 'cracked' by the presence of a Negro family there by some other means." And to add force to these agreements, dealers violating their terms have been penalized by their respective groups.<sup>205</sup>

<sup>200</sup> 1 Hearings, supra note 3, at 741. See N.Y. Unconsol. Laws Ch. 18 (McKinney 1960), forbidding insurance companies to discriminate in writing life insurance because of race, color, creed or national origin.

<sup>201</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>202</sup> 1 Hearings, supra note 3, at 224, 882-83.

<sup>203</sup> *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681, 705-06 (E.D. Ill. 1960). And see 1 Hearings, supra note 3, at 226.

<sup>204</sup> Thomas & Babow, "San Francisco's Housing Market—Open or Closed? Civil rights inventory of San Francisco," (Council for Civic Unity, 437 Market St., S.F. 1960).

<sup>205</sup> 1 Hearings, supra note 3, at 882. Examples of agreements among realtors in Atlanta,

In many instances, however, realtor organizations have adopted or included in their codes of practices a provision prohibiting member realtors from engaging in discriminatory selling practices.<sup>206</sup> While this of course is desirable and will no doubt influence the practices of many real estate operators, the positive results inuring therefrom are realized merely as a by-product of the negative interdictions. These organizations could go further: They could adopt resolutions or by-laws enjoining their members to cooperate with local officials and community groups engaged in effectuating fair housing practices. Thus, by placing a duty upon their members to take positive steps to lend their influence and assistance to local governmental and private groups concerned with fair housing problems, these organizations would achieve positive results through positive means, while at the same time discharging the duties of their profession.

States too may act to regulate the selling and leasing practices of realtors. At least one state has so acted. Oregon, amending its fair housing law, now prohibits discriminatory selling and leasing practices of realtors licensed in the state.<sup>207</sup> Two other states, Maryland<sup>208</sup> and New York,<sup>209</sup> have adopted a new regulatory policy under existing law. In those states disciplinary action may be taken to suspend or revoke the licenses of realtors engaged in discriminatory practices in racially changing neighborhoods, particularly "block-busting." The Philadelphia Commission on Human Relations has requested the Pennsylvania Real Estate Licensing Commission to take similar action.<sup>210</sup> In California, the state attorney general has issued an opinion stating that realtors are subject to the provisions of the recently amended public accommodations statute in selling and leasing housing accommodations.<sup>211</sup> Similar

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at 1 Hearings 441-53; in Chicago, at 1 Hearings 882-83; in New York, at 1 Hearings 395-96; in San Francisco, in U.S. Civil Rights Comm'n Hearings in San Francisco, reported in S.F. Chronicle, Jan. 28, 1960, p. 1. And see *Beddoe v. Southeast Realty Board*, discussed *infra* text accompanying note 247.

<sup>206</sup> E.g., San Jose Real Estate Board policy, reported in S.F. Chronicle, Jan. 28, 1960, p. 19; Santa Clara County Contractors and Home Builders Ass'n policy, *Trends in Housing*, May-June 1960, p. 4.

<sup>207</sup> See discussion in text at note 117 *supra*.

<sup>208</sup> *Trends in Housing*, May-June 1959, p. 8.

<sup>209</sup> Action by New York Secretary of State under N.Y. Real Prop. Law, § 441-C, reported in *Trends in Housing*, Sept.-Oct. 1959, p. 6. N.Y. secretary of state and N.Y. rent commissioner, on complaints from Negro tenants, agreed Feb. 13, 1960, to refer all complaints against real estate brokers, for charging illegal fees or bonuses for finding apartments, to the state Division of Licenses for action. N.Y. Times, Feb. 19, 1960.

<sup>210</sup> *Trends in Housing*, Sept.-Oct. 1959, p. 6.

<sup>211</sup> See *supra* note 128. The attorney general of California has also ruled that a redevelopment agency is barred by the Fourteenth Amendment from including in listings of available relocation housing any landlords who refuse to accept members of minority groups as tenants. The redevelopment agency is a state governmental agency authorized to function in the various communities to acquire property for the purpose of improving, rehabilitating and redeveloping blighted areas. As an incidental duty, such agencies are required to



opinions have been issued by the attorney general of Massachusetts and the Connecticut Civil Rights Commission.<sup>212</sup> In Michigan, after six days of hearings before the Corporations and Securities Commission on a "point system" operated to keep the Grosse Pointe area "exclusive," the attorney general condemned the practice and the Commission promulgated a new rule June 30, 1960 prohibiting brokers and salesmen from refusing to sell, buy, appraise, list or lease any real estate "because of the race, color, religion, national origin or ancestry of any person or persons."<sup>213</sup> The Chairman of the Massachusetts Board of Registration of Real Estate Brokers and Salesmen took similar action in July 1960.<sup>214</sup>

On this point Commissioners Hesburgh and Johnson added a footnote to the report of the Civil Rights Commission:

We wish to add that in line with the Commission's recommendation for biracial committees, it would be helpful if all real estate boards admitted qualified Negroes to membership. In view of the important role real estate boards play in determining housing policies and patterns throughout a community, we believe these boards are not merely private associations but are clothed with the public interest and that the constitutional principle of nondiscrimination, applicable to all parts of our public life, should be followed. With white and Negro realtors meeting and working together, misunderstandings could be cleared up and there would be greater possibility of solving racial housing problems through negotiation, understanding, and good will.<sup>215</sup>

### *County Refusal to Record Racial Restrictive Covenants*

In *Shelley v. Kraemer*<sup>216</sup> the Court held that enforcement of racial restrictive covenants by state courts constitutes state action within the meaning of the fourteenth amendment and is violative of the equal protection clause. This decision did not, however, purport to prohibit

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establish a practical method for the relocation of persons displaced by urban renewal projects, and therefore maintain relocation bureaus to assist displaced persons in securing other adequate housing. Under the attorney general's opinion, landlords who engage in discriminatory practices may no longer be listed with the relocation bureau as having accommodations available for such displaced persons. The attorney general opined that, because of the public expenditure to maintain a listing, such service could not be used by those who discriminated against certain tenants consistently with the equal protection clause of the Fourteenth Amendment. See American Jewish Congress, Joint Memo, No. 281, Dec. 4, 1959.

<sup>212</sup> American Jewish Congress, Joint Memo, No. 282, Jan. 1, 1960; No. 150, Feb. 10, 1956.

<sup>213</sup> 5 Race Rel. L. Rep. 567 (1960). For fifteen years the Grosse Pointe Brokers Association and Grosse Pointe Property Owners Association, representing 973 families, followed a rigid point system for screening families wanting to build or buy in the area, with 50 as a passing score for some, but Jews needing 85 points, Greeks—65, Poles—55. Negroes and Orientals were automatically rated zero. Points were based on ancestry, name, accent, religion, complexion, dress, grammar, friends, way of life ("Is it typically American?") Trends in Housing, Mar.-Apr. 1960, p. 3.

<sup>214</sup> 5 Race Rel. L. Rep. 253 (1960).

<sup>215</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 183.

<sup>216</sup> 334 U.S. 1 (1948).

homeowners from making such covenants, nor from attempting to enforce them by other nongovernmental means.

Testimony before the Civil Rights Commission described fourteen areas in and near the District of Columbia in which it is well known that members of certain racial and religious minority groups are excluded as owners or as occupants of dwellings through use of such covenants.<sup>217</sup> In many areas throughout the country owners continue to sign deeds containing explicit and detailed restrictive covenants.<sup>218</sup> While the courts will no longer enforce these covenants, it may be assumed that they still possess some extra-legal force or they would no longer appear in deeds to be recorded. It may be now that they are nothing more than "gentlemen's agreements," dependent upon the good faith and the promises of the parties agreeing thereto, but their continued use and presence frustrate many local voluntary efforts to effectuate fair housing practices.

Whatever force they still have would be dissipated by the refusal of county recorders to accept such instruments for recording. The Court in *Shelley v. Kraemer* stated that "so long as the purpose of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendments have not been violated."<sup>219</sup> But the recording of such instruments by the state is not voluntary adherence; it is state action and, as such, is forbidden by the equal protection clause.

It is suggested therefore that a recorder of deeds may decline to record an instrument containing a racial restrictive covenant on the basis of the decision in the *Restrictive Covenant* cases. And should a property owner or group seek to compel the recordation by court action, such relief would be foreclosed under the *Restrictive Covenant* cases.

Such action by recorders of deeds would appear to be valid. By providing a recordation service to property owners the states thus provide a ready public record of the status of each owner's property. This record or its contents, by reflecting the status of property, makes possible the determination of its transferability and marketability. In addition, recordation is a public service, operated with public funds, and the recorder's office being a state agency, its facilities cannot be utilized for a purpose contrary to the interdictions of the equal protection clause.

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<sup>217</sup> I Hearings, *supra* note 3, at 303-04, 396-97.

<sup>218</sup> *Id.* at 395-96, 397.

<sup>219</sup> 334 U.S. 1, at 13. But see *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681 (E.D. Ill. 1960), discussed in text accompanying note 241 *infra*.

*City Enforcement of Existing Housing Ordinances*

The primary thrust of this article is the elimination of racial discrimination and segregation in housing. But it is not intended to ignore the basic need for decent housing, quite apart from racial considerations. It is the absence of sufficient decent housing which creates the conditions in which racial segregation is intensified and inequities occur when minority groups seek new housing.

Experts have also documented the role of racial slums in drawing an ugly stereotype of a minority group: "If people of a particular group can live in such filth and squalor, then they must be filthy, sordid people. I don't want them to move into my neighborhood."

Large areas in every metropolitan urban center have disintegrated into slums. Many individual landlords have permitted their properties to deteriorate below acceptable standards of habitable accommodations while at the same time increasing their rental charges. This is particularly true in "ghettos" occupied by minority groups. One solution to this problem has been the razing of whole communities and rebuilding through Title I projects, discussed above. This solution however creates many new problems since it does not increase the total number of decent and habitable dwellings and it involves rather lengthy periods of displacement for many tenants and businesses.

How effectively can a city prevent deterioration of dwelling units through enforcement of existing laws and thereby eradicate many slums and minority group ghettos? No precise answer can be given. Perhaps the solution in each instance will depend upon the intensity and the nature of the problem in a given locality. However, it may be helpful to list the emergency measures recently instituted by New York City.

*Single-room-occupancy buildings.* There are 755 such buildings in New York City in which rooms are rented out separately in former apartment houses. Approximately 47,000 families occupy these buildings.

Under existing ordinances, the City has instituted:

- a. systematic inspection of all such buildings;
- b. prosecution of owners for building violations;
- c. action to reduce rents where services are not being provided.

The city has also enacted several ordinances forbidding families with children under sixteen years of age to move into single rooms in single-room-occupancy buildings or rooming houses, if the units do not have separate bathroom and kitchen facilities. The ordinances make it illegal for such families to continue to live in such units after January 1, 1965,

and require tenants in such buildings to furnish their landlords with affidavits listing their children under sixteen. Landlords are required to furnish this information to the city, together with applications for annual licenses.<sup>220</sup>

In addition, the city is condemning those single-room-occupancy buildings which can be restored to apartment house use. Tenants who are presently occupying these single-room buildings and are ineligible for public housing accommodations will be assisted by a social service program to prepare them for relocation in other public accommodations. Upon completion of this renovation program, the city will operate these accommodations as public housing projects.<sup>221</sup>

*Tenements.* The city magistrate courts during the emergency are giving special precedence to cases involving violations of the health and safety ordinances by tenement owners and managers. The state attorney general has also instituted dissolution proceedings against several real estate corporations, owners of tenements which repeatedly violated numerous provisions of the health and safety ordinances.<sup>222</sup> To aid in the effectuation of this emergency program, the City Rent Commission has ordered a 10 per cent reduction in rent charges in rodent-infested units.<sup>223</sup>

### *University Sponsored Agreements Not to Discriminate in Student Housing*

A number of universities have recently adopted regulations prohibiting racial and religious discrimination against students seeking housing accommodations near the institutions. In New York, Washington and Colorado,<sup>224</sup> the programs are the result of cooperation with state commissions against discrimination operating under fair housing statutes. Yale University<sup>225</sup> and the University of California at Berkeley<sup>226</sup> have

<sup>220</sup> N.Y. Times, Feb. 10, 1960, p. 1, col. 2.

<sup>221</sup> N.Y. Times, Jan. 27, 1960, p. 1, col. 1; Mar. 25, p. 12, col. 2. United Rooming House Operators, Inc., was organized to oppose this plan. HHFA was asked to pay two-thirds of the cost of restoration under the 1954 Housing Act.

In 1954, HHFA Administrator Cole estimated that at least two-thirds of the slum families in most major cities are members of minority groups. U.S. Comm'n on Civil Rights, *supra* note 2, at 144.

<sup>222</sup> The program was delayed due to difficulty in determining the actual owners of several of the tenements. \$40,000 from a state emergency fund was provided to the attorney general for untangling the corporate structures apparently intended to conceal the facts of ownership. N.Y. Times, Feb. 4, 1960, p. 1, col. 3. Receivership legislation has been introduced in the state legislature to permit the city to take over temporarily and make repairs on slum property which the landlord was unwilling to make or can not make. See San Francisco attack on South-of-Market slums, S.F. Chronicle, Mar. 6, 1960. Cf. Sporn, "Some Contributions of the Income Tax Law to the Growth and Prevalence of Slums," 59 Colum. L. Rev. 1026 (1960).

<sup>223</sup> N.Y. Times, Feb. 25, 1960, p. 20, col. 2.

<sup>224</sup> See, e.g., statement of Colo. Bd. of Regents, 5 Race Rel. L. Rep. 281 (1960).

<sup>225</sup> N.Y. Times, Jan. 8, 1960, p. 8, col. 2.

<sup>226</sup> S.F. Chronicle, Jan. 27, 1960.

recently required landlords to sign pledge cards agreeing not to discriminate "on the basis of race, color, religion, national origin or ancestry." Landlords refusing to sign will not be listed by the university housing bureaus. The typical provision adopted to penalize violators of the nondiscriminatory pledge is to remove their accommodations from the university housing list after an administrative-type hearing and a finding that the regulation has been violated. Somewhat similar regulations are now in effect at many other universities throughout the country.<sup>227</sup>

Social fraternities and sororities, traditionally selective in choice of members, have been forbidden on many campuses to use race, religion, or national origin as standards for judging acceptability. Most universities have set a deadline for initiation of this nondiscriminatory practice.<sup>228</sup>

#### IV. INDIVIDUAL SELF-HELP AND COMMUNITY APPROACHES TO INTEGRATION AND THEIR EFFECTIVENESS

##### *Reaction to Desegregation: Individual and Group Violence*

Probably the most extreme reaction directed against contemplated or actual integration of previously segregated residential communities has been acts of violence and property destruction. Such incidents are not limited to particular areas of the country, but have occurred from Berkeley, California<sup>229</sup> to Hamilton Township, New Jersey.<sup>230</sup> Nor are

<sup>227</sup> Trends in Housing, Nov.-Dec. 1959, p. 3. Other schools with similar regulations include New Paltz State Teachers College, N.Y.; Harvard; Radcliffe; Univ. of Minn.; Marquette Univ., Milwaukee.

<sup>122</sup> Ohio State faculty members asked the University to ban racial discrimination in off-campus housing in 1959, and the student senate voted for such action. In 1960, the University announced that any licensed off-campus rooming house against which a charge of discrimination has been proved will be dropped from the approved list. Trends in Housing, July-Aug. 1960, p. 7.

<sup>228</sup> Calif. Educ. Code §§ 954.6-954.9, prohibits state colleges from recognizing fraternities, sororities or living groups, honor societies or other student organizations which restrict membership on the basis of race, religion or national origin after Sept. 1, 1964. On May 27, 1960, U. of Pa. Trustees ordered three fraternities to end racial and religious discrimination in selection of members. N.Y. Post, May 28, 1960.

<sup>229</sup> S.F. Chronicle, Sept. 17, 1959, p. 14.

<sup>230</sup> N.Y. Post, Aug. 18, 1960, p. 24. In Wilmington, Del., a \$13,500 home was virtually destroyed by a bomb a few months after a Negro family moved into a previously all white neighborhood. N.Y. Post, Aug. 9, 1959. Twenty-six incidents of violence directly connected with attempts to sell, buy or occupy housing on a nonsegregated basis in southern states are reported in American Friends Service Committee—National Council of Churches of Christ—Southern Regional Council, *Intimidation, Reprisal and Violence in the South's Racial Crisis* (1959). In Louisville, Ky., indictments for sedition, conspiracy and bomb-throwing were brought against white friends of a Negro family who moved into a previously all white neighborhood and had their home partially destroyed by a bomb. One defendant was tried, but conviction was reversed on appeal; other defendants' indictments were quashed. *Kentucky v. Braden*, 291 S.W.2d 843 (1956); *Braden, The Wall Between* (1958).

In Chicago, Ill., there were 256 incidents of racial violence between 1956 and 1958, including 134 attacks on persons, 122 attacks on property. Reports of Chicago Commission on Human Relations, reprinted in 1 Hearings, *supra* note 3, at 854-5.

Recently four homes were bombed in one month in Chattanooga, including the home of

these incidents limited to individual acts; often such violence and destruction were the product of group action.<sup>231</sup>

In many instances, of course, the state or locality has acted to put down the violence and restore order.<sup>232</sup> On the other hand, there are many instances in which the local constabulary either was unsuccessful in its efforts to restore order or took a "hands-off" attitude towards the controversy.<sup>233</sup>

Local law enforcement, however, is but one aspect of the problem of maintenance of community order and tranquillity. Local public opinion has played a major role. Where prevailing public sentiment has been generally opposed to the reception of minority members in a previously non-integrated community, violent and destructive conduct has occurred repeatedly, but where the prevailing sentiment has been receptive to open occupancy, violent and destructive reactions have been either non-existent or limited and short-lived.

This disciplinary effect of local public sentiment has also influenced the actions of members of minority groups seeking housing accommodations in communities previously closed to them. Where the sentiment is favorable the tendency has been to seek accommodations; but where the sentiment is generally opposed to open occupancy, the tendency likewise has been to stay out. Similarly, the force of local sentiment has affected the practices of members of the majority group.<sup>234</sup>

The causes and effects of prejudice and discrimination against mi-

a real estate agent whose company handles sales of homes to Negroes. N.Y. Times, Aug. 19, 1960. Rock-throwing at the Philadelphia home of a Negro family in a white neighborhood brought a round-the-clock police guard. S.F. Chronicle, Mar. 28, 1960. A home was bombed in Atlanta on Apr. 13, 1960, the first since the 1958 synagogue bombing. N.Y. Post, Apr. 14, 1960. After winning a federal suit to prevent condemnation of their partially built home by a water district, the Portland, Ore., home of a Negro couple in a white neighborhood was damaged by fire July 4. N.Y. Times, July 5, 1960. See note 255 *infra*.

<sup>231</sup> Most of the incidents described in note 230 involved group action.

<sup>232</sup> When the first Negro family moved into Levittown, Pa. (see note 71), county officials moved rapidly for an injunction to prohibit eight named residents of Levittown from soliciting memberships in the Ku Klux Klan, burning crosses, distributing inflammatory literature and scurrilous pictures, setting off bombs and firecrackers, participating in motorcades, and making threats directed at the Negro family. The court granted a preliminary injunction and, after a three-day trial, made it permanent. No further incidents occurred. *Pennsylvania v. Williams*, 3 Civ. Lib. Docket 18, 42, 3 Race Rel. L. Rep. 49 (Bucks Co. Com. Pleas Ct. 1957).

Seventy incidents of harassment were listed by a Los Angeles Negro family in the 7 months after they moved into the white Pacoima section in 1959. After 500 patrols of the residence, police caught one of the neighbors in a malevolent act, for which he was tried and convicted by an all white jury in July, 1960. *Trends in Housing*, July-Aug. 1960, p. 2.

<sup>233</sup> E.g., in Atlanta, Ga., at least 12 houses were bombed in eight years, with no arrests or convictions, according to testimony, 1 Hearings, *supra* note 3, at 556-7. For examples of specific government action to prevent integrated housing, see notes 254 & 255 *infra*.

<sup>234</sup> See, e.g., Commission on Race and Housing, *Where Shall We Live* 54-56 (1958).

minority groups have been extensively studied and documented.<sup>235</sup> One of the major causes is fear of decline in property values in integrated neighborhoods.<sup>236</sup> Another primary cause as reflected by these studies is the lack of communication between the majority and minority groups. Where groups are isolated by such fictional barriers as race, creed or religion, without opportunity for contact, unfounded stereotypes, unfounded fears and hatred are fostered. But where there is a general coming together, an opportunity is thus provided for intergroup communication and understanding.<sup>237</sup>

No doubt many of the incidents of violence, property destruction and rejection are attributable to an absence of lines of communication between the majority group and the minority groups. These incidents are but instances where unfounded stereotypes, fears and hatred were translated into overt acts.

### *Individual Lawsuits*

The judicial machinery has also been utilized by members of minority groups seeking housing accommodations in previously restricted residential areas. Generally, the problem concerned racial restrictive covenants prohibiting sale to certain groups, or deeds containing forfeiture provisions in the event property is sold to a purchaser who is a member of a minority group. Such agreements and provisions have been uniformly denied enforcement under the equal protection clause.<sup>238</sup> Similarly, damages have been denied for breach of racial or religious restrictive agreements.<sup>239</sup>

A new twist has been added to the law of restrictive covenants by the efforts of some private developers to plan "balanced" inter-racial com-

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<sup>235</sup> Id. at 10-34.

<sup>236</sup> Laurenti, Property Values and Race (1960). This cause was mentioned explicitly in the long, careful recital of the facts in *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681, at 706 (E.D. Ill. 1960):

Viewed from any angle, the attitude of some of the Village residents was deplorable—based as it was on animosity and resentment at the prospect of having Negro neighbors. It must be observed, however, that many of the Villagers who were the most aroused and who raised the most commotion were animated by the telephoned offers to purchase their homes at reduced prices. Most of these people have all of their life savings invested in their homes and the prospect of losing that security was a greater factor than the thought of Negro neighbors. Fear gripped the community and fear is the very base and foundation of hate and intolerance.

<sup>237</sup> Commission on Race and Housing, *supra* note 234, at 14-18, and see discussion of experiences in multi-racial communities, *infra* at note 257.

<sup>238</sup> *Shelley v. Kraemer*, *supra* note 16; *Harris v. Sunset Islands Property Owners, Inc.*, 4 Civ. Lib. Docket 109 (1959). Clouds on title to property covered by racial restrictive covenants were removed as a result of suits by Negro purchasers in *Robinson v. Mansfield*, 2 Civ. Lib. Docket 81 (Super. Ct., Pima, Ariz. 1957); *Smith v. Clark*, 2 Civ. Lib. Docket 47 (D.C. Colo. 1956).

<sup>239</sup> *Barrows v. Jackson*, 346 U.S. 249 (1953); *Stratton v. Conway*, 301 S.W.2d 332 (1957).

munities by the use of "benign quotas."<sup>240</sup> When Modern Community Developers bought land in an all-white Chicago suburb, it planned to build 51 homes, 10 or 12 to be sold to Negroes and the rest to whites, in order to open this suburb to Negro occupancy while insuring that the particular development would not become segregated. When this plan became known, the village held an election to condemn the land purchased by Modern for park purposes, although two similar elections in the previous year had ended in defeat for the park commission. When the election returns authorized such condemnation, Modern sought injunctive relief in the federal district court. A temporary restraining order was granted, then dissolved after hearing, and injunctive relief was denied on a finding that Modern intended to enforce integration in its development by means of racial restrictive covenants. The developer required that each purchaser, as a condition precedent to his purchase, execute a separate resale agreement, which was not to be recorded. This agreement gave the developer the exclusive right to select a purchaser for the property in the event of a resale of the premises, and Modern would resell to another person of the same race as the original purchaser, and the initial integration ratio—alleged to be the same as that in the population of Chicago—would thus be continued.

The court held:

26. The "controlled occupancy pattern" which the plaintiffs propose is a racial discrimination and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and is unenforceable in any court of law or equity in the United States.

27. [This pattern] . . . is not protected by Sections 1981, 1982 and 1985, Title 42 U.S.C.A. . . .

28. The "controlled occupancy pattern" which the plaintiffs propose is illegal and the plaintiffs do not come into a court of equity with clean hands.

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30. The "controlled occupancy pattern" and resale quota system which Modern Community Developers, Inc., proposes to use in Deerfield . . . is illegal both as to initial sales and resales. The power of a federal court cannot be used consistently with the Fifth Amendment and the Civil Rights Statutes to impose any percentage quota of Negro or Caucasians. Similarly, State power and authority cannot be constitutionally employed within the restrictions of the Fourteenth Amendment to control either the original or subsequent devolution of realty on a quota basis.

31. A party who plans to put into effect a system of land tenure whereby ownership or occupation of land will be controlled on racial or other discriminatory bases cannot seek damages in a federal court for any interference which prevents such party from putting such plan into effect.<sup>241</sup>

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<sup>240</sup> See Navasky, "The Benevolent Housing Quota," 6 How. L.J. 30 (1960).

<sup>241</sup> *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681, at 712-13.



The court conceded that the immediate effect of its ruling would be to deny 10 or 12 Negro families the opportunity to live in Deerfield, but argued that if this quota were held constitutional, "then a quota of 50 to 50 or 99 to 1 or even 100 to 0 would be constitutional and *Shelley v. Kraemer* would be circumvented,"<sup>242</sup> citing *Hughes v. Superior Court*,<sup>243</sup> in which a unanimous Supreme Court outlawed a compulsory employment system which a group of Negroes sought to force on a Los Angeles department store. In a practical sense, the court pointed out:

Had a plan, similar to the one sponsored by plaintiffs, been adopted in Chicago twenty years ago—when the Negro population was nearer to 10 than to 20 per cent of the whole—today's Negro population of that city would be hard put to find homes there.<sup>244</sup>

The bind on the willing Negro home buyer in Chicago has been moving New York audiences nightly in "Raisin in the Sun."<sup>245</sup> It has also been moving Negro purchasers into the Chicago courts to reform contracts of sale based on inflated and extravagant sales prices. Because of the acknowledged limitations of the market of available housing accommodations for Negroes, courts have granted relief against some white speculators who bought property at low prices, then sold it to Negro purchasers at greatly inflated prices.<sup>246</sup>

In at least one instance, disciplinary action has been brought against a realtor who negotiated a sale of a home to a Mexican-American family in a previously restricted neighborhood. The realtor was ousted from membership in the local realty board and fined. The realtor refused to pay the fine and sued the local board for damages, charging that it had violated the state law prohibiting unfair interference with trade and competition. The court dismissed the complaint, holding that the board acted in good faith.<sup>247</sup> Two Baltimore brokers had their licenses sus-

<sup>242</sup> *Id.* at 707.

<sup>243</sup> 339 U.S. 460 (1950), quoting from Calif. Sup. Ct. opinion at 32 Cal. 2d 850, 856, 198 P.2d 885, 888 (1948).

<sup>244</sup> 182 F. Supp., at 709. Plaintiff's appeal is pending in the Court of Appeals.

<sup>245</sup> By Lorraine Hansbury.

<sup>246</sup> See, e.g., instance in which white purchaser bought a home for \$4,000, immediately sold it to a Negro for \$13,900 on contract. The Negro family paid \$1,400, then defaulted; the seller brought eviction proceedings. The buyer, in turn, sued to have the contract reformed, to restrain the seller from continuing the eviction proceedings, to disclose all of the circumstances in connection with seller's purchase of the property, and to restrain seller from making further sales of similar properties. The court stayed eviction proceedings and the case was ultimately settled out of court. *Bolton v. Crane*, Civil No. 57 § 6577, Cook Co. Super. Ct., 4 Civ. Lib. Docket 35, May 1957; correspondence with counsel, Mark J. Satter, Chicago, Oct. 27, 1959. See News Notes, Greater Lawndale Conservation Commission, July 23, 1958; Satter, "Land Contract Sales in Chicago: Security Turned Exploitation," *Chicago B. Rec.*, March 1958.

<sup>247</sup> *Beddoe v. Southeast Realty Bd.*, Civil No. S6C 1050, Calif. Super. Ct., Los Angeles, Dec. 1955, 2 Civ. Lib. Docket 27, 81, 3 Civ. Lib. Docket 62. In *McGregor v. Florida Real Estate Comm.*, 99 So. 2d 709 (Fla. 1958), the court affirmed action by the commission against an agent who accepted a listing of property restricted in sale to

pending by the Maryland Real Estate Commission. The brokers sued, contending that the complaints charging them with unethical misconduct were actually based on their handling purchases of residential properties by Negroes in previously all-white neighborhoods, but the state court of appeals affirmed the suspensions.<sup>248</sup>

In *Ming v. Horgan*,<sup>249</sup> discussed above, a prospective Negro purchaser sought declaratory relief in a class action<sup>250</sup> brought on behalf of all prospective Negro purchasers against the discriminatory sales practices of realtors and developers of all publicly assisted tract home developments in the area. In granting the requested relief, the court held that the regulation of the realtors and developers by the state and the regulation of construction standards under the federal housing program provided a sufficient basis for requiring the realtors and developers to sell without regard to race or color.

While in the *Ming* case the court was only concerned with declaring the rights of the parties, subsequent similar suits have requested other forms of relief such as damages<sup>251</sup> and have obtained temporary restraining orders requiring defendants to hold the property in controversy, pending outcome of the suit.<sup>252</sup> In July, 1960, a California court held, for the first time, that a Negro couple denied rental housing accommodations because of race was entitled to one thousand dollars damages under the two new California code sections discussed above.<sup>253</sup>

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Christians and then negotiated sale to a Jewish purchaser. The court upheld the action as one to punish the agent for breach of a confidential relationship and not one to enforce a discriminatory contract.

<sup>248</sup> *Bernstein v. Real Estate Comm'n*, 221 Md. 221, 156 A.2d 657 (1960).

<sup>249</sup> *Supra* note 70.

<sup>250</sup> The suit was not allowed as a class action due to a procedural defect. The court, however, admitted evidence of discriminatory practices against other Negroes by the defendants.

Some indication of the paucity of new housing for minority group members in metropolitan areas can be seen from the following FHA figures for 1950 through 1956 on occupancy of all newly constructed private units in the areas listed:

	White	Nonwhite
Boston	99.8%	0.2%
New York	99.4%	0.6%
Philadelphia	99.3%	0.7%
Detroit	98.6%	1.4%
Chicago	96.6%	3.4%
Los Angeles	98.1%	1.9%
Seattle	99.2%	0.8%
Dallas	97.3%	2.7%
Atlanta	85.4%	14.6%

FHA, *Trends in Occupied Dwelling Units* (1959).

For discussion of special agreements in Atlanta, see 1 Hearings, *supra* note 3, at 441-53, but cf. *id.* at 587, 556-57.

<sup>251</sup> *Gerrish v. Shattuck*, *supra* note 129.

<sup>252</sup> *Burks v. Poppy Constr. Co.*, *supra* note 129; *Pearson v. Frumentti*, *supra* note 127.

<sup>253</sup> *Hudson v. Nixon*, Civil No. 28219, Calif. Super. Ct. Merced County, 5 Civ. Lib. Docket 96, July 28, 1960. See text at note 129 *supra*.

In some instances city officials have appeared to enforce valid building standards in such a manner as to frustrate the efforts of Negro home owners to improve their property in a marginal area slated for razing and replacement by a segregated white housing development, and efforts of Negro builders to further upgrade the area through new construction. Court relief has been sought and sometimes granted against such official action.<sup>254</sup> Suits are pending in Missouri, Illinois and Oregon to test validity of condemnation proceedings instituted against pieces of property on which Negroes had begun building homes in previously all-white sections.<sup>255</sup>

### *Group Action to Maintain Desirable Integrated Communities*

Today, in many northern and western cities, there are residential communities composed of members of various racial, religious and national groups. The composition of these communities is by no means a happenstance; rather it is the end product of the efforts of realtors on the one hand, and voluntary private groups on the other. Realtors have generally opposed initiating sales of housing to members of a minority group in a previously exclusive neighborhood.<sup>256</sup> After the breakthrough, the same realtors generally refuse to rent to members of the majority group and actively discourage white tenants from remaining in the area. This technique is not employed for altruistic reasons, i.e., to provide additional housing accommodations for members of minority groups who enjoy at most a limited market in which to seek accommodations. Rather, it is the *modus operandi* for capitalizing on a situation brought about by the socio-economic problem extant in the housing field. By making housing accommodations available to members of minority groups who are limited in their choice in the general market, these realtors can and do provide the accommodations at inflated prices and with reduced services.

In several of these multi-racial neighborhoods, private organizations,

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<sup>254</sup> In *Carmichael v. Christenson*, Civil No. 57 § 17586, Cook Co. Super. Ct., 4 Civ. Lib. Docket 35, Nov. 1958, plaintiff Negro builder alleged that city officials refused to provide water and required occupancy permits before allowing purchaser to move into a substantially completed house. The city argued the house was not completed according to plans and specifications. Correspondence with counsel, Sherwin Willens, Chicago, Oct. 27, 1959.

A white seller in N.J. was charged with violating an unused housing code section for failing to obtain a health department certificate at the time of transfer, and the Negro buyer was temporarily denied access to the home on this ground. *Re Visconti*, 5 Civ. Lib. Docket 96 (1960).

<sup>255</sup> *City of Creve Coeur v. Dielman*, 5 Civ. Lib. Docket 96 (1960); *Missouri ex rel. City of Creve Coeur v. Weinstein*, 5 Civ. Lib. Docket 96 (1960); *Progress Dev. Corp. v. Mitchell*, supra note 241, pending in Court of Appeals; *Wiley v. Richland Water Dist.*, 5 Civ. Lib. Docket 96 (D.C. Ore. 1960).

<sup>256</sup> See text accompanying notes 204-05 supra.

local merchants and community leaders have sought to retain the inter-racial character of the changing neighborhoods, believing integration to be a social good.<sup>257</sup> The political and community leaders are also motivated by the knowledge that widespread migration disrupts citizen participation in government and in the operation of charitable and other community services, whereas a stable community promotes these social values.

In the main, community groups have followed a common pattern and approach. Their primary activities are usually listed as:

1. Neighborhood improvement: "clean up, fix up" projects, street repairs, improved street lighting, investigation of fire, sanitary, zoning and building code violations, attention to the problem of unsupervised children, opposition to increasing the number of liquor licenses issued in the area.

2. Stabilization of existing population: formation and guidance of a network of block associations, and extensive cooperation with various religious organizations.

3. Neighborhood promotion: newspaper advertisements and distribution of brochures stressing the advantages, convenience and services in the area. (Local businessmen often underwrite the expense of such campaigns.)

4. Intergroup relations: community institutes and conferences involving the total community, schools and religious institutions concerning the need for and desirability of balanced, stable communities.

5. Elimination of undesirable real estate practices: banning of real estate listings by race,<sup>258</sup> banning of "sold" signs where used to create

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<sup>257</sup> E.g., in Hyde Park-Kenwood section of Chicago, the Southeast Chicago Commission, in existence seven years, has achieved considerable success, recounted in Abrahamson, *A Neighborhood Finds Itself* (1959). In north Washington, D.C., the Neighbors, Inc., in existence about a year, employs a full-time executive secretary. Eight neighborhood groups are working in cooperation with the Philadelphia Commission on Human Relations. *Trends in Housing*, Sept.-Oct. 1959, p. 8. In the western section of St. Louis, the West End Community Conference, in existence five years, has sought to stabilize the population of this border city. *Southern School News*, Jan. 1960, pp. 10-11. Anti-slum groups are in process of development in the Rockaways area, New York City (*N.Y. Times*, Jan. 8, 1960, p. 9, col. 5) and in the Mission area of San Francisco (*S.F. Chronicle*, Oct. 20, 1959). The Cleveland Foundation has made a grant to Ludlow Community Association to preserve the Shaker Heights area in Cleveland, in which 80 or 90 Negro families and 500 white families live in \$20,000-\$50,000 homes. *N.Y. Times*, Aug. 25, 1959. And see Millsbaugh & Breckenfeld, *The Human of Urban Renewal—A Study of Attitude Changes Produced by Neighborhood Rehabilitation* (1958). Work in Springfield Gardens, Rosedale and Laurelton, Queens, New York, is described in 1 Hearings, *supra* note 3, at 218-23. The National Conference of Christians and Jews has assisted community groups in changing neighborhoods in the Reservoir Hill-Burroughs school area of Tulsa (*Southern School News*, Dec. 1959, p. 7) and Oklahoma City (*Southern School News*, Jan. 1960, p. 8).

<sup>258</sup> Neighbors, Inc., and the American Veterans Committee in Washington, D.C., obtained 2500 signatures in a petition drive against Washington newspapers' practice of listing real estate under racial designations. In August 1960, the three Washington dailies dropped the designation "colored" from houses for sale ads. H.R. 9209, 86th Cong., introduced in 1959, would prohibit this practice.

the impression of great (racial) turnover,<sup>259</sup> and feature stories in the press revealing tactics of unethical real estate operators to stimulate panic selling.<sup>260</sup>

While majority and minority group members in the changing areas desire to keep its integrated character, this objective has only been achieved to the extent that majority group families have been attracted to the community through the efforts of realtors working with community groups.<sup>261</sup>

These groups have also recognized that the public school can serve as a focus for community concern and cooperative efforts. Education in intergroup relations frequently starts in the local parent-teacher associations. Parents are also particularly sensitive to the fact that the quality of public education is one of the decisive factors in home selection. Where schools have maintained high standards, efforts to maintain multi-racial, stabilized communities have been more successful. But where boards of education have failed to retain experienced teachers, or have distorted the areas' racial patterns in drawing school zoning lines,<sup>262</sup> schools have become substandard. Not only do desirable prospective occupants then avoid the community, but those who reside in the community seek to get out.

New York City, however, has recently taken a step in exactly the opposite direction. The Parents Workshop for Equality in New York City Schools became convinced that integration in housing will be too slow in the nation's largest city to effectuate integration in public schools naturally, despite city and state fair housing legislation. The Workshop threatened a sit-out September 12, 1960, unless the Board of Education issued a "plan and timetable for the desegregation of the public schools" and for "immediate voluntary transfers" to parents wishing their children to attend integrated schools.<sup>263</sup> On August 31, 1960, the Board announced such a voluntary transfer plan, applicable at first to students attending 21 junior high and 2 senior high schools, and later to students in 16 elementary schools. Students of any race attending the "sending" schools—chosen because of their high con-

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<sup>259</sup> Neighbors, Inc., found such signs illegal in the District though commonly used. See Caplan, "Last White Family on the Block," *Atlantic Monthly*, July 1960, p. 54.

<sup>260</sup> Trends in Housing, Sept.-Oct. 1959, p. 8.

<sup>261</sup> *Ibid.*

<sup>262</sup> E.g., parents in Crown Heights section of Brooklyn, New York, charged that school zoning lines were redrawn in such a manner that the percentage of Negro children in two area schools was much higher than the percentage of Negro persons in the area population, while other schools in the area had a much smaller percentage of Negro children than the percentage of Negro persons in the area generally. Crown Heights is a racially changing neighborhood consisting primarily of rental units. *N.Y. Times*, Feb. 6, 1959, p. 16, col. 1.

<sup>263</sup> *National Guardian*, Sept. 5, 1960.

centration of Negro and Puerto Rican pupils and their overcrowded condition—are permitted to transfer to “receiving” schools—chosen because of their under-utilization. The percentage of minority group members in the “receiving” schools had been low before the transfers.<sup>264</sup>

The Board plan requires parents to provide transportation for their children to the “receiving” schools, often some distance from the pupils’ homes. Three hundred and ninety-three junior and senior high students transferred under the plan, and 284 third to fifth graders, although it had been estimated that several thousand would apply.<sup>265</sup> One reason given for the small number of transfers is the expense and difficulty of parents providing transportation to the new schools. There is also fear of the rootlessness which may result when children leave their own neighborhoods to attend school with one group of children, only to return to their neighborhood friends in the evening. Certainly the plan poses serious problems in terms of parent participation in parent-teacher associations in the non-neighborhood schools. While some immediate answer had to be found to the segregated and unequal education offered to most of New York’s colored students, this plan does nothing to alleviate the fear of further erosion of the concept of neighborhood in our largest metropolis, with its concomitant lack of community concern for the deterioration of housing and government services. Its effect on the expansion of integrated housing areas remains to be seen.

State and local commissions established to administer fair housing laws have, where empowered to do so, conducted educational campaigns, thus creating a receptive and favorable attitude for fair housing practices in the affected communities.<sup>266</sup> But some commissions, when called upon by local community organizations, have failed to provide the kind of decisive leadership necessary to preserve these communities.<sup>267</sup> It seems clear that the most hopeful situation exists in multi-racial communities having natural geographical advantages, housing accommodations of various sizes to permit movement within the community as families increase in size, and with a high percentage of home ownership and investment in the community. However, rental areas can also profit from governmental assistance to retain living standards generally, as well as

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<sup>264</sup> N.Y. Times, Sept. 1, 1960, pp. 1, 15, cols. 4, 3; *id.*, editorial, p. 26.

<sup>265</sup> N.Y. Times, Oct. 19, 1960.

<sup>266</sup> See, e.g., work of COIR in Queens, described in 1 Hearings, *supra* note 3, at 218-23. And see Phila. Comm’n on Human Relations, “What To Do Kit,” “Your Next Move,” (1960).

<sup>267</sup> Some fair housing commissions have indicated that their limited staffs permit attention to only three areas: (1) education of the public concerning the fair housing laws; (2) processing of specific complaints of unfair housing practices; (3) opening of additional housing to members of minority groups, through education and enforcement campaigns.

to prevent panic moving and inflated rentals. It would appear that constructive work by fair housing commissions can help delay or prevent the creation of additional segregated urban areas which, typically, are permitted to deteriorate into segregated slums.<sup>268</sup>

### *Building New Integrated Communities*

In recent years, a number of housing developments have been built as racially integrated communities. The developers intended from the beginning that the population would consist of multi-racial, ethnic and religious groups. The early projects had great difficulty in securing financing through ordinary channels, but many lending institutions now accept these planned interracial projects as good financial risks.<sup>269</sup> The developers established quotas of racial occupancy in order to prevent the areas from becoming segregated. Modern Community Developers, Inc., was the first corporation formed expressly for the purpose of advancing integrated communities.<sup>270</sup> It has established several integrated communities in Pennsylvania and New Jersey,<sup>271</sup> and plans to construct an integrated community in Deerfield Village, Illinois.<sup>272</sup>

As a wholly private endeavor, such activity may be both desirable and helpful. To be sure, it makes available on a limited scale decent, nonsegregated housing accommodations. But if public funds or assistance are involved, its constitutionality would be questionable. As has been seen, racial quota systems in public housing have been held unconstitutional.<sup>273</sup> This method of tenant selection contravenes the equal protection clause of the Fourteenth Amendment. By utilizing quotas based on race or religion in tenant selection the developer in effect either postpones the right to accommodations of those exceeding the determined quota percentile, or excludes them entirely. Hence, where such a program in operation and effect denies constitutionally protected rights, its sanc-

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<sup>268</sup> See description of specific community housekeeping problems which arise in such neighborhoods, in Abrahamson, *supra* note 257, in Appendix.

<sup>269</sup> See, e.g., 1 Hearings, *supra* note 3, at 31; Shapiro, "Integrated Housing: Its Extent and Acceptance," 18 *Law. Guild Rev.* 12-19 (1958). The UAW-CIO-AFL sponsored an open occupancy project in Milpitas, California, near the site of a new Ford Motor Co. plant. The 152-house project was sufficiently successful to encourage the builders to plan 270 more homes in the development, ranging from \$12,750 to \$13,750. *S.F. Chronicle*, July 12, 1960.

<sup>270</sup> U.S. Comm'n on Civil Rights, *supra* note 2, at 178. And note Spring Hill Gardens, new open occupancy development in Pittsburgh, Pa., described in *Trends in Housing*, Mar-Apr., 1960, p. 8.

<sup>271</sup> Modern Community Developers have built and sold 139 \$12,-\$15,000 homes at Trevoise, Pa., 55% white, 45% Negro; 19 \$20,-\$45,000 homes in Philadelphia, 66% white; 39 \$18,-\$42,000 homes in Princeton, New Jersey, 75% white. It is engaged in constructing 101 \$16,-\$19,000 homes in Waterbury, Conn.

<sup>272</sup> See discussion of *Progress Dev. Corp. v. Mitchell* accompanying note 241 *supra*.

<sup>273</sup> See text accompanying note 29 *supra*.

tion as a governmental program would run counter to equal protection interdictions against government, even if the racial quota is intended by its initiators to be "benign."

Such a program would also run counter to equal protection interdictions against government when, as in the *Deerfield* case, no federal funds or insurance were involved, but rather injunctive relief was sought from the judicial arm. Such relief can not be granted to a private corporation seeking to enforce integrated housing by means of racial restrictive covenants, even when the attack upon the corporation is made by a city government motivated by undemocratic, anti-Negro sentiments.

A less "benevolent" approach to integration in housing may prove more successful than the rigid percentage planning of the Community Developers. For example, an increased vacancy rate disturbed the management of Chatham Park Village, a twenty-year old Chicago apartment community of 62 town-house style buildings containing 554 units and 2700 white residents, paying \$98 to \$132 monthly rentals. Management notified all tenants that: "Effective Nov. 1, 1959, applicants for vacancies in the Village will be screened and selected with the objective of creating a high-grade, racially-integrated community . . ." Management simultaneously made a number of improvements: automatic washers and dryers were installed in all buildings; increased decorating allowances were put into effect; management provided increased police patrols on quiet, electric vehicles, and supervised a new well-equipped play area. Although 200 white residents moved out when the first Negro family moved in, and a reputable real estate firm circulated a letter encouraging other residents to move out, a Village Council was organized to squelch rumors and began organizing along the lines of other community groups described above. White families continued to move into the Village as well as Negro families.<sup>274</sup>

On a limited scale, at least eighteen organizations in nine northern and western states are working to find nondiscriminatory housing for members of minority groups.<sup>275</sup> One common technique is the establishment of a "listing service" or "fair housing registry" to provide a free service for sellers and landlords interested in selling or renting nondiscriminatorily, and for buyers and tenants seeking housing in areas previously restricted, in whole or in part. This approach has proved effective to some degree, especially in areas covered by some type of fair housing legislation.

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<sup>274</sup> Trends in Housing, May-June 1960, pp. 7, 8.

<sup>275</sup> See list in Trends in Housing, Sept.-Oct. 1959, pp. 4-6.



## CONCLUSION

"[A] decent home and a suitable living environment for every American family" is the stated goal of the United States. This goal requires the construction of much new housing, and the enforcement of existing health and housing standards. But merely to build new housing and to prevent the deterioration of existing housing will not solve, or even arrest the problem; what is needed is not only new and decent housing, but accommodations available to all Americans on a nondiscriminatory basis.

Specific and immediate attention must be given to America's minority groups, whose housing needs have long been acute and have as long been virtually ignored. The opportunities for rapid amelioration, if not solution, of the problem are great: (1) Housing today is being constructed and renovated to a considerable degree with governmental assistance, and this assistance must be undertaken under the constitutional principle that housing financed, insured, or otherwise aided by the federal, state or local governments, must be provided on a nondiscriminatory basis. (2) Many private builders today have found that nondiscriminatory housing is financially feasible and socially desirable, and are therefore prepared to build and sell without discrimination.

The enactment of fair housing legislation has proved to be a constitutional and effective method of discouraging customary discriminatory practices and of encouraging nonsegregated housing. Community action has also proved to be an effective approach toward establishing and maintaining stable, nonsegregated communities, particularly where it has caused the reversal of a policy of governmental unconcern and inaction.

The greatest progress toward the national goal has been made where community organizations and governmental units have attempted bold, imaginative and continuously forceful administration of existing laws while educating citizens, realtors and lending institutions on the need for new legislation to provide decent housing for all without regard to race, national origin, or religion.

If we still must finch when America is defined as "The house I live in," the means for changing this reaction are at hand.