

1-1-1965

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Charles Rice

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Recommended Citation

Charles Rice, *Bias in Housing: Toward a New Approach*, 6 SANTA CLARA LAWYER 162 (1965).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol6/iss1/15>

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BIAS IN HOUSING: TOWARD A NEW APPROACH

Charles E. Rice†

The United States Commission on Civil Rights in their 1959 report observed:

housing . . . 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.¹

The problem of racial discrimination in housing is the product of several factors. Among these is racial prejudice on the part of private land owners, real estate brokers, builders and mortgage finance institutions.² The result is a housing market partially closed to minority groups, especially negroes; a housing market in which the negroes' dollar does not have purchasing power equal to that of the whites. This accounts in part for the growing concentrations of negroes in urban racial enclaves, where they live under unhealthy, overcrowded conditions which can contribute to increased rates of crime, disease and disorder. For the negro, whether in or out of the ghetto, who has the financial capacity and the desire to move to better quarters, the housing problem is difficult and poignant. For even if he succeeds in overcoming the wall of prejudice and enters into a white neighborhood, he will often find that this prejudice has turned that neighborhood, shortly after his entry, into a predominantly black one.

Mr. Eugene P. Conser, Executive Vice President of the National Association of Real Estate Boards, analyzed well the reasons why negro integration into a neighborhood so often degenerates into a negro replacement of residents of other ethnic groups:

The white resident resists Negro encroachment and eventually moves because: (1) he believes his white neighbors will move sooner or later; (2) he believes that if he remains too long he will not be able to find a white buyer; (3) he believes that, under the circumstances, property values will drop; (4) he believes that if he remains his own social position will be adversely affected; (5) he prefers that his children's close associates and friends be of the same racial and similar religious background; (6) he is concerned about intermarriage and the added

† A.B., 1953, College of the Holy Cross; LL.B., 1956, Boston College Law School; LL.M., 1959, J.S.D., 1962, New York University School of Law; Associate Professor, Fordham University School of Law.

¹ U.S. Commission on Civil Rights, Report 534 (1959).

² U.S. Commission on Civil Rights, Report—Housing at 2-3 (1961).

problems that it brings; (7) if he can readily move, he chooses that way out as being preferable. The real estate broker who is charged with seeking a buyer soon finds that he cannot interest white families except as the property can be had at a bargain price or terms. Therefore, the seller easily concludes that his best interests are served by arranging a sale to a Negro family. And so the process of *replacement* starts—and with each sale it continues inexorably until the last white family moves.

The residents of the "all white suburbs" that have been the subject of so much critical analysis by some writers have seen this process of population osmosis occur in building after building, block after block, neighborhood after neighborhood from which they have moved. They cannot have any confidence that, once started in their own neighborhood it will not inevitably repeat its historical process. And so they resist any threatened beginning.³

The attitude described by Mr. Conser is deep rooted, beyond the reach of compulsive legislation. If it is to be changed, it will be done only by the growth of a voluntary consensus built upon the dictates of religion, morality and common sense. Unfortunately, rash and precipitate efforts are continually made to compel a surface integration of neighborhoods through so called fair housing laws and it is testimony to the depth of the emotions involved here that such laws have inevitably failed to achieve a durable housing integration and have aroused instead a popular opposition that is as awesome in its intensity as it is impressive in extent.

Recent developments in the state of California provide a clear example. In 1963 the state legislature, after much heated debate and substantial amending, passed the California Fair Housing Act (Rumford Act).⁴ The declared policy of the Rumford Act outlaws discrimination in certain enumerated categories on the basis of race, color, religion, national origin or ancestry.⁵ A comment in a recent edition of the Southern California Law Review provides a good summary and discussion of the Rumford Act.⁶

³ CONSER, HUMAN RIGHTS AND THE REALTOR, NATIONAL ASSOCIATION OF REAL ESTATE BOARDS 9 (1963).

⁴ CAL. HEALTH & SAFETY CODE §§ 35700-35744.

⁵ CAL. HEALTH & SAFETY CODE § 35700.

⁶ Comment, 37 SO. CAL. L. REV. 427 (1964). ". . . Section 35720 specifies various categories of persons coming under the Act, summarized as follows:

1. Owners of all dwellings having more than four units.
2. Owners of publicly assisted housing accommodations containing three or more units.
3. Owners of publicly assisted single family dwellings occupied by the owner.
4. Persons subject to the Unruh Act as it applied to housing accommodations.
5. Persons or financial institutions making loans for the acquisition or construction of housing accommodations.

The acts made unlawful are:

1. Discrimination with regard to sale or lease.
2. Discrimination with regard to terms, conditions, or privileges of such sale or lease.

In November of 1964 the voters of California approved by a margin of 2 to 1 an amendment (Proposition 14) to the state constitution nullifying much of that state's existing laws against racial discrimination in the sale or rental of housing.⁷ Almost immediately after its passage the new amendment to the state constitution met with a serious legal challenge on grounds that it is violative of the fourteenth amendment to the federal constitution.⁸ [Held unconstitutional by the California Supreme Court, May 10, 1966. See Editors' case note, page 241.] As a result of this challenge the position of the law on housing discrimination in California is very much in doubt.

The passage of fair housing legislation by the California state legislature and the subsequent voter rejection by popular referendum is illustrative of a broad national pattern. So-called fair housing laws have recently been rejected through popular referenda in such diverse places as Detroit, Tacoma, Seattle, Akron, Toledo, and Berkeley, California.⁹ At the same time, there is a counter trend toward the adoption of fair housing laws by state and local legislative bodies. As of September 15, 1965, at least sixteen states, twenty-nine cities, the District of Columbia, King County in the State of Washington, Puerto Rico and the Virgin Islands had adopted such laws to affect some part of the private housing market. Four more states prohibited discrimination in some types of publicly-assisted housing, and at least forty more cities had policy resolutions or regulations against various types of housing discrimination. In 1965, campaigns to enact or strengthen fair housing laws were actively waged in twenty-one states, as against campaigns in only twelve states in 1963, the previous record year. These 1965 campaigns were successful in at least seven states. And in eight states, opponents of fair housing laws failed in their efforts to secure legislation to provide for referenda on the housing question.¹⁰

3. Making oral or written inquiry of race, religion, etc. of the prospective tenant, purchaser, or borrower.

In addition, this section makes unlawful for any person, to aid, abet, incite, compel or coerce the doing of any of the acts made unlawful . . ."

⁷ CAL. CONST. art. 1, § 26. The essential provision states: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

⁸ *Mulkey v. Reitman*, L.A. No. 28360, Cal. Supreme Ct. (1965); *Hill v. Miller*, Sac. No. 7657 Cal. Supreme Ct. (1965); *Peyton v. Barrington Plaza*, L.A. No. 28449, Cal. Supreme Ct. (1965); *Thomas v. Goulis*, S.F. No. 22019, Cal. Supreme Ct. (1965); *Grogan v. Meyer*, S.F. No. 22020, Cal. Supreme Ct. (1965); *Prendergast v. Snyder*, L.A. No. 28422, Cal. Supreme Ct. (1965); *Redevelopment Agency of the City of Fresno v. Buckman*, S.F. No. 22017, Cal. Supreme Ct. (1965); the above cases were reheard by the California Supreme Court on March 21, 1966.

⁹ N.Y. Times, Mar. 21, 1965 § 8 (Review), p. 1, col. 1.

¹⁰ See Report, National Committee Against Discrimination in Housing, *The Fair Housing Statutes and Ordinances as of June 1, 1965*. (1965).

From these counter trends it is fully obvious that the opponents of fair housing laws are confident of popular support, while the advocates of such laws understandably prefer to work indirectly through legislatures. The reason for these attitudes is no less obvious.

Parallel with this state activity, the federal executive and Congress have acted to combat racial discrimination in housing. President Kennedy's executive order of November 20, 1962, forbids racial discrimination in housing financed by loans insured by the Federal Housing Administration or guaranteed by the Veterans Administration.¹¹ This order is applicable to less than ten percent of federally-aided housing, old and new.¹² An extension of this prohibition to housing financed by federally-insured banks has been proposed.¹³ Title VI of the 1964 Civil Rights Act has the effect, in theory, of prohibiting racial discrimination in federally-aided public housing, urban renewal projects and specialized housing for the elderly.¹⁴ It should be noted here that, apart from the questionable argument that federal mortgage or other assistance in the purchase or improvement of property gives the federal government power to prohibit racial discrimination in the sale of such property, there is not the slightest shadow of constitutional justification for a federal law simply prohibiting housing discrimination in general. Yet such a bill is presently before Congress, providing federal injunctive relief against discrimination in all housing, public and private, down to the smallest family dwelling.¹⁵ The housing bill is based upon the Congressional authority to regulate interstate commerce. In the present era, which witnesses the bankruptcy of limited, constitutional government, such a law might well be enacted and upheld by the courts. Let the record show here an anticipatory protest, based upon the conception that our founding fathers were wise in respecting the difference in roles between municipal and federal government.

There are many varieties among the existing fair housing laws and they are neatly summarized in a report of the National Committee Against Discrimination in Housing:

The fair housing laws vary widely in their primary coverage of the housing supply and in provisions for enforcement. Alaska's statute covers all sales and rentals with no exemptions, and is enforced by a state human rights commission. New Hampshire on the other hand, provides no official enforcement machinery for a provision in its public accommodations law which bars discrimination "in the matter of rental

¹¹ Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

¹² N.Y. Times, July 25, 1965, p. 1, col. 3.

¹³ N.Y. Herald-Tribune, Dec. 15, 1965.

¹⁴ Civil Rights Act of 1964 §§ 601-602, 78 Stat. 252 (1964), 42 U.S.C. § 2000D (1964).

¹⁵ N.Y. Times, March 16, 1966, p. 41, col. 2. See S. 3296, 89th Congress, 2d Session.

or occupancy of a dwelling in a building containing more than one dwelling." Among the 15 "private housing" states, only New Hampshire and Maine provide no official enforcement agencies. There is also considerable variance in enforcement practices, both under statutory provisions and operating procedures adopted by the commissions. Some commissions initiate complaints of discrimination on their own motion; some seek restraining orders from the courts to hold the housing at issue on the market until the charge of discrimination is investigated and resolved (injunctive relief); some lean toward a liberal interpretation of anti-discrimination legislation, taking into account "the intent of the law"; some follow a conservative approach, adhering rigidly to the "letter of the law."¹⁶

It would be a mistake to focus on the specifics of fair housing legislation to the neglect of the general principles involved. It is important to note here that there is no absolute right to own and dispose of property. Consistent with the Constitution as well as the moral idea of the stewardship of wealth, the right of property can be subjected by law to reasonable regulation for the common good. Thus, one cannot with impunity convert his split-level house into a glue factory to the discomfort of his neighbors. The opposition to fair housing laws, then, ought not to be framed in terms of a categorical defense of an unqualified right of property. Rather, the issue is the reasonableness and prudence of the proposed regulations. The problem of discrimination in housing involves more than a mere mechanical adjustment of human contacts. For it is in the housing area, more so than in employment, public accommodations and education, that compulsory laws evoke a truly visceral reaction. Here the regulation is one of tangible real property which, in the case of a residence, is not used in business nor devoted to any public use. It is a form of property, moreover, which has long been regarded as the hallmark of a man's independence. The tangible and uniquely private character of the regulated property accounts in part for the vehemence of the popular reaction to fair housing laws. Further, the opposition springs both from prospective sellers (and, in many cases, their real estate brokers) who object to the restraint upon their right of disposition and from the neighbors who resent the curtailment of their informal power, exercised through a subtle and effective social pressure, to discourage the sale of property in the neighborhood to negroes.

The right of disposition is one of the basic incidents of property ownership, and to the extent a man is deprived of the right to dispose of his property to whomever he chooses, he is to that extent less an owner than a trustee for the person or government possessing

¹⁶ Report, National Committee Against Discrimination in Housing, *The Fair Housing Statutes and Ordinances as of June 1, 1965*, p. 3 (1965).

the veto over his right of choice. The right to dispose of property is, of course, not immune from reasonable restriction for the common good, but it is sufficiently basic that it ought not to be infringed except for a proportionately serious reason. In order to justify compulsory fair housing laws, the proponents must show not only that the laws will increase the access of negroes to quality housing, and will do so without undue curtailment of the rights of others, but also that voluntary and conciliatory means are incapable of achieving the desired racial mobility of residence. In short, they must demonstrate that the laws are reasonably necessary to the promotion of the common good.

The legitimacy of fair housing laws must be decided with reference to their impact on would-be sellers of property and upon the existing neighbors of those sellers. In both respects, the distinction between morality and legality must be kept in mind. For instance, while an owner's right to dispose of his property is properly subject only to a very limited legal restraint, it is quite clear that, at least in this country at this time, it would be immoral to refuse to sell or lease property to a prospective buyer or tenant on account of that person's race. It would violate the prospective buyer's right to be treated in such a vital matter without regard to his race. For a man has no control over his race and, whatever his race may be, he is no less a man because of it. At least in twentieth century America, this natural moral claim of the buyer ought to be beyond dispute. This does not include blockbusting, of course, where a few unscrupulous real estate agents use negro buyers to promote panic sales and, thereby, large commissions. In that situation, an owner might properly refuse to sell, not because the buyer is a negro, but because he is a blockbuster. Ironically, compulsory fair housing laws make it easier for those few real estate brokers who would practice blockbusting, because those laws afford them a ready pretense and cover for the artificial introduction of prospective negro purchasers into a neighborhood where their introduction is likely to precipitate panic selling by white residents.¹⁷

But while racial discrimination in housing is immoral, it does not necessarily follow that it ought to be illegal. Obviously, the issues posed here are ones of balance and prudence and are not resolved by sweeping moralisms about the evil of racial discrimination. They reduce themselves in concrete situations to the wisdom and necessity of specific proposals in specific places and times. There are rational arguments on either side and, quite clearly, there is room for differ-

¹⁷ Conser, Human Rights and the Realtor, National Association of Real Estate Boards 10 (1963).

ence of opinion here among reasonable men who share a common opposition to racial discrimination. Unfortunately, there is a tendency among the advocates of racial legislation to slide too often from an affirmation of general moral principles to an uncritical assertion that particular laws are clear dictates of those principles. In the wake of the California voters' endorsement of Proposition 14, erasing much of that state's legislation against housing discrimination (including the so-called Rumford Law), one Los Angeles priest rebuked those clergy who too readily summoned the Pope as an authority for their political arguments in this matter. Father O'Reilly's point is important enough for an extensive quote:

This brings me to my final point, which is, to register a protest against the many priest writers who during the course of the campaign filled the mails with trash masquerading as theology. It was not their advocacy of a "No" on 14 that was offensive, but the way in which they sought to bully the consciences of the laity by a dishonest appeal to moral grounds. Instead of attempting a reasoned application of principles of law and government to the situation, the writers pounded ad nauseam on the evils of discrimination, shouting that this was a moral issue on which the Church had spoken. Indeed it was a moral issue, but a moral issue of lawmaking and its limits, for which Catholic thought provides no ready answers, but instead, a principle of balance. To insist otherwise was to play "politics" with religion.

It is interesting to note that Cardinal McIntyre, upon whom so much criticism has been heaped for his failure to come out publicly on the side of a "No" vote, seems to have a sounder grasp of Catholic thought than many of his critics. Having drawn attention to the clear statements of the Bishops of the United States on the moral evil of discrimination, having urged his priests to preach justice and charity, having declared the diocesan policy to continue moving toward greater integration in schools and institutions of the Church, he refused to commit himself publicly on the subject of lawmaking about discrimination. Since Catholic principles of jurisprudence are not rigidly in favor of laws, but speak also on the side of liberty, the Cardinal rightly left the choice to the individual consciences of Catholics. The fact that some of them might use this freedom to vote away Rumford-type laws just in order to continue violations against justice or charity in the sale of property would not be a valid reason for taking that freedom from them. Incidentally, the Cardinal was the first to point out publicly, as soon as the amendment had been passed, that the "Yes" vote on Proposition 14 did not make any change in the obligation arising out of the natural moral law of justice and charity. Such a statement, though obvious in another day, is clearly necessary in an age in which statutes and coercion tend to usurp the functions of conscience and cooperation, even in the minds of priests.¹⁸

What, then, are we to say about fair housing laws? As in other racial matters, the proper goal here is the promotion of color blindness and the discouragement of color consciousness. In fact, in

¹⁸ O'Reilly, *Conscience and Law in California*, AVE MARIA 8, Feb. 20, 1965.

housing the need of color blindness is even greater than in other areas, owing to the personal and prolonged character of the neighborhood relationship. Housing laws which impose penalties for conduct which an administrative tribunal and the courts happen to find, after the fact, to be racially discriminatory, ironically tend to accentuate racial differences and impede the development of the color blind consensus which is a prerequisite to enduring progress in housing matters. Seen from another aspect, they are an unreasonable restriction upon the owner's right to dispose of his property. They are unreasonable, for one thing, because they do not work to achieve their avowed aim of integration. Rather, they tend to accelerate the process of replacement of ethnic groups in a neighborhood. They are unreasonable on another count because they imprudently seek to exorcise, by coercion, deeply rooted feelings and instincts, and in so doing they move along a course which leads to grotesque and intolerable restrictions upon freedom of action. For fair housing laws cannot themselves change the attitudes underlying the chain reaction which causes neighborhood integration to become neighborhood replacement. If anything, such laws are only going to intensify that reaction. The result is, that if those laws are ever going to achieve their aim of neighborhood integration, they must be equipped with teeth to stem the tide of escaping whites. Those teeth must include the power to enjoin whites from selling to negroes, and to enjoin negroes from buying from whites, in a neighborhood which is nearing the "tipping point" beyond which it becomes irresistibly and totally negro. Only in this way can the coercive law succeed in maintaining neighborhood integration, and only thus can the power of the state prevent the steady osmosis by which neighborhoods, block by block, change color from all white to all black. In this way, too, one could be literally imprisoned in his neighborhood. And, of course, in such an extension of the so-called fair housing laws, the state would undertake to be the jailer of the people. In truth of course, the only way that free integration, as opposed to total replacement, can be achieved is through a regeneration of attitude, drawing upon religious and moral principles. In the development of such an attitude, compulsory fair housing laws are worse than irrelevant. They are positively harmful.

There are other objections that could be raised at length to compulsory fair housing laws. They are difficult of enforcement and lend themselves to a breadth of administrative discretion that is exceedingly subject to abuse. Also, it is not wholly incidental that they afford an opportunity for blackmail; a homeowner, having already contracted to buy another house and therefore being under pressure to sell his own house, might favorably consider "paying off" an unscrupulous member of a minority race as the price for prevent-

ing that person from lodging a protest with an official housing committee which could obtain an injunction against the sale of the house pending investigation, which injunction would take the seller's house off the market for what could be a lengthy period of time. New York law is just one example of fair housing legislation that allows such an injunction and also permits the awarding of compensatory damages to a person discriminated against, and to a person accused if he is found innocent of the discrimination and suffers losses as a result of the unfounded accusation made against him.¹⁹ The New York City Commission on Human Rights has even more power than the State Commission, in that the City agency can, without obtaining a court order and based on the Commission's own finding of "probable cause" of discrimination, post a notice on the door of the premises for ten days. The notice would say that "prospective transferees will take said accommodations at their peril" because the quarters are the subject of a complaint.²⁰ In California, the Rumford Act also has a provision allowing such an injunction.²¹

Despite the inherently limited capacity of compulsive law in racial matters, there is room for some governmental intervention in the housing area. Whatever else may be said of fair housing laws, they do provide an excuse to the realtor who is personally willing to show homes to negro purchasers but who would fear to do so, in the absence of a law, for fear of retaliation by some of his white clients. Now he can justify his showing of homes to negroes by the fact that the law forbids him to do otherwise. There is no reason, however, why this and any other desirable fruits of fair housing laws could not be obtained through a conciliatory law without compulsory sanctions. It is true that serious consideration should be given to workable laws, with teeth, to prevent "blockbusting" by unscrupulous real estate brokers and to prevent serious harassments of persons who sell or buy homes on an interracial basis. The state licensing agencies in Connecticut, New York and Pennsylvania have regulations under which real estate brokers or salesmen are liable to revocation or suspension of their licenses if they engage in "blockbusting" tactics.²² At least fifteen cities have ordinances prohibiting "blockbusting" or other promotion of panic sales.²³ But on the point of compelling or prohibiting the sale itself, the law should content itself with conciliation at the lowest level of government. A local government agency charged with the duty to conciliate interracial housing disputes, with

¹⁹ N.Y. EXEC. LAW § 297.

²⁰ N.Y. CITY ADMIN. CODE, ch. 1, §§ B.1-8.0(2).

²¹ CAL. HEALTH & SAFETY CODE § 35734.

²² Report, National Committee Against Discrimination in Housing, *The Fair Housing Statutes and Ordinances as of June 1, 1965*, p. 8 (1965).

²³ *Id.* at 9.

appropriate publicity but with no power to compel or forbid, offers a prospect of redirecting the housing effort from the path of indiscriminate and self-defeating compulsion onto the more promising road toward a genuinely voluntary consensus.

Such a non-compulsive commission could play a leading role in the basic job of education which must be done here. It is sometimes claimed that compulsory laws in the housing and other areas have an educative effect, in accustoming people to acting in a non-discriminatory manner, with the result that they eventually come to give internal assent to the standards initially imposed upon them by the coercive law. This may be so. But there is no sufficient reason why this task of education could not be performed more effectively by an adequate conciliatory commission of the sort described here without exacting a prohibitive toll in restricted freedom. If it be objected that it will take a long time to achieve the goal of color blindness in this way, let it be said in reply that the goal will never be reached by the coercive route. Until the prevalent attitudes are changed—and they can be changed, not by compulsion but only by the growth of a voluntary consensus—integration will continue to yield to replacement and the ghetto will merely be transplanted and not transformed. Voluntary fair housing committees, such as exist in some communities, can play an important part in this educational process by dispelling the prevailing misconception that integration necessarily leads to a deterioration in property values and by enlisting the affirmative cooperation of residents who pledge to resist the tendency to panic selling.²⁴ In a related vein, Representative Donald Fraser (D., Minn.) has set up a National Committee on Tithing in Investment, to encourage private capital investment in the construction of interracial housing projects.²⁵ Here, too, the National Urban League offers a constructive aid in publishing free registries of homes and apartments which the owners are personally willing to sell without regard to race.²⁶ These and other voluntary efforts are essential and their occurrence is encouraging. A great deal can be done by churches in furthering the formation of sound moral attitudes, an activity less dramatic and thrilling than the picket line, but far more effective. We need, in short, to dispel the prevalent infatuation with coercion as a universal remedy, and to redirect the primary effort into voluntary and constructive channels.

²⁴ See Faber, *I'm Not Against it, But*—, N.Y. Times, Oct. 27, 1963, § 6 (Magazine) p. 58. On the prevalent misconceptions concerning deterioration of property values, see, Palmore and Howe, *Residential Integration and Property Values*, Social Problems 52 (1962).

²⁵ See column of William F. Buckley, Jr., New York Journal American, March 4, 1965.

²⁶ N.Y. Times, Feb. 20, 1965, p. 13, col. 7.