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Critique of "Racial Discrimination in 'Private Housing'"

*Norman Dorsen**

DISCRIMINATION in housing has been a particularly tough nut to crack. While visible progress has been made in overcoming exclusion of Negroes from public accommodations and employment opportunities, the barriers erected to preserve all-white residential areas have been almost impenetrable. Part of the reason, of course, is the close relation between place of residence and the volatile issue of school attendance, with discrimination as to the former used to perpetuate segregation in the latter. Although there has recently been some state legislative action, the pattern exists virtually undisturbed. Theodore Leskes's observation in 1961 that "residential housing . . . appears to be the last of the major areas of discrimination that the states have been willing to attack"¹ remains true today.

Mr. Horowitz's paper is a response to these facts. It is chiefly devoted to exploring the validity of a judicial remedy for housing discrimination based on the equal protection clause of the fourteenth amendment. It must be read in the wider context of alternative institutional solutions—legislative and executive action at both federal and state levels. Mr. Horowitz does not explicitly reject these other means of battling discrimination, but rather puts them to one side as he concentrates on the potentialities of judicial intervention under the fourteenth amendment.

The paper does not confine itself to traditional lines of attack. It probes beyond the shadowy boundaries of "state action" into the broader area where discrimination is the product of private prejudice and private action, and it argues that in certain cases a court might properly invalidate private discrimination that is "permitted" by a state. In particular, the paper suggests two criteria for determining when this would be appropriate: (a) the norm of "equality of access to the benefits of governmental assistance to the discriminator," such as construction loans or reduced mortgage rates;² and (b) "the relative weight of the conflicting interests of the

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¹ Leskes, *State Law Against Discrimination*, in KONVITZ, *A CENTURY OF CIVIL RIGHTS* 236 (1961).

² Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 35 (1964).

discriminator and discriminatee.”³ I shall examine these separately before making all too brief comments on other possible solutions to the problem of discrimination in housing.

1. “Equality of Access to Governmental Assistance”

In canvassing this subject, Mr. Horowitz draws attention to the growing body of decisions applying the fourteenth and fifteenth amendments to occasions on which a state permits private discrimination. Whether or not these decisions can properly be considered part of the law of “state action,” he shows that that doctrine has been invoked to secure the right to vote, to proselytize for one’s religion, and to dine and travel free of the humiliation of segregated facilities. The “permission” cases may be auspicious portents for future efforts to combat deprivations of certain constitutional rights. My difficulty is that, even accepting the author’s assumptions, I do not see how “equality of access” draws us any nearer to the goal of a solidly grounded judicial remedy for housing discrimination.

Mr. Horowitz considers four types of cases in his conclusions.⁴ One is the “benign quota,” which seems to me to present a distinct question. Two others involve “private” discrimination by (a) a developer who is part of a federal-local urban renewal project, and (b) a vendor whose property was constructed with the aid of government insurance or other assistance. In these cases, Mr. Horowitz employs the concept of “equality of access to the benefits of governmental assistance” as a means of implicating the state and thereby bringing the “private” discrimination within the equal protection clause. But I do not understand why the traditional concept of “state action,” however unhelpful it may be in certain situations, could not do service here. For example, both *Smith v. Holiday Inns of America*⁵ and the dissenting opinion in *Dorsey v. Stuyvesant Town Corp.*,⁶ referred to by Mr. Horowitz,⁷ would seem equally amenable to “state action” analysis. If this is so, there seems little reason to shift into his new categories even if these are concededly more descriptive or precise.

The fourth and final type of case is strict private discrimination involving no denial of equality of access to a governmental benefit. Mr. Horowitz’s conclusion here is that:

in view of the relative magnitude of the injury to the discriminatee in being denied the opportunity to acquire housing as compared to the weight of the interests advanced by the discriminator, it should, at least in some

³ *Id.* at 28.

⁴ *Id.* at 38–45.

⁵ 220 F. Supp. 1 (M.D. Tenn. 1963).

⁶ 299 N.Y. 512, 536, 87 N.E.2d 541, 551 (1949), *cert. denied*, 339 U.S. 981 (1950).

⁷ Horowitz, *supra* note 2, at 40.

situations, be held that state law cannot constitutionally prefer the interests of the discriminator.⁸

In the ensuing discussion the only factors specifically singled out are "the quantity of housing in the locality controlled by the discriminator" and "the availability of other housing to the discriminatee." These considerations are relevant, of course, not to "access to the benefits of governmental assistance," but to the other criterion Mr. Horowitz employs—the "weight of the conflicting interests" involved.

2. "The Relative Weight of the Conflicting Interests"

It should first be acknowledged that Mr. Horowitz, by carefully identifying the interests of the discriminator and dealing with them squarely, places his argument at a meaningful level. Moreover, by taking pains to give due value to the reasons that may lead an individual to discriminate, he pays respect to those who would readily expose a less balanced presentation.

Despite the care taken, there is room for difference of opinion in appraising the reasons for discrimination. For example, both as to the associational motive⁹ and the economic motive,¹⁰ it seems to me that the paper overstates the degree to which the interests asserted are not personal, but are those of *other* home owners. The theory of the paper is that once a man sells his home (to a Negro or anyone else), he thereafter need not endure overstates the degree to which the interests asserted are not personal, but the interest at stake may be more personal than that, mainly because the unspoken (or sometimes spoken) compact among homeowners not to sell to the minority group gives to each owner the security *he* wishes as to both future associations and loss of value. It is true, as Mr. Horowitz points out, that this has overtones of "concerted action,"¹¹ bringing the case a step closer to *Shelley v. Kraemer* and its progeny. But it is only a step closer, and there is no evidence that a court would intervene on this ground. Mr. Horowitz seems to recognize this when he notes that in *Shelley* the question was whether the restrictive covenant would be enforced when a homeowner *wanted* to sell to a Negro, while here the question is whether action can be taken against a homeowner who does *not* want to sell to a Negro. Ultimately, Mr. Horowitz properly falls back on the point that the "concert," such as it is, merely lessens the substantiality of the interest of the discriminator.

Assuming that the various interests on both sides of the ledger can be identified and fairly evaluated, the next step in the proposed analysis is to

⁸ *Id.* at 41.

⁹ *Id.* at 30.

¹⁰ *Id.* at 33.

¹¹ *Id.* at 31-32.

“weigh” them. This is the technique suggested for a court that must decide whether a state is forbidden under the fourteenth amendment to “permit” any particular type of private discrimination.

The difficulty arises in figuring out how to “weigh” these apples and oranges. What, for example, is the quantity of harm to the boycotted buyer that will more than balance the desire of a homeowner not to deal with him for personal reasons of his own? What potential “economic harm”¹² to a developer is enough to justify denying anyone “adequate, healthy, and safe living conditions?”¹³ Whether these elements can be quantified, much less “weighed,” except on subjective standards of personal predilection and bias, is the tough question.¹⁴

Unfortunately, here Mr. Horowitz does not give us the benefit of his extended views. Accordingly, it is difficult to be confident about the precise nature of his proposal or the likely consequences of its employment by courts that may not share his preconceptions. (It should be added that some of us are a little gun shy about “balancing” tests in view of their upshot in the first amendment cases).¹⁵ Of course, Mr. Horowitz’s suggested fourteenth amendment remedy could be evaluated in the light of Professor Louis Henkin’s elaboration of the conflicting interests in private housing discrimination.¹⁶ But this is easier said than done, and in no event could it overcome the theoretical problem of quantifying the various elements and the ensuing chanciness of the outcome of the “weighing” process.

3. *An Alternative*

If the judiciary does not act on a theory akin to that proposed by Mr. Horowitz, which institution can be expected to break the log jam in housing, now rigidly fixed by decades of discrimination? The answer does not appear to be the state legislatures, at least not in the immediate future; nor the Congress, which has never acted effectively to achieve nondiscriminatory housing. The most likely source of power, coupled with a willingness to act, seems to be the executive branch of the federal government. As Mr. Horowitz points out,¹⁷ a year ago President Kennedy signed Executive Order 11063, which directs federal agencies to prevent discrimination

¹² *Id.* at 33.

¹³ *Id.* at 28.

¹⁴ The difficulties in applying a standard that requires the “weighing” of complex factors are brilliantly exposed in an article from the field of antitrust law. See Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 278-99 (1960).

¹⁵ See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961); *Barenblatt v. United States*, 360 U.S. 109 (1959).

¹⁶ Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 487-500 (1962).

¹⁷ Horowitz, *supra* note 2, at 36-37.

in the sale or rental of "residential property and related facilities" owned by the federal government, or aided or assisted by it after November 20, 1962. At least eight federal agencies have taken steps to implement this directive, and it may be the first instrument of a new deal in housing.

The order has been criticized as too narrow, particularly because it fails to include conventional mortgage activities of federally assisted lenders, and there also has been doubt whether it will be vigorously enforced. It is the last question that seems all-important. Executive agencies have served both as graveyards and Shangri-Las of the hopes of crusaders and reformers. Although much depends on the legal terms of reference, frequently even more hinges on the vehemence with which policy is carried out and the support given a willing administrator from above.

At this date it is too early to assess the effect of Executive Order 11063. What seems clear is that there is now a greater potential for achieving equal opportunity in housing than ever before.¹⁸ If this potential is realized through executive action, it may be a victory achieved quicker and at less risk than through a judicial remedy. If it is not, there will still be time, and more reason, to ask the courts to take the lead.

4. *A Judicial Alternative*

An entirely different approach to the problem of discrimination in private housing may be suggested. Section 1 of the Sherman Antitrust Act¹⁹ prohibits contracts, combinations and conspiracies in restraint of trade. The idea of employing this section to combat housing discrimination has been officially endorsed by the Chairman of the House Judiciary Committee, who recently urged the Attorney General to utilize the antitrust laws to engage the judiciary in the battle against discrimination in housing.²⁰ Accordingly, there seems good reason to consider the remedy seriously.

There is little doubt that arrangements to bar members of minority groups from housing opportunities involve a "restraint of trade"—a boycott that effectively closes off a market to purchasers, and sometimes to sellers and real estate brokers. Granting the restraint, certain legal questions are presented:

(a) Whether an agreement (*i.e.*, a "conspiracy") can be established. This is a matter of proof that would depend on evidence of overt agreement or, failing that, on circumstantial evidence explaining the identical conduct

¹⁸ See *Civil Rights '63*, 1963 REPORT OF THE UNITED STATES COMM'N ON CIVIL RIGHTS 95-103.

¹⁹ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

²⁰ Letter from Chairman Emanuel Celler to Attorney General Robert F. Kennedy, July 1, 1963.

as the product of an agreement.²¹ (Compare Mr. Horowitz's discussion of "concerted action.")²²

(b) Whether the conspiracy, if established, is in "trade or commerce among the several states." There would seem to be little difficulty, at least in many cases, in satisfying the jurisdictional requirement of interstate commerce under section 1. In addition, of course, state antitrust laws are available that do not require proof of interstate commerce.²³

(c) Whether restraints of trade as to real property are subject to the antitrust laws. They are.²⁴

(d) Whether the antitrust laws are applicable to so-called noncommercial boycotts—that is, boycotts that are motivated by reasons other than economic. Apart from the question whether economic and noneconomic motives can be disentangled, a series of cases applies the antitrust laws to such boycotts,²⁵ and writers have argued that, at least in certain circumstances, the Sherman Act would invalidate restraints that are "noncommercial."²⁶

(e) Whether the boycott is invalid as a *per se* violation of the Sherman Act or, if not, under the "rule of reason." Concerted refusals to deal are ordinarily considered automatically unlawful. If noncommercial housing restraints do not fall in the *per se* category, the question would be whether an exhaustive analysis of their economic consequences would lead to invalidation under the "rule of reason."²⁷

(f) Whether an appropriate remedy could be fashioned to prevent future boycotts of this character. At a minimum, such discriminators as professional real estate brokers and mortgage lenders, if implicated in the conspiracy, could be enjoined from refusing to deal with Negroes and other members of minority groups. The difficulty with a broader order would be the undesirability of requiring anyone, and particularly a private home owner, to deal with someone he did not wish to, for any reason whatever.²⁸

²¹ The inquiry would invoke that fascinating part of the law of conspiracy known as "conscious parallelism." See generally Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 657-84 (1962).

²² Horowitz, *supra* note 2, at 31-32.

²³ See GREENBERG, RACE RELATIONS AND AMERICAN LAW 303-04 (1959); see generally Note, 38 N.Y.U.L. REV. 575 (1963).

²⁴ *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *Block v. Hirsh*, 256 U.S. 135 (1921).

²⁵ *Council of Defense v. International Magazine Co.*, 267 Fed. 390 (8th Cir. 1920) (patriotic boycott); *Hughes Tool Co. v. Motion Picture Assn. of America*, 66 F. Supp. 1006 (S.D. N.Y. 1946) (boycott of firm engaged in allegedly immoral advertising); *Kates v. Lefkowitz*, 28 Misc.2d 210, 216 N.Y.S.2d 1014 (1961) (housing discrimination).

²⁶ Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962); Marcus, *Civil Rights and Anti-trust Laws*, 18 U. CHI. L. REV. 171 (1951); Comment, *Application of the Sherman Act to Housing Segregation*, 63 YALE L.J. 1124 (1954).

²⁷ *Cf. Associated Press v. United States*, 326 U.S. 1 (1945).

²⁸ *Cf. United States v. Klearflax Linen Looms*, 63 F. Supp. 32, 41-42 (D. Minn. 1945).