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NOTES

ANTI-DISCRIMINATION LEGISLATION AND INTERNATIONAL DECLARATIONS AS EVIDENCE OF PUBLIC POLICY AGAINST RACIAL RESTRICTIVE COVENANTS

The increasing number of statutes outlawing various forms of racial and religious discrimination[1] and the recent international declarations against racial

[1] Fair employment practice acts prohibiting discrimination in private employment and creating enforcement machinery were enacted in 1945 in New York and New Jersey, N.Y. Executive Law (McKinney, 1945 Supp.) art. 12, §§ 125–136; N.J. Rev. Stat. (1945 Supp.) tit. 18, § 18:25–1 et seq. Within the last nine years numerous states have amended their civil rights laws to enlarge the scope of prohibitions against discrimination in public accommodations: Conn. Gen. Stat. (1941 Supp.) § 800 f.; Ill. Rev. Stat. (1945) c. 38, §§ 125, 128a; Mich. Stat. Ann. (Henderson, 1945 Supp.) § 28. 341; Minn. Stat. (Mason, 1944 Supp.) § 7321; N.J. Rev. Stat. (1945 Supp.) tit. 10, § 10:1–1 et seq.; N.Y. Civil Rights Law (McKinney, 1945

prejudice[2] suggest a possible method for challenging the legality of racial restrictive covenants. The argument that restrictive covenants should be invalidated because they are hostile to a public policy evidenced by such statutes or declarations was made successfully in a recent Canadian case[3] and was rejected in two recent American decisions.[4] The Ontario court invalidated a covenant which provided "land not to be sold to Jews or persons of objectionable nationality." The court found a public policy against racial discrimination not only in provincial statutes directed against other forms of discrimination but also in the provisions of the Atlantic and United Nations Charters to which Canada was a party.[5] New Jersey and California courts refused to accept a similar argument

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Supp.) art. 4, § 40; Ohio Code Ann. (Throckmorton, 1940) § 12940; Pa. Stat. Ann. (Purdon, 1945 Supp.) tit. 18, § 4653; Wis. Stat. (1943) § 340.75.

In 1945 Illinois created a special division in the Attorney General's Office to enforce the civil rights law, Ill. Rev. Stat. (1945) c. 14, § 9. Since 1941 several states have established commissions to study the problems of racial discrimination and interracial relations: Conn. Gen. Stat. (1943 Supp.) § 470g; Ill. Rev. Stat. (1945) c. 127, § 214; Md. Ann. Code (Flack, 1945 Supp.) art. 49B, §§ 1–3; N.J. Rev. Stat. (1945 Supp.) tit. 18, § 18–25–6.

Illinois has prohibited and penalized discrimination by any public official in the administration of his office or of public property of which he has charge, Ill. Rev. Stat. (1945) c. 38 § 128k. Discrimination in hiring for public positions has been made illegal in Connecticut, Conn. Gen. Stat. (1943 Supp.) § 426g, and New Jersey, N.J. Rev. Stat. (1945 Supp.) tit. 10, § 10–1–1. Massachusetts, Pennsylvania, and Rhode Island have prohibited discrimination in the administration of public assistance, Mass. Ann. Laws (Michie, 1944 Supp.) c. 272 § 98B, Pa. Stat. Ann. (Purdon, 1945 Supp.) tit. 62, § 2513; 1944 Rhode Island Acts and Resolves, c. 1505, § 22.

Other recent statutes prohibit discrimination in state-aided housing projects, N.Y. Public Housing Law (McKinney, 1945 Supp.) art. 11, § 223; Pa. Stat. Ann. (Purdon, 1945 Supp.) tit. 18A, § 1711; municipal hospitals, N.J. Rev. Stat. (1945 Supp.) tit. 30, § 30:9–17; air-raid shelters, N.J. Rev. Stat. (1944 Supp.) sub-tit. 122A, § 2:122A 1 et seq.; labor organizations; N.Y. Civil Rights Law (McKinney, 1945 Supp.) art. 4, § 43; state championship athletic contests, N.Y. Civil Rights Law (McKinney, 1945 Supp.) art. 4, § 43; and in the issuance of insurance policies, Mass. Ann. Laws (Michie, 1944 Supp.) c. 175, § 113E; Minn. Stat. (Mason, 1944 Supp.) §3766–1; N.Y. Insurance Law (McKinney, 1940) art. 9-A, § 209.

[2] See note 12, infra.

[3] In re Drummond Wren, [1945] 4 D.L.R. 674.

[4] Lion's Head Lake v. Bizezensky, 43 A. 2d 729 (Dist. Ct. N.J., 1945); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P. 2d 720 (1944).

[5] The statutes and the pertinent provisions thereof cited by the court are as follows: "No person shall—(a) publish or display or cause to be published or displayed or (b) permit to be published or displayed on lands or premises or in a newspaper through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem, or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons." 1944 Ont. Stat., c. 51. "Any licensed ensurer which discriminates unfairly between risks within Ontario because of the race or religion of the ensured shall be guilty of an offense." The Insurance Act, Rev. Stat. Ont. (1937) c. 256, § 99. "Every hall erected under this Act shall be available for any public gathering of an educational, fraternal, religious or social nature or for the discussion of any public question and no organization shall be denied the use of the hall for religious, fraternal or political reasons." Regulations, § 6, passed pursuant to Community Halls Act, Rev. Stat. Ont. (1937) c. 284.

The court also held that the covenant was void as a restraint on alienation, and that the

based upon statutes in their respective states. Other arguments against the legality of restrictive covenants have not been successful in this country. The Supreme Court has refused to reconsider *Corrigan v. Buckley*[6] in which the Court held that a racial restrictive covenant did not raise a constitutional question.[7] Allegations that such covenants violate the rule against restraints upon alienation[8] or that they fail to meet technical requirements for enforcement have been ineffective.[9] Pending a reconsideration of the *Corrigan* decision[10] the "public

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description "Jews or persons of objectionable nationality" was void for uncertainty. However, these rulings were clearly secondary to the holding on the basis of public policy.

[6] 271 U.S. 323 (1925); see note 10, infra.

[7] State courts frequently cite this case as authority for the rule that racial restrictive covenants are not in violation of constitutional guaranties. United Co-operative Realty Co. v. Hawkins, 269 Ky. 563, 108 S.W. 2d 507 (1937); Ridgeway v. Cockburn, 143 Misc. 511, 296 N.Y. Supp. 936 (1937); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); Stone v. Jones, 66 Cal. App. 313, 152 P. 2d 19 (1944); Doherty v. Rice, 240 Wis. 389, 3 N.W. 2d 734 (1942). But cf. Gandolfo v. Hartman, 49 Fed. 181 (C.C. Cal., 1892); see McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).

[8] See Martin, Segregation of Residences of Negroes, 32 Mich. L. Rev. 721, 734–41 (1934); Bowman, The Constitution and Common Law Restraints on Alienation, 8 Boston U. L. Rev. 1 (1928); Bruce, Racial Zoning by Private Contract in the Light of the Constitution and the Rule against Restraints on Alienation, 21 Ill. L. Rev. 704 (1927). Section 406, Comment L, of the Restatement of Property (1944) states: "The avoidance of unpleasant racial and social relations and the stabilization of the value of land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation."

Those courts which hold that covenants prohibiting ownership by members of certain races are invalid restraints upon alienation, invariably nullify such a rule by holding that covenants which bar use and occupancy by members of a prohibited group do not violate the rule against restraints on alienation. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Parmelee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); cf. Edwards v. West Woodridge Theatre Co., 55 F. 2d 524 (App. D.C., 1931).

[9] The technical grounds upon which discriminatory covenants have been resisted with varying success are: (1) the required number of signatures was not obtained to give effect to the covenant according to its terms, or that there was fraud in obtaining or reporting the required number of signatures, compare Burke v. Kleiman, 277 Ill. App. 519 (1934), with Hansberry v. Lee, 311 U.S. 32 (1940), reversing 372 Ill. 369, 24 N.E. 2d 37 (1939); cf. Foster v. Stewart, 134 Cal. App. 482, 25 P. 2d 497 (1933); (2) failure to record, see Meade v. Dennistone, 173 Md. 295, 196 Atl. 330, 336 (1938); (3) change in character of occupancy in neighborhood subsequent to covenant, Grady v. Garland, 89 F. 2d 817 (App. D.C., 1937); Mays v. Burgess, 152 F. 2d 123, 124 (App. D.C., 1945); Pickel v. McCawley, 329 Mo. 166, 44 S.W. 2d 857 (1931); Letteau v. Ellis, 122 Cal. App. 584, 10 P. 2d 496 (1932); see 7 Univ. Chi. L. Rev. 710 (1940); (4) restrictions were not uniformly imposed on land in the immediate neighborhood, see Oberwise v. Poulos, 124 Cal. App. 247, 250, 12 P. 2d 156, 157 (1932); (5) occupancy or use by members of the prohibited group was in connection with governmental use of the land, compare Gableman v. Dep't. of Conservation, 309 Mich. 415, 15 N.W. 2d 689 (1944) with Eason v. Buffaloe, 198 N.C. 520, 152 S.E. 496 (1930); (6) covenant repugnant to grant of fee-simple estate, White v. White, 108 W.Va. 135, 150 S.E. 531 (1929).

[10] The Supreme Court has denied certiorari in all restrictive covenant cases brought before it since the Corrigan case. Cornish v. O'Donoghue, 30 F. 2d 983 (App. D.C., 1929), cert. de-

policy" argument appears to represent the one device available to opponents of restrictive covenants. Its endorsement by the Ontario court and its use in litigation in New Jersey and California suggest that attempts will be made to impress other state courts with the validity of the Canadian court's reasoning.[11]

The United Nations Charter has been ratified as a treaty and is the law of the land. The United States is also pledged to support the declarations contained in the resolution against discrimination accompanying the Act of Chapultepec. Both these documents contain unequivocal pledges to promote a policy against racial and religious discrimination.[12] However, an American

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nied 279 U.S. 871 (1929); Russell v. Wallace, 30 F. 2d 981 (App. D.C., 1929), cert. denied 279 U.S. 871 (1929); Grady v. Garland, 89 F. 2d 817 (App. D.C., 1937), cert. denied 302 U.S. 694 (1937); Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), cert. denied 325 U.S. 868 (1945). Two justices were of the opinion that certiorari should be granted and two justices took no part in the consideration or decision of this application. The fact that these cases all arose in the District of Columbia may account in part for the Court's refusal to grant certiorari. It is doubtful if a decision in a District of Columbia case would settle constitutional issues any more than did the Corrigan case, which also arose there. In the case of Harmon v. Tyler, 273 U.S. 668 (1926), the Court reversed a Louisiana case which had upheld the segregation of colored people by means of powers of sale in land instruments, and in Hansberry v. Lee, 311 U.S. 32 (1940), the Court granted certiorari and reversed without remand when it might have dismissed the application under the rule that ordinary res adjudicata is a matter of local law for the state courts to determine. At least one state court assumed that the constitutional issue on restrictive covenants is an open one and decided that such covenants are unconstitutional. In Anderson v. Auseth, Los Angeles Superior Court No. 48408 (unreported, decided December 6, 1945) the court stated: "This court is of the opinion that it is time that members of the Negro race are accorded without reservations and evasions, the full rights guaranteed them under the 14th Amendment of the Federal Constitution. Judges have been avoiding the real issue for too long. Certainly there was no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the war just ended. The objections of the defendants to the introduction of testimony will be sustained." Sustaining the objection to the introduction of evidence was equivalent to a general demurrer to the complaint which sought to enforce a restrictive covenant.

[11] See Jones, Legality of Racial Restrictive Housing Covenants, 4 Nat'l Bar J. 14 (1946).

[12] The following language occurs no less than five times in the United States Charter: "Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The preamble of the Charter affirms the faith of the peoples of the United Nations in fundamental human rights, in the dignity and worth of the human person, and equal rights of the sexes. See text of the Charter, 13 Department of State Bulletin 119 (June 24, 1945), also published in Department of State Publication 2353 (1945). The resolution against discrimination accompanying the Act of Chapultepec was proposed by the Republic of Haiti; a similar resolution against discrimination on the basis of sex was proposed by Mexico. Both resolutions were unanimously adopted by the Conference. N.Y. Times, p. 5, col. 6 (March 7, 1945).

The official American position on the discrimination and human rights provisions of the United Nations Charter was summed up by former Secretary of State Edward R. Stettinius, Jr., as follows: "The United States Government will work actively and tirelessly, both for its own people, and for peoples generally, toward the protection and promotion of these rights and freedoms," 13 Department of State Bulletin 928 (May 20, 1945). While no official steps have been taken by the American Government to adjust internal conditions to accord with Charter provisions against discrimination, the Preparatory Commission of the United Nations at London recommended an international bill of rights, and further international conventions or declarations for the prevention of discrimination on grounds of race, sex, language

court which sought to employ these commitments in a restrictive covenant case would be faced with difficulties. Constitutional limitations have been interpreted as preventing the use of the treaty-making power or the powers of the President in foreign relations to effect internal changes which have no substantial relationship to international affairs.[13] It is accepted as inherent in the federal system that the rules governing the transfer of land are to be determined by the states.[14] Thus, international declarations against discrimination cannot be expected to do more than complement an existing state policy against enforcement of restrictive covenants. So long as the *Corrigan* decision is the law, the major factor in the disposition of restrictive covenants will undoubtedly remain the policy considerations of the various states.

In other fields of the law state courts have not been unwilling to infer a public policy from related statutory or general constitutional materials in cases where there are no statutes directly in point.[15] Most of the classic examples of this technique appear in the field of contracts.[16] Married women's property acts have been invoked to support decisions affecting property and personal rights not provided for by the legislature.[17] A similar use has been made of bastardy stat-

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or religion and the protection of minorities. See McDiarmid, The Charter and the Promotion of Human Rights, 14 Department of State Bulletin 210, 212, 222 (Feb. 10, 1946).

[13] Roca v. Thompson, 232 U.S. 318 (1914); Patsone v. Pennsylvania, 232 U.S. 138 (1914); Compagnie Française v. State Board of Health, 186 U.S. 380 (1902); Heim v. McCall, 239 U.S. 175 (1915); see Missouri v. Holland, 252 U.S. 416, 432–35 (1919); Proceedings, Am. Society of Int'l Law, 194–96 (1929); 2 Hyde, International Law 1397 (2d rev. ed., 1945); James Parker Hall, State Interference with the Enforcement of Treaties, 7 Proceedings, Academy of Political Science 548 (1917); ibid., Discussion by Henry St. George Tucker 582–85. Cf. Gandolfo v. Hartman, 49 Fed. 181 (C.C. Cal., 1892) where a covenant prohibiting occupancy by Chinese was held not only unconstitutional but in violation of a treaty between the United States and China and therefore unenforceable. The Gandolfo case, perhaps the earliest restrictive covenant case, was not mentioned by the court in the Corrigan case, and has been generally overlooked in restrictive covenant cases although often mentioned by commentators. It has been contended that race discrimination in any form can no longer be considered the purely internal concern of the country in which it occurs. McDiarmid, op. cit. supra, note 10, at 222. Information Bulletin of the Embassy of the U.S.S.R., p. 6 (Nov. 28, 1944); ibid., pp. 4, 5 (Dec. 2, 1944).

[14] Green v. Neal, 6 Pet. (U.S.) 291 (1832); Case v. Kelly, 133 U.S. 21, 23 (1890); Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56 (1921); see Swift v. Tyson, 16 Pet. (U.S.) 1, 18 (1842).

[15] See Landis, Statutes and the Sources of Law, Harvard Legal Essays 213 (1934).

[16] See 5 Williston, Contracts § 1628 (rev. ed., 1937); Winfield, Public Policy in the English Common Law, 42 Harv. L. Rev. 76 (1928); Gellhorn, Contracts and Public Policy, 35 Col. L. Rev. 678 (1935); Pollock, Contracts 350 (10th ed., 1936).

[17] Aaby v. Citizens National Bank, 197 Wis. 56, 221 N.W. 417 (1928) (holding that married women's acts have destroyed the estate of tenancies by the entirety, because the former incapacity of the wife to hold by moieties was removed by the legislation); Donegan v. Donegan, 103 Ala. 488, 15 So. 823 (1894). Contra, Morrill v. Morrill, 138 Mich. 112, 101 N.W. 209 (1904). See 1 Schouler, Marriage, Divorce, Separation and Domestic Relationships §§ 82, 130–31 (6th ed., 1921). For collection of cases utilizing the acts as a basis of changes in the common-law rules as to torts between spouses see McCurdy, Torts between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930); cf. Dalton v. People 68 Colo. 44, 189 Pac. 37

utes,[18] wrongful death statutes,[19] uniform commercial acts,[20] and fair trade legislation.[21] In the absence of any legislation, the invasion of the right of privacy has been held to be actionable because of a provision in the state constitution guaranteeing to every person the right to the pursuit of happiness.[22]

Thus the inference of a public policy from legislation only indirectly related to the issue in dispute is a well known technique in American jurisdictions. Previous to the New Jersey and California cases, however, there were only a few cases in which this technique was suggested as a method for resolving disputes over racial restrictive covenants. In 1914 the Supreme Court of North Carolina invalidated, solely on the ground of public policy, a municipal ordinance which made it unlawful for Negroes to reside on a street where the majority of houses were occupied by whites, or for whites to reside where Negroes were in a majority.[23] The court held the ordinance contrary to the policy of the state, which it inferred from a statute enacted a few years previously when "labor agents began carrying out of the state colored laborers on whom many farmers depended for the cultivation of their crops which alone maintained the value of their lands." The statute made it an indictable offense to act as a labor agent without first obtaining a license. The court said that the policy reflected in the statute was to encourage the continued residence of Negroes, whereas the ordinance, if enforced, might tend to drive some of them out of the state.[24] In *Corrigan v. Buckley*,[25] the Court of Appeals of the District of

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(1920) which swept away the common-law rule that a husband and wife could not be convicted of conspiracy, on the basis of the economic separation of the spouses provided for in the Married Women's Property Act.

[18] Landis, op. cit. supra, note 15, at 224.

[19] In Hadley v. City of Tallahassee, 68 Fla. 436, 65 So. 545 (1914) the court permitted an illegitimate offspring to recover as "child" under provision of wrongful-death statute; Marshall v. Wabash R. Co., 120 Mo. 275, 25 S.W. 179 (1894); Thompson v. Delaware, L. & W. R. Co., 41 Pa. Super. Ct. 617 (1910); cf. Bell v. Terry & Trench Co., 177 App. Div. 123, 163, N.Y. Supp. 733 (1917). Contra: Robinson v. Ga. R. & Banking Co., 117 Ga. 168, 43 S.E. 452 (1902); State v. Hagerstown & Frederick R. Co., 139 Md. 78, 114 Atl. 729 (1921).

[20] Sherer-Gillett Co. v. Long, 318 Ill. 432, 149 N.E. 225 (1925) where the court held that the Uniform Sales Act recognized conditional-sales contracts and thus permitted the court to depart from its earlier decisions to hold in accordance with the majority of courts on a point with respect to conditional-sales contracts not expressly covered in the Uniform Sales Act; Howard National Bank v. Wilson, 96 Vt. 438, 120 Atl. 889 (1923) (Uniform Bills of Lading and Warehouse Receipts Acts employed as illustrating a policy applicable to a neogtiable-instrument case not expressly covered by the Negotiable Instruments Law).

[21] See 43 Harv. L. Rev. 945 (1930).

[22] Melvin v. Reid, 297 Pac. 91 (Cal. App., 1931); cf. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909).

[23] State v. Darnell, 166 N.C. 300, 81 S.E. 338 (1914).

[24] This case soon became obsolete due to the decision in Buchanan v. Warley, 245 U.S. 60 (1917), holding racial zoning by municipalities unconstitutional under the Fourteenth Amendment; see Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E. 2d 867 (1940).

[25] 299 Fed. 899 (App., D.C., 1924).

Columbia found in statutes and judicial opinions a policy supporting restrictive covenants.[26]

One obvious reason for the failure to make general use of this approach to restrictive covenants lies in the complete lack of any public policy against racial discrimination in many states.[27] Undoubtedly, a further explanation for the hesitation to use the policy argument has been the general misconception concerning the Supreme Court's decision in the *Corrigan* case. The Court dismissed the appeal from the appellate court's decision on the ground that a covenant against Negro ownership in a District of Columbia neighborhood did not present constitutional or statutory questions sufficiently substantial to give it jurisdiction under the provisions of the Judicial Code. The Court carefully pointed out that it was not passing on the arguments that the covenant violated public policy and was of such a discriminatory character that a court of equity would not enforce it.[28] Nevertheless, subsequent cases have cited the *Corrigan* decision for the rule that such covenants are legally valid and enforceable in equity.[29] Frequently the courts have added that the covenant did not violate public policy without discussion of the point.[30]

Where legislation directed against other forms of discrimination does exist it is still questionable whether the technique employed by the Ontario court and accepted by American courts in other litigation should be employed. In *Lion's Head Lake v. Bizezensky*[31] the New Jersey court, in refusing to hold a restrictive covenant void as contrary to public policy, observed that the legislature had declared the public policy of the state against discriminatory practices in respect to many and varied subjects, among them jury service, hospitals, fair

[26] The court relied mainly upon state statutes providing for segregation of Negroes in common carriers and schools and the decisions which supported these statutes, particularly Plessy v. Ferguson, 163 U.S. 537 (1896), and Berea College v. Kentucky 211 U.S. 45 (1908). It is arguable that it is generally more difficult to infer a public policy hostile to a contract than it is to find a policy supporting a particular contract.

[27] Compare the following statutes with those cited in note 1, supra: 1943 Texas L. p. 651–52 (separate accommodations on motor buses); 1943 Texas L. p. 1119 (equal privileges to all persons of the Caucasian race); 1943 Ark. L. p. 235 (requiring designation of race in divorce complaints, etc.); 1939 Ark. L. p. 170 (poll-tax lists to show color of person paying); 1937 Ark. L. p. 826–27 (separation of races at horse racing tracks); 1944 Miss. L. p. 565 (segregation of races at state penitentiary); 1937 S.C.L. p. 154–55 (segregation of races in trains and steam ferries); 1939 N.C. Pub. L. p. 165–66 c. 147 (separate accommodations on street cars and buses).

[28] Corrigan v. Buckley, 271 U.S. 323, 332 (1926).

[29] Lyons v. Wallen, 191 Okla. 567, 133 P. 2d 555 (1942), Porter v. Johnson, 232 Mo. App. 1150, 115 S.W. 2d 529 (1938); Steward v. Cronan, 105 Colo. 393, 98 P. 2d 999 (1940); see also cases cited note 30, infra.

[30] See Helmsley v. Sage, 194 Okla. 669, 154 P. 2d 577 (1944); Parmalee v. Morris, 218 Mich. 625, 628, 188 N.W. 330, 331 (1928); Ridgeway v. Cockburn, 163 Misc. 511, 513, 296 N.Y. Supp. 936, 941 (1937); Chandler v. Ziegler, 98 Colo. 1, 5, 291 Pac. 822, 824 (1930); Koehler v. Rowland, 275 Mo. 573, 585, 205 S.W. 217, 220 (1918); Meade v. Dennistone, 173 Md. 295, 309, 196 Atl. 330, 336 (1938).

[31] 43 A. 2d 729 (Dist. Ct. N.J., 1945).

employment practices, schools and employment in defense industries. The legislature had not, however, "yet declared that restrictions governing ownership and occupancy of private property should be forbidden or eliminated. Until the legislature, the supreme law-making power, acts in the matter it is not within the power or competency of the courts to do so."[32] In *Burkhardt v. Lofton*,[33] the California court refused to find a public policy hostile to racial restrictive covenants in the California Civil Rights Code. The court said:

> The responsibility of striking down the validity of racial restrictive covenants with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the "present" public policy on the subject or of personal belief that the consequences would be for the general good.

The reasoning of the New Jersey and California courts appears sound. If related statutes are said to reflect a policy opposed to restrictive covenants, it is difficult to understand why the legislature did not enact a statute expressly outlawing such covenants. Where a bill designed to invalidate restrictive covenants is introduced but is not passed by the legislature it becomes even more difficult to support the inference of a policy hostile to restrictive covenants from related statutes.[34] There are, moreover, important differences between restrictive covenant cases and other types of litigation in which this technique has been used, which would justify even the most liberal court in refusing to invoke "public policy." In many of the "public policy" cases a decision will affect only the immediate parties to the suit; a later legislative enactment can correct what is believed to be an erroneous opinion of the court. The use of this technique in restrictive covenant cases, however, might have consequences which could not be readily altered by subsequent legislative action. If a court invalidates a restrictive covenant, it is possible that the neighborhood affected will be unalterably and completely changed before any action would be taken by the legislature.[35]

[32] The court neglected to construe the following provision of the New Jersey law against discrimination (Fair Employment Practice Act): "Finding and Declaration by Legislature. The legislature finds and declares the practices of discrimination against any of its inhabitants because of race, creed, color, national origin or ancestry are a matter of concern to the government of the state, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the state but menaces the institutions and foundations of a free democratic state." Since the statute also contained a specific declaration that the opportunity to obtain employment without discrimination is a civil right, the broad terms of the quoted declaration suggest that it was intended to serve as a statement of public policy of general application. N.J. Rev. Stat. (1945 Supp.) tit. 18 §§ 18:25–3, 18:25–4.

[33] 63 Cal. App. 2d 230, 146 P. 2d 720 (1944).

[34] See Kahen, Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem, 12 Univ. Chi. L. Rev. 198, 210 (1945) citing H. B. 563, 63d Gen. Assembly of Illinois (1943), 2d S.B. 281, 62d Gen. Assembly of Illinois (1941) which were tabled, as were similar bills submitted to the 61st and 62d General Assembly.

[35] It is generally conceded that when the first breach is made into the restricted area by a member of the group barred by the covenant, an almost complete change-over of the neighborhood soon follows. Thus, while an injunction was being prosecuted to force a family of Negroes

The most persuasive argument against the use of related statutory materials in the covenant case rests upon the extremely controversial nature of these covenants. It is questionable whether it is the proper function of the courts to establish new rules with respect to rights in land which have serious political and economic aspects and upon which the legislature has refused to act. The controversy that has surrounded the advocacy of fair employment practice legislation suggests that equally drastic measures with respect to property interests should be taken only by the legislature. The courts do not provide the best forum for the hearing of the numerous issues which are involved in a debate over racial restrictive covenants.[36]

The attempt to infer public policy from related statutes raises problems similar to those posed by the suggestion that courts exercising equity powers should look to relevant sociological and background materials in many restrictive covenant cases as a source of public policy.[37] It is argued that the desirability of enforcing the covenant should be examined in the light of data pertaining to hardship, population pressures, relative housing facilities, and racial tensions. This proposal would be ineffective strategy against these covenants in many situations since it does not afford relief against a covenant solely because there is discrimination. Furthermore, it is debatable whether a court is equipped to make the necessary investigation.[38] Two recent California decisions in restrictive covenant cases reflect opposite views on the competence of courts to make such investigations in a private litigation.[39]

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to remove from an otherwise 100 per cent white neighborhood in Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), other Negroes moved into the area in sufficient numbers to indicate that the trend was definitely colored, and still other Negroes had purchased within the area preparatory to occupancy, Mays v. Burgess, 152 F. 2d 123 (App. D.C., 1945).

[36] It is, of course, doubtful whether efforts to have legislatures invalidate restrictive covenants will be successful in any state in the immediate future. However, it does not follow from this that a court is the proper forum in which to try these issues.

[37] The material which presents a sociological approach to the problem of racial restrictive covenants is voluminous. See Kahen, op. cit. supra, note 34, at 198; Race Relations in the Nation's Capital, First Annual Report of Citizens Committee on Race Relations (Aug. 26, 1944); Klutznick, Public Housing Charts Its Course, Survey Graphic (Jan., 1945); Weaver, Racial Restrictive Housing Covenants, 30 J. of Land and Public Utility Economics 183, 190 (1944); Woofter, Negro Problem in Cities (1928); Federal Housing Administration, The Structure and Growth of Residential Neighborhoods in American Cities (1939).

[38] See Gellhorn, op. cit supra, note 16, at 685.

[39] Fairchild v. Raines, 24 Cal. 2d 818, 151 P. 2d 260, 267 (1944), where the concurring opinion of Traynor, J., refers to such social data as pertinent evidence in a restrictive covenant case and states that a trial court should be obliged to determine whether there was a need for Negro expansion into the restricted area as a result of a shortage of available housing facilities in the present colored district. But see Stone v. Jones, 66 Cal. App. 2d 264, 152 P. 2d. 19, 22 (1944), where the court said "Changes, or the likelihood thereof, incident to the growth of a community, may create or forecast perplexing social problems, but such problems, from the very nature of things, cannot be solved by the courts in the process of litigation of a purely private nature." The court, therefore, declined to make such an examination on the ground that it was a legislative task.

In Mays v. Burgess, 147 F. 2d 869, 874, 876 (App. D.C., 1945), Edgerton, J., dissenting,

One may expect to see an increasing use of the public policy argument in restrictive covenant cases in those states which have recently enacted legislation against other forms of racial discrimination. While the technique employed by the Ontario court does not appear to be readily adaptable to the American legal system, the decision does constitute an invitation to those state courts which are unsympathetic to restrictive covenants to limit the influence of the *Corrigan* decision.

LEGALITY OF WAGE READJUSTMENT PLANS UNDER THE OVERTIME PROVISION OF THE FAIR LABOR STANDARDS ACT

The most troublesome question which the Fair Labor Standards Act of 1938[1] has presented to the courts has been the interpretation of that part of Section 7(a) of the Act which provides that the employee shall be paid for overtime work at not less than one and one-half times "the regular rate at which he is employed."[2] In attempting to comply with this provision of the Act the employer is confronted with several problems. In the first place he wishes to maintain his wages and hours at their former over-all level, so that his labor costs will not be increased by compliance. In the second place he wishes to avoid the necessity for spreading work brought about by extra labor cost for extra hours, since it may be uneconomical for him to reallocate the work in his plant for an increased force of workers, all of whom work only regular time; likewise labor unions whose members would suffer from reduced take-home pay by such a result might find it to their interest to support plans designed to avoid it.[3] And in the

took the position that the court should consider evidence of the notorious dearth of housing for Negroes in the District of Columbia in making its decision whether to enforce a restrictive covenant. The same judge took a similar position in his dissent in Mays v. Burgess, 152 F. 2d 123, 126, 127 (App. D.C., 1946).

[1] 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201–219 (1942).

[2] The full text of Section 7(a) is as follows: No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[3] The Act was designed primarily for the relief of unorganized, unskilled, and unemployed workers. Presidential messages, 1941 Wage & Hour Man. 747 (1937), and 82 Cong. Rec. 11 (1937). Its passage met with opposition from some labor unions, particularly the American Federation of Labor, which in 1937 went on record opposing it. N.Y. Times, p. 1, col. 2 (May 24, 1937), because it feared that the minimum wage would tend to become the maximum wage. It was estimated by the Department of Labor that by 1945 upwards of 1,000,000 workers would receive wage increases because of the law, but 4,000,000 would have their hours