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The Horror — Discriminatory Advertising on the Internet!

by George C. Leef

Nothing has ever made it so easy for buyers and sellers to get together and engage in trade as the Internet. It reduces transaction costs immensely because they can find each other so readily. And if one seller doesn't have what a buyer wants, all that has been lost is the few seconds of time and the energy it takes for another mouse click.

Everyone understands that if an Internet seller doesn't have exactly what you want, or insists on terms you won't accept, or chooses to sell to someone else, it's no big deal. You simply move on. Well, not quite everyone. It turns out that there are authoritarians who want to use the law to punish people who have real estate for sale or rent and advertise on the Internet that they have preferences for the people with whom they would contract. Cries are going up for litigation or legislation to end this monstrous attack on the nation's commitment to "fair housing."

The federal Fair Housing Act of 1968, one of the most offensive pieces of legislation signed by Lyndon Johnson (with LBJ, there were so many), makes it illegal for those who sell or rent housing to discriminate against buyers or renters. The prohibition extends to advertising. It is a violation of the law to hint even obliquely that you have a preference for a contracting party who has certain characteristics or doesn't have others. If, for example, a landlord were to advertise that he has an apartment that's "Great for a stable family," that could be interpreted to mean that gays aren't welcome. Or if an ad pictured a group of tenants enjoying a pool party, but the photo didn't show anyone from different minority groups, that could be a hidden message that whites are preferred. Anyone who sells or rents property must be constantly alert to be sure that he is not in violation of this vague but aggressively enforced law.

Following the passage of the Fair Housing Act, a plethora of "Fair Housing Centers" sprang up around the United States, staffed by eager crusaders who want to stamp out the supposed problem of housing discrimination. Those organizations have frequently brought lawsuits against sellers and lessors of housing and extorted substantial sums of money in exchange for a settlement. What now has the fair-housing crusaders in a snit is the emergence of Internet sites such as Craigslist, where properties are advertised. Sometimes ads run afoul of the

law forbidding seller preferences — for example, one by a woman with an apartment to rent specifying that she wants a young, single female tenant. The law says that no discrimination is allowed and that woman is flagrantly violating it.

“Fair housing” advocates are up in arms, of course. The executive director of the Greater New Orleans Fair Housing Action Center said in congressional testimony recently that discriminatory postings “are perhaps the most concerning issues we have confronted since the hurricanes.” A Chicago-based group has filed suit against Craigslist for running “discriminatory” ads. While court decisions have thus far held Internet sites immune from liability for the speech of those who post on them, the housing activists say that discriminatory housing ads shouldn’t be allowed.

(A *New York Times* article published last year discusses this controversy:

<http://www.nytimes.com/2006/03/05/weekinreview/05liptak.html>.)

The judges and politicians who wrestle with his issue ought to stop and ask a simple question: Is there any harm here? If someone looking for housing on the Internet comes across an ad making it clear that the owner prefers to deal with people who have attributes he doesn’t have, all the searcher needs to do is click on another ad. That inconvenience is no different from searching for other goods, services, or information on the Internet. If one place doesn’t have just what you want, you just move along. Most housing sellers don’t turn away prospective customers. Instead of attempting to stamp out “discrimination” — the pejorative term for having a preference in contracting — why not use the remarkable facility of the Internet to bypass it? If one landlord says that he would prefer a white, Catholic family, what’s so hard about searching a little longer to find one who cares only about getting paid each month?

While the judges and politicians are at it, they might examine the central premise of “fair housing” legislation, namely that the preferences of those who sell or rent housing should be disallowed. If, for whatever reason, a landlord prefers to have tenants with certain characteristics, why should that be any business of the government? Buyers are permitted to act in accordance with *their* preferences. There is no law against buyer “discrimination” in housing, or anything else. If a prospective tenant looks at a house or apartment and decides to walk away, no law permits the disappointed landlord to sue him if he suspects that the reason he decided not to enter into a contract is a “bad” one. Not exactly equal protection under the law.

I am not suggesting that the law should be made symmetrical by extending anti-discrimination features to cover both sides of the contract. Instead, it should be made symmetrical by eliminating it from the seller’s side. The proper rule to follow is that of the common law of contracts, requiring mutual assent before the law recognizes any contract. If one party has obtained the other’s assent through duress, then there is no true contract; and with its anti-discrimination laws, the government has introduced duress into every housing contract. We should return to the time when either side could say “no” without fear of reprisal.

As for you folks at the various “fair housing” centers, if you’re really worried about renters who are turned down or advised not to apply, then just turn on your computer and help them find landlords who want to contract with them. It won’t be hard, and it won’t involve any coercion.

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